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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 YOTRIO INTERNATIONAL, LLC,

No. C 08-2199 SI

9 Plaintiff,

10 v.

11 LNT MERCHANDISING CO, LLC, *et al.*,

12 Defendants.
13 _____/

**ORDER GRANTING DEFENDANT UPS'
MOTION TO DISMISS FOR IMPROPER
VENUE; DISMISSAL EFFECTIVE
NOVEMBER 24, 2008 UNLESS EITHER
PARTY REQUESTS TRANSFER NO
LATER THAN NOVEMBER 21, 2008**

14 Defendant United Parcel Service, Inc., dba Supply Chain Solutions, Inc. has filed a motion to
15 dismiss for improper venue and for failure to state a claim. Pursuant to Civil Local Rule 7-1(b), the
16 Court determines that the matter is appropriate for resolution without oral argument, and VACATES
17 the November 7, 2008 hearing. The Court also VACATES the November 7, 2008 case management
18 conference.
19

20 **BACKGROUND**

21 On April 25, 2008, plaintiff Yotrio International, LLC filed this action in the Superior Court for
22 the County of Alameda. The original complaint named LNT Merchandising Company, LLC dba Linen
23 N' Things, Inc. ("LNT"), and United Parcel Service, Inc., dba UPS Supply Chain Solutions, Inc.
24 ("UPS") as defendants, although the three claims in the complaint were alleged solely against LNT. The
25 complaint alleged that LNT purchased goods from Yotrio, Yotrio shipped the goods to LNT, and LNT
26 had breached its contracts with Yotrio by failing to pay for the goods.

27 On April 28, 2008, LNT filed a notice of removal in this Court. LNT's notice of removal stated
28 that it had not been served with the lawsuit at the time of filing the notice of removal, and that to its

1 knowledge, no other defendants had been served.¹ On May 2, 2008, LNT filed a notice stating that on
2 that date LNT had filed for bankruptcy.

3 On August 2, 2008, plaintiff filed a first amended complaint (“FAC”) naming LNT and UPS as
4 defendants, but alleging seven claims only against UPS.² The FAC alleges that on April 29, 2008, after
5 plaintiff filed this action in state court, plaintiff obtained a Temporary Restraining Order and Order to
6 Show Cause Re Preliminary Injunction against UPS enjoining UPS from “transferring any inventory
7 UPS has received from YOTRIO . . . to LNT, pending trial in this action.” FAC ¶ 3, Ex. B. Plaintiff
8 alleges that it sent notice of the TRO to UPS in a letter dated April 29, 2008, and on April 30, 2008,
9 mailed a copy of the summons and complaint to UPS’s attorney in Georgia. *Id.* ¶ 5, Ex. C & D. The
10 FAC alleges that “[d]espite Yotrio’s instructions to UPS to stop shipment of the Goods, UPS has been
11 uncooperative. Plaintiff Yotrio is informed and believes that UPS has delivered the Goods to LNT.”
12 *Id.* ¶ 9.

13 The complaint alleges that the shipments were made pursuant to an agreement with UPS titled
14 “FORWARDER’S CARGO RECEIPT: TERMS AND CONDITIONS FOR CONSOLIDATION
15 AND/OR RECEIPT” (“Forwarding Agreement”), and plaintiff’s first claim is one for breach of that
16 contract. *Id.* ¶¶ 2, 16-21.³ The agreement is attached to the FAC as Exhibit A. Paragraph 9 of the
17 agreement states:

18 This Agreement shall be governed by the federal law of the United States, or, if federal
19 law is not applicable, by the law of the State of New York, notwithstanding that law’s
20 choice of law rules; and all claims or disputes or questions arising from this Agreement,
21 including those related to limitation of liability, shall be determined in the United States
22 District Court for the Southern District of New York, which shall have exclusive
jurisdiction over all disputes arising from this agreement to the exclusion of the
jurisdiction of any and all other courts. If the United States District Court for the
Southern District of New York does not have subject matter jurisdiction over the dispute,

23 ¹ LNT stated that it obtained a copy of the complaint from the Superior Court’s website. Notice
24 of Removal ¶ 3.

25 ² The amended complaint states that LNT filed for bankruptcy and that “[t]his case will now
26 proceed against UPS.” FAC ¶ 7. According to UPS, LNT appeared at the August 22, 2008 initial case
management conference and informed the Court that because of its bankruptcy and because the FAC
contains no charging allegations against it, LNT is not a party to this case.

27 ³ The FAC also alleges claims for breach of implied covenant of good faith and fair dealing;
28 breach of implied warranty; negligence; negligent misrepresentation; fraud – false promise; and breach
of U.C.C. § 2-705.

1 the dispute will be determined in a New York State court within the Borough of
2 Manhattan, County of New York. All claims hereunder must be filed against UPS SCS,
3 care of UPS Supply Chain Solutions, 12380 Morris Road, Alpharetta, Georgia 30005,
4 Attention: Claims Department. Service of process for suits must be filed against UPS
SCS, care of CT Corporation Systems at the below address. They will be deemed filed
when they are received by CT Corporation systems at the following address: CT
Corporation Systems, 111 Eighth Avenue, New York, New York, 10011.

5 *Id.* Ex. A ¶ 9. On August 20, 2008, UPS filed a motion to dismiss for improper venue based upon this
6 forum selection clause, or alternatively to dismiss the complaint for failure to state a claim.

8 LEGAL STANDARD

9 Federal law governs the enforceability of forum selection clauses in diversity actions. *Manetti-*
10 *Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). Motions to dismiss based on
11 a forum selection clause are treated as a Rule 12(b)(3) motion to dismiss for improper venue. *Argueta*
12 *v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996). The pleadings need not be accepted as true
13 and the Court may consider facts outside of the pleadings. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d
14 1133, 1137 (9th Cir. 2004) (citing *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998)
15 and *Argueta*, 87 F.3d at 324). Forum selection clauses are *prima facie* valid and should not be set aside
16 unless the party challenging their enforcement can show that they are unreasonable under the
17 circumstances. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *Hendricks v. Bank of*
18 *America, N.A.*, 408 F.3d 1127, 1137 (9th Cir. 2005) (“[W]e presume that the shareholder agreement’s
19 forum selection clause is *prima facie* valid and enforceable unless the Hendricks can show that
20 enforcement would be “‘unreasonable’ under the circumstances.”).

22 DISCUSSION

23 Defendant moves to dismiss this lawsuit pursuant to the forum selection clause of the
24 Forwarding Agreement, which specifies that the United States District Court for the Southern District
25 of New York “shall have exclusive jurisdiction over all disputes arising from [the Forwarding
26 Agreement].” FAC, Ex. A ¶ 9. Plaintiff argues that the forum selection clause is a “bad faith tactic”
27 because defendant has not responded to plaintiff’s discovery, and because defendant’s agent for service
28 of process did not initially accept service. Plaintiff devotes an inordinate amount of its opposition

1 papers to detailing its efforts to propound discovery and serve defendant. However, in addition to being
2 factually disputed by defendant, neither of these issues is relevant to determining whether the forum
3 selection clause is unreasonable.⁴

4 “A forum selection clause is unreasonable if (1) its incorporation into the contract was the result
5 of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so ‘gravely
6 difficult and inconvenient’ that the complaining party will ‘for all practical purposes be deprived of its
7 day in court,’; or (3) enforcement of the clause would contravene a strong public policy of the forum
8 in which the suit is brought.” *Argueta*, 87 F.3d at 325 (internal citations omitted). Plaintiff does not
9 contend that the forum selection clause is invalid based on any of these grounds, nor has plaintiff shown
10 in any way “that trial in the chosen forum would be so difficult and inconvenient that the party would
11 effectively be denied a meaningful day in court.” *Id.* (internal quotation and citation omitted).

12 Plaintiff also contends that even if the forum selection clause is valid, that clause only applies
13 to plaintiff’s breach of contract claim. “Whether a forum selection clause applies to tort claims depends
14 on whether resolution of the claims relates to interpretation of the contract.” *Manetti-Farrow, Inc. v.*
15 *Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988). In *Manetti-Farrow*, the plaintiff alleged that
16 “Gucci Parfums instituted a price squeeze by raising prices substantially above what it charged other
17 customers, that Gucci America fraudulently obtained Manetti-Farrow’s customer lists and business
18 information to solicit Manetti-Farrow’s customers, that Gucci Parfums wrongfully neglected delivery
19 orders, and that Gucci Parfums wrongfully abrogated the contract.” *Id.* The Ninth Circuit held that
20 “each of these claims relates in some way to rights and duties enumerated in the exclusive dealership
21 contract,” and thus that they were all covered by the forum selection clause.

22 Here, as in *Manetti-Farrow*, plaintiff’s non-contract claims all relate in some way to the rights
23 and duties set forth in the Forwarding Agreement. For example, plaintiff’s claim for breach of implied

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25 ⁴ Plaintiff also suggests that defendant is precluded from moving to dismiss based on the forum
26 selection clause because “this case was removed from Alameda County Superior Court when UPS had
27 notice of the proceedings . . . and UPS decided to do nothing.” Opposition at 17. As a factual matter,
28 the Court finds that there is no support for plaintiff’s assertion that UPS was served with the state court
complaint prior to removal, and indeed LNT’s notice of removal states that to its knowledge, UPS had
not been served at the time of the removal. Further, the Court rejects plaintiff’s argument that a
defendant may not seek to enforce a forum selection clause in a case removed from state court. See
Premier Jets, Inc. v. Honeywell Int’l Inc., 2008 WL 1840753, at *3 (D. Or. Apr. 21, 2008).

1 covenant of good faith and fair dealing alleges that UPS was required to be “responsive to Yotrio’s
2 concerns about the delivery of the Goods” and that “it is reasonable that UPS be required to receive
3 instructions to stop the delivery of the Goods, and to advise Yotrio of the status of the shipped Goods,”
4 FAC ¶ 23, while plaintiff’s negligence claim alleges that “UPS breached its duty of care by refusing to
5 stop delivery of Goods that were destined to LNT . . . [and] by not being responsive to Yotrio’s concerns
6 about the shipment of the Goods.” *Id.* ¶ 32. These claims cannot adjudicated without analyzing UPS’s
7 obligations under the Forwarding Agreement.

8 Because the Court concludes that the forum selection clause is enforceable, the Court GRANTS
9 defendant’s motion to dismiss for improper venue and does not address the parties’ arguments regarding
10 whether plaintiff has stated a claim against defendant.

11
12 **CONCLUSION**

13 For the foregoing reasons, the Court GRANTS defendant’s motion to dismiss for improper
14 venue. (Docket No. 30). The Court notes that neither party has requested that this action be transferred
15 to the United States District Court for the Southern District of New York in lieu of dismissal. The
16 dismissal will become effective November 24, 2008, unless either party requests no later than November
17 21, 2008, that this action be transferred.

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19 **IT IS SO ORDERED.**

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21 Dated: November 3, 2008

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24 SUSAN ILLSTON
25 United States District Judge
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