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9
 10 **UNITED STATES DISTRICT COURT**
 11 **CENTRAL DISTRICT OF CALIFORNIA**

12 LANDEC CORPORATION,
13 a Delaware corporation,

14 Plaintiff,

15 v.

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

18 Defendants.

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

**PLAINTIFF’S OPPOSITION TO
 DEFENDANTS’ MOTION TO
 DISMISS FOR *FORUM NON
 CONVENIENS***

*[FILED CONCURRENTLY WITH
 DECLARATION OF D. GARDINER]*

Judge: Hon. Dolly M. Gee
 Hearing Date: September 17, 2021
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 Location: Courtroom IC – 8th Floor

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TABLE OF AUTHORITIES

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CASES

Appalachian Ins. Co. v. Superior Ct.,
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Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas,
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Bank of the W. v. Superior Court,
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Bay Cities Paving Grading, Inc. v. Lawyers’ Mutual Ins. Co.,
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Boghos v. Certain Underwriters at Lloyd’s of London,
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Carijano v. Occidental Petroleum Corp.,
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Cates Constr., Inc. v. Talbot Partners,
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Century Indem. Co. v. Bank of Am.,
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Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.,
195 N.J. 231 (2008)..... 12

Connor Group v. Certain Underwriters at Lloyds, London,
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DePuy Synthes Sales Inc. v. Stryker Corp.,
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Derosa v. Thor Motor Coach, Inc.,
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Dinallo v. Dunav Ins. Co.,
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7 *Ford Motor Co. v. Ins. Co. of N. Am.*,
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9 *Frontier Oil Corp. v. RLI Ins. Co.*,
 10 153 Cal. App. 4th 1436 (2007)..... 10

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17 *Hazelwood Logistics Ctr. LLC v. Illinois Union Ins. Co.*,
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21 *Kransco v. Am. Empire Surplus Lines Ins. Co.*,
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23 *Manzarek v. St. Paul Fire & Marine Ins. Co.*,
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25 *Murphy v. Schneider Nat’l, Inc.*,
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27 *Perini Corp. v. Orion Ins. Co.*,
 28 331 F. Supp. 453 (E.D. Cal. 1971)..... 11, 12

Piper Aircraft Co. v. Reyno,
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15 **OTHER AUTHORITIES**

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 17 <https://www.irmi.com/term/insurance-definitions/endorsement>..... 10
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1 Plaintiff Landec Corporation (“Landec”) respectfully submits this
2 memorandum of law in support of its Opposition to Defendants’ Motion to
3 Dismiss for *Forum Non Conveniens*.¹

4 I. INTRODUCTION

5 The Lloyd’s insurance policy that Landec paid for contains an endorsement
6 stating that in the event Lloyd’s doesn’t pay a covered claim, Landec may sue
7 Lloyd’s, and Lloyd’s promised to “submit to the jurisdiction of a Court of
8 competent jurisdiction within the United States.” After Lloyd’s wrongfully refused
9 to cover over \$5 million in losses Landec sustained in connection with a July 2019
10 product recall, Landec did exactly that—it brought this lawsuit in this Court, which
11 is “a Court of competent jurisdiction within the United States.” Lloyd’s now
12 breaches the insurance policy again by failing to stand by its promise to “submit to
13 a Court of competent jurisdiction within the United States,” and instead moves to
14 dismiss the Complaint claiming this forum is not convenient despite the fact that:
15 (a) the insured is in California, (b) the policy was purchased in California, (c) most
16 of the key witnesses are in California, (d) this Court has diversity jurisdiction, and
17 (e) this case is the first case to be filed concerning this dispute.

18 Lloyd’s argues another part of the form policy provides that venue should be
19 in New York. This argument is contrary to case law which holds that in such
20 circumstances, a policy endorsement authorizing litigation in any court of
21 competent jurisdiction will override a forum selection clause in the form of the
22 policy. *Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.*, 88 F. Supp. 3d
23 1156, 1165 (S.D. Cal. 2015) (“the Service of Suit Endorsement modifie[s] the
24 forum selection clause so that the plain language of the Policy unambiguously
25 permits Plaintiff to bring suit in a forum of its choosing.”).

26
27 ¹ Policy No. B0595XR5938019 (the “Policy”) is Exhibit 1 to the FAC. Defendants
28 are two Lloyd’s underwriting syndicates that subscribed to the Policy: Syndicate
No. 2003 XLC and Syndicate No. 0033 HIS. For purposes of this motion,
Landec refers to both syndicates collectively as “Lloyd’s.”

1 Lloyd’s argument that Landec is engaging in forum shopping is meritless
2 and borders on gas-lighting because Lloyd’s is the party that has forum-shopped
3 and made misrepresentations to various courts. After Landec filed its initial
4 Complaint, Lloyd’s requested an extension of the deadline to respond to Landec’s
5 Complaint, and used that time to draft and file a duplicative suit in New York state
6 court. This Court then issued a *sua sponte* Order to Show Cause, inquiring as to
7 whether the Court had diversity jurisdiction. In response, Lloyd’s represented to
8 both Landec and this Court that federal diversity jurisdiction was lacking because
9 of the residency of one of its members. Landec initially accepted Lloyd’s
10 representation, assuming a company would not make a misrepresentation to a
11 federal district court, and filed a California state court action. Landec later
12 discovered that Lloyd’s represented to a federal court in New York that all of its
13 members “are all foreign corporations with their principal places of business
14 located outside the United States,” fully contradicting the representations made to
15 this Court. Landec then filed this First Amended Complaint (“FAC”), citing
16 Lloyd’s representations in New York about the residency of its members. Lloyd’s
17 has now abandoned its argument that the Court does not have subject matter
18 jurisdiction, thus establishing that its initial representations to Landec and the
19 Court were false.

20 Lloyd’s now argues that the FAC should be dismissed for *forum non*
21 *conveniens*. In so doing, Lloyd’s asks the Court to ignore the Policy’s Service of
22 Suit endorsement that expressly states that Lloyd’s will submit to the jurisdiction
23 of any court of competent jurisdiction, and to instead enforce the contradictory
24 statement in the policy that venue should be in New York. Lloyd’s does not even
25 attempt to address the recent, on-point decision by the United States District Court
26 for the Southern District of California.

27 Landec has always been transparent with the Court and Lloyd’s—it believes
28 the coverage litigation should occur in California. This is the state in which

1 Landec resides, where the policy was purchased, where most of the key witnesses
 2 reside, and the state with a firm policy interest in ensuring that insurance contracts
 3 negotiated in the State are interpreted consistent with California law. New York
 4 has no connection to this case, other than a forum selection clause that was
 5 overridden by an endorsement. Lloyd’s clearly prefers to litigate in New York
 6 because it believes New York law is more favorable to insurance carriers and New
 7 York law may prohibit one of Landec’s claims. A party’s strategic preferences,
 8 however, are not relevant to the *forum non conveniens* analysis. Lloyd’s should
 9 never have issued the Policy, nor should it have accepted Landec’s premiums, if it
 10 was not willing to abide by its promise to “submit to the jurisdiction of a Court of
 11 competent jurisdiction within the United States.”

12 **II. BACKGROUND**

13 **A. Landec Purchases Insurance To Cover Losses Arising From** 14 **Potential Product Recalls**

15 Landec is a leader in creating new products that advance health and wellness
 16 by designing, developing, manufacturing, and selling differentiated items for food
 17 and biomaterials markets. FAC ¶ 18. Landec is made up of a portfolio of six
 18 brands, one of which is the natural food company Curation Foods, Inc., based in
 19 Santa Maria, California, which sells prepacked salads under its Eat Smart Brand.
 20 *Id.* ¶ 18–20.

21 Because Landec operates in the highly regulated food and agricultural
 22 industry, it purchases—and depends on the availability of—product contamination
 23 insurance to cover the risk of financial loss that would arise if regulators like the
 24 United States FDA or the Canadian Food Inspection Agency (“CFIA”) issues a
 25 product recall. *Id.* ¶¶ 23–30. Landec purchased from Lloyd’s the Policy at issue, a
 26 Product Contamination Insurance Policy, to cover the period May 31, 2019
 27 through May 31, 2020. *Id.* ¶ 31. The Policy has a \$5,000,000 limit of liability,
 28 subject to a \$500,000 retention. *Id.*

1 On July 8, 2019—two months after Landec bought the Policy—the CFIA
2 notified Landec that it received a positive test for the presence of *Listeria*
3 *monocytogenes* (“Lm”) in the 28 ounce bag of the Eat Smart® Sweet Kale Salad
4 Kit. *Id.* ¶ 51. On July 9, 2019, the CFIA initiated a public recall to all Canadian
5 stores for Landec’s Sweet Kale Salad Kit (“July 2019 Recall”). *Id.* Despite its
6 quick and decisive action to address the July 2019 Recall, Landec was forced to
7 adjust customer sales orders and provide customers with credits and
8 reimbursements, incur public relations and legal costs as a result of the recall, and
9 increase its trade spend expenses following the recall to maintain its market share
10 and sales. *E.g., id.* Ultimately, Landec lost a great deal of profit and business on
11 the recalled product and other products that customers did not purchase because of
12 the July 2019 Recall. *Id.* ¶¶ 54–55.

13 **B. Lloyd’s Refuses To Honor Its Obligations Under The Policy**

14 Landec promptly notified Lloyd’s of the July 2019 Recall on July 9, 2019, in
15 compliance with the terms of the Policy, and requested coverage for all resulting
16 losses (the “Claim”). *Id.* ¶ 56. Landec fully cooperated with Lloyd’s and its
17 adjuster and furnished them with information on the July 2019 Recall. *Id.* ¶ 58.
18 On July 13, 2020, a full year after Landec tendered the Claim to Lloyd’s and began
19 cooperating with its investigation, Lloyd’s informed Landec for the first time that
20 its losses resulting from the July 2019 Recall were allegedly not covered under the
21 Policy. *Id.* ¶ 60. The denial issued by Lloyd’s mainly relied on a strained
22 interpretation of the Policy and the facts: that Landec’s losses did not arise “solely
23 and directly” from the July 2019 Recall. *Id.* Instead, Lloyd’s alleged that
24 Landec’s losses are not covered because they arise from two earlier product recalls
25 in December 2018 and February 2019 involving different products. *Id.*

26 **C. Landec Sues Lloyd’s For Breach Of Contract And Bad Faith**

27 Landec has firmly stated throughout and following Lloyd’s analysis of its
28 coverage obligations under the Policy that Lloyd’s was obligated—up to the full

1 limits of liability under the Policy—to indemnify Landec’s losses resulting from
2 the July 2019 Recall. Lloyd’s could have initiated litigation before May 2021, but
3 chose not to do so, instead refusing to negotiate in good faith with Landec.

4 On May 21, 2021, Landec initiated this action to resolve the parties’
5 coverage dispute. The Policy contains contradictory provisions on venue for any
6 dispute. One portion of the Policy form states that jurisdiction shall be in “a court
7 of competent jurisdiction within New York,” but another portion of the Policy—
8 the “Service of Suit” endorsement—states that Lloyd’s “will submit to the
9 jurisdiction of a Court of competent jurisdiction within the United States.” FAC at
10 25, 36.

11 As a result, Landec filed this action, asserting three causes of action against
12 Lloyd’s: (1) breach of contract, (2) breach of the implied covenant of good faith
13 and fair dealing, and (3) violation of California Business and Professional Code
14 § 17200 et seq. *See* FAC ¶¶ 66–88.

15 **D. Lloyd’s Procedural Gamesmanship Leads To A Duplication Of**
16 **Litigation**

17 Upon receiving notice of this action, Lloyd’s sought an extension from
18 Landec to answer, which Landec granted as a gesture of good faith and
19 professional courtesy. Lloyd’s instead used that extra time to draft and file a
20 duplicative suit in New York state court. During this time, this Court issued an
21 Order to Show Cause as to whether it had jurisdiction over this case, and ordered
22 Landec to show why the Court should not dismiss the case for lack of subject
23 matter jurisdiction. *See* Dkt. 15. Lloyd’s does not publicly list its members and
24 thus Landec could not confirm their residencies before suing, but Landec
25 responded, compiling the available public information on Lloyd’s and its
26 members’ citizenship. *See* Dkt. 20. In a meet and confer and subsequent
27 responsive filing, Lloyd’s argued that this Court lacked subject matter jurisdiction,
28 representing that one or more of the members of the Lloyd’s syndicate were not

1 diverse parties with Landec and thus diversity jurisdiction was not met. *See* Dkt.
2 22; Declaration of Drew Gardiner (“Gardiner Decl.”) ¶ 2.

3 As a result of Lloyd’s representation to both Landec and this Court that its
4 non-public membership information would defeat diversity jurisdiction, Landec
5 filed a similar lawsuit in California state court (the “California State Action”) to
6 ensure its rights would be decided under California law if this Court determined
7 that it lacks jurisdiction.

8 Landec also discovered that Lloyd’s misrepresented the true facts of the
9 residency of the members of one of its syndicates. Landec located, and cited to the
10 Court, a recent federal complaint in a different case in which the same Lloyd’s
11 syndicate alleged all of its members “are all foreign corporations with their
12 principal place of business located outside the United States.” *See* Dkt. 23 at 2;
13 Dkt. 24. Landec immediately alerted the Court of these new facts. In response, the
14 Court issued a ruling inviting the parties to stipulate to a two-month stay of the
15 action to allow Landec to conduct the requisite jurisdictional discovery to confirm
16 diversity jurisdiction—a practical solution that Lloyd’s immediately rejected. *See*
17 Dkt. 25. In the alternative, the Court invited Lloyd’s to move to dismiss Landec’s
18 Complaint based on the alleged lack of subject matter jurisdiction. *Id.*

19 Lloyd’s decided not to file such a motion, instead choosing to file the instant
20 Motion to Dismiss based on *forum non conveniens*. *See* Dkt. 26. In order to avoid
21 any further jurisdictional disputes—and because Lloyd’s was unwilling to allow
22 Landec to conduct jurisdictional discovery—Landec amended its Complaint and
23 added allegations about Lloyd’s admission that all of its members were foreign
24 corporations. *See* Dkt. 30. Lloyd’s refiled its Motion to Dismiss for *forum non*
25 *conveniens*, seeking to dismiss this action. *See* Dkt. 34.

26 Landec offered to stay both the California State Action and the New York
27 State Action to allow this Court to decide the pending motion. Lloyd’s rejected
28 this offer, and instead is arguing to both this Court and the court in the California

1 State Action that their actions should be dismissed in favor of the New York State
 2 Action. *See* Gardiner Decl. ¶ 3. Lloyd’s refusal to allow this Court—the first
 3 court with a filed action—to make a decision has required Landec to litigate in
 4 multiple forums, driving up the cost of its effort to secure its rights under the
 5 insurance policy it purchased to cover the precise loss it sustained.

6 **III. ARGUMENT**

7 **A. Legal Standard**

8 1. Contract Formation

9 “Federal law, specifically 28 U.S.C. § 1404(a), governs the District Court’s
 10 decision whether to give effect to the parties’ forum-selection clause” in diversity
 11 cases. *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*,
 12 571 U.S. 49, 58 (2013). That said, there must first be a *contractually valid* forum
 13 selection clause. *See id.* at 62 n.5 (“Our analysis presupposes a contractually valid
 14 forum-selection clause.”). Thus, the enforceability of a forum selection clause
 15 turns on whether it is valid in the first instance, which is a matter of contract
 16 interpretation guided by state law. *See DePuy Synthes Sales Inc. v. Stryker Corp.*,
 17 2019 WL 1601384, at *2 (C.D. Cal. Feb. 5, 2019) (“First, before embarking on the
 18 § 1404 analysis, the court must determine whether there is a ‘contractually valid
 19 forum-selection clause.’”) (quoting *Atlantic Marine*) (collecting cases); *Glob.*
 20 *Power Supply, LLC v. Acoustical Sheetmetal Inc.*, 2018 WL 3414056, *2 (C.D.
 21 Cal. 2018) (“Although federal law governs the interpretation and enforcement of
 22 forum selection clauses, state law governs contract formation and the interpretation
 23 of an agreement’s terms.”); *Tri-Union Seafoods*, 88 F. Supp. 3d at 1161 (“A
 24 precursor to this analysis, however, is a contractually valid forum-selection
 25 clause.”).

26 In California, the interpretation of an insurance policy is a question of law to
 27 which the ordinary rules of contract interpretation apply. *Waller v. Truck Ins.*
 28 *Exchange, Inc.*, 11 Cal. 4th 1, 18 (1995); *Bank of the W. v. Superior Court*, 2 Cal.

1 4th 1254, 1264 (1992). “When deciding whether a valid forum-selection clause
 2 exists, ‘the trial court must draw all reasonable inferences in favor of the non-
 3 moving party and resolve all factual conflicts in favor of the non-moving party.’”
 4 *Derosa v. Thor Motor Coach, Inc.*, 2020 WL 6647734, at *3 (C.D. Cal. Sept. 30,
 5 2020) (quoting *Murphy v. Schneider Nat’l, Inc.*, 362 F.3d 1133, 1138 (9th Cir.
 6 2004)). Additionally, a policy provision is considered ambiguous when it is
 7 capable of two or more constructions, both of which are reasonable. *Bay Cities*
 8 *Paving Grading, Inc. v. Lawyers’ Mutual Ins. Co.*, 5 Cal. 4th 854, 867 (1993).

9 2. Motions to Dismiss For *Forum Non Conveniens*

10 “The doctrine of *forum non conveniens* is a drastic exercise of the court’s
 11 ‘inherent power’ because, unlike a mere transfer of venue, it results in the
 12 dismissal of a plaintiff’s case.” *Carijano v. Occidental Petroleum Corp.*, 643 F.3d
 13 1216, 1224 (9th Cir. 2011). As the moving party, Lloyd’s “bears the burden of
 14 showing (1) that there is an adequate alternative forum, and (2) that the balance of
 15 private and public interest factors favors dismissal.” *Dole Food Co. v. Watts*, 303
 16 F.3d 1104, 1118 (9th Cir. 2002). While it is a two-step analysis, the “plaintiff’s
 17 choice of forum will not be disturbed unless the ‘private interest’ and ‘public
 18 interest’ factors strongly favor trial” in another jurisdiction. *Id.*

19 The public interest factors include (1) the local interest in the lawsuit; (2) the
 20 court’s familiarity with the law; (3) the burden on local courts and juries; (4) court
 21 congestion; and (5) the costs of resolving a dispute unrelated to a particular forum.
 22 *Carijano*, 643 F.3d at 1232. In terms of private interests, courts look to several
 23 factors, including: (1) the parties’ and witnesses’ residence; (2) convenience of the
 24 forum to the litigants; and (3) the cost of bringing witnesses to trial. *Id.* at 1229.

25 There is a strong presumption in favor of the plaintiff’s choice of forum, and
 26 “where the home forum has been chosen, it is reasonable to assume that this choice
 27 is convenient.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–256 (1981); *see*
 28

1 *also Carijano*, 643 F.3d at 1227 (“There is ordinarily a strong presumption in favor
2 of the plaintiff’s choice of forum.”).

3 **B. The Policy’s Service of Suit Endorsement Modifies the Policy and**
4 **Supersedes the Forum Selection Clause**

5 The Policy’s Service of Suit endorsement authorizes Landec to bring suit in
6 any court of competent jurisdiction within the United States. *See* FAC at 36 (“It is
7 agreed that in the event of the failure of the Underwriters hereon to pay any
8 amount claimed to be due hereunder, the Underwriters hereon, at the request of the
9 Insured [], will submit to the jurisdiction of a Court of competent jurisdiction
10 within the United States.”). This provision overrides the forum selection clause
11 and affords Landec, as the plaintiff, the right to select the forum to litigate the
12 parties’ coverage dispute. *See Tri-Union Seafoods*, 88 F. Supp. 3d at 1165.

13 Lloyd’s asks the Court to disregard the Service of Suit endorsement in favor
14 of the Policy’s “Choice of Law and Jurisdiction” clause. Lloyd’s argues that
15 Landec “negotiate[ed] for and obtain[ed]” this forum selection clause, but ignores
16 the fact that Landec also negotiated and obtained the Service of Suit endorsement
17 in the Policy. Lloyd’s makes the unusual suggestion that the Policy endorsement
18 merely clarifies that Lloyd’s is submitting to the jurisdiction of a court in the
19 United States, and the form policy specifies to which court in the United States it
20 will submit (New York). Lloyd’s Motion to Dismiss at 14. This reading makes no
21 sense because it is plainly unnecessary for the parties to clarify in an endorsement
22 that the New York courts are “within the United States.” New York is obviously
23 “within the United States,” and there is thus no need for the endorsement to
24 provide such a clarification or statement if New York were the only appropriate
25 venue.

26 Put another way, if the Policy form requires litigation in New York *in all*
27 *circumstances*, as Lloyd’s contends, there would be no reason for Lloyd’s to have
28 agreed in an endorsement to “submit to the jurisdiction of a Court of competent

1 jurisdiction within the United States” as it did in the Service of Suit endorsement.
 2 Lloyd’s interpretation would render the Service of Suit endorsement superfluous
 3 and violate California rules of policy construction. *See Frontier Oil Corp. v. RLI*
 4 *Ins. Co.*, 153 Cal. App. 4th 1436, 1463 (2007) (“An endorsement modifies the
 5 basic insuring forms of the policy and is an integral part of the policy”); *Haynes v.*
 6 *Farmers Ins. Exch.*, 32 Cal. 4th 1198, 1208 (2004) (“[W]here the terms of an
 7 effective endorsement conflict with terms in the main body of such a policy, **the**
 8 **endorsement controls**”) (emphasis added); *see also* 16 Williston on Contracts §
 9 49:23 (4th ed.) (“[W]hen a conflict arises between an endorsement and another
 10 policy provision, the endorsement controls.”). This applies even where the
 11 endorsement does not make clear that it supersedes anything to the contrary in the
 12 policy. *Id.*²

13 Indeed, the proper interpretation of these two provisions has already been
 14 resolved. In *Tri-Union Seafoods*, the plaintiff, a California-based seafood product
 15 company, purchased product contamination insurance from the defendant insurer.
 16 88 F. Supp. 3d at 1159. The plaintiff suffered losses from a product recall and
 17 tendered a claim, which the insurer denied. *Id.* The plaintiff brought suit in the
 18 Southern District of California, alleging the same three causes of action at issue
 19 here. *Id.*

20 The defendant insurer moved to dismiss or transfer venue, arguing that the
 21 policy included a choice of law and forum selection clause that stated any claims
 22 under the policy could only be litigated in New York under New York law. *Id.* at
 23 1160–62. In response, the plaintiff argued that the policy’s service of suit

24 ² The import of the Service of Suit clause added to the Policy does not turn on
 25 whether it is labeled as an endorsement. *See* International Risk Management
 26 Institute, Inc., *Endorsement*, [https://www.irmi.com/term/insurance-](https://www.irmi.com/term/insurance-definitions/endorsement)
 27 [definitions/endorsement](https://www.irmi.com/term/insurance-definitions/endorsement) (last accessed Aug. 8, 2021) (defining endorsement as
 28 “an insurance policy form that either changes or adds to the provisions included
 in one or more other forms used to construct the policy, such as the declarations
 page or the coverage form.”); *E.M. Sergeant Pulp & Chem. Co. v. Travelers*
Indem. Co., 2017 WL 239339, at *5 n.8 (D.N.J. Jan. 19, 2017) (same, citing
 IRMI).

1 endorsement, which stated that the insurer would “submit to the jurisdiction of a
2 court of competent jurisdiction within the United States” at the plaintiff’s request,
3 allowed it to sue in California. *Id.*

4 The *Tri-Union Seafoods* court noted that “federal courts have consistently
5 found [the service of suit language] unambiguously permits the insured to choose
6 which forum to bring suit.” *Id.* at 1162 (collecting cases). In addressing the
7 competing forum selection clause and service of suit endorsement, the court noted
8 that it must interpret the contract “as a whole and in a manner that does not render
9 any clause or provision superfluous.” *Id.* at 1164. In so doing, the court concluded
10 that “the Service of Suit Endorsement modifie[s] the forum selection clause so that
11 the plain language of the Policy unambiguously permits Plaintiff to bring suit in a
12 forum of its choosing.” *Id.* at 1165.

13 Despite the clear commonality between the facts and issues in this case and
14 those at issue in *Tri-Union Seafoods*, Lloyd’s neglected to raise this authority with
15 the Court (despite addressing it in prior briefing in the New York State Court
16 Action). Instead, Lloyd’s seeks to focus the Court solely on the forum selection
17 clause, asserting the clause is mandatory and applies in all circumstances. Motion
18 at 8. This view, however, ignores the great weight of authority dictating that a
19 service of suit provision “makes clear that the policyholder shall enjoy the right to
20 choose the forum in which any dispute will be heard.” *Dinallo v. Dunav Ins. Co.*,
21 672 F. Supp. 2d 368, 370 (S.D.N.Y. 2009), *aff’d*, 402 F. App’x 595 (2d Cir. 2010);
22 *see also Appalachian Ins. Co. v. Superior Ct.*, 162 Cal. App. 3d 427, 437–38,
23 (1984) (“The Service of Suit clause meant that the convenience of the parties
24 weighed in favor of suit in the forum chosen by the plaintiff”); *Kashama v.*
25 *Century Ins. Grp.*, 2009 WL 1312940, at *2 (N.D. Cal. May 12, 2009) (holding a
26 similar service of suit provision to be a forum selection clause); *Perini Corp. v.*
27 *Orion Ins. Co.*, 331 F. Supp. 453, 454 (E.D. Cal. 1971) (“The meaning of the
28 service of suit clause is generally clear. It purports to compel the insurer to submit

1 to the forum chosen by a dissatisfied policy holder who sues to recover proceeds
 2 owing under the policy.”); *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*,
 3 195 N.J. 231, 243 (2008) (“We read the service of suit clause as it has been read by
 4 nearly every court that has considered it—as a consent to jurisdiction by the insurer
 5 and a prohibition against an insurer interfering with a forum initially chosen by the
 6 insured.”).

7 Lloyd’s cites one New York case for the proposition that the Service of Suit
 8 clause merely “generally obligates” the parties to submit to the jurisdiction of
 9 courts in the United States. *See* Motion at 13–14. But the great weight of
 10 authority goes against Lloyd’s case. *Compare Dornoch Ltd. ex rel. Underwriting*
 11 *Members of Lloyd’s Syndicate 1209 v. PBM Holdings, Inc.*, 666 F. Supp. 2d 366,
 12 370 (S.D.N.Y. 2009), *with Tri-Union Seafoods*, 88 F. Supp. at 1162; *Perini*, 331 F.
 13 Supp. at 454; *Kashama*, 2009 WL 1312940, at *2; *Rembrandt Enterprises, Inc. v.*
 14 *Illinois Union Ins. Co.*, 129 F. Supp. 3d 782, 786 (D. Minn. 2015) (“Thus, when
 15 the Endorsement is read together with the forum-selection clause in this action, the
 16 only unambiguous interpretation is that the Endorsement’s language, when read in
 17 its entirety, amends the underlying Policy.”); *Hazelwood Logistics Ctr. LLC v.*
 18 *Illinois Union Ins. Co.*, No. 4:13–CV–2572 CAS, 2014 WL 805886, at *2 (E.D.
 19 Mo. Feb. 28, 2014).³

20 At best for Lloyd’s, the two contractual provisions conflict and are thus
 21 ambiguous. If the terms are ambiguous, courts interpret them to protect “the
 22 objectively reasonable expectations of the insured.” *Manzarek v. St. Paul Fire &*
 23 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (quoting *Boghos v. Certain*
 24 *Underwriters at Lloyd’s of London*, 36 Cal. 4th 495, 501 (2005)). If the Service of

25 _____
 26 ³ Lloyd’s also cites *Connor Group v. Certain Underwriters at Lloyds, London*,
 27 which is inapplicable because in *Connor*, (1) the forum selection clause was an
 28 endorsement rather than part of the policy form, (2) the forum selection
 endorsement came after the service of suit endorsement, and (3) the forum
 selection endorsement contained a declaration stating that it “changes the
 policy”—unlike here where no such language exists. 2018 WL 2937443, at *3
 (S.D. Ohio June 12, 2018).

1 Suit endorsement does not modify and supersede the forum selection clause—as
2 Lloyds argues—a plain contradiction exists where one clause permits a California
3 venue and the other prohibits it. Thus, this ambiguity must be resolved in favor of
4 Landec. *See Manzarek*, 519 F.3d at 1031 (“Only if these rules do not resolve a
5 claimed ambiguity do we resort to the rule that ambiguities are to be resolved
6 against the insurer.” (quoting *Boghos*, 36 Cal. 4th at 501)).

7 In sum, the Service of Suit endorsement supersedes the forum selection
8 clause and authorizes Landec to sue in any forum and venue it chooses. As a
9 result, Lloyds motion to dismiss for *forum non conveniens* should be denied.

10 **C. California Is the Proper Forum to Resolve the Parties’ Coverage**
11 **Dispute**

12 Landec does not bear the burden to prove that it can litigate in California.
13 To the contrary, Lloyd’s is the party seeking to avoid an authorized forum selected
14 by Landec, and thus has the burden to establish it would be *unreasonable* to litigate
15 the parties’ dispute in California. *See Dole*, 303 F.3d at 1118. Lloyd’s cannot
16 meet that burden because the public and private interests weigh heavily in
17 litigating the dispute in California.

18 1. California Has a Closer Relationship to the Dispute and the
19 Parties and Is a More Convenient Venue

20 Numerous private factors related to the parties’ dispute weigh heavily in
21 favor of litigating in California instead of any other forum. Landec’s headquarters
22 are in California, the parties negotiated, paid for, and delivered the Policy in
23 California, many of Landec’s witnesses are in California, and Landec sustained the
24 losses from the product recall in California. In contrast, Lloyd’s and its syndicates
25 are based outside the United States, and the State of New York has no factual
26 connection to this matter.

27 Further, as a corporation headquartered in California, the courts in this state
28 are more convenient for Landec than any other state. Indeed, California is

1 presumed to be the most convenient forum for a California litigant. *See Piper*, 454
2 U.S. at 255–256 (“[W]here the home forum has been chosen, it is reasonable to
3 assume that this choice is convenient.”). Lloyd’s, in contrast, is made up of
4 foreign corporations and has counsel that resides in California, meaning that
5 litigating in California is no more or less convenient to Lloyd’s than in New York.

6 2. California Has a Strong Public Interest in Regulating Insurers
7 Issuing Policies in California to California Corporations

8 Public interest factors also warrant the Court retaining jurisdiction over this
9 dispute.⁴ California has a “significant state interest in interpreting insurance
10 contracts” issued in California. *Century Indem. Co. v. Bank of Am.*, 58 Cal. App.
11 4th 408, 413 (1997). As New York has no relationship to either party, the
12 “prosecution of the action will or may place a burden on the courts of [New York]
13 which is unfair, inequitable, or disproportionate in view of the relationship of the
14 parties or of the cause of action to [New York].” *Ford Motor Co. v. Ins. Co. of N.*
15 *Am.*, 35 Cal. App. 4th 604, 615 (1995). As discussed above, California has a
16 substantial interest in regulating the conduct at issue, materially all of which
17 occurred within the borders of California, and the burden imposed on California
18 courts will not be disproportionate to the state’s relationship to this dispute.
19 Additionally, this Court is likely more familiar with California law than a New
20 York court. *See Dole*, 303 F.3d at 1119 (“Public interest factors include . . . [a]
21 preference for having a forum apply a law with which it is familiar.”).

22 Moreover, New York law is contrary to California public policy because it
23 does not recognize an insured’s right to sue its insurer for the tort of breaching the
24 implied covenant of good faith and fair dealing. *See Tri-Union Seafoods*, 88 F.
25 Supp. 3d at 1170. The court in *Tri-Union Seafoods* found that California has a

26 ⁴ In its Motion, Lloyd’s does not even attempt to address the private factors
27 because it incorrectly asserts that the Policy includes a mandatory forum
28 selection clause. Still, as discussed herein, even if the forum selection clause
were valid, the public factors weigh heavily in favor of California retaining
jurisdiction over this dispute.

1 fundamental policy and a well-developed history recognizing a tort remedy for an
2 insurer’s breach of the covenant of good faith and fair dealing. *Id.* at 1167–70. In
3 contrast, New York does not recognize this remedy when a breach of contract
4 claim is also pled. *Harris v. Provident Life & Acci. Ins. Co.*, 310 F.3d 73, 81 (2d
5 Cir. 2002); *Tri-Union Seafoods*, 88 F. Supp. 3d at 1168 (“Accordingly, New York
6 law is contrary to California law on this issue.”).⁵

7 Granting Lloyd’s motion to dismiss would allow Lloyd’s, which chose to do
8 business in California, to evade longstanding California public policy protecting
9 insureds against bad faith and other unfair insurance business practices. *See Tri-*
10 *Union Seafoods*, 88 F. Supp. 3d at 1170 (“[T]he Court finds that recognizing a tort
11 remedy for the an [sic] insurer’s breach of the implied covenant of good faith and
12 [fair] dealing implicates a substantial and thus fundamental public policy in
13 California.”).

14 **IV. CONCLUSION**

15 For the foregoing reasons, Lloyd’s cannot meet its heavy burden to dismiss
16 this action pursuant to *forum non conveniens*. Accordingly, Defendants’ Motion to
17 Dismiss should be denied.

23 ⁵ California law recognizes that insurance contracts, unlike most other contracts,
24 are characterized by “elements of adhesion, public interest and fiduciary
25 responsibility.” *Cates Constr., Inc. v. Talbot Partners*, 21 Cal. 4th 28, 44 (1999).
26 As a result, the “relationship of insurer and insured is inherently unbalanced: the
27 adhesive nature of insurance contracts places the insurer in a superior bargaining
28 position.” *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 685 (1988). Because
of this, the “availability of tort remedies in the limited context of an insurer’s
breach of the covenant advances the social policy of safeguarding an insured in
an inferior bargaining position who contracts for calamity protection, not
commercial advantage.” *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal.
4th 390, 400 (2000).

1 Dated: August 27, 2021

Respectfully submitted,
LATHAM & WATKINS LLP

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/s/ Drew T. Gardiner

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Drew T. Gardiner

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John D. Niemeyer

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