

1 **Background**

2 The estate of Donald L. Pratt bought \$300,000 of debt in Ten X Holdings, LLC, an
3 Illinois company that was formed to acquire and develop businesses in the financial-services
4 industry.² The estate’s investment is secured by a promissory note that requires Ten X to repay
5 the investment amount by a certain date and to pay interest until paid in full.³ The note contains
6 a clause providing that “the parties agree to the exclusive jurisdiction and venue of state or
7 federal courts located in Chicago, Illinois.”⁴ The parties also executed a subscription agreement
8 that similarly provides that “[t]he venue for any legal action under this Agreement will be in the
9 proper forum in the City of Chicago, State of Illinois.”⁵

10 The estate contends that Ten X did not fulfill its obligations under the note.⁶ It also
11 contends that Ten X, its president Richard Beston and vice president John Branch, and broker-
12 dealer Brian Pebley concealed, omitted, or failed to disclose material information affecting the
13 estate’s investment in Ten X.⁷ The estate, through its executor Jeffrey Morse, sued Ten X in
14 Nevada state court for breach of contract, breach of the implied covenant of good faith and fair
15 dealing, and unjust enrichment,⁸ and it sued all the defendants for breach of fiduciary duty,
16 fraudulent concealment, negligent misrepresentation, civil conspiracy, and punitive damages.⁹

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20 ² ECF No. 1-1 at ¶¶ 11–16 (complaint).

21 ³ *Id.* at ¶¶ 15–16.

22 ⁴ ECF No. 6-3 at 4, ¶ 5(D).

23 ⁵ ECF No. 6-2 at 31, ¶ 5.

24 ⁶ ECF No. 1-1 at ¶¶ 17–18, 28–31.

25 ⁷ *Id.* at ¶¶ 19

26 ⁸ *Id.* at ¶¶ 32–44, 67–72.

27 ⁹ *Id.* at ¶¶ 45–66, 73–74.

1 Beston removed the case to federal court.¹⁰ The defendants now move to transfer this case to the
2 U.S. District Court for the Northern District of Illinois or to dismiss plaintiff’s claims against
3 them.¹¹

4 **A. Legal standard to transfer venue in a forum-selection-clause case**

5 “For the convenience of the parties and witnesses, in the interest of justice, a district court
6 may transfer any civil action to any other district or division where it might have been brought or
7 to any district or division to which all parties have consented.”¹² The purpose of 28 U.S.C. §
8 1404(a) is to “prevent the waste ‘of time, energy, and money’ and ‘to protect litigants,
9 witnesses[,] and the public against unnecessary inconvenience and expense.’”¹³ Motions to
10 transfer lie within the district court’s discretion and require an “individualized, case-by-case
11 consideration of convenience and fairness.”¹⁴ “Ordinarily, the district court would weigh the
12 relevant factors and decide whether, on balance, a transfer would serve ‘the convenience of the
13 parties and witnesses’ and otherwise promote ‘the interest of justice.’”¹⁵

14 “The calculus changes, however,” in a case involving a valid forum-selection clause,
15 “which ‘represents the parties’ agreement as to the most proper forum.’”¹⁶ “The presence of a
16 valid forum-selection clause requires district courts to adjust their usual § 1404(a) analysis in
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20 ¹⁰ ECF No. 1 (petition for removal).

21 ¹¹ ECF Nos. 6, 7, 17, 18, 19.

22 ¹² 28 U.S.C. § 1404(a).

23 ¹³ *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (quoting *Continental Grain Co. v. Barge*
24 *F.B.L.*, 364 U.S. 19, 26 (1960)).

25 ¹⁴ *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000).

26 ¹⁵ *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Ct. W.D. Tex.*, 134 S. Ct. 568, 581 (2013)
27 (quoting 28 U.S.C. § 1404(a)).

¹⁶ *Id.* (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)).

1 three ways.”¹⁷ “First, the plaintiff’s choice of forum merits no weight.”¹⁸ “Second, [the
2 evaluating court] . . . should not consider arguments about the parties’ private interests.”¹⁹ The
3 court must instead “deem the private-interest factors to weigh entirely in favor of the preselected
4 forum.”²⁰ “As a consequence, a district court may consider arguments about public-interest
5 factors only.”²¹ “Because those factors will rarely defeat a transfer motion, the practical result is
6 that forum-selection clauses should control except in unusual cases.”²² “Third, when a party
7 bound by a forum-selection clause flouts its contractual obligation and files suit in a different
8 forum, § 1404(a) transfer of venue will not carry with it the original venue’s choice-of-law
9 rules—a factor that in some circumstances may affect public-interest considerations.”²³ The
10 “party acting in violation of the forum-selection clause . . . bear[s] the burden of showing that
11 public-interest factors overwhelmingly disfavor a transfer.”²⁴

12 A motion under § 1404(a) is the proper vehicle to enforce a forum-selection clause that
13 points to a federal forum, while a motion under the doctrine of *forum non conveniens* is the
14 proper way to enforce a clause that points to a nonfederal forum.²⁵ But the analysis is the same
15 whether the clause points to a federal forum or a nonfederal forum.²⁶

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17 ¹⁷ *Id.*

18 ¹⁸ *Id.*

19 ¹⁹ *Id.* at 582.

20 ²⁰ *Id.*

21 ²¹ *Id.*

22 ²² *Id.*

23 ²³ *Id.*

24 ²⁴ *Id.*

25 ²⁵ *Id.* at 580 (citation omitted).

26 ²⁶ *Id.* (citation omitted) (explaining that, “because both § 1404(a) and the *forum non conveniens*
27 doctrine from which it derives entail the same balancing-of-interests standard, courts should

1 The Ninth Circuit has recognized that the scope of a forum-selection clause is not
2 necessarily limited to contract claims.²⁷ The success of a “forum non conveniens argument
3 hinges on whether the . . . forum[-]selection clause applies to” the other party’s claims.²⁸
4 “Whether a party’s claims sufficiently relate to a contract to fall within the scope of its forum[-]
5 selection clause is a question of law”²⁹

6 **B. The contracts contain mandatory but narrow forum-selection clauses.**

7 The contracts at issue in this case consist of a confidential disclosure statement, a
8 promissory note, a subscription agreement and power of attorney, and a purchaser
9 questionnaire.³⁰ The subscription agreement states that it “will be governed by and construed in
10 accordance with the laws of the State of Illinois. The venue for any legal action under this
11 Agreement will be in the proper forum in the City of Chicago, State of Illinois.”³¹ The note
12 provides that it “will be governed by, and construed in accordance with, Illinois law (excluding
13 the conflicts of law provisions), and the parties agree to the exclusive jurisdiction and venue of
14 state or federal courts located in Chicago, Illinois.”³²

15 Although not addressed by the parties, these contracts constitute a single agreement and
16 must be read together because they were contemporaneously signed by the same parties and

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18 evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they
19 evaluate a forum-selection clause pointing to a federal forum”).

20 ²⁷ *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988).

21 ²⁸ *In re Orange, S.A.*, 818 F.3d 956, 961–62 (9th Cir. 2016).

22 ²⁹ *Rey v. Rey*, 666 Fed. Appx. 675, 676 (9th Cir. 2016) (unpublished).

23 ³⁰ ECF No. 6-2.

24 ³¹ *Id.* at 31, ¶ 5. By designating courts “in” the city of Chicago, Illinois, the subscription
25 agreement’s forum selection clause refers to state or federal courts. *Accord Doe 1 v. AOL LLC*,
26 552 F.3d 1077, 1081–82 (9th Cir. 2009) (interpreting “forum[-]selection clause designating
27 courts ‘of,’ rather than ‘in,’ a state” as referring only to the state courts not also the federal courts
in that state).

³² ECF No. 6-3 at 4, ¶ 5(D).

1 relate to the same subject matter.³³ The disclosure statement is dated January 15, 2010;³⁴ the note
2 is dated February 25, 2010, and was signed by Beston;³⁵ the subscription agreement was signed
3 by Morse on behalf of the estate on January 27, 2010;³⁶ and the questionnaire was signed by
4 Morse on behalf of the estate on January 27, 2010.³⁷ The contracts repeatedly refer to one
5 another.³⁸ Finally, all of the contracts relate to the same subject matter: the estate purchasing
6 debt in Ten X in the form of a note.

7 The forum-selection clauses in both contracts contain mandatory language: “venue . . .
8 **will be proper**”³⁹ and “**exclusive** jurisdiction and venue”⁴⁰ The subscription agreement’s
9 clause refers to legal actions “under” that agreement.⁴¹ The note’s clause is silent on this issue.⁴²
10 The Ninth Circuit has interpreted clauses using phrases like “arising under” as being narrower in
11 scope than ones using phrases like “arising out of or relating to.”⁴³ I find that these clauses are
12 mandatory in nature but narrow in scope.

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16 ³³ See *Kelsey v. Clausen*, 100 N.E. 984, 986 (Ill. 1913).

17 ³⁴ ECF No. 6-2 at 2.

18 ³⁵ ECF No. 6-3 at 2, 5.

19 ³⁶ ECF No. 6-2 at 32.

20 ³⁷ *Id.* at 37.

21 ³⁸ See, e.g., *id.* at 3, 10–11, 23, 28, 34.

22 ³⁹ *Id.* at 31, ¶ 5 (emphasis added).

23 ⁴⁰ ECF No. 6-3 at 4, ¶ 5(D) (emphasis added).

24 ⁴¹ ECF No. 6-2 at 31, ¶ 5.

25 ⁴² ECF No. 6-3 at 4, ¶ 5(D).

26 ⁴³ *Rey*, 666 Fed. Appx. at 676 (quoting in parenthetical *Mediterranean Enters., Inc. v. Ssangyong*
27 *Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983)).

1 **C. Plaintiff’s claims fall within the scope of these forum-selection clauses.**

2 Narrow forum-selection clauses cover only “claims that cannot ‘be adjudicated without
3 analyzing whether the parties were in compliance’ with the agreement containing the clause.”⁴⁴
4 Plaintiff does not dispute that the note’s forum-selection clause covers his breach-of-contract and
5 breach-of-implicit-covenant-of-good-faith-and-fair-dealing⁴⁵ claims against Ten X. But the
6 parties disagree about whether plaintiff’s tort claims fall within these clauses’ scope.

7 Plaintiff pleads claims for breach of fiduciary duty, fraudulent concealment, negligent
8 misrepresentation, civil conspiracy, and unjust enrichment.⁴⁶ Plaintiff alleges that a fiduciary
9 relationship exists between the estate and the defendants because of “their special relationship.”⁴⁷
10 It appears from plaintiff’s allegations that the contracts forming the parties’ agreement are the
11 basis for their special relationship. Thus, the court will have to examine the contracts to
12 determine what duty, if any, the defendants owed plaintiff. The same is true for plaintiff’s
13 fraudulent-concealment claim, which requires him to establish that the defendants owed the
14 estate a duty to disclose the allegedly concealed facts.⁴⁸

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18 ⁴⁴ *Id.* (quoting *Manetti-Farrow*, 858 F.2d at 514).

19 ⁴⁵ Nevada recognizes two species of breach of the implied covenant of good faith and fair
20 dealing: one sounds in contract and the other is a hybrid of contract and tort. *Hilton Hotels Corp.*
21 *v. Butch Lewis Prods., Inc.*, 808 P.2d 919, 922–23 (Nev. 1991). To plead the “contort” version
22 of this claim, the plaintiff must allege a special element of reliance or fiduciary duty. *Id.*
23 Although these allegations are later found in plaintiff’s complaint, they do not appear in the
24 portion that sets up this claim. ECF No. 1-1 at ¶¶ 39–44. Plaintiff, thus, pleads only the contract
25 form of this claim.

26 ⁴⁶ ECF No. 1-1 at ¶¶ 45–72. Plaintiff also asserts a “claim” for “punitive damages,” ECF No. 1-1
27 at ¶¶ 73–74, but punitive damages is not a stand-alone cause of action. *See Nev. Rev. Stat. §*
42.005(1) (punitive damages can be awarded “in an action for breach of an obligation not arising
from contract”).

⁴⁷ ECF No. 1-1 at ¶ 46.

⁴⁸ *See Nev. Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1415 (D. Nev. 1995).

1 Plaintiff alleges that the defendants breached their fiduciary duties “by failing to disclose
2 numerous material facts in the Confidential Disclosure Statement”⁴⁹ and breached their duties to
3 disclose by “conceal[ing] numerous material facts in the Confidential Disclosure Statement.”⁵⁰
4 The trier of fact will need to examine the contracts to resolve the breach elements of plaintiff’s
5 breach-of-fiduciary-duty and fraudulent-concealment claims (e.g., to determine what information
6 the defendants did disclose). Plaintiff’s negligent-misrepresentation claim requires him to show
7 that the defendants supplied the estate with false information.⁵¹ And because the only
8 information that plaintiff alleges the estate was supplied with is contained in the contracts, the
9 trier of fact will have to examine and interpret those documents to resolve this claim, too. The
10 same rationale applies to plaintiff’s civil-conspiracy claim, which baldly alleges that the
11 “[d]efendants acted in concert with one another with respect to the concealment of material
12 information.”⁵² Finally, because a claim for “unjust enrichment is not available when there is an
13 express, written contract,”⁵³ the court will have to examine and interpret the contracts to resolve
14 this claim against Ten X. Based on this record, I find that none of plaintiff’s tort claims can be
15 adjudicated without analyzing and interpreting the contracts that form the parties’ agreement
16 about the estate’s purchase of debt in Ten X.

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18 **D. This is not an extraordinary case where exceptional public-interest factors
overwhelmingly disfavor a transfer.**

19 Because all of plaintiff’s claims fall within the scope of the forum-selection clauses, he
20 bears the burden to show that the public-interest factors overwhelmingly disfavor a transfer. The
21 public-interest factors include “the administrative difficulties flowing from court congestion”;

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23 ⁴⁹ ECF No. 1-1 at ¶ 48.

24 ⁵⁰ *Id.* at ¶ 53.

25 ⁵¹ *Land Baron Inv. v. Bonnie Springs Family LP*, 356 P.3d 511, 518 (Nev. 2015).

26 ⁵² ECF No. 1-1 at ¶ 65.

27 ⁵³ *Leasepartners Corp. v. Robert L. Brooks Trust Dated November 12, 1975*, 942 P.2d 182, 187
(Nev. 1997).

1 “the ‘local interest in having localized controversies decided at home’”; “the interest in having
2 the trial of a diversity case in a forum that is at home with the law that must govern the action”;
3 “the avoidance of unnecessary problems in conflicts of laws”; and “the unfairness of burdening
4 citizens in an unrelated forum with jury duty.”⁵⁴

5 Plaintiff doesn’t address any of these factors; he merely states without authority or
6 analysis that Nevada has an interest in holding non-resident defendants accountable for their
7 tortious actions.⁵⁵ I therefore find that plaintiff has not met his burden to show that this is an
8 extraordinary case where the public-interest factors overwhelmingly disfavor a transfer.

9 **Conclusion**

10 Accordingly, IT IS HEREBY ORDERED that Beston and Ten X’s motions to transfer
11 venue [ECF Nos. 7, 17] are **GRANTED** and these defendants’ motions to dismiss [ECF Nos. 6,
12 18] are **DENIED** without prejudice to the ability to raise any arguments still relevant after
13 transfer before the transferee court. Branch’s motion to dismiss or alternatively to transfer venue
14 [ECF No. 19] is **GRANTED in part** as to the request to transfer venue and **DENIED** without
15 prejudice to the ability to raise any arguments still relevant after transfer before the transferee
16 court. **The Clerk of Court is directed to TRANSFER this case to the U.S. District Court for**
17 **the Northern District of Illinois.**

18 DATED: September 13, 2017.

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20 U.S. District Judge Jennifer A. Dorsey
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27 ⁵⁴ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

⁵⁵ *See, e.g.*, ECF No. 10 at 5–9; ECF No. 24 at 5–8; ECF No. 25 at 7–8.