

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 CAI INTERNATIONAL, INC.,

No. C 11-2403 CW

5 Plaintiff,

ORDER GRANTING  
MOTION TO SET  
ASIDE DEFAULT  
(Docket No. 29)

6 v.

AND DENYING  
MOTIONS TO DISMISS  
(Docket Nos. 27  
and 30)

7 SOUTH ATLANTIC CONTAINER LINES,  
8 LTD.; MARUBA S.C.A. EMPRESA DE  
9 NAVEGACION MARITIMA; and EMPRESA  
DE NAVEGACION MARUBA S.A.,

10 Defendants.

11 \_\_\_\_\_/  
12 Defendant South Atlantic Container Lines, Ltd. (SACL) moves  
13 to set aside the default entered against it. Plaintiff CAI  
14 International, Inc. has filed a statement of non-opposition to  
15 SACL's motion. SACL and Defendant Empresa de Navegacion Maruba  
16 S.A. (Maruba SA) also move to dismiss CAI's complaint for improper  
17 venue pursuant to Federal of Civil Procedure 12(b)(3).<sup>1</sup> CAI  
18 opposes their motions. Having considered the papers filed by the  
19 parties and their arguments at the hearing, the Court GRANTS  
20 SACL's unopposed motion to set aside the default and DENIES the  
21 motions to dismiss.

22 BACKGROUND

23 Except where noted, the facts material to the resolution of  
24 these motions are not in dispute.

25  
26 \_\_\_\_\_  
27 <sup>1</sup> Defendant Maruba S.C.A. Empresa De Navegacion Maritima, now  
28 known as Maritima Maruba, S.A. (Maritima Maruba), did not  
participate in either motion to dismiss.

1 CAI and SACL entered into three agreements whereby CAI leased  
2 shipping containers to SACL.

3 The first two lease agreements, dated May 1, 2005 and  
4 November 1, 2008, amended December 15, 2008, contain identical  
5 venue selection clauses. These clauses state in relevant part,

6 With respect to any claim or controversy arising out of  
7 or relating to this agreement, the parties consent to  
8 the jurisdiction of State and Federal Courts located in  
San Francisco, California, U.S.A.

9 Declaration of Nadine Teixeira in Supp. of Pl.'s Opp. to Def.  
10 Maruba SA's Mot. to Dismiss (Teixeira Maruba SA Decl.) ¶ 4, Ex. E  
11 at 10, General Terms and Conditions ¶ 11(a); id. at ¶ 4, Ex. F at  
12 10, General Terms and Conditions ¶ 11(a).

13 The third lease agreement, dated August 8, 2009, states,

14 With respect to any claim or controversy arising out of  
15 or relating to this agreement, Lessor may require that  
16 any dispute or proceeding arising out of or relating to  
17 this Agreement, shall, at Lessor's sole option and  
18 discretion, be brought only in state or federal courts  
19 having jurisdiction over the City and County of San  
Francisco or before the American Arbitration Association  
in San Francisco under its Commercial Arbitration Rules.  
Lessee consents to jurisdiction and venue in those  
courts. Lessor may opt to commence or allow proceedings  
in any other jurisdiction.

20 Teixeira Maruba SA Decl. ¶ 4, Ex. G at 8, General Terms and  
21 Conditions ¶ 11(a).

22 On August 10, 2009, CAI entered into an amended and restated  
23 guaranty agreement with Maruba SA and Maritima Maruba, in which  
24 Maruba SA and Maritima Maruba guaranteed SACL's performance and  
25 payment under the lease agreements. Id. ¶ 5, Ex. A at 1. The  
26 guaranty agreement contained a forum selection clause stating,

27 CAI may require that any dispute or proceeding arising  
28 out of or relating to this Guaranty shall, at CAI's sole  
option and discretion, be brought only in state or  
federal courts having jurisdiction over the City and

1 County of San Francisco or before the American  
2 Arbitration Association in San Francisco under its  
3 Commercial Arbitration Rules. Each of the Guarantors  
4 consents to jurisdiction and venue in those courts. CAI  
5 may opt to commence or allow proceedings in any other  
6 jurisdiction.

7 Id. at 6 ¶ 12.

8 On September 30, 2010, CAI entered into a Creditors Agreement  
9 with multiple parties, including Maruba SA and SACL, but not  
10 Maritima Maruba. Id. ¶ 6, Ex. B. The purpose of this agreement  
11 was to restructure debt that various debtors, including Maruba SA  
12 and others, owed to creditors, including CAI and others, to allow  
13 the debtors to resolve assorted debts, including that owed under  
14 the guaranty and lease agreements described above, with the  
15 assistance of a new investor. Id. at 3-4. The Creditors  
16 Agreement incorporated the lease agreements between CAI and SACL  
17 by reference in the schedule of "Charter Party Agreements /  
18 Leasing Contracts." Id. at 16. The Creditors Agreement provided  
19 that, after certain payments of the outstanding debt amounts were  
20 made, forty percent of the total overdue debt would be waived.  
21 Id. at 7. The Creditors Agreement also provided that the Company<sup>2</sup>  
22 would pay, effective June 30, 2010, the original lease amounts in  
23 the leasing contracts. Id. at 7 ¶ 2.6. The creditors agreed,  
24 "for the duration of the Creditors Agreement, not to take any  
25 legal actions against the Company (including but not limited to a  
26 demand for payment, filing for insolvency, enforcement action or  
27 any other similar proceedings)." Id. at 7 ¶ 4.

28 <sup>2</sup> The "Company" was defined to include Maruba SA, SACL and  
four other companies. Teixeira Maruba SA Decl. ¶ 6, Ex. B, at 3.

1           The Creditors Agreement included clauses addressing events of  
2 default that allowed CAI and the other creditors to cancel the  
3 agreement. If the Company failed to make the payments of  
4 outstanding debt required to any creditor within specified amounts  
5 of time, the default "shall be deemed to be a repudiatory breach  
6 of the Creditors Agreement insofar as it relates to that  
7 Creditor." Id. at 8-9 ¶¶ 7.1-7.3. In such an event, the creditor  
8 "shall be entitled to cancel the Creditors Agreement insofar as it  
9 relates to that Creditor" and to start proceedings to recover the  
10 total overdue amount, including any amount that would have been  
11 waived had the Creditors Agreement remained in effect. Id.  
12 Further, if ongoing lease payments were not made within a certain  
13 time period, the affected creditor could also cancel the Creditors  
14 Agreement. Id. at 9 ¶ 7.4.1. In addition, "the Creditors reserve  
15 all of their rights to commence any action or proceeding against  
16 the relevant counterparty under the relevant Container Lease  
17 Agreements / Leasing Contracts and/or Charter Party Agreements to  
18 which they are party. This right shall be in addition to and  
19 shall not replace or amend any existing rights, terms or  
20 conditions contained in the Container Lease Agreements / Leasing  
21 Contracts and/or Charter Party Agreements." Id. at 9-10 ¶ 7.4.2.

22           The Creditors Agreement also included clauses establishing a  
23 condition precedent:

24           9.1 The restructuring shall be subject to the Condition  
25           Precedent that the Company provides evidence of the  
26           undertaking from the New Investor, in which the New  
27           Investor guarantees:

27           (a) the New Investor's investment and capital  
28           injection into the Company;

1 (b) that a minimum of USD 30,000,000 (United  
2 States Dollars Thirty Million only) of the New  
3 Investor's investment and capital injection  
4 will be invested in the bulker business of the  
5 Company; and

6 (c) that the New Investor unconditionally and  
7 irrevocably agrees and acknowledges that its  
8 investment and capital injection into the  
9 Company shall always be subordinated to the  
10 Total Overdue Amount, less the amount already  
11 paid by the Company to the Creditors pursuant  
12 to this Creditors Agreement.

13 . . .

14 9.3 The Creditors Agreement will be effective as from  
15 the Effective Date, which shall be evidenced by  
16 confirmation in writing by Roland Berger Strategy  
17 Consultants addressed to all Parties.

18 9.4 Notwithstanding any provision in this Creditors  
19 Agreement to the contrary, the Creditors Agreement  
20 shall not become effective unless and until the  
21 Conditions Precedent set out in clause 9.1 has been  
22 satisfied.

23 Id. at 10 ¶¶ 9.1, 9.3, 9.4.

24 Like the earlier agreement, the Creditors Agreement included  
25 a venue selection clause:

26 The parties irrevocably agree that the Courts of England  
27 and Wales shall have exclusive jurisdiction to determine  
28 any dispute or claim (including non-contractual disputes  
or claims) arising under or in connection with the  
Creditors Agreement.

29 Id. at 13 ¶ 19.2.

30 The Creditors Agreement also stated,

31 In the event of any conflict between this Agreement and  
32 (i) any amendment to the Charter Party and / or Leasing  
33 Contracts, according to which the terms of this  
34 Agreement are implemented, or (ii) any other agreement,  
35 which is concluded for the purpose of the implementation  
36 of the terms of this Agreement, the terms of this  
37 Agreement shall prevail.

38 Id. at 13 ¶ 18.2.

1 Also on September 30, 2010, CAI entered into a Letter  
2 Agreement with multiple parties, again including Maruba SA and  
3 SACL but not Maritima Maruba. Id. at ¶ 7, Ex. C. The Letter  
4 Agreement was drafted by counsel for Maruba SA and SACL. Id. at  
5 ¶ 7. In consideration for CAI entering into the Creditors  
6 Agreement, Maruba SA agreed to pay the overdue amount that CAI  
7 agreed to waive in the Creditors Agreement and to return the  
8 containers to CAI. Id. at ¶ 7, Ex. C at 1-2. The Letter  
9 Agreement provided,

10 In the event that Maruba fails to make payment to CAI on  
11 the terms set forth above, the Creditors Agreement may  
12 be immediately cancelled by CAI and the respective full  
13 current Outstanding Debt shall fall automatically due  
14 and payable to CAI without further notice.

15 2 ¶ 3. It also contained a forum selection clause:

16 CAI may require that any dispute or proceeding arising  
17 out of or relating to this Letter Agreement shall, at  
18 CAI's sole option and discretion be brought only in  
19 state or federal courts having jurisdiction over the  
20 City and County of San Francisco or before the American  
21 Arbitration Association in San Francisco under its  
22 Commercial Arbitration Rules. Each of the Maruba  
23 Companies consents to jurisdiction and venue in those  
24 courts. CAI may opt to commence or allow proceedings in  
25 any other jurisdiction.

26 3 ¶ 9.

27 The parties dispute whether the conditions precedent to the  
28 Creditors Agreement were ever met, and thus whether that agreement  
became effective. With their replies, SACL and Maruba SA  
submitted a letter dated October 18, 2010 and purportedly written  
by Nils R. Kuhlwein von Rathenow of Roland Berger Strategy  
Consultants. Swenson Maruba SA Reply Decl. ¶ 2, Ex. 1. The  
letter is addressed to "all creditors of Maruba S.A." and bears  
the subject line "Conditions for effectiveness of the creditor

1 agreement MARUBA.” Id. It states that the new investor had  
2 signed a confirmation letter fulfilling the conditions precedent  
3 set forth in clause 9.1 of the Creditors Agreement and that  
4 “Roland Berger Strategy Consultants (RBSC) hereby confirms, that  
5 the conditions for the effectiveness of the creditors agreement  
6 . . . are fulfilled.” Id. CAI never received this letter, or any  
7 other evidence of the undertaking from the new investor as  
8 required by paragraph 9.1 of the Creditors Agreement, and disputes  
9 its authenticity. Teixeira Maruba SA Decl. ¶ 8; Declaration of  
10 Nadine Teixeira in Supp. of Pl.’s Opp. to Def. SACL’s Mot. to  
11 Dismiss (Teixeira SACL Decl.) ¶ 6-8. Marcelo Sibione, the  
12 operational director of Maruba SA, attests that he received a copy  
13 of this letter by email from von Rathenow on October 20, 2012, but  
14 does not provide a copy of the email to which the letter was  
15 attached, or attest that the other parties to the Creditors  
16 Agreement were included on the email. Sibione Decl. ¶ 6.<sup>3</sup>

17 The debtors, including SACL, made only a small initial  
18 payment in late 2010, of less than the amount that would have been  
19 required under the Creditors Agreement and not on the deadline set  
20 \_\_\_\_\_

21 <sup>3</sup> Because the Court concludes that, even if the Creditors  
22 Agreement came into effect, CAI validly cancelled it, and that its  
23 venue selection clause does not apply, the Court need not resolve  
24 the admissibility of the Roland Berger letter or whether the  
25 conditions precedent were met. The Court notes, however, that  
26 that Sibione, as a representative of Maruba SA and not the  
27 creditors of Maruba SA, was not among the parties to whom the  
28 letter was purportedly addressed. Further, the letter was not  
addressed to “all Parties” to the Creditors Agreement, as required  
by paragraph 9.4 of the Creditors Agreement. Finally, even if the  
letter were properly authenticated, it would amount to  
inadmissible hearsay to the extent that Maruba SA and SACL seek to  
use it to establish that Defendants provided proof of the new  
investor’s undertaking as required by paragraph 9.1 of the  
Creditors Agreement.

1 forth in the Creditors Agreement. Teixeira SACL Decl. ¶ 10.  
2 Maruba SA also never made payment to CAI according to the payment  
3 schedule set forth in the Letter Agreement and never returned any  
4 containers to CAI pursuant to the Letter Agreement. Id.

5 On December 21, 2010, the parties to the Creditors Agreement  
6 executed an addendum to that agreement. Teixiera Maruba SA Decl.  
7 ¶ 6, Ex. B, 22-27. The addendum stated that, in the original  
8 Creditors Agreement, the Company agreed that it would "within 30  
9 days after the Effective Date pay to the Creditors the Payable  
10 Overdue Amount in full," but that for "several reasons it was not  
11 possible for the Company to comply with their obligations under  
12 the Creditors Agreement and to pay to the Creditors the Payable  
13 Overdue Amount accordingly." Id. at 1-2. In the addendum, the  
14 parties agreed to change the due dates for certain payments of the  
15 overdue debt, but that "all other terms and conditions of the  
16 Creditors Agreement shall remain in full force and effect and be  
17 unaffected hereby." Id. at 1.1-2.

18 On March 14, 2011, CAI sent Defendants a letter titled,  
19 "Termination for Default of all Lease Agreements between CAI  
20 International, Inc, as Lessor ('CAI'), and South Atlantic  
21 Container Lines Ltd. ('Lessee')." Teixiera Maruba SA Decl. ¶ 10,  
22 Ex. D. In the letter, CAI stated that it "formally declares with  
23 immediate effect the default" of the three lease agreements  
24 between itself and SACL. Id.

25 On May 17, 2011, CAI initiated this action. Docket No. 1.  
26 In the complaint, CAI alleges that Defendants breached the lease  
27 and guaranty agreements, and seeks compensation from Defendants  
28 for outstanding leasing charges, the replacement value of

1 containers that were not returned, the cost of repairs to  
2 containers that were returned and liquidated damages. CAI does  
3 not refer to the Creditors Agreement or Letter Agreement in the  
4 complaint.

5 On November 18, 2011, upon CAI's motion, the clerk entered  
6 default as to SACL. Docket No. 13.

7 On May 14, 2012, after Maruba SA filed its reply in support  
8 of its motion to dismiss, CAI sent Defendants a letter stating  
9 that it cancelled the Creditors Agreement because they had not  
10 made the required payments or returned the leased containers.  
11 Teixeira SACL Decl. ¶ 12, Ex. F. In the letter, CAI reserved its  
12 arguments that the Creditors Agreement had not come into effect or  
13 was already cancelled. Id.

14 LEGAL STANDARD

15 A defendant may raise a Rule 12(b)(3) motion to dismiss for  
16 improper venue in its first responsive pleading or by a separate  
17 pre-answer motion. See Federal Rule of Civil Procedure 12(h)(1).  
18 Once the defendant challenges venue, the plaintiff bears the  
19 burden of establishing that venue is proper. Piedmont Label Co.  
20 v. Sun Garden Packing Co., 598 F.2d 491, 496 (9th Cir. 1979).

21 When considering a Rule 12(b)(3) motion to dismiss, "the  
22 pleadings need not be accepted as true, . . . and the court may  
23 consider facts outside of the pleadings." Murphy v. Schneider  
24 Nat'l, Inc., 362 F.3d 1133, 1137 (9th Cir. 2004) (internal  
25 quotations and citations omitted). If there are material factual  
26 issues in genuine dispute, it is "within the sound discretion of  
27 the district court" to elect to hold an evidentiary hearing on the  
28 disputed facts, in order to weigh evidence, assess credibility and

1 make factual findings necessary to resolve the motion. Id. at  
2 1139-40. Alternatively, the court may deny the motion "while  
3 granting leave to refile it if further development of the record  
4 eliminates any genuine factual issue." Id. at 1139. If the court  
5 does not hold an evidentiary hearing, it "must draw all reasonable  
6 inferences in favor of the non-moving party and resolve all  
7 factual conflicts in favor of the non-moving party." Id. at  
8 1138-40.

9 DISCUSSION

10 SACL and Maruba SA move to dismiss this action. They argue  
11 that, although CAI's complaint did not mention the Creditors  
12 Agreement, its claims necessarily implicate that agreement, which  
13 restructured the debt between the parties. They contend that the  
14 action is thus subject to the forum selection clause in the  
15 Creditors Agreement, which specifies England and Wales as the  
16 forum.

17 The Court does not reach the parties' arguments regarding  
18 whether the conditions precedent for the Creditors Agreement were  
19 met and thus whether it was ever effective, because the Court  
20 concludes that CAI's undisputed valid termination of the agreement  
21 precludes the application of forum selection clause to the instant  
22 dispute.<sup>4</sup>

23 SACL and Maruba SA argue that their breach of the substantive  
24 obligations of the Creditors Agreement should not excuse the  
25

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26 <sup>4</sup> While Maruba SA suggested in a footnote in its reply brief  
27 that the March 14, 2011 letter was not an effective cancellation  
28 of the Creditors Agreement, neither Defendant contested in its  
papers or at the hearing that the May 14, 2012 letter was an  
effective cancellation.

1 requirement that CAI comply with the forum selection clause.  
2 However, SACL and Maruba SA do not acknowledge that a termination  
3 or cancellation of a contract may have a different effect than the  
4 breach of a contract. "A breach by a party to a contract does not  
5 in itself cancel the contract." Comedy Club, Inc. v. Improv W.  
6 Associates, 553 F.3d 1277, 1289 (9th Cir. 2009).<sup>5</sup> "Cancellation  
7 of a contract occurs when either party puts an end to the contract  
8 for breach by the other." Id. (internal quotations omitted).  
9 "Termination occurs when either party pursuant to a power created  
10 by agreement or law puts an end to the contract otherwise than for  
11 its breach." Id. at 1289 n.13.

12 Here, CAI's valid cancellation of the Creditors Agreement,  
13 pursuant to the power granted to it in that contract, put an end  
14 to the obligations of either party to continue performing  
15 thereunder in the future. As a result, the relationship between  
16 the parties, set up by the lease and guaranty agreements, was no  
17 longer subject to the restructuring of debt created by the  
18 Creditors Agreement. Thus, CAI's claims do not arise "under or in  
19 connection with the Creditors Agreement," as SACL and Maruba SA  
20 argue, and are not subject to the forum selection clause therein.

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22  
23 <sup>5</sup> In their replies, Maruba SA and SACL raise for the first  
24 time an argument that the Creditors Agreement contains a choice of  
25 law provision stating, "The Creditors Agreement and any dispute or  
26 claim (including non-contractual disputes or claims) arising out  
27 of or in connection with it or its subject matter or formation  
28 shall be governed by and construed with [sic] in accordance with  
the laws of England and Wales." Teixeira SACL Decl., Ex. D, 13  
¶ 19.1. However, they do not cite any authority from England and  
Wales or suggest any way in which such law would materially differ  
from federal or California law regarding the enforcement of forum  
selection clauses or any other issue relevant to the resolution of  
this motion.

1           The parties do not dispute that CAI has the right to commence  
2 an action to enforce the obligations under the lease and guaranty  
3 agreements. Indeed, the Creditors Agreement specifically reserved  
4 to CAI the right to commence any action or proceeding against  
5 Defendants under the relevant lease agreements, and noted that  
6 CAI's existing rights in the lease agreements were not replaced or  
7 amended. Texiera Maruba SA Decl., Ex. B, at 9-10 ¶ 7.4.2.

8           Because CAI is seeking to enforce its rights in the original  
9 agreements, and is not suing for damages for Defendants' failure  
10 to perform their obligations under the Creditors Agreement itself,  
11 this case is distinguishable from those in which the plaintiff is  
12 suing based on the terminated or cancelled agreement. When a  
13 contract is terminated or cancelled, parties retain the right to  
14 sue at least on past breaches. See, e.g., 1 Witkin Sum. Cal. Law  
15 Contracts § 925. In those situations, where the plaintiff's  
16 claims are based on a breach of the terminated or cancelled  
17 contract, a forum selection clause in that contract may survive  
18 the termination or cancellation. See, e.g., Modern Am. Recycling  
19 Servs. v. Dunavant, 2011 U.S. Dist. LEXIS 39768, at \*9 (E.D. La.)  
20 (applying forum selection clause where the claims arose out of a  
21 terminated contract); TriState HVAC Equip., LLP v. Big Belly  
22 Solar, Inc., 752 F. Supp. 2d 517, 535-37 (E.D. Pa. 2010) (same).  
23 For this reason as well, SACL and Maruba SA's argument that the  
24 forum selection clause would be rendered meaningless if it were  
25 not applied to this case is incorrect; the clause might be  
26 applicable to an action brought by CAI for Defendants' past breach  
27 of the Creditors Agreement itself.  
28

1 SACL also argues that, even if the forum selection clause in  
2 the Creditors Agreement is not applied, this action should be  
3 dismissed or transferred because the assigned judge is currently  
4 located in the Oakland Division of the Northern District of  
5 California and the first two lease agreements provide that "the  
6 parties consent to the jurisdiction of State and Federal Courts  
7 located in San Francisco, California, U.S.A." Teixeira Maruba SA  
8 Decl. ¶ 4, Ex. E at ¶ 11(a), Ex. F at ¶ 11(a).<sup>6</sup>

9 The forum selection clauses in the first two lease agreements  
10 are not mandatory, and are instead permissive. California Dist.  
11 Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d  
12 1034, 1037 (9th Cir. 1995) ("To be mandatory, a clause must  
13 contain language that clearly designates a forum as the exclusive  
14 one."). See also Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817  
15 F.2d 75 (9th Cir. 1987) (concluding that a forum selection clause  
16 that stated that a particular court "shall have jurisdiction over  
17 the parties in any action" was permissive and not mandatory).  
18 Here, the relevant clauses do not state that the action may be  
19 litigated only San Francisco. Accordingly, the clauses do not

20 \_\_\_\_\_  
21 <sup>6</sup> SACL acknowledges that CAI did everything within its power  
22 to have the case assigned to a judge located the San Francisco  
23 courthouse. CAI filed this action in San Francisco, requested in  
24 the complaint that the case "be assigned to the San Francisco  
25 Division," and checked the only box on the Court's civil cover  
26 sheet that would allow such an assignment. See Compl. ¶ 2; Docket  
27 1-1 (checking the box for "San Francisco/Oakland").

28 For its own administrative purposes, the Court has decided  
that all actions that "arise in the counties of Alameda, Contra  
Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San  
Francisco, San Mateo or Sonoma shall be assigned to the San  
Francisco Division or the Oakland Division," and does not permit  
the parties themselves to choose between those two divisions.  
Civil Local Rule 3-2(d). See also General Order No. 44.

1 provide an exclusive venue of San Francisco and the Court need not  
2 reach whether venue would nevertheless be appropriate if the  
3 clauses did create exclusive jurisdiction in San Francisco.

4 CONCLUSION

5 For the reasons set forth above, the Court GRANTS SACL's  
6 motion to set aside default (Docket No. 29) and denies Maruba SA  
7 and SACL's motions to dismiss for improper venue (Docket Nos. 27  
8 and 30).

9 IT IS SO ORDERED.

10  
11 Dated: July 5, 2012

  
12 CLAUDIA WILKEN  
13 United States District Judge  
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