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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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AMERICAN SPECIALTY LAB LLC,

Plaintiff,

v.

GENTECH SCIENTIFIC INC.,

Defendant.

Case No. 2:17-cv-01458-MMD-PAL

ORDER

**I. SUMMARY**

This case arises from Plaintiff American Specialty Lab, LLC's ("ASL") purchase of equipment from Defendant GenTech Scientific, Inc. ("GenTech"). GenTech has filed two motions: (1) motion to dismiss pursuant to Rule 12(b)(6) ("Motion to Dismiss") (ECF No. 8); and (2) motion to dismiss pursuant to Rule 12(b)(3), or in the alternative, motion to transfer venue ("Motion to Transfer") (ECF No. 10). The Court has reviewed ASL's responses (ECF Nos. 11, 12) and GenTech's replies (ECF Nos. 13, 14). For the reasons discussed below, the Court grants the Motion to Transfer and declines to address the Motion to Dismiss.<sup>1</sup>

**II. RELEVANT BACKGROUND**

The following facts are taken from the Complaint. (ECF No. 1.) ASL owns a lab that evaluates herbs and other biological issues. GenTech makes a number of claims on

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<sup>1</sup>While the Court declines to rule on the Motion to Dismiss in light of the transfer of the case, the Court did consider the arguments presented in ASL's opposition to the Motion to Dismiss because ASL incorporated those arguments in its opposition to the Motion to Transfer.

1 its website about its products and services, including that it is “well known throughout the  
2 analytical instrumentation community for its excellent service, repair and support.” (ECF  
3 No. 1 at 3-4.) ASL purchased certain equipment from GenTech for \$75,000.00, but the  
4 equipment “never worked according to the specification and to the satisfaction of the  
5 desired and projected results.” (*Id.* at 5.) ASL asserts claims for breach of contract and  
6 breach of the implied covenant of good faith and fair dealing.

### 7 **III. DISCUSSION**

8 GenTech relies on the forum-selection clause in the “Customer Purchase Order”  
9 (“the Purchase Order”) to argue that venue is not proper in Nevada and seeks dismissal  
10 pursuant to Fed. R. Civ. P. 12(b)(3), or in the alternative, to transfer venue pursuant to 28  
11 U.S.C. § 1404. (ECF No. 10 at 2-3.) The Court may consider the Purchase Order in  
12 deciding the Motion to Transfer under Rule 12(b)(3). *See Murphy v. Schneider Nat’l, Inc.*,  
13 362 F.3d 1133, 1137 (9th Cir. 2004) (the court may consider matters outside the pleadings  
14 in deciding a motion made pursuant to Fed. R. Civ. P. 12(b)(3).) Moreover, ASL agrees  
15 that the Purchase Order governs the parties’ dispute. (ECF No. 12 at 4.) The Purchase  
16 Order is a single page document that contains the following provision (“Terms and  
17 Conditions”) to the right of the signature line and immediately below the date, which  
18 states:

19 This order for equipment, parts, or services is expressly limited to  
20 acceptance of GenTech’s General Sales Terms and Conditions (available  
21 at <http://gentechscientific.com/contents/8-sales-terms-and-conditions>). Any  
different or additional terms are expressly rejected by GenTech unless  
agreed to in writing.

22 (ECF No. 10 at 9.) Paragraph 30 of the Terms and Conditions (“the Clause”) provides, in  
23 pertinent part, that the parties agree that any dispute arising under their agreement “shall  
24 be finally settled in an action commenced and maintained in any state or federal district  
25 court sitting in WYOMING COUNTY, New York . . .” (*Id.* at 13.) Accordingly, GenTech  
26 argues that the Court should enforce the Clause and dismiss this action, or in the  
27 alternative, transfer this action to the federal district court sitting in Wyoming County, New  
28 York.

1           The Supreme Court in *Atlantic Marine Construction Company, Inc. v United States*  
2 *District Court for the Western District of Texas*, 134 S.Ct. 568 (2013), clarified the  
3 procedure for enforcing a forum-selection clause. As the Court explained, 28 U.S.C. §  
4 1404(a) “provides a mechanism for enforcement of forum-selection clauses that point to  
5 a particular federal district court.” *Id.* at 579. In dicta, the Court noted that a Rule 12(b)(3)  
6 motion is not a proper mechanism to enforce a forum-selection clause; Rule 12(b)(3)  
7 allows for dismissal based on “improper venue” but whether venue is “improper” is  
8 governed by 28 U.S.C. § 1391. *Id.* at 577, 580. Here, GenTech does not contend that  
9 venue is improper in this Court under § 1391. GenTech instead seeks to change venue  
10 solely because of the forum-selection clause in the Purchase Order, not because venue  
11 is not proper in this Court. Indeed, the Complaint sufficiently alleges venue in this Court.  
12 (ECF No. 1 at ¶ 4 (“Substantial portion of the activities occurred in Las Vegas.”)) Thus,  
13 the Court will consider GenTech’s Motion to Transfer under section 1404(a).

14           “[B]ecause the overarching consideration under § 1404(a) is whether a transfer  
15 would promote the interest of justice, a valid forum-selection clause should be given  
16 controlling weight in all but the most exceptional cases.” *Atlantic Marine*, 134 S.Ct. at 581  
17 (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988)) (internal quotation  
18 marks and alteration omitted). The Court instructs “district courts to adjust their usual §  
19 1404(a) analysis in three ways”: (1) disregard the plaintiff’s choice of forum; (2) disregard  
20 “arguments about the parties’ private interests”; and (3) “consider arguments about  
21 public-interest factors only.” *Id.* at 581-82. The Supreme Court recognizes that this  
22 “analysis presupposes a contractually valid forum-selection clause.” *Id.* at 579 n. 5. In the  
23 Ninth Circuit, a “forum selection clause is presumptively valid; the party seeking to avoid  
24 a forum selection clause bears a heavy burden to establish a ground upon which [the  
25 court] will conclude the clause is unenforceable.” *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083  
26 (9th Cir. 2009) (internal quotation marks and citation omitted).

27           GenTech insists that under Ninth Circuit case law, the Clause is presumptively  
28 valid and should be enforced. The Clause is clear as to forum—any dispute under the

1 Purchase Order “shall be finally settled in an action commenced and maintained in any  
2 state or federal district court sitting in WYOMING COUNTY, New York . . .” (ECF No. 10  
3 at 13.)

4 The gist of ASL’s response is that the Terms and Conditions are not part of the  
5 Purchase Order, and hence are not enforceable, by characterizing the Terms and  
6 Conditions as a “browsewrap agreement.”<sup>2</sup> (ECF No. 11 at 2-3 (incorporating arguments  
7 presented in ECF No. 12 at 5-19).) However, as GenTech correctly points out, this is a  
8 term of art used to refer to contracts formed on the Internet “where a website’s terms and  
9 conditions of use are generally posted on the website via a hyperlink at the bottom of the  
10 screen.” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175-1176 (9th Cir. 2014). With  
11 a browsewrap agreement, the user of the website “gives his assent [to the terms and  
12 conditions] by simply using the website.” *Id.* at 1176 (internal quotation marks and citation  
13 omitted). “The defining feature of browsewrap agreements is that the user can continue  
14 to use the website or its services without visiting the page hosting the browsewrap  
15 agreement or even knowing that such a webpage exists.” *Id.* (quoting *Be In, Inc. v.*  
16 *Google Inc.*, No. 12–CV–03373–LHK, 2013 WL 5568706, at \*6 (N.D. Cal. Oct. 9, 2013)).

17 The Purchase Order does not share any substantial features with a browsewrap  
18 agreement.<sup>3</sup> First and foremost, ASL does not dispute that the Purchase Order is a valid  
19 contract because ASL is premising its breach of contract claim on the Purchase Order.  
20 Second, ASL completed the missing information in the Purchase Order by hand writing  
21 in the items ordered, adding an additional term that “timeliness is important if not 5%

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22 <sup>2</sup>ASL also makes a number of arguments (i.e., a plaintiff’s choice of forum should  
23 be given great deference and the court should consider whether the forum is convenient  
24 to the parties and witnesses) (ECF No. 12 at 4-5) that are not applicable under the *Atlantic*  
25 *Marine*’s “public-interest factors” analysis pertains to its claim of fraud. In particular, ASL  
26 contends that the Clause “if not obtained by fraud, clearly had been taken by duress in  
the form of a clause hidden in browsewrap.” (ECF No. 11 at 6.) However, because the  
argument as to fraud is based on the Clause being a browsewrap, this argument is  
misplaced. See discussion, *infra*.

27 <sup>3</sup>Assuming the Purchase Order was obtained online at GenTech’s website, the  
28 only similar feature with a browsewrap agreement ends there—that the form for the  
agreement form was found on the Internet.

1 discount/week,” and signed and dated the Purchase Order. (ECF No. 10 at 9.) Thus the  
2 wet signature removes the Purchase Order and the Terms and Conditions from the  
3 universe from which browserwrap agreements reside. Third, the Purchase Order clearly  
4 states that the “order for equipment, parts, or services is expressly limited to acceptance  
5 of GenTech’s General Terms and Conditions.” (ECF No. 10 at 9.) This provision provides  
6 notice of the incorporation of the Terms and Conditions, unlike the situation with  
7 browserwrap agreements where “the user can continue to use the website . . . without  
8 visiting the page hosting the browserwrap agreement or even knowing that such a  
9 webpage exists.” *Nguyen*, 763 F.3d at 1176. That the party entering into the Purchase  
10 Order needed to access the provided link to obtain the Terms and Conditions does not  
11 turn the Purchase Order into a browserwrap agreement. Accordingly, the cases that ASL  
12 relies on, and the arguments that ASL offers that are premised on the characterization of  
13 the Terms and Conditions as a “browserwrap agreement,” have no application to the  
14 enforceability of the Clause.

15 ASL has not met its “heavy burden” of providing any basis for the Court to  
16 determine that the Clause is invalid. The Court agrees with GenTech that the forum-  
17 selection clause in the Purchase Order is enforceable. That Clause provides for the  
18 proper forum to be the state or the federal district court sitting in Wyoming County, New  
19 York. The Court will transfer this case to the federal district court sitting in Wyoming  
20 County, New York.

#### 21 **IV. CONCLUSION**

22 The Court notes that the parties made several arguments and cited to several  
23 cases not discussed above. The Court has reviewed these arguments and cases and  
24 determines that they do not warrant discussion as they do not affect the outcome of the  
25 Motion to Transfer.

26 It is therefore ordered that the motion to dismiss under Rule 12(b)(3), or in the  
27 alternative, motion to transfer venue (ECF No. 10) is granted. This case will be transferred

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to the United States District Court for the Western District of New York. In light of the transfer of venue, the Court declines to address the Motion to Dismiss (ECF No. 8).

The Clerk is directed to effectuate the transfer of this case.

DATED this 16<sup>th</sup> day of November 2017.



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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE