

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Green Life Technologies LLC

INDEX NO. 602065/09

MOTION DATE 7/15/09

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Great Harbour Holdings

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

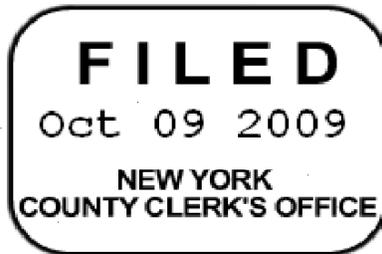
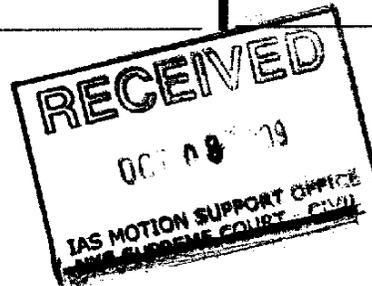
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion



MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/8/09

HON. RICHARD B. LOWE, III
J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

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GREEN LIFE TECHNOLOGIES, LLC,

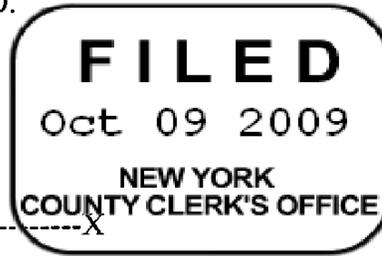
Plaintiff,

Index No.602065/09

-against-

GREAT HARBOUR HOLDINGS COMPANY, LTD.
and ABC CORP.,

Defendants.



-----X
Richard Lowe, III, J.:

Plaintiff Green Life Technologies, LLC (Green Life) brings this order to show cause for a preliminary injunction barring defendant Great Harbour Holdings Company, Ltd. (Great Harbour) from, among other things, acting to “modify, change or terminate” plaintiff’s rights under an exclusive Distribution and License Agreement (Agreement), or to allow any negotiations with third parties concerning the sale and distribution of the products plaintiff is licensed to sell under the Agreement (mot. seq. no. 001). In an order dated July 7 2009, Green Life was granted a temporary restraining order(TRO).

Great Harbour has filed its own motion seeking to dismiss the complaint, pursuant to CPLR 3211 (a) (1), claiming that a forum selection clause in the Agreement requires that any action brought thereunder be brought in the courts in Hong Kong (mot. seq. no. 002).

Background

Pursuant to the Agreement (Aff. of Screwvala, Ex. E), Green Life has the exclusive right to distribute and sell a product it describes as “unique environmentally friendly, organic

barbeque “bricks,” and other fire-starting products for use in cooking and fireplaces (Products)(Aff. of Harari, at 2). Green Life alleges that Great Harbour claims to have terminated the Agreement, in a notice dated June 4, 2009 (Order to Show Cause, Ex. B), and that Great Harbour intends to commence negotiations with other parties for the right to sell the Products, all in breach of the Agreement. Green Life maintains that, as the Agreement is its sole asset, it will be irreparably harmed by any such breach of the Agreement.

Great Harbour claims that Green Life breached the Agreement first, by failing to meet a minimum purchase requirement of \$2,000,000 contained in the Agreement.

Discussion

Great Harbour maintains that this court is an improper forum for the resolution of this matter, and so, it is logical to address Great Harbour’s motion for dismissal, based on the Agreement’s forum selection clause, as a threshold matter. The forum selection clause reads as follows:

[t]his Agreement shall be governed by and constructed in accordance with the laws of Hong Kong SAR, without regard to its conflict of laws principles.¹ Any legal matter (including judicial and administrative proceedings) with respect to any matter arising under or growing out of this Agreement, *shall be brought in a court of competent jurisdiction located in Hong Kong*. Each party hereby consents to the jurisdiction and venue of such courts for such purposes [emphasis added]

(Agreement, ¶ 11.6).

Forum selection clauses are “prima facie valid” (*Brooke Group Ltd. v JCH Syndicate* 488, 87 NY2d 530, 534 [1996]; *see also Sterling National Bank v Eastern Shipping Worldwide,*

¹No party has attempted, or shown a desire, to apply the laws of Hong Kong to these motions.

Inc., 35 AD3d 222 [1st Dept 2006]). Such clauses are favored because “they provide certainty and predictability in the resolution of disputes” (*Brooke Group Ltd. v JCH Syndicate* 488, 87 NY2d at 534). A forum selection clause will be upheld unless a plaintiff can show that “its enforcement ‘would be unreasonable, unjust, or would contravene public policy, or that the clause is invalid because of fraud or overreaching’” (*Boss v American Express Financial Advisors, Inc.*, 15 AD3d 306, 307-308 [1st Dept 2005], *affd* 6 NY3d 242 [2006], quoting *Koko Contracting v Continental Environmental Asbestos Removal Corp.*, 272 AD2d 585, 586 [2d Dept 2000]).

Green Life cites three bases upon which to invalidate the forum selection clause: (1) that it is permissive only, and does not make Hong Kong the only forum available to Green Life; (2) that Green Life’s action seeks equitable relief, which is not covered by the clause; and (3) that the forum selection clause did not survive the termination of the Agreement.

This court finds the forum selection clause in issue to be mandatory in requiring all actions arising from the Agreement to be heard in the courts of Hong Kong. The use of the word “shall” in a clause conferring jurisdiction in a certain venue has been found to require the parties to litigate where the contract designates (*see e.g. Micro Balanced Products Corp. v Hlavin Industries Ltd.*, 238 AD2d 284 [1st Dept 1997]). That is, the word “shall” makes the jurisdiction mandatory (*Seward v Devine*, 888 F2d 957 [2d Cir 1989]). However, other courts have felt that a clause stating that a certain forum “shall have jurisdiction” is merely permissive, as the language might allow jurisdiction to lay elsewhere (*see First National City Bank v Nanz, Inc.*, 437 F Supp 184 [SD NY 1975]). In *First National City Bank*, the court found that the language “shall have jurisdiction”

is not mandatory, since that clause does not clearly indicate that any dispute brought under the ... agreement must be litigated in the New York State Supreme Court. Rather, it is susceptible to the interpretation that the New York State Supreme Court could have jurisdiction of disputes ... but that other forums may also be appropriate

(*id.* at 187).

Green Life offers *Mena Films, Inc. v Painted Zebra Productions, Inc.* (13 Misc 3d 1221[A], 2006 NY Slip Op 51937[U], *1 [Sup Ct, NY County 2006]) for this proposition. In *Mena*, the forum selection clause provided that the laws of California “shall” apply, and that any action “shall be subject to the jurisdiction of the Federal and State Courts located in Los Angeles County.” The *Mena* court determined that something more than the mere use of the word “shall” was needed to make a forum selection clause mandatory. In fact, the *Mena* court distinguished between forum selection clauses and what it considers to be mere “jurisdiction conferring” clauses, the assumption being that, by drafting a forum selection clause saying that a forum “shall” have jurisdiction, without more (such as use of the word “exclusive”), a party is not precluded from choosing any other forum it may wish.

In *Water Energizers Ltd. v Water Energizers, Inc.* (788 F Supp 208, 212 [SD NY 1992]), the court stated that “[t]here are no magic words, such as ‘forum’ or ‘venue,’ that must appear in a contract to create an effective designation of an exclusive forum. Any language that reasonably conveys the parties’ intention to select an exclusive forum will do.” In *First National City Bank v Nanz, Inc.* (437 F Supp 184, *supra*), the court described two instances where language in a forum selection clause would mandate litigation in a particular forum. It noted that, in *M/S Bremen v Zapata Off-Shore Co.* (407 US 1 [1972]), the clause stated that any dispute arising from the agreement ““must be treated before the London Court of Justice”” (*First*

National City Bank v Nanz, Inc. [437 F Supp at 187], quoting *M/S Bremen v Zapata Off-Shore Co.* [407 US at 2]), and that this language was mandatory. In *Central Contracting Co. v Maryland Casualty Co.* (367 F2d 341, 343 [3d Cir 1966]), the mandatory language stated that the litigant “agrees that it will not commence any action ... arising out of ... this subcontract agreement, in any Courts other than those in the County of New York” (see *First National City Bank v Nanz, Inc.*, 437 F Supp at 187, quoting *Central Contracting Co. v Maryland Casualty Co.*, 367 F2d at 343).

Indeed, in *Mena Films, Inc. v Painted Zebra Productions, Inc.* (13 Misc 3d 1221[A], 2006 NY Slip Op 51937[U], *supra*), the court cited language which it admitted would make a forum selection clause mandatory, to wit, the use of the words “exclusive,” “shall be litigated” and “shall be prosecuted.”

In the present case, the forum selection clause does not say that the parties agree that a certain forum have jurisdiction, leaving open the possibility that the action might proceed elsewhere; rather, it specifically states that matters arising from the Agreement “shall be brought in a court of competent jurisdiction located in Hong Kong.” This language, similar to the words “shall be litigated” and “shall be prosecuted,” could not be more mandatory, as it does not just say that Hong Kong has jurisdiction, it places the action squarely in Hong Kong’s courts. Therefore, Green Life cannot invalidate the forum selection clause by claiming that it is permissive only.

Green Life’s second argument is that the Agreement does not require equitable actions to be heard in Hong Kong. This interpretation arises from the language saying that “[a]ny legal action ... with respect to any matter arising under or growing out of this Agreement” shall be

heard in Hong Kong, language which does not include the word “equitable.” Green Life characterizes its action as one brought in equity, which may be heard in this court.

While Grand Harbour relies on CPLR 103 (a), which states that “[t]here is only one form of civil action. The distinctions between actions at law and suits in equity, and the forms of these actions and suits, have been abolished,” to offset Green Life’s attempt to characterize its action as a suit in equity, it is not necessary to invoke this statute. Green Life’s complaint is robustly one at law, brought under four different causes of action, each seeking damages in excess of \$2,000,000. This motion does not serve to alter the clear nature of Green Life’s action, and this court finds that even a potential cause of action for a preliminary injunction, which has not been made, could change this action into an equitable suit. The Agreement’s language does not restrict the forum selection clause in this manner.

Green Life’s final argument is a bit puzzling, claiming as it does that the termination of the Agreement terminated the effectiveness of the forum selection clause. Rather, it is at the contested termination of an agreement when a forum selection clause is most likely to apply to resolve, as in this case, “any matter arising under or growing out of” such agreement (*see Weingard v Telepathy, Inc.*, 2005 WL 2990645, 2005 US Dist LEXIS 26952, *9 [SD NY 2005][forum selection clause survives termination of the agreement when the claims in the action arise from the agreement]).

In sum, Grand Harbour has established the existence of a valid and enforceable forum selection clause that requires this court to dismiss the action in favor of an action in the courts in Hong Kong, where the parties expressly agreed to litigate. As a result, it is not necessary to address Green Life’s motion for a preliminary injunction, as the case will not proceed in this

forum.

Conclusion

Accordingly, it is

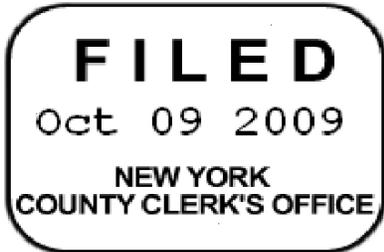
ORDERED that plaintiff Green Life Technologies, Inc.'s motion for a preliminary injunction is denied; and it is further

ORDERED that defendant Great Harbour Holdings Company, Ltd.'s motion for dismissal of the complaint is granted, and the complaint is dismissed with costs and disbursements to this party as calculated by the Clerk of this Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the temporary restraining order presently in place is vacated; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 8, 2009



ENTER:



HON. RICHARD B. LOWE, III