UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV16-08042 JAK (JEMx)	Date	July 13, 2017
Title	Southern California Regional Rail Authority v. Hyundai Rotem Company		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE**

PLAINTIFF'S MOTION TO REMAND (DKT. 20)

PLAINTIFF AND COUNTER-DEFENDANT'S MOTION TO DISMISS COUNT TWO OF HYUNDAI ROTEM COMPANY'S FIRST AMENDED COUNTERCLAIMS (DKT. 39)

I. Introduction

The Southern California Regional Rail Authority ("Plaintiff") brought this action in the Los Angeles Superior Court ("LASC") against Hyundai Rotem Company ("Defendant") for breach of contract, breach of warranty and indemnity arising out of a contract for the manufacture of railcars by Defendant for Plaintiff. Dkt. 1-2. On October 28, 2016, Defendant removed this action. Dkt. 1. On November 30, 2016, Plaintiff filed a Motion to Remand. Dkt. 20. Defendant opposed the Motion to Remand (Dkt. 25), and Plaintiff replied. Dkt. 34.

On November 16, 2016, Defendant filed a Counterclaim. Dkt. 16. On January 11, 2017, Defendant filed a First Amended Counterclaim ("FACC"). Dkt. 35. On January 25, 2017, Plaintiff filed a Motion to Dismiss the FACC. Dkt. 39. Defendant opposed the Motion to Dismiss (Dkt. 40), and Plaintiff replied. Dkt. 42.

On March 13, 2017, a hearing on the Motions was held and they were taken under submission. Dkt. 43. For the reasons stated in this Order, the Motions are **DENIED**.

II. Factual Background

A. The Parties

Plaintiff is a government authority that operates the Metrolink commuter rail system in Southern California. Dkt. 1-2 ¶ 1. Defendant is a corporation formed under the law of South Korea and whose principal place of business is there. *Id.* ¶ 7.

B. The Contract

On April 13, 2006, the parties entered a contract pursuant to which Defendant agreed to design and manufacture railcars for Plaintiff for a total price of $305,974,486 (the "Contract"). *Id.* ¶ 13. The Complaint alleges that under the terms of the Contract, Defendant was responsible for making all decisions as to the design of the railcars. *Id.* ¶ 15. It also alleges Defendant agreed to indemnify Plaintiff for any losses it sustained as a result of Defendant's actions in performing under the Contract. *Id.* ¶ 17. Defendant also provided a two-year warranty for all work, and a 15-year warranty for work relating to the carbody and underframe of the railcars. *Id.* The Complaint alleges that the last delivery under the Contract was in April 2014. *Id.* ¶ 18.

C. Alleged Design Defects and the Oxnard Crash; Claims Asserted

The Complaint alleges that Defendant's design of the railcars was defective. *Id.* ¶ 2. It alleges that the pilot, or cowcatcher, of the railcars was defectively designed and inadequately attached to the railcars. *Id.* "The pilot is a critical safety component that is located at the front end of the cab car and is required to prevent collision debris from getting under the train's wheels that could cause it to derail." *Id.* ¶ 1. The Complaint alleges: "in February 2015 . . . a Metrolink train with a Hyundai-built cab car at the front collided with a pickup truck that had stopped on the tracks in Oxnard. The pilot broke off from the cab car and the train derailed." *Id.* ¶ 3.[1]

After the Oxnard Crash, Plaintiff began an investigation into the railcars and accompanying pilots. *Id.* ¶ 24. It allegedly "revealed multiple fleet-wide defects" in Defendant's railcars and pilot assemblies. *Id.* The Complaint alleges that the "design of the pilot assembly was defective as well." *Id.* ¶ 27. It also alleges that Defendant refused to cooperate with Plaintiff in curing the defects in the railcars and as a result, Plaintiff had to lease another locomotive to place in front of its railcars whose cost to Plaintiff exceeded $20 Million. *Id.* ¶ 35.

Based on these allegations, the Complaint advanced the following causes of action: (i) breach of written contract; (ii) breach of express warranty; (iii) breach of implied warranty of merchantability; (iv) breach of implied warranty of fitness for a particular purpose; and (v) express indemnity. *Id.* ¶¶ 37-72.

D. Allegations in the FACC

The FACC advances two causes of action: (i) breach of contract and (ii) breach of the implied covenant of good faith and fair dealing. In support of these claims, the FACC alleges that, pursuant to the terms of the Contract, the parties participated in a design review process. During that process, the parties allegedly held frequent meetings concerning the design of the railcars, including the pilot. FACC ¶¶ 16-17. This process led to the approval of Defendant's designs by LTK, the firm designated by Plaintiff to provide engineering services. *Id.* The FACC alleges the LTK had broad authority to approve and modify the technical specifications for the design of the railcars. *Id.* ¶¶ 18-19. It also alleges that Plaintiff approved, inspected and tested Defendant's proposed designs, which were then finalized. *Id.* ¶¶ 22-24, 31. The FACC also alleges that Plaintiff tested, inspected and approved each final railcar. *Id.* ¶¶ 25-31.

[1] This incident is hereafter referred to as the "Oxnard Crash."

The FACC alleges that Defendant performed all of its obligations under the Contract. *Id.* ¶ 32. It also alleges that, on July 1, 2015, Plaintiff agreed that it would pay to Defendant $4,991,498.89, which was the total amount that was due under the Contract. *Id.* ¶ 33. The payment was allegedly to be made by September 15, 2015. It is alleged that Plaintiff failed to make that payment. *Id.* ¶ 34. It also alleged that, on October 30, 2015, Plaintiff confirmed that it would not make the final payment in light of the Oxnard Crash and the other design problems Plaintiff discovered as a result of the investigation that it conducted after that incident. *Id.* ¶¶ 34-35.

The FACC alleges that the Oxnard Crash and derailment was caused by the negligence of the truck driver and not by any defects in the design or manufacture of the pilot or railcars. *Id.* ¶ 36. It also alleges that Plaintiff disclosed a confidential, internal report to the *Los Angeles Times* that concluded that the crash was due to defects in Defendant's design of the pilot. *Id.* ¶ 38.

III. Analysis

A. Motion to Remand

1. General Legal Standards

A motion to remand is the procedural tool to challenge the removal of an action. *Moore-Thomas v. Alaska Airlines, Inc*., 553 F.3d 1241, 1244 (9th Cir. 2009). Generally, a civil action may be removed only if it could have been brought originally in a federal court. 28 U.S.C. § 1441(a). Federal courts have diversity jurisdiction where the amount in controversy exceeds $75,000 and is between parties who are citizens of different states. 28 U.S.C. §§ 1332, 1441. The removal statute is to be strictly construed; any doubt about removal jurisdiction is to be resolved in favor of remand. *Gaus v. Miles, Inc*., 980 F.2d 564, 566 (9th Cir. 1992). The result of the presumption against removal is that a removing party has the burden of establishing that removal was proper. *Id.* "If a case is improperly removed, the federal court must remand the action because it has no subject-matter jurisdiction to decide the case." *ARCO Envtl. Remediation, LLC v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1113 (9th Cir. 2000).

2. Application

Plaintiff contends that the Contract that gives rise to this dispute contains a forum selection clause that specifies the state courts of California as the exclusive forum. Defendant argues that remand is improper because this Court has subject matter jurisdiction and the forum selection clause is permissive, not mandatory.

a) Legal Standards for Applying a Forum Selection Clause

Federal law governs the interpretation of a forum selection clause. *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009). When "interpret[ing] a contract under federal law, [the court] look[s] for guidance 'to general principles for interpreting contracts.'" *Id.* (quoting *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999)). "Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first." *Id.* (quoting *Klamath Water Users Protective Ass'n.*, 204 F.3d at 1210. "A primary rule of interpretation is that '[t]he common or normal meaning of language will be given to the words of a contract unless circumstances show that in a

particular case a special meaning should be attached to it.'" *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987) (quoting 4 S. Williston, *A Treatise on the Law of Contracts* § 618 (W. Jaeger 3d ed. 1961)). A written contract is to be read as a whole, and each part interpreted with reference to the whole. *Doe 1*, 552 F.3d at 1081.

"Ninth Circuit precedent requires that the court pay careful attention to whether the language in a forum selection clause is mandatory or permissive. If the language is mandatory, the clause must be enforced and venue will lie in the designated forum only." *Calisher & Assocs., Inc. v. RGCMC, LLC*, 2008 WL 4949041, at *3 (C.D. Cal. Nov. 17, 2008), *aff'd sub nom. Calisher & Assocs., Inc. v. RGCM, LLC*, 373 F. App'x 697 (9th Cir. 2010). "A forum selection clause that designates a state court as the exclusive forum is a mandatory clause requiring that the case be remanded." *Chinatrust Bank (U.S.A.) v. Aclor, Inc.*, 2011 WL 1668393, at *1 (N.D. Cal. May 3, 2011). "[W]here venue is specified with mandatory language the clause will be enforced. When only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive." *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989) (citations omitted); *see also Gennock v. Lucas Energy, Inc.*, 2011 WL 4738320, at *3 (E.D. Cal. Oct. 5, 2011); *Chinatrust Bank*, 2011 WL 1668393, at *1; *Calisher & Assocs.*, 2008 WL 4949041, at *4.

"To be mandatory, a clause must contain language that clearly designates a forum as the exclusive one." *N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1037 (9th Cir. 1995). "However, if the language of the forum selection clause is non-mandatory or permissive, the forum selection clause will not preclude suit elsewhere." *Gennock*, 2011 WL 4738320, at *3. "A forum selection clause is permissive when the parties merely consent to bestow jurisdiction on a court without stating that the court has exclusive jurisdiction to hear their disputes." C*alisher & Assocs.*, 2008 WL 4949041, at *4; *see also Chinatrust Bank*, 2011 WL 1668393, at *1 ("if the forum selection clause merely indicates that the parties consent to a particular jurisdiction but does not provide that they cannot litigate elsewhere, the clause does not preclude removal to federal court.").

b) The Forum Selection Clause is Permissive

The forum selection clause provides:

> The validity of this Contract and any of its terms and provisions, as well as the rights and duties of [Defendant] and [Plaintiff], shall be governed by the laws of the State of California. By entering into the Contract, [Defendant] consents and submits to the jurisdiction of the Courts of the State of California over any action at law, suit in equity, and/or other proceeding that may arise out of this Contract.

Ex. A to Declaration of Edward E. Johnson ("Johnson Decl."), Dkt. 20-1 (Contract ¶ 99).

Plaintiff argues that the use of the word "of" instead of the word "in" in the phrase "the jurisdiction of the Courts of the State of California" means that the agreement is only as to state courts in California. Thus, it contends that it does not refer to a federal court located in California. *See Doe 1*, 552 F.3d at 1082 ("Thus, courts 'of' Virginia refers to courts proceeding from, with their origin in, Virginia—i.e., the state courts of Virginia. Federal district courts, in contrast, proceed from, and find their origin in, the federal government.").

Plaintiff also contends that this forum selection clause is mandatory because the phrase "consents and submits to the jurisdiction of the Courts of the State of California" creates exclusive jurisdiction in those state courts. Defendants respond that this clause is permissive because it constitutes consent to jurisdiction in California, but does not clearly state that there is exclusive jurisdiction in the California state courts.

(1) Ninth Circuit Decisions

The Ninth Circuit has not addressed the specific issue presented by the forum selection clause in the Contract. However, it has analyzed similar ones. *Hunt Wesson Foods* considered the following clause: "The courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract." 817 F.2d at 76. *Hunt Wesson Foods* concluded that the forum selection clause was "permissive rather than mandatory" because "the plain meaning of the language is that the Orange County courts shall have jurisdiction over this action." *Id.* at 77. As a result, it was proper to deny the motion to remand because

> [t]he language says nothing about the Orange County courts having exclusive jurisdiction. The effect of the language is merely that the parties consent to the jurisdiction of the Orange County courts. Although the word "shall" is a mandatory term, here it mandates nothing more than that the Orange County courts have jurisdiction. Thus, Supreme cannot object to litigation in the Orange County Superior Court on the ground that the court lacks personal jurisdiction. Such consent to jurisdiction, however, does not mean that the same subject matter cannot be litigated in any other court. In other words, the forum selection clause in this case is permissive rather than mandatory.

Id.

Docksider reached a different result based on its reading of the following clause: "Licensee hereby agrees and consents to the jurisdiction of the courts of the State of Virginia. Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia." 875 F.2d at 763. *Docksider* held that this clause created exclusive jurisdiction in the Virginia state court in Gloucester County, because the "critical language . . . is the final sentence." *Id.* The sentence created exclusive jurisdiction because

> [t]his language requires enforcement of the clause because Docksider not only consented to the jurisdiction of the state courts of Virginia, but further agreed by mandatory language that the venue for all actions arising out of the license agreement would be Gloucester County, Virginia. This mandatory language makes clear that venue, the place of suit, lies exclusively in the designated county. Thus, whether or not several states might otherwise have jurisdiction over actions stemming from the agreement, all actions must be filed and prosecuted in Virginia.

Id. at 764.

N. Cal. Dist. Council of Laborers considered the following clause: "[a] decision of the Board of Adjustment . . . or the decision of a permanent arbitrator shall be enforceable by a petition to confirm an arbitration award filed in the Superior Court of the City and County of San Francisco, State of California." 69 F.3d at 1036 (alterations in original). *N. Cal. Dist. Council of Laborers* noted that "[t]he clause does not contain additional

language . . . [that] designated the state court as the exclusive forum." *Id.* at 1037. It held the clause permissive "because it does not contain language 'clearly require[ing] exclusive jurisdiction.'" *Id.* (quoting *Hunt Wesson*, 817 F.2d at 77). As a result, *Docksider* reversed the district court's order remanding the case.

Doe 1 considered the following forum selection clause: "[y]ou expressly agree that exclusive jurisdiction for any claim or dispute . . . resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute . . . ." *Doe 1*, 552 F.3d at 1080. *Doe 1* found that this clause provided for exclusive jurisdiction in the Virginia state courts. *Id.* at 1082. The only relevant dispute in *Doe 1* was whether the clause created exclusive jurisdiction in either the state or federal courts in Virginia or solely in the state courts. *Doe 1* considered the dictionary definition of the word "of" and compared it to that of the word "in." *Id.* Based on this comparative analysis, it held that exclusive jurisdiction was solely in the Virginia state courts. *Id.* at 1081-82 ("We hold that the forum selection clause at issue here—designating the courts of Virginia—means the state courts of Virginia only; it does not also refer to federal courts in Virginia.").

(2) District Court Decisions

Several district courts have considered the phrase "submits to," in assessing whether it establishes an exclusive, mandatory venue. They generally have concluded that it does not. *Chinatrust Bank* held that the forum selection clause, "If there is a lawsuit, [defendants] agree upon [plaintiff's] request to submit to the jurisdiction of the courts of SANTA CLARA County, State of California," did not create mandatory jurisdiction in the Santa Clara County Superior Court. 2011 WL 1668393, at *1 ("While the clause at issue in this case states that [defendant] agrees to the jurisdiction of the courts of Santa Clara County, it does not state that those courts have exclusive jurisdiction."); *id.* at *2 ("Because the choice of venue clause in the instant case does not show that the parties intended to designate the state court as the exclusive jurisdiction for disputes arising under the contract, Chinatrust's motion to remand will be denied.").

A.O. Smith Corp. v. Transpac Container Sys. Ltd. considered this forum selection clause:

> 4.1 Disputes arising under the Document shall be determined by the courts and subject to Clause 17 of this Document in accordance with the laws of Hong Kong.
> 4.2 No proceedings may be brought before other courts unless the parties agree on both the choice of another court or arbitration tribunal and the law to be then applicable.

2009 WL 3001503, at *3 (C.D. Cal. May 8, 2009).

The court held that this "forum selection clause is mandatory and exclusive." *Id.* The basis for this outcome was that "Paragraph 4.1 uses the term 'shall,' which sufficiently indicates that Hong Kong courts are the mandatory forum for resolving disputes. Moreover, Paragraph 4.2's prohibition on resolution of disputes in other courts, except upon the parties' agreement, indicates that the clause is exclusive." *Id.* (citation omitted).

Aviation Fin. Grp., LLC v. Duc Hous. Partners, Inc. evaluated this forum selection clause: "Grantor agrees upon Lender's request to submit to the jurisdiction of the Courts of Ada County, State of Idaho." 2009 WL 1298403, at *2 (D. Idaho May 7, 2009). The court denied a motion to remand the matter to a state court in Idaho because "[t]here is no language mandating exclusive jurisdiction in Ada County. . . the contract contains

only a consent to jurisdiction clause, not a forum selection clause." *Id.* at *2. *Thomas v. Mayhew Steel Prod.* considered a similar clause: "It is mutually agreed that the courts of Jackson County, Oregon are of competent jurisdiction and the parties mutually submit to the jurisdiction of said courts concerning any disputes arising directly or indirectly from this Agreement." 2004 WL 2486260, at *1 (D. Or. Nov. 4, 2004). *Thomas* found that this clause was permissive rather than mandatory because "in cases in which forum selection clauses were found to be mandatory, the language mandated more than that a particular court had jurisdiction-[-] the language mandated that the specified courts were the only ones which had jurisdiction." *Id.* at *2.

Gennock considered the following forum selection clause:

> [e]ach party hereby irrevocably submits to the jurisdiction of the state of and federal courts sitting in the State of Nevada, and hereby irrevocably waives and agrees not to assert in any such suit, action or proceeding, any claim that it is not personally subject to the jurisdiction of any such court, that such suit or proceeding is brought in an inconvenient forum or that the venue of such suit, action or proceeding is improper.

2011 WL 4738320, at *2.

The district court then denied the defendant's motion to dismiss or, in the alternative, transfer the matter to Nevada. It concluded that, although the clause used the word "submit," "the rule is that merely specifying jurisdiction in a particular state does not create a mandatory clause; rather, the intent to make jurisdiction exclusive must appear." *Id.* at *4. *Gennock* held that the operative clause did not create exclusive jurisdiction in Nevada because "[i]t does not say that the parties cannot bring suit in a different jurisdiction, nor does it state that the parties cannot consent or cannot be subject to other jurisdictions." *Id. Gennock* found that the "irrevocably submit" language operated to prevent the parties from withdrawing their consent to jurisdiction in Nevada, but did not bar jurisdiction elsewhere:

> Conspicuously absent from [the clause] is any provision that actually commands where a lawsuit is to be filed. Indeed, the term "venue" is used only once, and that is in a clause that waives the parties's [sic] ability to argue that venue in Nevada is improper. There is nothing that expressly identifies Nevada as the venue for a lawsuit, let alone language that clearly designates Nevada as the exclusive forum.
>
> . . . Here, the Court does not see an intent to make Nevada the exclusive jurisdiction. The words "exclusive," "sole," or "only" are not found in [the clause] and there is no language that prohibits the parties from filing a lawsuit in states other than Nevada. It is true that the there is also a choice of law clause that specifies Nevada law as controlling. However, the inclusion of a choice of law clause does not itself sufficiently show an intent to make Nevada the exclusive jurisdiction.

Id. (citations omitted).

(3) Caselaw in Other Circuits

The First and Fifth Circuits considered clauses similar to the one at issue here. Each concluded that the clause was not mandatory as to forum selection. *Redondo Const. Corp. v. Banco Exterior de Espana,*

S.A. evaluated the clause, "Borrower and the Guarantors each hereby *expressly* submits to the jurisdiction of all Federal and State courts located in the State of Florida," and concluded that it was permissive. 11 F.3d 3, 5-6 (1st Cir. 1993). Thus, it did not constitute an agreement for exclusive jurisdiction in courts in Florida. *Id.* at 6. The opinion noted that "[a]ffirmatively conferring Florida jurisdiction by consent does not negatively exclude any other proper jurisdiction." *Id.*

Similarly, in *Keaty v. Freeport Indonesia, Inc.*, the Fifth Circuit considered the following clause: "This agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York." 503 F.2d 955, 956 (5th Cir. 1974). It held that this language "falls short of being a mandatory forum-selection clause." *Id.* at 957.

(4) The Clause at Issue Is Permissive

The forum selection clause here does not limit jurisdiction to California state courts. By using the word "of" in the phrase "the jurisdiction of the Courts of the State of California," the clause establishes Defendant's consent to personal jurisdiction of the California state courts. *Doe 1*, 552 F.3d at 1082. However, consent to such jurisdiction does not mean that it is exclusive. As noted, to establish that limitation, a forum selection clause must "contain language clearly requiring exclusive jurisdiction." *N. Cal. Dist. Council of Laborers*, 69 F.3d at 1037. The clause here provides that Defendant "consents and submits to the jurisdiction of the Courts of the State of California." Dkt. 20-1 (Contract ¶ 99). Once again, it does not state that venue is exclusively in such courts with respect to disputes that arise from the Contract.

This clause is quite similar to those that were addressed in *Hunt Wesson* Foods, 817 F.2d at 76, and *N. Cal. Dist. Council of Laborers*, 69 F.3d at 1036. Like in the clauses at issue in those cases, the clause in the Contract does not include any exclusivity language. Therefore, its plain meaning is that California state courts shall have jurisdiction, but it is not exclusive.

The clause is different from the one that was at issue in *Docksider*. 875 F.2d at 763. As noted, the first sentence of the clause there was that the defendant "agrees and consents to the jurisdiction of the courts of the State of Virginia," is almost identical to the "consents and submits to the jurisdiction of the Courts of the State of California," language here. However, the provision in *Docksider* goes on to state that "[v]enue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia." It was this sentence that *Docksider* found to be "critical" to the determination of exclusivity.

(5) Dictionary Definitions Do Not Compel a Different Result

Plaintiff argues that, notwithstanding the rulings in the aforementioned cases, the dictionary definition of "submits" makes exclusivity clear. Thus, it argues that "submit" means "to yield to governance or authority," and that "yield," in turn, means "to give or render as fitting, rightfully owed or required." *See* http://www.merriam-webster.com/dictionary/submit; http://www.merriamwebster.com/dictionary/yield. Based on these definitions, Plaintiff argues that the phrase "submits to the jurisdiction" means that Defendant is required to yield to the authority of a California court. It argues that by removing the action, Defendant has not yielded to the authority of the California court.

Plaintiff also argues that the inclusion of both "consents" and "submits" in the clause shows that it is mandatory, because if it is interpreted as permissive, one of the two words would be superfluous. It

argues that because "consent" is a permissive term, the only reason that "submit" is included is to make the clause mandatory. Finally, Plaintiff argues that words such as "sole" or "exclusive" are not required to make a clause mandatory, because "there are no magic words that render a forum selection clause mandatory and exclusive." *A.O. Smith Corp.*, 2009 WL 3001503, at *3.

The dictionary definitions do not clearly demonstrate that the word "submits" makes the forum selection clause in the Contract mandatory. Nor is any case cited in which such an interpretation was adopted. The definition of "submits" reinforces Defendant's position that this clause functions as a promise by Defendant, which is a foreign entity, not to contest personal jurisdiction in California. *A.O. Smith Corp.* does not compel a different result. 2009 WL 3001503, at *3. There, although the clause did not contain any of the words associated with exclusive jurisdiction, it was deemed mandatory based on the following language: "[n]o proceedings may be brought before other courts unless the parties agree on both the choice of another court or arbitration tribunal and the law to be then applicable." *Id.* There is no similar language in the Contract.[2]

(6) Ambiguities May Construed Against the Drafting Party

Defendant argues that, even if the forum selection clause were ambiguous, the issue should be resolved in its favor because Plaintiff drafted the contract. "Another fundamental rule of contract interpretation is that where language is ambiguous the court should construe the language against the drafter of the contract." *Hunt Wesson Foods*, 817 F.2d at 78 ("Hunt drafted the contract. Construing the language against Hunt, we would conclude that the clause does not provide for an exclusive forum."). Here, the forum selection clause was present in the Invitation for Bid, which Plaintiff published in September 2005. *Compare* Ex. 1 to Declaration of Jun Yeon Jeong ("Jeong Decl."), Dkt. 26-1 (Draft Contract in Invitation to Bid ¶ 99), *with* Ex. 2 to Jeong Decl., Dkt. 26-2 (Contract ¶ 99). This language remained unchanged in the final version of the Contract. *Id.* Therefore, any ambiguity in the clause is construed against Plaintiff. This also supports an interpretation that the clause does not provide for exclusivity.

* * *

For the foregoing reasons, the forum selection clause is permissive and does not create an exclusive forum in the California state courts. Therefore, the Motion to Remand is **DENIED**.

[2] Plaintiff cites several cases in which insurers had entered agreements with their insureds, stating that the insurer would submit to the insured's chosen jurisdiction. It contends that they support the exclusive interpretation advanced here. *See City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13, 14 (5th Cir. 1991); *Am. States Ins. Co. v. Century Surety Co*., 2008 WL 4779833, at *2-3 (W.D. Wash. Oct. 30, 2008). These cases are distinguishable. In both, the courts relied on "the familiar principle that ambiguities in contracts of insurance are to be construed against the drafter of the policy." *Nutmeg Ins. Co.*, 931 F.2d at 15. There is no similar presumption here. Further, each contract stated that the insurance company "agree[s] to submit to the jurisdiction of any Court of Competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction" and to "abide by the final decision of such court or of any Appellate Court in the event of an appeal." *Id.* at 14. It is this language, not the word "submits," that provides the basis for the requirement that the insurers could not contest the designated fora selected by plaintiffs.

B. Motion to Dismiss

1. Legal Standard

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may bring a motion to dismiss a cause of action that fails to state a claim. It is appropriate to grant such a motion where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scies. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

2. Application

a) Claim for Breach of Implied Covenant

"California law recognizes in every contract . . . an implied covenant of good faith and fair dealing." *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 434 (9th Cir. 2011) (quoting *Brehm v. 21st Century Ins. Co.*, 166 Cal. App. 4th 1225, 1235 (2008)). "[T]he covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement." *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 36 (1995), *as modified on denial of reh'g* (Oct. 26, 1995). "The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 372 (1992). "[W]here a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing." *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 923 (1985) (quoting *Cal. Lettuce Growers v. Union Sugar Co.*, 45 Cal. 2d 474, 487 (1955).

A breach of the underlying contract is not required to establish a breach of good faith and fair dealing. *Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1137 (9th Cir. 1998) (citing *Carma Developers*, 2 Cal. 4th at 373). But a "breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself." *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App.

3d 1371, 1394 (1990), *as modified on denial of reh'g* (Oct. 31, 2001) (internal quotation marks omitted). "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." *Id.* at 1395.

To state a claim for breach of the implied covenant,

> allegations which assert such a claim must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement. Just what conduct will meet these criteria must be determined on a case by case basis and will depend on the contractual purposes and reasonably justified expectations of the parties.

Id.

b) The FACC States a Claim for Breach of the Implied Covenant

Plaintiff argues that the breach of implied covenant counterclaim should be dismissed because it duplicates the breach of contract counterclaim. Plaintiff contends that both are premised on the same factual allegations and seek the same remedies. Plaintiff argues that the breach of implied covenant counterclaim is based on the allegation in the FACC that Plaintiff did not make the final payment to Defendant under the Contract. Damages are sought in that amount. Plaintiff adds that, notwithstanding the general allegations of bad faith in the FACC, the only act alleged to be the breach of the implied covenant was its nonpayment of amounts due under the Contract.

Defendant contends that the breach of implied covenant counterclaim is not duplicative. It argues that it presents an alternative path to recovery if it is determined that Plaintiff did not breach the Contract, but nevertheless acted in bad faith in the exercise of its discretion when it withheld the final payment owed to Defendant. FACC ¶ 35. The breach of contract counterclaim alleges that Plaintiff failed to make the final payment that it was obligated to make. *Id.* ¶ 34. Defendant argues that it anticipates that in defense of this counterclaim, Plaintiff may contend that its failure to make the payment was not a breach of the Contract, because the Contract provides that Plaintiff may withhold amounts due to Defendant under certain circumstances. *See* Ex. A to RJN, Dkt. 41-1 (Contract ¶¶ 13.4, 64.4, 69). Defendant argues that in the event these circumstances are established, Plaintiff has the discretion to withhold payment to Defendant. *See id.* ¶ 13.4 ("[Plaintiff] shall not withhold money due [Defendant] provided [Plaintiff] receives adequate written assurance from [Defendant]'s insurance carrier or surety . . . . [Plaintiff] shall have sole discretion to determine the adequacy of the assurance furnished"); ¶ 64.4 ("In the event of any claim or demand made against any party that is entitled to be indemnified hereunder, [Plaintiff] may at its sole discretion withhold, retain, and/or apply any monies due [Defendant] under the Contract, for the purpose of resolving such claims; provided, however, that [Plaintiff] may release such funds if [Defendant] gives [Plaintiff] reasonable assurance that [Plaintiff]'s interest will be protected. [Plaintiff] shall, at its sole discretion, determine whether such assurance is acceptable to [Plaintiff]"); ¶ 69 ("[Plaintiff] may, in its discretion, enforce any [warranty] rights against [Defendant]").

Defendant argues that Plaintiff must exercise its discretion in good faith. Paragraph 13 of the Contract is instructive. *Id.* ¶ 13. It gives Plaintiff the authority to withhold amounts it owes to Defendant if a claim, lien or judgment is made against Defendant that is related to the Contract. *Id.* Plaintiff may assert that it did not breach the Contract because it withheld the payment pursuant to this term. That would not necessarily bar the breach of the implied covenant counterclaim. Thus, Paragraph 13.4 provides that

> [Plaintiff] shall not withhold money due [Defendant] provided [Plaintiff] receives adequate written assurance from [Defendant]'s insurance carrier or surety on bonds required hereunder that the insurer or surety will assume all responsibility in connection with the claim including defending and indemnifying [Defendant] or [Plaintiff]. [Plaintiff] shall have sole discretion to determine the adequacy of the assurance furnished.

Id. ¶ 13.4.

In defending the breach of contract counterclaim, Plaintiff may demonstrate that, although it received assurances from Defendant's insurance carrier, it determined that they were inadequate. For that reason, it did not make a payment to Defendant. Defendant could still prevail on its counterclaim for breach of implied covenant by proving that Plaintiff's exercise of its discretion in determining that the assurances were inadequate was made in bad faith. *See Carma Developers*, 2 Cal. 4th at 372 ("The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith."). As explained in *Celador Int'l Ltd. v. Walt Disney Co.*:

> Even if Plaintiffs are not ultimately successful on their breach of contract claim, they may still be able to prevail on their breach of the covenant of good faith and fair dealing claim. Even if the fact finder concludes that the consensual terms of the contract did not impose such obligations on Defendants, the fact finder could conclude that the actions of Defendants frustrated a benefit of the contract-the benefit of receiving Contingent Compensation from the Series.
>
> Defendants argue that because the claim is based on the same facts as the breach of contract claim and seeks the same remedy, it is superfluous. *See Bionghi v. Metropolitan Water District,* 70 Cal.App.4th 1358, 1370, 83 Cal.Rptr.2d 388 (1999). However, such claims will always be based on the same facts; a certain set of circumstance gives rise to a lawsuit. They will always seek the same remedy; the same remedies are available for both claims. Therefore, the Court should not mechanically inquire whether the same facts are alleged and whether the same remedy is sought. Rather, the challenge brought by *Careau* and its progeny is to distinguish two claims based on the same facts. If they cannot be distinguished, then the natural conclusion is that they are duplicative. Plaintiffs have distinguished their claims here. Plaintiffs allege that Defendants' actions breached the contract. If not, the actions, allegedly taken in bad faith, frustrated the *actual* benefits of the contract. *See Lamke*[*v. Sunstate Equip. Co., LLC*], 2004 WL 2125869, *3[(N.D. Cal. Sept. 22, 2004)] (allowing leave to amend to make such a distinction). The breach of the covenant of good faith and fair dealing claim, therefore, is not superfluous.

347 F. Supp. 2d 846, 853 (C.D. Cal. 2004).

For the foregoing reasons, based on the allegations that are presented, the breach of implied covenant counterclaim is not superfluous.

IV. Conclusion

For the reasons stated in this Order, the Motion to Remand is **DENIED** and the Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer ak