IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

SUMMERWIND WEST CONDOMINIUM OWNERS ASSOCIATION, INC., a Florida not-for-profit corporation,

Plaintiff,

v. CASE NO: 3:21-cv-1040-MCR/EMT

MT. HAWLEY INSURANCE COMPANY, A Delaware for-profit corporation, and SYNDICATE 1458 AT LLOYD'S OF LONDON, a United Kingdom for-profit corporation,

Defendants.
_____/

PLAINTIFF'S RESPONSE AND INCORPORATED MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE

Plaintiff SUMMERWIND WEST CONDOMINIUM OWNERS ASSOCIATION, INC., ("SUMMERWIND"), by and through the undersigned counsel, files this Response in Opposition to Defendants' Motion to Transfer Venue and Memorandum in Support, and as grounds therefor, states as follows:

I. INTRODUCTION

An English insurance company and an Illinois insurance company jointly seek to force a Florida condominium association and its constituent members to litigate

an insurance claim resulting from Hurricane Sally in the United States District Court for the Southern District of New York ("Southern District of New York") and remove jurisdiction from this Court. The Defendants' Motion to Transfer Venue ("Motion") intends to delay and deny the Association and residents of Santa Rosa County, Florida their day in court by sending this case a thousand miles away to a forum with less interest in the underlying action than exists with this Court. This Court should deny that Motion and retain jurisdiction for the reasons set forth below.

Plaintiff is a condominium association organized and existing pursuant to Florida law, and the insured property in question is located in Santa Rosa County, Florida. Defendant Mt. Hawley ("Mt. Hawley") is a corporation organized under the laws of Illinois, and Defendant Syndicate 1458 at Lloyd's of London ("Syndicate 1458") is a Lloyd's syndicate with a sole corporate member based in London, England (collectively, "Defendants"). Defendants issued a policy of insurance bearing Policy Number MWC0600445 ("Policy") upon which Plaintiff made a claim after being the condominium was struck by Hurricane Sally under claim number 00488482. This case was removed by the Defendants from the Circuit Court in and for Santa Rosa, County, Florida to this Court on the basis of diversity of citizenship.

Defendants' Motion is predicated upon applicability of 28 U.S.C. § 1404(a) ("section 1404(a)"). Defendants' Motion must be denied as the forum selection

clause in question seeks to transfer jurisdiction to a foreign state court and *forum non conveniens* precludes such a result; alternatively, the forum selection clause is permissive and as such the case should remain here in this Court ("Northern District of Florida"); and, even if the clause is not permissive, the balancing test espoused by the courts should be weighed to allow this Court to retain jurisdiction.

II. Where a Forum Selection Clause Identifies a Foreign State Court, a Motion to Transfer is Analyzed Under *forum non conveniens*.

The appropriate framework to analyze the Motion is under *forum non conveniens*, under which Defendants are not entitled to transfer to the Southern District of New York. "[M]otions to enforce a forum-selection clause are evaluated under one of two similar frameworks. If the forum-selection clause *specifies a particular United States district court* in which a plaintiff should have brought the case, the Court analyzes the matter as a motion to transfer under 28 U.S.C. § 1404(a). If the clause does not identify such a district court, the Court considers the matter under the residual doctrine of *forum non conveniens*." *Hisey v. Qualtek USA, LLC*, 753 F. App'x 698, 701 (11th Cir. 2018) (emphasis added).

1. The Supreme Court's Opinion in *Atlantic Marine* requires a *forum non conveniens* analysis.

As the Supreme Court set forth in *Atlantic Marine*, "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the

doctrine of *forum non conveniens*." *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas, 571 U.S. 49, 60 (2013).* The Supreme Court went on to note that "Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system." *Id.* Justice Alito, in writing the opinion of *Atlantic Marine*, made clear that "[s]ection 1404(a)… provides a mechanism for enforcement of forum-selection clauses that point to a *particular federal district*." *Id*. at 59 (emphasis added). The forum selection clause in the present case does not point to a particular federal district, but rather, potentially multiple nonfederal courts within New York State, while reserving Defendants' right to potentially remove to a federal court. This fails to satisfy section 1404(a) or the requirements of *Atlantic Marine*.

2. The Policy language does not point to a particular Federal District.

The forum selection clause at issue here provides that "[a]ll matters arising hereunder… shall be determined in accordance with the law and practice of the State of New York…" and that the parties "…shall submit to the jurisdiction of a court of competent jurisdiction in the State of New York." Such language first makes clear that the parties are not constrained to a specific court with exclusive jurisdiction over any such claims within New York and certainly no federal court. Construing this clause according to its plain meaning, the parties are free to choose from one of

sixty-two New York supreme courts, one of which exists in each of New York's 62 counties. *See Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007) (an insurance policy is a contract and must be construed according to its plain meaning).

The Policy's forum selection clause further provides "[n]othing in this clause constitutes or should be understood to constitute a waiver of [Defendants'] right to remove an action to *a* United States District Court." (Emphasis added.) This language, when read in conjunction with the preceding, makes clear that a "court of competent jurisdiction" refers only to the state courts within New York. To read the Policy otherwise, and include the Southern District of New York would render the latter clause mere surplusage. Similarly, the language reserving Defendants' right to remove to a United States District Court is merely permissive, as it is clearly not a "particular" federal district court, at the exclusion of others. This language in no way excludes jurisdiction anywhere else, nor does it identify with any specificity to which federal court Defendants may seek to remove or transfer an action to.

Furthermore, assuming an action was filed in "a court of competent jurisdiction in the State of New York," this forum selection clause does not make clear whether removal and subsequent transfer be made to the Northern, Southern, Eastern or Western Districts of New York, and clearly does not exclude any of the others. The forum selection clause contained in the Policy does not designate venue

in a particular federal court at the exclusion of others, but rather, designates a geographic area, the state of New York, containing numerous state and federal courts, making the clause merely permissive. *See Fla. Polk Cty. v. Prison Health Servs., Inc.*, 170 F.3d 1081, 1084 n.8 (11th Cir. 1999) (a forum selection clause must "unambiguously designate the forum in which the parties must enforce their rights under the contract"); *see also Hisey*, 753 F. App'x at 701.

3. This action could not have been brought in the Southern District of New York, or any New York court, initially.

As Defendants have not demonstrated that the Southern District of New York is a forum in which the action could have been brought initially, nor have the parties consented to this forum pursuant to section 1404(a), Defendants' analysis contained in their Motion is misguided. Plaintiff, a Florida entity, would not have been able to obtain jurisdiction over Defendants, Illinois and English entities, in the Southern District of New York. It is Defendants' burden to establish that their selected forum is more convenient. *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989). Section 1404(a) is not applicable to the facts of the instant case as this code provision only permits transfer to "any other district or division where it might have been brought or to any district or division to which all parties have consented." The Southern District of New York is neither the court in which the action could have initially been brought by Plaintiff, nor a court Plaintiff has expressly consented to.

As made evident above, Plaintiff would not have been permitted to file this action in the Southern District of New York, as this would not constitute a "court of competent jurisdiction" under the forum selection clause, nor is Plaintiff afforded the right to remove or transfer the action to that court. Similarly, Plaintiff has not consented to the jurisdiction of the Southern District of New York as the mandatory venue for an action arising under the Policy. According to the plain language of section 1404(a) and an analysis of the forum selection clause in the Policy, Defendants are not entitled to an analysis of their Motion under section 1404(a).

III. Under *Atlantic Marine*, this Court Should Evaluate the Motion Under *forum non conveniens*.

In analyzing a motion to transfer under *Atlantic Marine*, should a court find a forum selection clause does not point to a "particular federal district," "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*." *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 59-60 (2013) (emphasis added).

Forum non conveniens is a "comparative inquiry [which] requires the district court to weigh the 'relative' advantages and disadvantages of each respective forum." *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1331 (11th Cir. 2011). Although

courts are not constrained to any specific set of factors or formula for considering these factors, some of the private interest factors to be considered include:

> [The] relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Atl. Marine Const. Co., 571 U.S. at 62, n.6 (*citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, n. 6 (1981). "Public-interest factors may include the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law." Id. (quoting Piper Aircraft, 454 U.S. at 241, n.6 (1981) (internal quotation marks omitted)).

1. This Court has broad discretion in considering all factors.

In performing the *forum non conveniens* analysis, a court is given substantial deference when it "has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable." *Fresh Results, LLC v. ASF Holland, B.V.*, 921 F.3d 1043, 1048 (11th Cir. 2019) (*quoting Piper Aircraft Co.*, 454 U.S. at 257). And "[a] defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." *Sinochem Int'l Co.*

v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430 (2007). The defendant challenging on the basis of *forum non conveniens* "has the burden of persuasion as to all elements." *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001). "While considering all relevant factors, the Court must weigh in the balance a 'strong presumption' against disturbing the plaintiffs' initial choice of forum which 'may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum.'" *J.C. Renfroe & Sons, Inc. v. Renfroe Japan Co.*, 515 F. Supp. 2d 1258, 1266 (M.D. Fla. 2007) (*citing Piper Aircraft Co.*, 454 U.S. at 255.). "A federal court has discretion to dismiss a case on the ground of *forum non conveniens* 'when an alternative forum has jurisdiction to hear [the] case, and ... trial in the chosen forum would establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience, or ... the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'" *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007) (internal quotations omitted).

The factors for this court to consider in *forum non conveniens* include both private and public considerations. Those considerations necessitate denial of Defendants' motion and retaining of jurisdiction to this Court. Defendants, who

predicate their Motion on *Atlantic Marine*, do not argue the adequacy of an alternate forum nor private interests, however, both favor this Court retaining jurisdiction.

2. Private interest factors favor Plaintiff.

Defendants presuppose the applicability of section 1404(a), and as such they do not perform an analysis of the private interests set forth in *Piper*. However as is evident *infra*, those factors are relevant and must be considered by this Court. In addressing those factors, it is evident they weigh heavily in favor of this declining transfer and retaining jurisdiction over this matter.

a) Private - Ease of access to sources of proof and possibility of view of the premises.

First, in addressing the relative ease of access to sources of proof, this factor clearly weighs in favor of declining transfer of this action and this Court retaining jurisdiction. Access to evidence has been noted to be "perhaps the most important private interest." *Ford v. Brown*, 319 F.3d 1302, 1308 (11th Cir. 2002). The property in question is located in Santa Rosa County, Florida, and it is dubious that Defendants could argue that any other evidentiary concerns outweigh the location of the property in question, particularly where the property remains sitting damaged and cannot be moved to another location. Similarly, the Southern District of New York "offers no view of the… location" *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1332

(11th Cir. 2011), while the Northern District of Florida does, a clearly relevant factor in hurricane damage claims. Defendants have not demonstrated that any "relevant acts or omissions took place specifically [in the transfer district]" (*Florida v. Jackson*, 2011 WL 679556, at *2 (N.D.Fla. Feb. 15, 2011)), and this factor weighs against transferring venue. *See also In re Nintendo Co., Ltd.*, 589 F.3d 1194, 1199–200 (Fed.Cir.2009) ("Because most evidence resides in Washington or Japan with none in Texas, the district court erred in not weighing this factor heavily in favor of transfer.").

Similarly, "the location of operative facts underlying a claim is a key factor in determining a motion to transfer venue." *Nat'l Tr. Ins. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 223 F. Supp. 3d 1236, 1245 (M.D. Fla. 2016) (internal quotations omitted). In considering this issue, the Middle District of Florida found in the context of insurance disputes, this factor weighed in favor of the locale in which the policy was executed, where the underlying insurance claim arose and where the witnesses were located. *Id*. In the instant case, the policy was issued, the hurricane occurred, the underlying insurance claim arose, and the property and witnesses to testify to these matters are predominantly located in Florida, and none in New York. Thus, this factor weighs heavily in favor of this Court declining to transfer and retaining jurisdiction over this matter.

b) Private - Availability of compulsory process for witnesses and costs of obtaining attendance of witnesses.

Next, the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of witnesses similarly favors Florida. "Certainly to fix the place of trial at a point where litigants cannot compel personal attendance [of witness] and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury, or most litigants." *Otto Candies, LLC v. Citigroup, Inc.*, 2018 WL 638344, at *7 (S.D. Fla. Jan. 30, 2018) *(quoting Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) (internal quotations omitted)). Plaintiff's witnesses, be they public adjusters, experts, property management personnel, members of the board of the condominium association, or individual unit owners, are either Florida residents or subject to the jurisdiction of Florida. And while Defendants' witnesses have not yet been disclosed, they are likely to be Defendants' employees, located in either Illinois or England, or their agents and experts, who could be anywhere, but would be within the control of the Defendants and thus able to appear in Florida. "The significance of this factor is diminished when the witnesses, although in another district, are employees of a party and their presence at trial can be obtained by that party." *SMA Portfolio Owner, LLC v. CPX Tampa Gateway OPAG, LLC,* 2014 WL 4791997, at *6 (M.D. Fla. Sept. 22, 2014). Plaintiff, as a condominium association, is afforded no such luxury. Defendants can

clearly compel the attendance of their witnesses, and in fact, will have to if litigation is to continue in *either* New York or Florida, as neither coincide with Defendants' domiciles. In analyzing this factor, the "[c]onvenience of the witnesses is given more weight than convenience of the parties when considering a transfer of venue." *Motorola Mobility Inc. v. Microsoft Corp.*, 804 F.Supp. 2d 1271, 1276 (S.D. Fla. August 17, 2011). Decidedly, this factor weighs in favor of this Court retaining jurisdiction over this matter and should be afforded due weight in the analysis.

c) Private - Convenience of the parties.

Convenience of the parties similarly favors Florida. As neither Plaintiff nor Defendants are domiciled in New York, it can hardly be argued that either party would be more inconvenienced by litigating in Florida than in New York. *See, e.g., Wylie v. Island Hotel Co. Ltd.*, 774 F. App'x 574, 579 (11th Cir. 2019) ("The district court also noted that litigating her claims in The Bahamas, as opposed to Miami, would not inconvenience Ms. Wylie because she resides in North Carolina and would need to travel similar distances either way."). Plaintiff, however, and its members, reside in the Northern District of Florida. As such, weighing the comparative inconvenience of Defendants' need to travel to New York or Florida, and Plaintiffs' need to travel only if litigation were permitted in New York, this factor weighs in favor of this Court retaining jurisdiction.

d) Private - Relative means of the parties.

Similarly, the relative means of the parties favors denying the Motion and this Court retaining jurisdiction. As Plaintiff is a not-for-profit condominium association, and Defendants are two large for profit insurance providers, the relative expenses of litigation are best distributed to lessen the burden on Plaintiff. *See, e.g.*, *Carucel Invs., L.P. v. Novatel Wireless, Inc.*, 157 F. Supp. 3d 1219, 1227 (S.D. Fla. 2016) ("Plaintiff is correct in pointing out that Defendants, that are large publicly-traded corporations, likely have more money at their disposal than Carucel, a limited family partnership."). Thus, this factor weighs in favor of this Court declining to transfer and retaining jurisdiction over this matter.

e) Private - Other considerations and the totality of the circumstances.

Given the totality of the circumstances in the current case, the private interest factors overwhelmingly outweigh Defendants' alternate forum in New York. The court should also consider the public interests, as "the better rule is to consider both the private interest factors and public interest factors in all case even where evidence is not in equipose." *Kirek v. Riusa II, S.A.*, 2014 WL 12600808, at *3 (S.D. Fla. June 6, 2014). *See also Leon v. Million Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001).

3. Public interest factors favor Plaintiff.

In viewing the public interest factors, it equally evident that Defendants are not entitled to a transfer of venue and the public interest factors favor this Court's retention of jurisdiction over this matter. In making a determination as to whether a motion to transfer venue is proper, the public interest factors for the Court to consider include: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) (citing *Piper*, 454 U.S. 235, 241 n. 6 (1981)). Accordingly, a motion to transfer must be denied if the public interest factors disfavor the transfer. *Atlantic Marine Constr. Co.*, 571 U.S. at 67.

a) Public - Administrative duties flowing from congestion.

The first factor, addressing administrative duties flowing from congestion, clearly weighs in favor of Plaintiff and this Court retaining jurisdiction. Defendants improperly attempt to transfer this case to the Southern District of New York, one of the most congested district courts in the country. *See Nuss v. Guardian Life Insurance Company of America*, 2021 WL 1791593, at *9 (S.D.N.Y. 2021) (*quoting Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 698

(S.D.N.Y. 2009) ("There can be no doubt that the 'Southern District of New York is one of the busiest district courts in the country' with a heavy complex commercial and criminal docket.")); *see also Wave Studio, LLC v. General Hotel Management Ltd.*, 2017 WL 972117, at *8 (S.D.N.Y. 2017) (*quoting Tel. Sys. Int'l Inc. v. Network Telecom PLC*, 303 F. Supp. 2d 377, 384 (S.D.N.Y. 2003) ("Turning to the public interest in adjudicating this case in this Court, the Southern District of New York 'is one of the busiest in the country, making it a paradigmatic congested center of litigation….'"). The transfer of this case to such a district would not serve the interest of justice as it would delay proceedings, Plaintiff's day in court, and also burden the judges in the Southern District of New York in having to present a case of non-domiciled corporations arguing over a Florida insurance policy and Florida property.

b) Public - Local interest in having localized interests decided at home.

The second factor, the local interest in having localized interests decided at home, is decidedly in favor of this Court declining transfer and retaining jurisdiction. This case involves property damage caused by Hurricane Sally, a storm that made landfall within the Northern District of Florida and negatively impacted residents therein, including Plaintiff. District courts throughout the country have recognized the strong localized interest in deciding insurance claims arising from natural

disasters. *See, e.g., GuideOne Elite Insurance Company v. Mount Carmel Ministries*, 2018 WL 379023, at *1 (S.D. Miss. 2018) (holding that Mississippi had greater local interest than Illinois because parties claiming right to insurance proceeds arising from tornado-caused property damage where Mississippi residents); *see also Hotel Motel, LLC v. United Fire and Casualty Company*, 2013 WL 12091643, at *3 (S.D. Fla. 2013) ("Not only should Missouri law apply to this matter, but Missouri has an inherent interest in regulating insurance within its borders.") (c*iting Shapiro v. Associated Int'l. Ins., Co.*, 899 F.2d 1116, 1121 (11th Cir. 1990) (noting that Florida has a significant interest in litigation involving insurance contracts located in Florida, thus adding to the court's reasoning why Florida should be where this case is heard)).

Mt. Hawley Ins. Co. v. TFP Properties III, LLC is particularly instructive with regard to this factor. 2018 WL 10419785, at *5 (N.D. Tex. 2018). In applying the public interest analysis, the Northern District of Texas held that venue was proper in the jurisdiction where the insured's property was located and where the casualty event, Hurricane Harvey, occurred. *Id*. The district court specifically addressed the "localized interest" factor:

> The Southern District of Texas has the stronger local interest in deciding this case. Although [Insurer] repeatedly points out that it does not dispute whether the alleged damage was covered by the Policy, this fact does not negate that the disputed issues here relate to the Property

> located in Rockport, Texas. *The alleged damage also resulted from Hurricane Harvey, a natural disaster that significantly affected the Southern District of Texas. A matter of insurance coverage may not generally be of interest to the residents of either districts, but between the two districts, the residents of the Southern District of Texas have more of a local interest in how insurance companies are treating claims stemming from Hurricane Harvey*. The second public-interest favor weighs in favor of transfer.

Id. (emphasis added).

As evidenced by the reasoning of the court in *TFP Properties III*, the localized factor in this case undoubtedly weighs in favor of declining transfer and this Court retaining jurisdiction, as the Northern District of Florida has a stronger local interest in deciding this case.

IV. The Forum Selection Clause is Permissive, and Transfer is Within This Court's Discretion and Should be Exercised in Favor of Denying the Motion.

Should a valid, enforceable forum selection clause pointing to a *particular* federal district court be at issue, the analysis of a motion to transfer proceeds under § 1404(a), albeit with some changes. *Atlantic Marine Constr. Co.*, 571 U.S. at 63-66. This analysis, however, "presupposes [the] contractually valid forum-selection clause" under *Atlantic Marine*. *Id*. at 62 n.5. Further, "[e]ven a valid forum selection clause is not dispositive and does not compel transfer if the factors listed in 1404(a) militate against transfer." *Rimkus Consulting Group, Inc. v. Balentine*,

693 F.Supp.2d 681, 691 (S.D. Tex. 2010) (*citing Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)).

While under *Atlantic Marine* the existence of a forum selection clause would change the analysis under a motion for transfer of venue, this is dependent upon the specific forum selection clause at issue, and whether it is mandatory or permissive. This distinction is crucial because mandatory clauses have more weight than permissive clauses. *Gaby's Bags, LLC v. Mercari, Inc.*, 2020 WL 495215, at *4 (M.D. Fla. Jan. 30, 2020).

1. Defendants fail to meet their burden of proving Plaintiff could have filed in the Southern District of New York.

The preliminary question under §1404(a) is whether a civil action "might have been brought" in the destination venue. *In re Volkswagen of America*, Inc., 545 F.3d 304, 312 (5th Cir. 2008). As discussed, the subject forum-selection clause is not dispositive as it is invalid or, at best, permissive. Defendants therefore have the burden of establishing that Plaintiff may have raised this action in the Southern District of New York originally.

Pursuant to 28 U.S.C. 1391(b), a civil action may be brough in (1) a judicial district in which any defendant resides, (2) a judicial district in which a substantial part of the events occurred, or (3) if there is no other district in which an action may be raised, any judicial district with personal jurisdiction over any

defendant. Applying the §1391(b) analysis, it is evident that venue is not proper in the Southern District of New York. First, the Defendants are residents of Illinois and the United Kingdom; as such, Plaintiff would not have been able to file suit in New York based upon Defendants' residency. Second, it is undisputed that a substantial part of the events occurred in Florida; again, Plaintiffs would not have been able to raise this action in New York based upon this prong. Third, the final option for establishing venue does not apply as the Northern District of Florida provides an appropriate forum for this matter.

Without a mandatory forum-selection clause, Defendants cannot escape the first requirement precedent to transferring venue, which is to establish that Plaintiff could have raised this action in the Southern District of New York. Defendants have made no attempt to demonstrate that this case "might have been brought" in New York under the federal venue rules. Accordingly, Defendants fail to meet the first requirement for transferring venue under 28 U.S.C. 1404(a).

2. The Policy provision is permissive not mandatory.

If the forum selection clause is merely permissive, the court must consider the remaining factors in a typical transfer of venue motion under § 1404(a) and the *forum non conveniens* framework. *See Belacon Pallet Servs., LLC v. Amerifreight, Inc.*, 2016 WL 8999936, at *1 (N.D. Fla. Mar. 26, 2016) ("[n]evertheless, because the

forum selection clause at issue is permissive, rather than mandatory, this Court will consider the remaining factors under the transfer statute").

"A permissive clause authorizes jurisdiction in a designated forum but does not prohibit litigation elsewhere, whereas [a] mandatory clause . . . dictates an exclusive forum for litigation under the contract." *Slater v. Energy Servs. Grp. Int'l, Inc.*, 634 F. 3d 1326, 1330 (11th Cir. 2011) (internal quotation marks and citation omitted). A forum selection clause "*conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction elsewhere unless it contains specific language of exclusion." *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imp. and Distrib.*, Inc., 22 F.3d 51, 53 (2nd Cir. 1994) (emphasis in original).

However, the Eleventh Circuit has espoused that it "require[s] quite specific language before concluding that a forum selection clause is mandatory, such that it dictates an exclusive forum for litigation under the contract." *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1262 n.24 (11th Cir. 1999). *See also Anderson v. First Mercury Ins. Co.*, 2020 WL 3316917, at *2 (M.D. Fla. Feb. 28, 2020) ("The Eleventh Circuit only enforces clauses that 'unambiguously designate the forum in which the parties must enforce their rights under the contract.'") (*Quoting Fla. Polk Cty. v. Prison Health Servs., Inc.*, 170 F.3d 1081, 1084 n.8 (11th Cir. 1999)).

The clause in *Atlantic Marine* was mandatory, and the Northern District of Florida has subsequently held that in cases involving permissive forum selection clauses, courts "will consider the remaining factors under the transfer statute." *Belacon*, 2016 WL 8999936 at *1. This analysis is discretionary with the court making the determination. *See Pinson v. Rumsfeld*, 192 Fed. Appx. 811, 817 (11th Cir. 2006).

As discussed *supra*, the instant forum selection clause is permissive, as it fails to "unambiguously designate the forum in which the parties must enforce their rights under the contract." *Fla. Polk Cty.*, 170 F.3d at 1084 n.8. The ambiguities in the forum selection clause are such that it not only merely dictates a geographic area containing multiple state and federal courts which suit may be initiated in, it does not preclude removal or transfer to a particular district court in Defendants' reservation of right to remove. *See e.g., Pappas v. Kerzner Int'l Bahamas Ltd.*, 585 F. App'x 962, 964 (11th Cir. 2014) (per curiam) ("[A] motion to dismiss for *forum non conveniens* ... is the appropriate means to enforce a valid forum-selection clause if that clause *requires* the dispute to be litigated in a non-federal forum." (emphasis added)). Further, as *Atlantic Marine* makes clear, Section 1404(a) provides the framework "for enforcement of forum-selection clauses *that point to a particular*

federal district." *Atlantic Marine Constr. Co.*, 571 U.S. at 60 (emphasis added). Otherwise, *forum non conveniens* is the correct analysis. *Id*. at 60.

3. Analysis under section 1404(a) of this permissive Policy provision requires denial of the Motion.

If this Court determines the Motion should be analyzed under section 1404(a), the framework of analyzing those private and public interests would be substantially similar as under a *forum non conveniens* analysis. *See Belacon*, 2016 WL 8999936 at *1 ("[n]evertheless, because the forum selection clause at issue is permissive, rather than mandatory, this Court will consider the remaining factors under the transfer statute"). This Court, then, must consider the convenience of the parties and witnesses, as well as those interests of justice in the private and public analyses. *Id*.

The result of an analysis under section 1404(a) with the specific forum selection clause at issue presently would necessitate the same result as one achieved under the doctrine of *forum non conveniens*, as discussed in this memorandum, as those factors and considerations are effectively the same. *See e.g. Hisey v. Qualtek USA, LLC*, 753 F. App'x 698, 701 (11th Cir. 2018) ("[M]otions to enforce a forum-selection clause are evaluated under one of two similar frameworks. If the forum-selection clause specifies *a United States district court* in which a plaintiff should have brought the case, the Court analyzes the matter as a motion to transfer under 28 U.S.C. § 1404(a). If the clause does not identify such a district court, the Court

considers the matter under the residual doctrine of *forum non conveniens*.") (emphasis added).[1]

4. The uneven bargaining power of the parties renders the Policy is a contract of adhesion.

"In its resolution of the § 1404(a) motion… the District Court will be called on to address such issues as the convenience of a Manhattan forum given the parties' expressed preference for that venue, and the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988).

In addressing the issue of fairness of the parties and unequal bargaining power, the Eleventh circuit has held that:

> [I]nsurance policies, while contractual in nature, are certainly not ordinary contracts, and should not be interpreted or construed as individually bargained for, fully negotiated agreements, but should be treated as contracts of adhesion between unequal parties.

Castleberry v. Goldome Credit Corp., 418 F.3d 1267, 1271 (11th Cir. 2005)[2] (internal citation omitted). *See also Eagle Star Ins. Co. v. Intern'l Proteins Corp.*, 45 A.D.2d 637, 360 N.Y.S.2d 648, 650 (1974) (insurance contracts are

[1] The court is *Hisey* found that a forum selection clause which "encompassed multiple state and federal courts instead of a particular federal district," was properly reviewed by the district court under the doctrine of *forum non conveniens. Hisey, 753 F. App'x at 701.*

[2] The Castleberry court also noted that ambiguities in insurance contracts are construed against the insurer under New York law. Id.

"adhesion contracts"), *aff'd*, 38 N.Y.2d 861, 382 N.Y.S.2d 481, 346 N.E.2d 249 (1976). Given the Policy at present was issued by Defendants, this factor in the court's analysis must militate against transfer, in addition to the discussion concerning the public and private interests mentioned *infra*.

Given the foregoing, based upon Defendants' incorrect interpretation as to the applicability of section 1404(a) and the permissive nature of the forum selection clause, and a failure to address the correct *forum non conveniens* framework, transfer to the Southern District of New York is not appropriate if this Court finds the Policy's forum selection clause points to a particular federal district court and the Motion should be denied.

V. If This Court Determines that the Policy's Forum Selection Clause is Mandatory, This Court Should Still Retain Jurisdiction and Decline Transfer.

Even when giving Defendants more deference than the preceding, assuming the forum selection clause at issue presently is mandatory, this would still not afford Defendants right to transfer. *See Rimkus Consulting Group, Inc.*, 693 F.Supp.2d at 691 ("Even a valid forum selection clause is not dispositive and does not compel transfer if the factors listed in 1404(a) militate against transfer." (*citing Stewart Org.*, 487 U.S. at 29).

Under this analysis, this Court must consider "the administrative difficulties flowing from court congestion[,] the local interest in having localized controversies decided at home[,] and 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, 582. As discussed *infra*, all of these public interest factors militate strongly against transfer to the Southern District of New York, a district with an exceedingly high caseload and with little to no interest in resolving accommodating an insurance dispute concerning property in Florida, with Illinois and English insurance carriers. *See e.g.*, *United States v. Dimaria*, 2018 WL 1173094, at *8 (S.D. Fla. Mar. 6, 2018) ("the Southern District of Florida resolves cases more than twice as quickly as the Southern District of New York, transfer of this case to the Southern District of New York could result in substantial delay and [t]hus, this factor does not support transfer." (internal citation omitted); *Lary v. Doctors Answer, LLC*, 2013 WL 987879 (N.D. Ala. Mar. 8, 2013) ("[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.");.

Accordingly, it would follow that it would be prejudicial and patently unfair to force a party with little to no bargaining power to litigate a case involving issues of hurricane damage in a forum with minimal personal knowledge of hurricanes and an more backlogged docket than the one in which the property which forms the crux

of the dispute is located and is quite familiar with these events. This Court should exercise its discretion and deny Defendants' Motion in the best interests of justice.

VI. CONCLUSION

For the reasons set forth above, Plaintiff SUMMERWIND WEST CONDOMINIUM OWNERS ASSOCIATION, INC. respectfully requests this Court deny Defendants' Motion to Transfer Venue, and require these English and Illinois insurance carriers to litigate their breaches of the Policy in the jurisdiction where the condominium property the Policy covers is located, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

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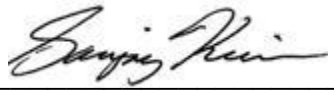
NOTICE OF COMPLIANCE

The undersigned hereby certifies that the forgoing motion contains 6,161 words, excluding the caption, signature block, and certificate of service.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system and is being served this day on all counsel of record on the attached service list via transmission of Notice of Electronic Filing generated by CM/ECF, on this 8th day of October, 2021.

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