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United States District Court,
D. New Jersey.
PEMAQUID UNDERWRITING BROKERAGE, INC., United Messenger Courier Program, David Madden, John T. Simon, and Joan Z. Simon, Plaintiffs,
v.
MUTUAL HOLDINGS (BERMUDA) LTD., Mutual Indemnity (Bermuda) Ltd., Mutual Risk Management, Ltd., Commonwealth Risk Services, David Alexander, Paul Watson, XYZ Corporations 1-50 (fictitious entities), and John Does 1-50 (fictitious persons), Defendants.
No. Civ.A. 02-4691(JAP).

June 3, 2003.

Scarinci & Hollenbeck, LLC, Andrew L. Indeck, Lyndhurst, New Jersey, for Plaintiffs.

Riker, Danzig, Scherer, Hyland & Perretti LLP, Edwin R. Chociey, Jr., Morristown, NJ, for Defendants Mutual Holdings (Bermuda) Ltd., Mutual Indemnity (Bermuda) Ltd., Mutual Risk Management Ltd., and David Alexander.

OPINION

PISANO, J.

***1** Defendants Mutual Holdings (Bermuda) Ltd. ("MHB"), Mutual Indemnity (Bermuda) Ltd. ("MIB"), Mutual Risk Management ("MRM"), and David Alexander (collectively referred to as Defendants) move under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiffs' eleven count complaint that sounds in breach of contract. Plaintiffs oppose this motion. This Court has jurisdiction to consider this matter under 28 U.S.C. § 1332(a), and resolves Defendants' motion without oral argument, Fed R. Civ. P. 78. For the reasons explained below, the Court grants Defendants' motion and dismisses with prejudice the complaint.

I. Rule 12(b)(6) Standard

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss a complaint "for failure to state a claim upon which relief can be granted."On a Rule 12(b)(6) motion, the court will, as it must, accept as true all of the factual allegations within the complaint and any reasonable inferences that may be drawn from those allegations. *Nami v. Fauver,* 82 F.3d 63, 65 (3d Cir.1996). Claims will be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Generally, the court's task requires it to disregard any material beyond the pleadings. *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1426 (3d Cir.1997); *Pension Benefit Guar. Corp. v. White Consol. Indus.,* 998 F.2d 1192, 1196 (3d Cir.1993). A district court may, however, consider the factual allegations within other documents, including those described or identified in the complaint and matters of public record, if the plaintiff's claims are based upon those documents. *Burlington Coat.* 114 F.3d at 1426;*In re Westinghouse Sec. Litig. ("Westinghouse"),* 90 F.3d 696, 707 (3d Cir.1996); *In re Donald Trump Sec. Litig.,* 7 F.3d 357, 368 n. 9 (3d Cir.1993); *Pension Benefit Guar. Corp.,* 998 F.2d at 1196. Yet just because the court elects to examine these types of documents outside of the complaint does not mean that it need treat the motion as one for summary judgment. *Burlington Coat,* 114 F.3d at 1426; *Pension Benefit Guar. Corp.,* 998 F.2d at 1196-97.

Accordingly, in resolving this motion under Rule 12(b)(6), the Court shall consider the Shareholder

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Agreements entered into by the parties and the subsequent Amendments to those Agreements. The Shareholder Agreements created the relationship between the parties from which this action arose. Since the Shareholder Agreements and later Amendments are integral to the allegations pleaded within the complaint, the Court relies on these documents, and does not convert this Rule 12(b)(6) motion to a summary judgment motion.

II. Background

A. The Parties

1. The Plaintiffs

Pemaquid Underwriting Brokerage, Inc. ("Pemaquid") is a New Jersey corporation with its principal place of business in Randolph, New Jersey. (Pls.' compl. at ¶ 1.) United Messenger Courier Program ("United") is a New Jersey partnership that operates its principal place of business at the same Randolph, New Jersey location. (Pls.' compl. at ¶ 2.) David Madden, a New Jersey resident, is a partner/owner of United. (Pls.' compl. at ¶ 3.) John T. Simon and Joan Z. Simon, who are spouses, are New Jersey residents. (*Id.* at ¶ 3.) Mr. Simon is a partner/owner of United. (*Id.* at ¶ 3.)

2. The Named Defendants

***2** MRM is a Bermuda-based company that offers risk management and financial services to international clients and provides alternative risk financing products and services. (*Id.* at ¶ 5.) It is the parent of MIB, a Bermuda insurance and reinsurance company and subsidiary of MHB, a Bermuda holding company owned by parent MRM. (Alexander Cert. at ¶¶ 1-3.) MHB and MIB are companies organized under Bermuda law and operating a principal place of business at the same location in Hamilton, Bermuda. (Compl. at ¶ 6.) Other subsidiaries of MRM are Legion Insurance Company in Rehabilitation ("Legion") and Commonwealth Risk Services ("CRS"). CRS, but not Legion, is a defendant in this action.[FN1] CRS, a Delaware corporation that maintains its principal place of business in Philadelphia, Pennsylvania, (*Id.* at ¶ 7), is a risk management consulting and marketing firm specializing in the structuring of alternative market products.[FN2] (*Id.*)

FN1. According to the complaint, Legion is a successor to Legion Insurance Company, a New Jersey corporation with a principal place of business in Philadelphia, but is not named as a defendant because an Order of Rehabilitation entered as to Legion prohibits any party from filing a lawsuit against Legion. (*Id.* at ¶ 8.)

The complaint's references to Legion's conduct refer to the company's actions before voluntary submission to rehabilitation, (*Id.*), when MRM owned Legion, (*Id.* at ¶ 10.)

FN2. By order dated April 16, 2003, the Court entered default against Defendant CRS.

The individual Defendants are Paul Watson,[FN3] the former President of MIB and MHB, and David Alexander, the current President of MIB and MHB. (Compl. at ¶¶ 11-12.) Both Watson and Alexander are British citizens and Bermuda residents. (Alexander Cert. at ¶¶ 1-3.)

FN3. Plaintiffs have not served process on Defendant Paul Watson, who is the former president of MIB and MHB, a British citizen, and a Bermuda resident.

B. The Shareholder Agreements Between the Parties

On February 1, 1996, Pemaquid entered into a Shareholder Agreement with MIB and MHB. (Compl. at ¶ 19.) On August 14, 1998, United entered into a Shareholder Agreement with MIB

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and MHB. (Compl. at ¶ 53.) The Shareholder Agreements indicate that MIB "has entered into one or more Reinsurance Agreements ... with the insurance company(ies) as shown in Appendix 1 ..., all as set forth in Appendix I, pursuant to which [MIB] has reinsured certain of the liability of Insurance Company on policies of insurance ... issued to [Pemaquid or United] and its affiliates."(Alexander Cert., Exs. A & C at p. 1.) Among other promises, the Agreements bind Pemaquid and United to provide MIB with letters of credit (LOCs) or cash as collateral to secure reinsurance obligations held by MIB, and to indemnify MIB from any loss that might result from such obligations. (Compl. at ¶ 40; Alexander Cert., Exs. A & C at ¶ 3.)

The Shareholder Agreements also contain choice of forum and choice of law provisions. The pertinent clause reads: "This Agreement has been made and executed in Bermuda and shall be exclusively governed by and construed in accordance with the laws of Bermuda and any dispute concerning this Agreement shall be resolved exclusively by the courts of Bermuda."(Alexander Cert., Exs. A & C at ¶ 10.)

Five Amendments were made to Pemaquid's Shareholder Agreement between April/May 1997 and May 2001. (Alexander Cert., Ex. B; Compl. at ¶ 19.) Three Amendments were made to United's Shareholder Agreement between September 1999 and December 2000/January 2001. (Alexander Cert., Ex. D; Compl. at ¶ 53.) No Amendment involves the choice of forum or choice of law clause. Through each Amendment, however, Pemaquid and United renewed their commitments.

***3** According to Plaintiffs, in or about December 2001, Pemaquid was induced to renew its commitments despite that Legion, MIB, MHB, and MRM were aware that their respective financial situations were "significantly deteriorating" and that, in fact, the MRM Companies were facing "financial collapse." (Compl. at ¶ 42; *see also id* . at ¶¶ 43-44.)Representations by MIB, MHB, CRS, MRM, and their respective officers, employees, and agents led Pemaquid and United to believe in or about 2001 that their loss funds would be held in "segregated cells" so as to be insulated from adverse financial conditions. (Compl. at ¶¶ 45-47.) Later, Pemaquid learned that its loss funds were not maintained in segregated cells and, instead, have been offered as payment for liabilities and obligations of MRM and other MRM companies. (Compl. at ¶¶ 46-48.) Relying on these "misrepresentations and omissions," Pemaquid claims, it obtained an LOC in the amount of $600,000 from a New Jersey bank for the benefit of MIB and MHB. (Compl. at ¶ 49.) Pemaquid alleges that it would have neither renewed its commitment or obtained the LOC but for these misrepresentations and omissions. (Compl. at ¶ 50.) United generally makes the same allegations, claiming that it would not have renewed its commitment for the year 2002 or secured LOCs in the amount of $800,000 had it known the true financial circumstances surrounding Legion, MIB, MHB, and MRM. (Compl. at ¶¶ 51-55.)

Pemaquid and United claim that, based upon their Shareholder Agreements and Legion's rehabilitation status, they are entitled to underwriting profits and investment income. (Compl. at ¶¶ 57-62.) They further claim that MIB and MHB have improperly drawn upon the LOCS posted on behalf of Pemaquid and United, have diminished underwriting profits and investment income, have exposed Pemaquid and United funds to the overall deteriorating condition of MIB, MHB, MRB, and to the Rehabilitator handling the Legion matter. (Compl. at ¶¶ 63-73.)

C. The Causes of Action in the Complaint & Arguments in Support of Dismissal

Plaintiffs plead eleven causes of action in their complaint: Count One-Accounting: Count Two-Breach of Contract: Count Three-Fraud; Count FourStatutory Liability of MIB, MHB, and MRM's Officers; Count FivePromissory Estoppel/Detrimental Reliance; Count Six-Unjust Enrichment; Count Seven-Breach of Duty of Good Faith and Fair Dealing; Count Eight-Fraudulent Conveyance;

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Count Nine-Breach of Fiduciary Duty; Count Ten-Constructive Trust; and Count Eleven-Piercing the Corporate Veil. (Compl. at pp. 14-23.)

Defendants move to dismiss the complaint in its entirety on five, alternative grounds. First, Defendants argue that this Court lacks personal jurisdiction over them because they, connected in all meaningful respects to Bermuda, do not have sufficient minimum contacts with New Jersey. (Br. of Defs.' in Supp. of Mot. to Dismiss at pp. 10-15.)Second, Defendants contend that dismissal is appropriate based on the binding and enforceable forum selection clause that requires the parties to litigate all disputes in Bermuda. (*Id.* at pp. 15-21.)Third, Defendants argue that Plaintiffs are collaterally estopped from raising their claims because the New Jersey Superior Court, Chancery Division has previously dismissed this same action filed in state court for Plaintiffs' failure to establish the requisite personal jurisdiction over the Defendants or to prove that the forum selection clause should be struck as invalid. (*Id.* at pp. 22-24.)Next, Defendants seek a dismissal based on the doctrine of comity, pointing out that the Chancery Division's ruling is currently on appeal to the New Jersey Superior Court, Appellate Division and that Plaintiffs should be precluded from simultaneously litigating the same issues in two courts.(*Id.* at pp. 25-27.)Lastly, Defendants move for dismissal based on the forum non conveniens doctrine, arguing that Bermuda is the more favorable forum for this action.

***4** Because the Court finds that the forum selection clause argument is as equally compelling, if not more so, as Defendants' personal jurisdiction argument, the Court sets, at the outset, its attention on that clause in the Shareholder Agreements.

III. Forum Selection Clause

Forum selection clauses are " 'prima facie valid." ' *Carnival Cruise Lines, Inc.,* 499 U.S. 585, 589, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) (quoting *M/S Bremen v. Zapata Off-Shire Co.,* 407 U.S. 1, 9-10, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)). Absent proof of fraud, overreaching, or undue influence, a court shall enforce forum selection clauses. *M/S Bremen,* 407 U.S. at 12-13. These clauses dictate the venue for litigation unless the challenging party demonstrates that enforcement would be so inconvenient as to deprive that party of a day in court and would violate public policy. *Id.* at 18.In so challenging, Plaintiffs bear the burden of proving why they should not be bound by their contractual choice of forum. *See Jumara v. State Farm Ins. Co.,* 55 F.3d 873, 880 (3d Cir.1995) ("Where the forum selection clause is valid, which requires that there have been no 'fraud, influence, or overweening bargaining power,' the plaintiffs bear the burden of demonstrating whey they should not be bound by their contractual choice of forum."(citation omitted).) Failure to prove this burden justifies a dismissal of the action under 12(b)(6).*See Salovaara v. Jackson Nat'l Life Ins. Co.,* 246 F.3d 289, 299 (3d Cir.2001) (opining that though transfer is a more practical remedy, dismissal is nevertheless permissible:"We acknowledge that, as a general matter, it makes better sense, when venue is proper but the parties have agreed upon a not-unreasonable forum selection clause that points to another federal venue, to transfer rather than dismiss. And if a defendant moves under § 1404(a), transfer, of course, is the proper vehicle (assuming the reasonableness of the forum selection clause); *Druckers', Inc. v. Pioneer Elecs., Inc.,* 1993 WL 431162 at *2 (D.N.J.1993) ("Federal courts are afforded two different processes-transfer or dismissal-by which they may dispose of forum selection clause disputes. But when a defendant moves under Rule 12, a district court retains the judicial power to dismiss notwithstanding its consideration of § 1404.")

Here, the Shareholder Agreement's forum selection clause explicitly provides that the agreement "has been made and executed in Bermuda and shall be exclusively governed by and construed in accordance with the laws of Bermuda and any dispute concerning this Agreement shall be resolved ex-

clusively by the courts of Bermuda."Thus, the Court shall enforce the clause unless Plaintiffs prove that it is patently unreasonable. *M/S Bremen,* 407 U.S. at 12-13, 18.

Plaintiffs make several arguments. They claim that Defendants fraudulently induced them into renewing their contractual commitments to and that they had no choice but to accept the forum selection clause. Plaintiffs further claim that the forum selection clause "contravenes strong public policy given the nature and purpose of insurance and banking."(Br. in Support of Pls.' Opp. at p. 33.)By inducing Plaintiffs to procure LOCs from New Jersey banks, Defendants have compromised not just their own financial status, but also that of New Jersey insureds and claimants. (*Id.* at 33.)Lastly, Plaintiffs claim that litigation in Bermuda would be "seriously inconvenient" because they would have to try twice this matter in different jurisdictions, Pennsylvania and Bermuda, so as to fully resolve this matter among all parties. (*Id.* at 34.)

***5** After considering these arguments, this Court finds that Plaintiffs fails to satisfy "the heavy burden of proof" required to strike as invalid the forum selection clause within the Shareholder's Agreement. *Shute,* 499 U.S. at 595. This Court's findings are essentially indistinguishable from those made by the Chancery Division in the state court action. Plaintiffs have not rebutted the presumption of validity that forum selection clauses enjoy. This provision was one clause within an agreement between savvy business individuals. Plaintiffs have offered no proof that their ability to negotiate for a fair agreement was compromised in any way or that they ever objected to the choice of law/choice of forum provision. *See Nat'l Micrographics Sys., Inc. v. Canon U.S.A ., Inc.,* 825 F.Supp. 671, 675 (D.N.J.1993) (quotation omitted) (recognizing that allegations of fraud shall not invalidate a forum selection clause absent proof that "the inclusion of that clause in the contract was the product of fraud or coercion."). Indeed, the Plaintiffs agreed to several Amendments to the Shareholder Agreements in reaffirming their commitments over the course of time, yet they did not alter or challenge Bermuda as the forum choice for litigation. Specifically, Pemaquid agreed to and authorized five, unrelated Amendments between April/May 1997 and May 2001, while United consented to three such amendments between September 1999 and December 2000/January 2001. Furthermore, the Court is unpersuaded that Plaintiffs will be denied recourse if required to litigate in Bermuda. Accordingly, venue does not lie in New Jersey, and Plaintiffs' complaint is dismissed in its entirety as to Defendants MHB, MIB, MRM, and David Alexander.

Having reached the conclusion that the parties are necessarily bound by their contracted-for forum as specified in the choice of forum clause, the Court grants Defendants' motion for dismissal on this basis. Accordingly, the Court need not reach the merits of Defendants' alternative arguments in support of a dismissal, and declines to do so here.

IV. Conclusion

For the foregoing reasons, the Court grants Defendants' motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. This case is closed.

An appropriate order accompanies this opinion.

ORDER

Defendants Mutual Holdings (Bermuda) Ltd., Mutual Indemnity (Bermuda) Ltd., Mutual Risk Management Ltd., and David Alexander have filed a motion to dismiss Plaintiffs' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs have opposed the motion. Having considered the parties' written submissions, and for the reasons stated in the accompanying written opinion in this matter, IT IS

On this *3rd* day of June 2003.

ORDERED that Defendants' motion to dismiss is

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GRANTED; and it is further

ORDERED that Plaintiffs' complaint is dismissed in its entirety as to the moving Defendants; and it is further

ORDERED that this case is closed.

D.N.J.,2003.
Pemaquid Underwriting Brokerage, Inc. v. Mutual Holdings (Bermuda) Ltd.
Not Reported in F.Supp.2d, 2003 WL 24089901 (D.N.J.)

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