UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LT LEASING, INC.,

Plaintiff,

v.

NHA HAMBURGER ASSEKURANZ-AGENTUR GmbH, and UNIQA SACHVERSICHERUNG AG,

Defendants.

No. 2:14-cv-00716-MCE-EFB

MEMORANDUM AND ORDER

Through this action, Plaintiff LT Leasing, Incorporated ("Plaintiff") seeks to recover damages from Defendants NHA Hamburger Assekuranz-Agentur GmbH ("NHA") and Uniqa Sachversicherung Ag ("Uniqa") (collectively, "Defendants") for their alleged breach of an insurance contract. NHA has filed a motion requesting that the Court either dismiss this case under the common-law doctrine of forum non conveniens or transfer this case to a more convenient forum in the United States under 28 U.S.C. § 1404(a). ECF No. 9. Plaintiff opposes both dismissal and transfer. For the reasons that follow, Defendants' Motion is DENIED.[1]

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[1] Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

BACKGROUND[2]

Plaintiff is a California corporation with its principal place of business in South Lake Tahoe, California. Defendant NHA is a German limited liability company with its principal place of business in Hamburg, Germany. NHA is an agent for Defendant Uniqa, which is an Austrian corporation with its principal place of business in Vienna, Austria.

Plaintiff is the owner of the M/Y R Rendezvous, a 110-foot yacht ("the Yacht"). On April 12, 2013, Plaintiff entered into a written contract with Sevenstar Yacht Transport B.V. ("Sevenstar B.V.") of Amsterdam, Netherlands, to transport the Yacht from Port Everglades, Florida to Ensenada, Mexico. Sevenstar B.V. appointed its Florida agent, Sevenstar Yacht Transport USA Agencies, LLC ("Sevenstar USA") to make the necessary arrangements. Sevenstar USA, in turn, assigned a loadmaster in Florida to oversee the load and stowage of the Yacht aboard the M/V Rickmers Tianjin.

On April 14, 2013, Plaintiff delivered the Yacht to the M/V Rickmers Tianjin in Florida for transportation to Mexico. Plaintiff contends that the Yacht was in good order and condition before it was loaded onto the M/V Rickmers Tianjin; NHA maintains that the Yacht "had defects or conditions which were observed and documented by several witnesses in Florida." NHA's Mot. at 5-6.[3] The parties, however, agree that the Yacht was damaged during the lifting process onto the M/V Rickmers Tianjin.

As required under the transportation contract with Sevenstar B.V., Plaintiff had purchased from Defendants all-risk cargo insurance without any deductible to cover the Yacht in the event of loss or damage. Sevenstar B.V. issued a Certificate of Insurance

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[2] The following statement of facts is based on the allegations in Plaintiff's Complaint, Mar. 18, 2014, ECF No. 1, and NHA's Motion, Oct. 22, 2014, ECF No. 9. Unless otherwise noted, the parties do not dispute these facts.

[3] For ease of reference, all page number citations to court documents are to the pagination assigned via the court's electronic filing system.

(Number 282/2013) covering the Yacht ("the Certificate").[4] The Certificate states that Defendants agreed to insure the Yacht from risks of loss or damage. The Certificate also provides: "This insurance is subject to English law and practice." Additionally, the Certificate indicates that NHA "has insured the above mentioned goods for the voyage and value stated on behalf of Sevenstar [B.V.] under policy number 2006-0608-001."[5] [6]

Plaintiff contends that the Yacht was covered from all risks of physical loss under the Certificate when it was damaged during the lifting process in Florida. After using its own resources (approximately $375,950) to repair that damage, Plaintiff initiated a claim against Defendants for insurance benefits. According to NHA, however, "much of what was claimed by [Plaintiff] was pre-existing or not connected to the transport of the [Y]acht." NHA's Mot. at 8, Oct. 22, 2014, ECF No. 9. Defendants have not paid any money towards the damage of the Yacht.

Plaintiff's Complaint identifies three claims for relief: (1) breach of contract, (2) declaratory relief against all defendants, and (3) tortious breach of the implied covenant of good faith and fair dealing.

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[4] NHA has submitted a copy of the Certificate. See Decl. of Lars Toeppner (Ex. 3 at 2), Oct. 22, 2014, ECF No. 10-3.

[5] The policy referenced in the Certificate is "[t]he master policy of insurance," and provides that "Sevenstar is the master insured." See Toeppner Decl. at ¶ 4. Under "Place of Jurisdiction," the policy states it is "[s]ubject to German Law and Jurisdiction or the jurisdiction given under ICC (A) 1/1/2009 at the Assureds/Co-Assureds option."

[6] NHA's Motion provides additional details to the formation of the insurance contract. According to the Motion, Plaintiff emailed a completed insurance application to Sevenstar USA. Sevenstar USA forwarded that information to Sevenstar BV, who in turn forwarded the information to Pantaenius Unternehmens-versicherungen GmbH ("Pantaenius"). Pantaenius, a German company, was the insurance broker for Sevenstar B.V. and the claims survey agent for the insurers. Sevenstar B.V. is the insured under the master policy. The master policy allows Sevenstar B.V. to issue Certificates of Marine Insurance to individual yacht owners. Pursuant to the master policy, Sevenstar B.V. issued the Certificate to Plaintiff via email.

ANALYSIS

In its Motion, NHA argues that the Court should either dismiss this case under the common-law doctrine of forum non conveniens or transfer this case to a more convenient forum in the United States under 28 U.S.C. § 1404(a). In its Opposition to NHA's Motion (ECF No. 18), Plaintiff counters that neither dismissal nor transfer is appropriate. NHA advances an entirely new argument in its Reply (ECF No. 20) in asking that the Court enforce a forum-selection clause in the Certificate. Plaintiff quickly filed an Objection to NHA's Reply (ECF No. 23), which requested that the Court either strike the Reply or permit Plaintiff to file a surreply.

The Court will address each of these arguments, beginning first with NHA's claim that the Certificate includes a forum-selection clause. See Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex., 134 S. Ct. 568, 581 (2013) (explaining that the analysis of a "§ 1404(a) motion (or a forum non conveniens motion) . . . . changes, however, when the parties' contract contains a valid forum-selection clause ").

A. Forum-Selection Clause

Although this Court "need not consider arguments raised for the first time in a reply brief," Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007), the Court now addresses and summarily dismisses NHA's newly raised argument.

The Certificate states: "This insurance is subject to English law and practice." Plaintiff and NHA agree that this provision is a choice-of-law clause, and that English law governs this suit. In its Reply, however, NHA suggests that the provision also serves as a forum-selection clause. But "[t]his insurance is subject to English law and practice" does not identify, let alone mandate, a specific forum for litigating disputes under the Certificate. Cf. Atl. Marine, 134 S. Ct. at 575 (analyzing a contract that provided all disputes between the parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division."); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2 (1972) ("Any dispute

arising must be treated before the London Court of Justice."); Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 511 (9th Cir. 1988) ("For any controversy regarding interpretation or fulfillment of the present contract, the Court of Florence has sole jurisdiction."). Because the choice-of-law clause does not require that the parties litigate their disputes under the Certificate in a specific forum, it does not also serve as a forum-selection clause.

NHA appears to suggest that the relevant forum-selection clause is found not in the Certificate, but rather in the "master policy" (which designated Germany as the mandatory forum). See NHA's Reply at 5, Dec. 1, 2014, ECF No. 20 ("the Certificate of Insurance provides that English law and practice apply and incorporates the conditions of the underlying policy of insurance which includes the German forum."). But the master policy was an agreement between Sevenstar B.V. and Pantaenius, and Plaintiff was not a party to that contract. See E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty."). Cf. M/S Bremen, 407 U.S. at 17-18 ("Whatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting."). NHA's suggestion that the Certificate "incorporates" the master policy is also unconvincing: the Certificate's only mention of the master policy states that NHA, acting on behalf of Uniqa, had insured the Yacht on behalf of Sevenstar B.V., pursuant to the master policy. See Toeppner Decl., Ex. 3 at 2.

Because NHA has failed to establish the existence of a forum-selection clause, there is no such clause for the Court to enforce.

B. Forum Non Conveniens

"A federal court has discretion to dismiss a case on the ground of forum non conveniens . . . ." Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 429 (2007). Although dismissal "reflects a court's assessment of a range of considerations," id., "[a] party seeking dismissal . . . must show two things: (1) the existence of an adequate alternative forum, and (2) that the balance of private and public interest factors

favors dismissal," Loya v. Starwood Hotels & Resorts Worldwide, Inc., 583 F.3d 656, 664 (9th Cir. 2009). The Ninth Circuit has identified the following private interest factors:

> (1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive.

Boston Telecomms. Grp., Inc. v. Wood, 588 F.3d 1201, 1206-07 (9th Cir. 2009). The Ninth Circuit has also identified the following public interest factors: "(1) the local interest in the lawsuit, (2) the court's familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum." Id. at 1211.

"A defendant invoking forum non conveniens ordinarily bears a heavy burden in opposing the plaintiff's chosen forum," and particularly so when the plaintiff has chosen its home forum. Sinochem Int'l, 549 U.S. at 430; see also Dole Food Co. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002) ("Forum non conveniens is an exceptional tool to be employed sparingly, not a doctrine that compels plaintiffs to choose the optimal forum for their claim."). A district court abuses its discretion when it "fails to hold a party to its 'burden of making a clear showing of facts which establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience.'" Carijano v. Occidental Petroleum Corp., 643 F.3d 1216, 1236 (9th Cir. 2011) (quoting Boston Telecomms., 588 F.3d at 1212).

The Court finds that NHA has not met its heavy burden of opposing Plaintiff's chosen forum, and that the balance of private and public interest factors weighs against dismissal.[7] The Court will address each of the factors that the Ninth Circuit identified in Boston Telecommunications.

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[7] This finding renders unnecessary any discussion of whether NHA has demonstrated that Germany is an adequate alternative forum.

1. Private Interest Factors

a. Residence of Parties

Plaintiff is a California corporation with its principal place of business in California, and NHA and Uniqa are both foreign corporations with their principal places of business in Europe. The fact that Plaintiff has chosen this Court—its home forum—weighs against dismissal. See Carijano, 643 F.3d at 1236 (finding that the district "erroneously afforded reduced deference to [plaintiff's] chosen forum"); Neelon v. Bharti, ___ F. App'x ___, No. 12-56958, 2014 WL 7336404, at *1 (9th Cir. Dec. 26, 2014) ("The district court did not weigh [plaintiff's] residency or consider the deference due [plaintiff's] chosen forum"); see also Boston Telecomms., 588 F.3d at 1207 (noting that although plaintiff's choice of forum—a federal district court in California—was entitled to deference because plaintiff was a citizen and resident of the United States, plaintiff "would stand in a stronger position were he a California resident"). In light of the Ninth Circuit's emphasis on deferring to a plaintiff's choice of forum—particularly when the plaintiff has chosen its home forum—the Court finds that the first factor weighs against dismissal.

b. Convenience to the Litigants

The Eastern District of California is undeniably convenient for Plaintiff and undeniably inconvenient for NHA. Of course, NHA's proposed forum (Germany) would be inconvenient for Plaintiff. Accordingly, this factor is neutral. See Boston Telecomms., 588 F.3d at 1208.

c. Access to Physical Evidence

This factor requires that the Court compare "the ease of access to physical evidence and other sources of proof if this case is litigated in California versus [Germany]." Id. NHA maintains that "[t]he overwhelming majority of the relevant evidence . . . exists outside the Eastern District [of California] . . . ." NHA's Mot. at 13. But NHA has not made any representations as to whether the parties could access the evidence with greater ease if this case were litigated in Germany. Absent any representation to the contrary, the Court finds that the difficulty of obtaining evidence for

a lawsuit in Germany is "likely to be equal to, or perhaps even greater than, the difficulty of obtaining [evidence] for purposes of an action in California." Boston Telecomms., 588 F.3d at 1208. Accordingly, "[t]he comparative difficulties presented by litigation in either of the two potential jurisdictions are, at best, in equipoise." Id.

d. Witnesses[8]

The Ninth Circuit has emphasized that "the focus for this private interest analysis should not rest on the number of witnesses in each locale[,] but rather the court should evaluate the materiality and importance of the anticipated witnesses' testimony and then determine their accessibility and convenience to the forum." Carijano, 643 F.3d at 1231 (internal quotation marks and ellipses omitted). The defendant bears the burden of providing enough information for the court to make this determination. Boston Telecomms., 588 F.3d at 1209 ("[Defendant], in asking for the extraordinary measure of dismissal on forum non conveniens grounds, needed to provide not simply the numbers of witnesses in each locale, but information sufficient to assist the court in assessing the materiality and importance of each witness.") (internal quotation marks omitted); Neelon, 2014 WL 7336404, at *2 ("Defendants only provided a list of witnesses who resided in either Canada or Mongolia. This showing was insufficient to carry Defendants' burden.").

Plaintiff contends that "all of the witnesses, evidence, and supporting documentation is located in California." Pl.'s Opp'n at 15. NHA, on the other hand, claims that the "overwhelming majority of the witnesses and documents . . . are in Europe and Florida." NHA's Reply at 8. NHA has submitted a "Witness Outline." See Decl. of Jeremy B. Gard (Ex. 9), Oct. 22, 2014, ECF No. 14-2. That Outline provides the names and location of several witnesses and is organized by the following topics: witnesses to the condition of the Yacht prior to loading; witnesses to damage occurring

[8] For the sake of efficiency, the Court consolidates the analysis of the private interest factors related to witnesses (the first, fourth, and fifth factors identified in Boston Telecomms.). See Boston Telecomms., 588 F.3d at 1208 (doing the same); see also Carijano, 643 F.3d at 1231 (addressing "Evidentiary Considerations" under a single heading).

at loading; witnesses to the condition of the Yacht in Mexico; witnesses to the carriage contract; witnesses to the insurance contract; and witnesses to insurance claims handling. However, based on NHA's Reply, it appears that the material issue in this case is the extent of the damage caused during the loading. See NHA's Reply at 8 ("The extent of all repairs done to the [Yacht] after the voyage do not go [to] the gravamen of the dispute. A repair after the fact does not establish [that the] underlying damage was caused during the coverage period, thereby triggering NHA's obligation to pay Plaintiff."). NHA suggests that Plaintiff is seeking reimbursement for repairs of damage that predated the Certificate and the damage caused during the lifting onto the M/V Rickmers Tianjin. Thus, the relevant witnesses are those that have knowledge of the condition of the Yacht both before and after loading.

Given the topics specified in NHA's Witness Outline, the testimony of the identified witnesses is likely material. But see Boston Telecomms., 588 F.3d at 1210 (finding that "the district court abused its discretion in holding that this private interest factor was neutral when Wood provided very little information that would have enabled the district court to understand why various witnesses were material to his defense"). Nevertheless, NHA has not established that this forum is less accessible and more inconvenient for most of the witnesses than a German court would be. As to the witnesses to the condition of the Yacht prior to loading, NHA has identified seven individuals, five of whom are located in Florida. As to the five witnesses to the condition of the Yacht in Mexico, one is in the United Kingdom, two are in California, and the other two (both of which are also listed as witnesses to the condition of the vessel prior to loading) are in Germany. Thus, dismissing this case would be for the benefit of two witnesses in Germany and one in the United Kingdom, and to the detriment of at least seven individuals in California and Florida.

NHA's claim that "the taking of evidence from witnesses is relatively easier in the [United States]" is unsupported and not persuasive. NHA's Mot. at 14. As in Boston Telecommunications: "This is a case in which witnesses are scattered around the globe.

Whether the case is tried in [Europe] or California, both parties will likely be forced to depend on deposition testimony in lieu of live testimony for at least some witnesses." 588 F.3d at 1210. This factor weighs against dismissal.

e. Enforceability of the Judgment and "Other Practical Problems"

Because neither Plaintiff nor NHA has argued that there would be any problem enforcing a judgment in either forum, this Court concludes that this public interest factor is neutral. See Boston Telecomms., 588 F.3d at 1210. Similarly, neither party has identified "other practical problems that make trial of a case easy, expeditious and inexpensive." Id. at 1207. Accordingly, that public interest factor is also neutral.

2. Public Interest Factors

a. Local Interest in the Lawsuit

This Court need not find that "California is the principal locus of the case or that California has more of an interest than any other jurisdiction in order to conclude that California has a meaningful interest in this litigation." Boston Telecomms., 588 F.3d at 1212. Rather, the Court need only determine if there is an identifiable local interest in the controversy. Id. Here, there is a local interest in the lawsuit because Plaintiff is a California corporation with its principal place of business in the Eastern District of California. Accordingly, this factor weighs against dismissal.

b. Judicial Concerns[9]

Per the terms of the Certificate, English law is the governing law whether the case proceeds in this Court or in Germany. NHA has not established that the German courts are any more familiar with English law than this Court. Accordingly, the "familiarity with the governing law" factor is neutral.

NHA has submitted exhibits in support of its claim that this Court is one of the most congested federal district courts in the United States. See NHA's Req. Judicial

[9] See Carijano, 643 F.3d at1233-34 (analyzing the remaining public interest factors together because they "all relate to the effects of hearing the case on the respective judicial systems").

Notice (Ex. 10), Oct. 22, 2014, ECF No. 15-1.[10] But NHA has not made any representations as to the congestion of the German courts or the burden the case would impose on local courts and juries. Accordingly, those factors are neutral.

Lastly, NHA has not made any representation regarding the costs of resolving a dispute unrelated to a particular forum. That factor is also neutral.

3. Balance of Private and Public Interest Factors

The only non-neutral factors weigh against dismissal. Taken together, the factors fail to establish oppressiveness and vexation to NHA out of all proportion to Plaintiff's convenience. Carijano, 643 F.3d at 1234. Because the private and public interest factors do not strongly favor trial in Germany, dismissal on the grounds of forum non conveniens is not warranted. See Dole Food, 303 F.3d at 1118 ("The plaintiff's choice of forum will not be disturbed unless the 'private interest' and 'public interest' factors strongly favor trial in the foreign country."); see also Boston Telecomms., 588 F.3d at 1212 (reversing a forum non conveniens dismissal because the "district court did not hold [the defendant] to his burden" of showing the foreign forum was more convenient where "[a]ll but one of the private and public interest factors were either neutral or weighed against dismissal").

C. Transfer Under 28 U.S.C. § 1404(a)

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . . ." 28 U.S.C. § 1404(a). The purpose of § 1404(a) is to "prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) (internal quotation marks omitted). On a motion to transfer venue, the moving party must make "a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." Hope v. Otis Elevator Co., 389 F. Supp. 2d 1235, 1243 (E.D .

[10] The Court denies each of NHA's Requests for Judicial Notice (ECF No. 15), as none are necessary for resolution of NHA's Motion.

Cal. 2005) (quoting Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986)). Courts have discretion in deciding whether such transfer is warranted based on an "individualized, case-by-case consideration of convenience and fairness." Van Dusen, 376 U.S. at 622.

Once the court determines a case could have been brought before the proposed transferee court, it must consider a number of factors relating to the interests of the parties and the judiciary. For example, the court may consider: (1) the plaintiff's choice of forum; (2) the respective parties' contacts with the forum; (3) the contacts relating to the plaintiff's cause of action in the forum; (4) the cost of litigation in either forum; (5) the ease of access to sources of proof; (6) the complexity of the governing law; (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses; and (8) other factors that, in the interest of justice, impact the convenience or fairness of a particular venue. Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000).

NHA argues that this Court should transfer the case to the Fort Lauderdale Division of the United States District Court for the Southern District of Florida. In support of that argument, NHA cites "this case's significant contacts with that forum, [] the convenience of the parties [and] the witnesses[,] and the administration of justice." NHA's Mot. at 21. The Court finds that this action could have been brought in the Southern District of Florida. That District would have subject matter jurisdiction on the basis of diversity under 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties named in the original complaint, and it is apparent from the face of the complaint that at least $75,000 is in controversy. Additionally, venue would be proper under 28 U.S.C. § 1391(a), as Plaintiff's claims against Defendants arguably first arose when the Yacht was damaged during loading onto the M/V Rickmers Tianjin in Florida.

Nevertheless, transfer is not warranted because NHA has not made a sufficiently strong showing of inconvenience to justify disturbing Plaintiff's choice of forum. The first

factor clearly weighs against transfer, as Plaintiff has chosen its home forum, and the remaining factors are neutral. As to contacts with the forums, Plaintiff—again, a California corporation with its principal place of business in the Eastern District of California—presumably has significant contacts with the Eastern District of California. Moreover, there is nothing to indicate that Plaintiff has, aside from the events described in its Complaint, had any contact with the Southern District of Florida. On the other hand, Defendants do not appear to have had contacts with the Eastern District of California, and its contacts with the Southern District of Florida are also limited to the facts of this case. See also Decker Coal, 805 F.2d at 843 ("The transfer would merely shift rather than eliminate the inconvenience.")

Furthermore, it is difficult to determine the forum in which plaintiff's cause of action accrued. Although the damage to the Yacht occurred in the Southern District of Florida, Plaintiff is not suing for the damage to the Yacht. Rather, Plaintiff alleges that Defendants have breached the Certificate. NHA did not address the comparative costs of litigation in its Motion. Presumably, Plaintiff's litigation costs are lower here in its home forum than in the Southern District of Florida. It is unclear whether there is any difference in Defendants' litigation costs; whether this case proceeds in this Court or in the Southern District of Florida, Defendants are litigating in a foreign court. The "ease of access to sources of proof" is an outdated factor, as most discovery will be conducted electronically and the "physical location" of electronic records is irrelevant. As to "the complexity of the governing law," both forums would be applying English law. Lastly, the parties would be able to utilize compulsory process to compel attendance of unwilling non-party witnesses in both this Court and the Southern District of Florida.

NHA has failed to support its Motion with a strong showing of inconvenience. Accordingly, the Court finds that a disruption of Plaintiff's choice of forum is unwarranted.

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CONCLUSION

Thus, there is no forum-selection clause for the Court to enforce, and neither dismissal under the common-law doctrine of forum non conveniens nor transfer under 28 U.S.C. § 1404(a) is warranted. Accordingly, Defendant NHA's Motion to Dismiss or Transfer (ECF No. 8) is DENIED.

IT IS SO ORDERED.

Dated: April 9, 2015

MORRISON C. ENGLAND, JR, CHIEF JUDGE
UNITED STATES DISTRICT COURT