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CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON, SYNDICATE
NO. 2003 XLC AND SYNDICATE
NO. 0033 HIS, SUBSCRIBING TO
POLICY NO. B0595XR5938019

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LANDEC CORPORATION,
a Delaware corporation,

Plaintiff,

v.

CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON, SYNDICATE
NO. 2003 XLC AND SYNDICATE NO.
0033 HIS, SUBSCRIBING TO POLICY
NO. B0595XR5938019,

Defendants.

Case No. 2:21-cv-04274-DMG (RAOx)

REPLY BRIEF IN FURTHER SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR *FORUM NON CONVENIENS*

Date: Friday, September 17, 2021
Time: 9:30 AM
Judge: Hon. Dolly M. Gee
Ctrm: 8C – 8th Floor

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I. INTRODUCTION[1]

Landec does not deny that Underwriters have correctly presented the legal framework for a *forum non conveniens* motion based on a forum selection clause. Thus, if the Policy's New York forum selection clause remains operative, it would be mandatory, applicable, and enforceable under the circumstances of this case. Instead, Landec argues that Underwriters' motion should be denied because the Policy's forum selection clause is no longer valid. Landec's legal arguments thus turn on one key claim—that the Policy's Service of Suit clause effectively erases the Policy's New York forum selection clause. To make this claim, however, Landec must persuade the Court to ignore the Policy's actual wording, and find a "conflict" where none exists. The usual rules of policy interpretation—including interpretive canons regarding surplusage, manuscripted contract terms, and specific contract terms—demonstrate that the Policy's New York forum selection clause remains a valid part of the Policy and determine the outcome of this motion.

Landec repeatedly accuses Underwriters of misrepresenting the "true facts" to this Court and others. None of these accusations are relevant to the issues raised by Underwriters' pending motion; Landec seeks only to distract the Court with table-pounding. To be clear, however, Underwriters deny these accusations.[2]

Accordingly, this case should be dismissed in favor of the litigation already pending in New York concerning the same coverage dispute.

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[1] This brief will use the same abbreviations as the Underwriters' opening memo of points and authorities. Landec's Opposition brief (Doc. 36) will be cited as "Opp.".

[2] See the Declaration of William J. Brennan, filed herewith. Landec also spends several pages describing its coverage claim and suggesting that Underwriters improperly delayed giving their coverage position. (Opp. at 3-5). While these issues are also irrelevant to this motion, Underwriters deny Landec's characterizations.

II. THE NEW YORK FORUM SELECTION CLAUSE IS MANDATORY, APPLICABLE, AND ENFORCEABLE

Landec cites several Ninth Circuit cases concerning the standard for a *forum non conveniens* motion if the parties have not agreed to a forum selection clause. (Opp. at 8-9). Landec goes on to argue that "the private and public interests" of the parties favor selection of California as the proper forum to resolve this dispute. (Opp. at 13-15). All of these precedents and arguments miss the point, however, because the parties contracted to resolve this dispute "only" in New York and federal policy favors the enforcement of such forum selection agreements. *See Atlantic Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 571 U.S. 49, 60 (2013); *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 992 (9th Cir. 2006); *see also Smith, Valentino & Smith, Inc. v. Superior Ct.* (1976) 17 Cal.3d 491, 495, 551 P.2d 1206, 1209 (holding that California law favors enforcement of forum non selection clauses); *Carlyle CIM Agent, L.L.C. v. Trey Res. I, LLC*, 148 A.D.3d 562, 564, 50 N.Y.S.3d 326, 328 (1st Dept. 2017) (finding New York courts are required to enforce forum selection clauses under N.Y. Gen. Obl. L. §5-1402). The usual *forum non conveniens* analysis simply does not apply if the Policy's New York forum selection clause does.

As detailed in Underwriters' opening brief, the Policy's New York forum selection clause is mandatory, applicable to this dispute, and enforceable under federal law. (Opening Br. at 7-11). Underwriters also noted that Landec bears the burden of proving that the forum selection clause is not enforceable. (Opening Brief at 7). With one exception, Landec's Opposition does not oppose any of these arguments or attempt to carry its burden of showing that the forum selection clause is unenforceable. Landec has therefore conceded these issues.

The one exception is Landec's argument in Section III.C.2 of Landec's Opposition, which briefly argues that the public interest factors disfavor enforcement and that California's public policy precludes enforcement. (Opp. at 14). These arguments, however, are factually and legally meritless, and fail to show that this is "the

most exceptional case[]" in which a mandatory forum selection clause should not be given controlling weight. *Atlantic Marine*, 571 U.S. at 60, 63.

First, Landec's public interest argument is based on a number of erroneous factual claims about both private and public interests. Landec asserts, for example, that sending this case to New York would unfairly burden New York because that has "no relationship to either party." This is not only factually inaccurate—Landec does business in New York and the Policy's coverage applied to Landec's products in New York—New York's express public policy *favors* having disputes like this one take place in New York courts. *See* N.Y. Gen. Obl. L. §5-1402. Landec also asserts that California law would apply to this dispute, and "materially all of [the conduct at issue] occurred within the borders of California." Again, these claims are inaccurate. The Policy states it will "be governed by and construed in accordance with the law of New York," so this factor too favors New York. And finally, most of the conduct at issue occurred *outside* California—this coverage dispute concerns the contamination of produce packed in an Ohio plant that caused a product recall in Canada ordered by the Canadian government, resulting in a loss of Landec's business in Canada; and the Policy was negotiated and delivered in London.[3] Because these public interest factors are either neutral or weigh in favor of New York, Landec has failed to prove that the "public-interest factors overwhelmingly disfavor" enforcement of the Policy's forum selection clause. *Atlantic Marine*, 571 U.S. at 67.

Second, Landec does not acknowledge that it must identify a specific, "strong" public policy to overcome the enforcement of a mandatory forum selection clause. (Opp. at 14). Instead, the public policies that Landec relies on are California's generalized interest in interpreting insurance contracts issued in California and a difference in available remedies in New York. These are not the type of "strong" public

[3] The inaccuracy of Landec's claims about the negotiation and delivery of the Policy is detailed in section IV, *supra*.

policies that the Ninth Circuit allows to override the public policy favoring enforcement of forum selection clauses. For example, in *Lewis v. Liberty Mut. Ins. Co.*, the Ninth Circuit held that the selected forum must only provide "some remedy" and rejected the argument that a forum's "less favorable" law was a basis to avoid enforcement. 953 F.3d 1160, 1167 (9th Cir. 2020). Thus, "courts must enforce a forum-selection clause unless the contractually selected forum affords the plaintiffs no remedies whatsoever." *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1092 (9th Cir. 2018); *see also Atlantic Marine*, 571 U.S. at 66 n.8 (enforcing a forum selection clause in a situation where that results in the dismissal of a plaintiff's claim "would work no injustice" if "the plaintiff has violated a contractual obligation by filing suit in a forum other than the one specified in a valid forum-selection clause").

III. LANDEC'S "SERVICE OF SUIT" ARGUMENT IS MERITLESS

Because Landec cannot refute Underwriters' arguments about the controlling effect of the forum selection clause, Landec argues instead that the forum selection clause should be given no effect. To do so, Landec claims that the Policy's Service of Suit clause "expressly states that Lloyd's will submit to the jurisdiction of *any* court of competent jurisdiction." (Opp. at 2 (emphasis added)).[4] According to Landec, this supposed agreement in the Service of Suit clause to submit to jurisdiction anywhere supersedes the Policy's forum selection wording that provides that litigation can "only" be filed in New York and the agreed jurisdiction "must be a court of competent jurisdiction in New York." (Doc. 30-1, at 4 & 38 of 41). Landec's argument, however, is deeply flawed.

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[4] When Landec quotes the Service of Suit clause, it does so correctly, using "a court." (E.g., Opp. at 1, 9). When Landec omits quotation marks and characterizes the Service of Suit clause, however, it uses "any court." (Opp. at 1, 2, 9).

A. The Policy's Service of Suit Clause Requires Underwriters to Appear Before *A* Court in the United States, Not *Any* Court in the United States

Landec departs from the Policy's actual wording when it claims that the Policy's Service of Suit clause commits Underwriters to appear before "any" court. (Opp. at 1, 2, 9). The Policy's Service of Suit clause is a pre-printed form—LMA5020, dated 14/09/2005 and originally drafted by the Lloyd's Market Association—and serves several functions including, most obviously, allowing for service of suit against a foreign insurer. (Doc. 30-1 at 15 of 41). Unlike other versions of the Service of Suit clause, this version states that the Underwriters "will submit to the jurisdiction of *a* Court of competent jurisdiction within the United States," and not as Landec suggests "*any* Court." This distinction is important because the Policy's actual wording of "a court" obviously allows for a much narrower meaning, especially when a single forum is elsewhere identified in the Policy.

B. The Service of Suit Clause and General Condition P Both Appear on Forms

Landec next makes the tendentious claim that the Service of Suit clause controls because it is an "endorsement" while the forum selection clause is located in a "form." (Opp. at 9-10). The sharp distinction between endorsements and forms that Landec assumes, however, does not exist.[5] Both the Service of Suit clause and Policy's General Condition P ("Choice of Law and Jurisdiction") are obviously printed forms that would be issued to many different insureds; there is no reason to believe either one supersedes the other. Moreover, Landec's conclusory characterization of the Service of Suit clause as an "endorsement" conflicts with the Policy's own terminology—the Policy's Risk

[5] The lack of a consistent difference between forms and endorsement is confirmed by Landec's reliance on the IRMI definition of "endorsement" as "an insurance policy *form* that either changes or adds to the provisions included in one or more *other forms* used to construct the policy …." (Opp. at 10 n.2 (emphases added)).

Details lists the Policy's component parts, and while other parts of the Policy are described as "Endorsements," the Service of Suit clause is not. (Doc. 30-1 at 3, 22 of 41). Thus, even if Landec's form/endorsement distinction were valid, it would cut against Landec's position in this case.[6]

C. The General Service of Suit Clause Does Not Conflict with the Specific New York Forum Selection Clause

In order to negate the Policy's forum selection clause, Landec insists that the Policy's Service of Suit clause creates an irreconcilable conflict with the forum selection clause. Landec makes no attempt to explain why these provisions cannot be harmonized, however. In fact, as several courts have already found, these provisions are complementary, and do not conflict at all.

Because New York is part of the United States, the forum selection clause's specific choice of a New York forum easily harmonizes with Underwriters' generic agreement in the Service of Suit clause to "submit to the jurisdiction of a Court of competent jurisdiction within the United States." The obvious interpretation of these provisions is that the Service of Suit clause generally obligates Underwriters to submit to the jurisdiction of a court in the United States, while the Policy's forum selection clause refines that agreement by specifying a particular form where the parties agree to litigate. *See Chaly–Garcia v. United States*, 508 F.3d 1201, 1204 (9th Cir. 2007) (relying on presumption "that every provision [of a contract] was intended to

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[6] Some cases do find that a provision's inclusion on an endorsement impacts how it is interpreted in case of a conflict with the other printed parts of a policy. This, however, is typically because those endorsements openly state an intent to supersede other policy components. For example, in *Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.*, 88 F. Supp. 3d 1156 (S.D. Cal. 2015), a case much relied on by Landec, the Service of Suit clause appeared in a form that began: "This endorsement modifies the insurance coverage form(s) that have been purchased by you and evidenced as such on the Declarations page." *Id.* at 1165. No such language appears in the Policy's Service of Suit clause.

accomplish some purpose, and that none are deemed superfluous." (citation and internal quotation omitted)).

The Southern District of New York adopted this very interpretation of a materially identical Service of Suit clause in *Dornoch Ltd. ex rel. Underwriting Members of Lloyd's Syndicate 1209 v. PBM Holdings, Inc.*, 666 F. Supp. 2d 366, 370 (S.D.N.Y. 2009). The *Dornoch* court rejected the "contradiction" argument Landec advances here, finding that "the clauses are perfectly complementary: the Service of Suit Clause merely ensures that Underwriters are subject to suit in the United States, and the Forum Selection Clause, in turn, designates the forum in which any disputes between the parties are to be litigated, namely, the state and federal courts of New York." *Dornoch*, 666 F. Supp. 2d at 370. *See also Connor Group v. Certain Underwriters at Lloyd's, London*, 2018 WL 2937443, at * 4 (S.D. Ohio June 12, 2018) (following *Dornoch*). The *Dornoch* Court also noted that "since the endorsement containing the Service of Suit Clause does not include any language purporting to overrule or modify the Forum Selection Clause, the two clauses should not be read as inconsistent but as compl[e]mentary." *Dornoch*, 666 F. Supp. 2d at 370. Similarly, in *Certain Underwriters at Lloyd's v. New Dominion, LLC,* 2016 WL 4688866 (S.D.N.Y. Sept. 7, 2016), the court addressed a coverage dispute where the policy contained both a Service of Suit clause with "a court" wording and a New York forum selection clause. *Id*. at *3-4. The Southern District of New York ruled that these provisions meant that the coverage litigation should take place in New York, explaining:

> Because the Policy contains an enforceable [New York] forum selection clause, the Oklahoma Action was brought in the wrong forum. . . . Read together with the forum selection clause, Lloyd's is required to accept service of process in any jurisdiction in the United States when [the insured] claims it is owed a specific amount, even if such an action is filed

in an improper forum, but also has a right to either move to transfer that case to New York, or file its own action in New York.

Id. These three precedents—*Dornoch*, *Connor Group*, and *New Dominion*—confirm that there is no conflict or contradiction between Policy's New York forum selection clause and the Service of Suit that would requiring reading one of those provisions out of the Policy.

Even more authority supports Underwriters' position in the analogous situation of service of suit clauses that co-exist with policy terms that select an arbitral forum. *See, e.g., Century Indem. Co. v. Certain Underwriters at Lloyd's, London, subscribing to Retrocessional Agreement Nos. 950548, 950549, 950646*, 584 F.3d 513, 554 (3d Cir. 2009) ("But service-of-suit clauses do not negate accompanying arbitration clauses; indeed, they may complement arbitration clauses by establishing a judicial forum in which a party may enforce arbitration."); *Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n (Bermuda)*, 79 F.3d 295, 298 (2d Cir. 1996) ("The principal effect of the New York Suable Clause is to resolve the issue of personal jurisdiction over a foreign association...."); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971) ("The assent of the insurer to jurisdiction does not prevent it from raising [an arbitration] defense based on policy terms."); *City of Anaheim v. Philadelphia Ins. Companies,* 2017 WL 5592894, at *3 (C.D. Cal. Sept. 14, 2017).

D. The New York Forum Selection Clause Would Prevail Over the Service of Suit Clause in Case of a Conflict

Moreover, even if there were an irreconcilable conflict between these Policy terms—and there is not—the New York forum selection clause would prevail over the Service of Suit clause under the canons of contract interpretation governing surplusage, manuscripted contract terms, and specific contract terms.

First, Landec proposes no alternative meaning for the Policy's forum selection wording. It seeks only to nullify it entirely. Such an interpretation is heavily disfavored.

"Courts interpreting the language of contracts should give effect to every provision, and an interpretation which renders part of the instrument to be surplusage should be avoided." *Flores v. Barr*, 934 F. 3d 910, 915 (9th Cir. 2019) (internal quotation marks omitted). Landec's proposed nullification is therefore an unreasonable interpretation as a matter of law.

Second, the key language of the forum selection clause appears in the Policy's manuscripted Risk Details, which, together with the manuscripted Schedule, serves as the Policy's declarations. *See* Croskey et al., *California Practice Guide: Insurance Litigation*, Anatomy of Insurance Policy Ch. 3-C ¶3:41.5 (explaining that the declarations page "[i]dentifies the named insured, policy period, policy limits and any deductible or self-insured retention; and lists the forms and endorsements that comprise the policy"); *id*. at ¶3.42 ("The declarations page(s) is a "manuscript" … even if the rest of the policy is a preprinted form[;] [i]ts principal function is to customize the policy for the particular insured and the specific risk(s) covered by the policy."). Because the Policy's designation of New York law to govern their disputes and the selection of a New York forum to litigate in appear in a manuscript section of the Policy, these provisions would supersede any contrary provision in a preprinted form, such as the Service of Suit clause. *See Lomax Transp. Co. v. United States*, 183 F.2d 331, 333 (9th Cir. 1950)("[I]t is well settled that, where a special clause has been written into a prepared printed form contract, it will prevail over any inconsistent provisions contained in the printed portion"); *Cont'l Cas. Co. v. Phoenix Constr. Co*., 46 Cal. 2d 423, 431 (1956) ("[U]nder the provisions of section 1651 of the Civil Code, the written or specially prepared portions of a contract control over those which are printed or taken from a from."); 22 N.Y. Jur. 2d Contracts § 249; *California Practice Guide: Insurance Litigation* at ¶4.271 ("Provisions specially negotiated and drafted for a particular policy ('manuscript' provisions) control over 'standardized' provisions in the policy form."); 11 *Williston on Contracts* § 32:13 (4th ed.) ("When … the printed contract provisions irreconcilably conflict with the provisions added by the parties, the added provisions

will control … [and] any doubt as to the reasonable meaning of the contract will be controlled by the added provisions.").[7] *Cf.* UCC §3-114 ("If an instrument contains contradictory terms, typewritten terms prevail over printed terms ….").

And finally, Landec's attempt to erase the forum selection clause must fail because the specific language of the forum selection clause ("shall only be brought in [New York]") would prevail over the general language of the Service of Suit clause ("a court of competent jurisdiction within the United States"). "[I]f there is an inconsistency between a general provision and a specific provision of a contract, the specific provision controls." *Bank of Tokyo-Mitsubishi, Ltd., New York Branch v. Kvaerner a.s.*, 243 A.D.2d 1, 8, 671 N.Y.S.2d 905, 910 (1998); *Kavruck v. Blue Cross of California*, 108 Cal. App. 4th 773, 781, 134 Cal. Rptr. 2d 152, 157 (2003) ("In the interpretation of insurance contracts, 'a specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, even though the latter, standing alone, would be broad enough to include the subject to which the more specific provision relates.'" (quoting *General Ins. Co. v. Truck Ins. Exch.* (1966) 242 Cal.App.2d 419, 426, 51 Cal. Rptr. 462). Thus, "according to traditional canons of statutory [*sic*] construction, the general language in the "Subject to Service of Suit Clause" would need to give way to the more specific mandate of the forum selection clause." *London Mkt. Insurers v. Musket Corp.*, 2017 WL 8218282, at *2 (C.D. Cal. Apr. 11, 2017).

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[7] Cal. Civ. Code § 1651 provides:

> Where a contract is partly written and partly printed, *or where part of it is written or printed under the special directions of the parties, and with a special view to their intention*, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, *the written parts control the printed parts, and the parts which are purely original control those which are copied from a form*. And if the two are absolutely repugnant, the latter must be so far disregarded. (emphases added).

As all of the applicable interpretative canons point *against* the proposed contract interpretation underlying Landec's Opposition, the Court should reject Landec's nullification interpretation of these provisions.

E. Landec Relies on Inapposite and Distinguishable Cases

Landec argues that "proper interpretation" of the Policy's New York forum selection clause and Service of Suit clause is laid out in *Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co*., 88 F. Supp. 3d 1156, 1165 (S.D. Cal. 2015), and then cites seven more cases to show that show that "the great weight of authority" supports its motion. (Opp. at 10-12). These cases, however, all fail to support Landec's position given the distinct wording of the Policy at issue.

In *Tri-Union*, the court reviewed an insurance policy with a "provision [that] unambiguously designate[d] New York as the parties' chosen forum to litigate disputes." *Tri-Union*, 88 F. Supp. 3d at 1162. The *Tri-Union* policy also contained a Service of Suit clause that committed the insurer to "submit to the jurisdiction of a court of competent jurisdiction within the United States." *Id*. While that wording is identical to the Policy's, the Service of Suit clause was added to the *Tri-Union* policy by an endorsement that stated, "This endorsement modifies the insurance coverage form(s) that have been purchased by you and evidenced as such on the Declarations page." *Id*. The *Tri-Union* court cited five federal cases holding that a Service of Suit clause had authorized the insured to choose the forum in which to bring suit, and concluded that the forum selection clause and Service of Suit clause conflicted. *Id*. The court then reconciled this "conflict" by holding that the Service of Suit clause superseded the forum selection clause because it was contained in an endorsement that expressly modified the rest of the policy. *Id*. at 1164-65. The *Tri-Union* decision, however, is both factually distinguishable and poorly reasoned.

First, the *Tri-Union* decision is factually distinguishable because its holding was based on the fact that the endorsement with the Service of Suit language expressly stated

it was modifying the rest of the policy.[8] *Tri-Union*, 88 F. Supp. 3d at 1164-65. Absent that finding, the court would not have been able to nullify the forum selection clause. Here, however, the Policy's Service of Suit clause was not added by endorsement and contains no similar language indicating an intent to modify the rest of the Policy. Thus, *Tri-Union* cannot support Landec's suggestion that the Court should simply ignore the Policy's forum selection clause in this case.[9]

Second, the *Tri-Union* court's legal reasoning is obviously flawed. The Tri-Union court claimed that "[w]hen interpreting almost identical language in other service of suit provisions, federal courts have consistently found such language unambiguously permits the insured to choose which forum to bring suit" and cited five cases.[10] *Tri-Union*, 88 F. Supp. 3d at 1162-63. Each of the cases located by the *Tri-Union* court, however, involved the interpretation of a Service of Suit clause that committed the insurer to appear in "any court" of competent jurisdiction, and not the wording found in the policy at issue, "a court." Moreover, none of these precedents involved a policy that contained *both* a Service of Suit clause *and* a forum selection clause. None of those precedents was therefore capable of providing guidance on harmonizing those two

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[8] The *Tri-Union* court summarized the grounds for its ruling as follows: "Thus, the plain language of the Service of Suit Endorsement unambiguously states in two separate places … that the Endorsement changes the Policy to correspond with the Endorsement's provisions." *Tri-Union*, 88 F. Supp. 3d at 1164-65.

[9] *Tri-Union* is also factually distinguishable from this case because the specific forum selection language it analyzed was included in a form, rather than a manuscripted section of the policy, as in the present case. *Tri-Union* at 1162; Section II.C, *supra*.

[10] The precedents relied on by the *Tri-Union* court are: *Dinallo v. Dunav Ins. Co.*, 672 F.Supp.2d 368, 370 (S.D.N.Y. 2009); *Perini Corp. v. Orion Ins. Co.*, 331 F. Supp. 453, 454 (E.D. Cal. 1971); *City of Rose City v. Nutmeg Insurance Company*, 931 F.2d 13, 15 (5th Cir. 1991), *Kashama v. Century Ins. Grp.*, 2009 WL 1312940, at *2 (N.D. Cal. May 12, 2009); and *Triad Mech., Inc. v. Coatings Unlimited, Inc.*, 2007 WL 2713842, at *2 (D. Or. Sept. 12, 2007).

provisions. The *Tri-Union* court, however, did not recognize that it was reasoning from precedents that addressed materially distinct language. By failing to analyze the difference between agreeing to appear in "any court" in the United States, as opposed to "a court" in the Service of Suit term *when a specific court forum was chosen in a separate forum selection clause*, the *Tri-Union* court interpreted the policy before it to create an unnecessary "conflict" between these policy terms. The Court should decline Landec's invitation to follow *Tri-Union* and so interpret the Policy to create conflicts that do not appear on any reasonable reading of the relevant wording.

Landec repeats the mistake made by the *Tri-Union* court. Three of the cases cited by Landec on this issue (*Dinallo*, *Kashama*, and *Perini*) are cases cited by Tri-Union and therefore inapposite for the reasons noted above. Two more cases cited by Landec share the same defects—the service of suit clause at issue used the phrase "any court" and the policies at issue did not contain a forum selection clause identifying a specific jurisdiction as the only forum for litigation.[11] Notably, the court in *Appalachian Ins. Co. v. Superior Ct.*, 162 Cal. App. 3d 427 (Ct. App. 1984), explained its decision by "stress[ing] the critical distinction between this case and cases which have enforced contractual clauses which achieve certainty and predictability by providing for a specific forum," *i.e.*, a forum selection clause, and suggested that it would have enforced a specific choice of jurisdiction had the parties included one in that policy. *Id.* at 439. The final two cases cited by Landec addressed service of suit clauses using the phrase "any court," but did have forum selection clauses. The courts in these cases, however, grounded their decisions squarely on the fact that these clauses were added to the policies at issue via a form endorsement that expressly warned that this language changed the rest of the policy.[12]

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[11] *See Appalachian Ins. Co. v. Superior Ct.*, 162 Cal. App. 3d 427, 437–38, (Ct. App. 1984); *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 195 N.J. 231, 243 (2008).

[12] *See Rembrandt Enterprises, Inc. v. Illinois Union Ins. Co.*, 129 F. Supp. 3d 782, 786 (D. Minn. 2015) ("The Endorsement begins by declaring, in bolded and capitalized

Accordingly, none of these cases provide any guidance for the instant case, where the Policy's Service of Suit clause uses the phrase "a court," the Service of Suit was not added via endorsement and does not purport to change the rest of the Policy, and the Policy's manuscripted sections specifically designate New York as the sole proper forum for litigation. Landec's cases therefore either support Underwriters' position or are inapposite.

Since Landec's arguments seeking to avoid the forum selection clause are uniformly meritless, the Court should enforce the parties' written agreement to select New York as the exclusive forum for litigation and dismiss Landec's Complaint.

IV. LANDEC'S ARGUMENTS MISREPRESENT THE FACTS

In the course of its arguments, Landec makes a number of claims that are inaccurate or unsupported. While most of these issues are not material to Underwriters' motion, and undersigned counsel would prefer to avoid who-said-what quarrels about informal conversations, Underwriters also do not wish to leave Landec's claims uncorrected and risk misleading the Court.

First, Landec asserts that Underwriters made "misrepresentations" and "false" representations to Landec and this Court and then raises a flurry of objections and accusations based on this supposed "fact." (Opp. at 1, 2, 5-6). Specifically, Landec charges that "[i]n a meet and confer and subsequent responsive filing, Lloyd's argued that this Court lacked subject matter jurisdiction, representing that one or more of the members of the Lloyd's syndicate were not diverse parties with Landec and thus diversity jurisdiction was not met." (Opp. at 5-6). Landec has two pieces of evidence to

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letters: '**THIS ENDORSEMENT CHANGES THE POLICY, PLEASE READ IT CAREFULLY.**'" (emphasis original)); *Hazelwood Logistics Ctr. LLC v. Illinois Union Ins. Co.*, 2014 WL 805886, at *2 (E.D. Mo. Feb. 28, 2014) ("In plaintiff's policy, the service of suit endorsement expressly and conspicuously states that it changes the policy.").

support these allegations, Underwriters' filing of Document 22 and a statement by Mr. Gardiner (Doc. 36-1) claiming that, "On July 2, 2021, counsel for Lloyd's represented on a meet and confer call that the citizenship of one or more of Lloyd's syndicates or their members would defeat diversity jurisdiction."

Landec then argues that Underwriters' decision to file this *forum non conveniens* motion means that Underwriters have "abandoned" their right to challenge subject matter jurisdiction, and "establish[es] that its initial representations to Landec and this Court were false." Landec even claims that "[a]s a result of Lloyd's representation to … this Court that its non-public membership information would defeat diversity jurisdiction, Landec filed" the California State Action. (Opp. at 6; *see also* Opp. at 2 ("Landec initially accepted Lloyd's representation, assuming a company would not make a misrepresentation to a federal district court, and filed a California state court action.")).

Landec is wrong about all of this. In fact, Underwriters in Document 22 plainly did not "represent[] that one or more of the members of the Lloyd's syndicate were not diverse parties with Landec and thus diversity jurisdiction was not met." And, as detailed in the Declaration of William J. Brennan, filed herewith, Landec misdescribes the July 2, 2021 "meet and confer" conversation. Underwriters continue to stand behind their statements in that conversation and to this Court. Underwriters' choice to move to dismiss for *forum non conveniens* rather than under Rule 12(b)(1) is not proof of wrongdoing; it is an option that this Court authorized in Document 25 ("Defendants may file a motion to dismiss for lack of subject matter jurisdiction *or for improper venue*.") that has also been approved by the Supreme Court. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). Underwriters' choice to raise the proper forum issue first does not abandon anything—the existence of subject matter jurisdiction would still have to be determined if this case is not dismissed. *See* Fed. R. Civ. P. 12(h) (no waiver of Rule 12(b)(1) defense). Remarkably, even Landec's claim

about its own conduct is wrong—it is not possible that Landec filed the California State Action on July *2*, 2021, "[a]s a result of" the filing of Document 22 on July *8*, 2021.

Second, Landec claims—again, without any evidence—that "the parties negotiated, paid for, and delivered the Policy in California." (Opp. at 13). Tellingly, however, Landec's factual claim is not only unsupported, it is inaccurate. The Policy itself notes that Landec's renewal submission was prepared by Besso Limited, a London insurance broker, and supplied to Underwriters, who also operate in London, by email dated April 20, 2019.[13] (Doc. 30-1 at 6 of 41). A copy of that email is attached to the Declaration of William J. Brennan. This email shows that Landec's renewal submission was sent by Landec's broker, Neil Starling of Besso's London office, to Shaun Russ, a Senior Underwriter for Syndicate 2003's managing agent, who also works in London. This email, combined with subsequent communications between Mr. Starling and Mr. Russ, indicates that the Policy was negotiated and delivered in London.[14] Thus, while Landec asserts that "materially all of [the conduct at issue] occurred within the borders of California," (Opp. at 14), the facts show that this case presents a thoroughly international dispute, not localized in California, involving an insurance policy negotiated and issued in London by two London-based insurers to a corporation incorporated in Delaware and headquartered in California that does business across the United States and Canada, concerning the contamination of produce packed in an Ohio

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[13] Besso Limited is a UK corporation, based in London. According to its website (https://www.besso.co.uk/web/), Besso also has offices in Turkey and Brazil. Underwriters are not aware of any indication that Besso has ever had an office in California and the Policy specifies that documents relating to the Policy and claims are to be maintained by Besso in London. (Doc. 30-1 at 5 of 41).

[14] The references in Exhibit B to the "PPL" are to a digital system used in the Lloyd's Market for negotiating and delivering policy-related document electronically. *See* https://placingplatformlimited.com/. It is likely that payment was also made in London as well, but the undersigned has not attempted to obtain the documents needed to investigate that issue.

plant that caused a product recall in Canada ordered by the Canadian government, resulting in a loss of business in Canada.

While other examples of misstatements and exaggerations could be added, Landec's decision to fill its Opposition with irrelevant complaints and baseless accusations only underscores its inability to present the Court with any meritorious arguments against Underwriters' motion.

V. CONCLUSION

Underwriters respectfully request that the Court dismiss this action, based on the mandatory forum selection clause in the Policy which requires Landec to litigate this dispute only in the State of New York.

DATED: September 3, 2021

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