

BNY AIS NOMINEES LIMITED, Gottex ABL (Cayman) Limited, Gottex Matrix Asset Focused Master Fund Limited, Gottex/Nomura Market Neutral Fund (USD) Limited, Gottex Abi Master Fund Limited, and Hudson ABL Fund Limited, Plaintiffs,

v.

Marlon QUAN and Stewardship Investment Advisors, LLC, Defendants.

Civil No. 3:08CV00796(AWT).

United States District Court,
D. Connecticut.

April 22, 2009.

Background: Investors in hedge fund brought action against fund's investment manager and one of its directors for fraud, fraud in inducement, intentional misrepresentation, negligent misrepresentation, tortious interference with contractual relations, tortious interference with business expectations, breach of contract, conversion, breach of the covenant of good faith and fair dealing, promissory estoppel, violations of Securities Exchange Act, declaratory judgment, violation of state Unfair Trade Practices Act, and unjust enrichment. Defendants moved to dismiss based on improper venue.

Holdings: The District Court, Alvin W. Thompson, J., held that:

- (1) defendants could invoke contractual forum selection clause since it was foreseeable they would enforce clause due to their close relationship to fund;
- (2) defendants could invoke clause due to mutuality of obligations between investors and defendants as to fund;
- (3) investors' claims were subject to clause; and
- (4) clause was enforceable.

Motion granted.

1. Federal Courts ⇌96

In deciding a motion to dismiss based on improper venue, the court must take all allegations in the complaint as true, unless contradicted by the defendants' affidavits, and when an allegation is so challenged a court may examine facts outside the complaint to determine whether venue is proper. Fed.Rules Civ.Proc.Rule 12(b)(3), 28 U.S.C.A.

2. Contracts ⇌206

Language in contractual forum selection clause, which stated three times that parties were subject to "exclusive" jurisdiction of Bermuda courts as to any action or proceeding covered by clause, required enforcement of clause.

3. Contracts ⇌206

Investment manager and director of hedge fund could invoke contractual forum selection clause in fund's share application in investors' action against it for fraud, misrepresentation, tortious interference, breach of contract, Securities Exchange Act, state Unfair Trade Practices Act, and other equitable claims, since it was foreseeable manager and director would enforce clause by virtue of their close relationship to hedge fund, and that fund would be bound by outcome of action; manager made all decisions on behalf of fund under direction and control of director, who was manager's sole member, investors' claims focused on amount of management fees being charged and failure of manager and director to comply with redemption provisions of by-laws of fund and the fund's private placement memorandum, and manager and director allegedly misled investors into believing that they could lower management and performance fees payable to manager and that manager and director would cause fund to redeem investors' funds in cash if investors delayed their redemptions.

4. Contracts ⇔206

A party does not have to be a signatory to a contract to be subject to a contract's forum selection clause; a non-party may invoke a clause if the non-party is closely related to one of the signatories such that the non-party's enforcement of the clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound.

5. Contracts ⇔206

Investment manager and director of hedge fund could invoke contractual forum selection clause of fund's share applications in investors' action against it for fraud, misrepresentation, tortious interference, breach of contract, Securities Exchange Act, state Unfair Trade Practices Act, and other equitable claims, since clause contained mutuality of obligations between investors, manager and director as to fund; investors had obligations to manager to maintain confidentiality of certain information, they agreed to indemnify fund and manager for losses occurring in connection with misrepresentations or breaches made by the investors or their failure to fulfill agreements or covenants under applications, and manager and director could enforce clause against investors if they breached obligations under provisions of applications.

6. Contracts ⇔206

Investors' action against investment manager and director of hedge fund for fraud, misrepresentation, tortious interference, breach of contract, Securities Exchange Act, state Unfair Trade Practices Act, and other equitable claims was based on either amount of management fees being charged by manager and director or their alleged failure to comply with redemption provisions of the fund's bylaws and private placement memorandum (PPM), and thus, claims were subject to forum selection clause in fund's share applications; investors executed share appli-

cations pursuant to terms of PPM, applications reflected that investors' subscription for shares was based "upon the terms" of PPM, and each additional subscription request provided that investor restated all agreements made in its original application.

7. Contracts ⇔127(4)

Contractual forum selection clause of hedge fund's share applications was enforceable in investors' action against fund's investment manager and one of its directors for claims arising out of management fees charged by defendants or their alleged failure to comply with redemption provisions of fund's bylaws and private placement memorandum (PPM); potential unavailability of legal theories of recovery in Bermuda forum did not make clause unreasonable or unjust, investors were sophisticated mutual fund companies managed by Swiss company registered with Securities and Exchange Commission (SEC) as investment advisor, and investors had already commenced parallel action against fund in Bermuda.

Dahlia S. Fetouh, Damian W. Wilmot, Stephen D. Poss, Goodwin Procter, Boston, MA, Dean M. Cordiano, Erick M. Sandler, Shannon D. Leger, Day Pitney LLP, Hartford, CT, for Plaintiffs.

David Steven Smith, Smith Campbell, LLP, New York, NY, Denise V. Zamore, Francis H. Morrison, III, Axinn, Veltrop & Harkrider, Hartford, CT, for Defendants.

RULING ON DEFENDANTS' MOTION TO DISMISS

ALVIN W. THOMPSON, District Judge.

BNY AIS Nominees Limited ("BNY"), acting for and on behalf of Gottex ABL

(Cayman) Limited, Gottex Matrix Asset Focused Master Fund Limited, Gottex/Nomura Market Neutral Fund (USD) Limited, Gottex ABI Master Fund Limited, and Hudson ABL Fund Limited (collectively the “Gottex Funds”), bring this case against Marlon Quan (“Quan”) and Stewardship Investment Advisors, LLC (“SIA”).

Quan and SIA have moved to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(3) for improper venue. For the reasons set forth below, the motion is being granted.

I. **FACTUAL BACKGROUND**

Between 2005 and 2007, the Gottex Funds purchased shares in the Stewardship Credit Arbitrage Fund, Ltd. (the “Fund” or the “Hedge Fund”) worth over \$100 million. BNY has been the “nominee” for the Gottex Funds, “holding their investments and assets, including [their] Class A shares in the Hedge Fund, and redemption proceeds thereof.” (Compl.(Doc. No. 1) ¶9.) The Gottex Funds contend that they invested in the Fund in reliance upon the Fund’s July 1, 2005 Confidential Private Placement Memorandum (“PPM”).

The PPM discloses that SIA is the Investment Manager of the Fund, and that Quan is one of the four Directors of the Fund. The PPM contains the following summary with respect to SIA and the Directors of the Fund:

The Investment Manager

Stewardship Investment Advisors LLC, a Delaware, U.S.A. limited liability company, will make all investment decisions on behalf of the Fund under the direction of Mr. Marlon Quan, its sole member. Mr. Quan is also the President and sole member of Acorn. For a biography describing Mr. Quan, see “The Investment Manager.”

Management

The Fund’s administrative affairs are managed under the supervision of its Directors, Mr. Marlon Quan, Mr. Thomas H. Davis, Mr. Gustav E. Escher III and Ms. Jennifer Kelly. For biographies describing Messrs. Davis, Escher, and Ms. Kelly, see “Operation of the Fund.”

(Decl. of J.P. Bailey . . . (Doc. No. 27), Ex. 2 at 3.) The PPM also discusses the management fees and performance fees that are payable to SIA, as the Investment Manager, and the procedure for voluntary redemptions, the Fund’s right to make mandatory redemptions, and the manner in which redemption payments will be made. At all relevant times, SIA and Quan, SIA’s managing member, managed the Fund.

In connection with the purchase of shares in the Fund, BNY executed Share Applications on behalf of the Gottex Funds “pursuant to the terms of the [PPM].” (Compl. ¶22.) The form of the Share Application is attached to the PPM as an exhibit. The only parties to each Share Application are the subscriber and the Fund. One part of the Share Application begins:

UNDERSTANDINGS, COVENANTS, REPRESENTATIONS, AND WARRANTIES.

Recognizing that the Fund and the Investment Manager rely on the information and on the representations set forth herein, Subscriber hereby covenants, represents and warrants to the Fund and the Investment Manager as follows: (Pls.’ Mem. in Opp’n to Defs.’ Mot. to Dismiss for Improper Venue . . . (“Pls.’ Opp’n”) (Doc. No. 46), Ex. A at A-3.) There are 15 sections of understanding, covenants, representations and/or warranties.

Three of the sections specifically refer to the Investment Manager. Section 11 re-

quires the subscriber to give the Fund and the Investment Manager notice of certain events. Section 12 provides:

Subscriber agrees that it will indemnify and hold harmless the Fund and the Investment Manager and each of their affiliates and their officers, directors and employees from and against any and all direct and consequential loss, damage, liability, cost or expense, including reasonable attorneys' and accountants' fees, which the Fund or any one of them may incur by reason of or in connection with any misrepresentation made by Subscriber or any of Subscribers' agents, any breach of any representation or warranty of Subscriber or the failure by Subscriber to fulfill any covenants or agreements under this Share Application.

(Pls.' Opp'n, Ex. A at A-4, § 12.) Section 14 provides, *inter alia*, that the subscriber will maintain the confidentiality of confidential information disclosed to it about the Fund or any other fund or account managed by SIA. (*Id.*, Ex. A at A-7, § 14.) The forum selection clause, contained in Section 15(e), makes no reference to SIA or the Investment Manager. Rather, it refers to "the parties." It provides:

The parties agree that any action or proceeding arising, directly, indirectly or otherwise, in connection with, out of, related to, or from, this Share Application, any breach hereof, or any transaction covered hereby, shall be resolved, whether by arbitration or otherwise, exclusively within Bermuda. Accordingly, the parties consent and submit to the exclusive jurisdiction of the courts located within Bermuda. The parties further agree that any such action or proceeding brought by either such party to enforce any right, assert any claim, or obtain any relief whatsoever in connection with this Share Application shall be com-

menced by such party exclusively in Bermuda.

(*Id.*, Ex. A at A-8, § 15(e).)

When the Gottex Funds subscribed to purchase additional shares after their initial investment, they executed a form Additional Subscription Request. Each Additional Subscription Request provided that the subscriber "restates all of the declarations, acknowledgments, representations, warranties, agreements, and understandings made in the undersigned's original Share Application as if they were made on the date hereof." (Decl. of Marlon Quan ("Quan Decl.") (Doc. No. 41) ¶ 4; *see also* Quan Decl., Ex. B.)

According to the PPM, the Fund, whose offices are in Hamilton, Bermuda, is a mutual fund company incorporated under the laws of Bermuda. SIA is a Delaware limited liability company whose officers are located in Connecticut. Quan resides in Connecticut.

On May 23, 2008, the plaintiffs commenced this action against SIA and Quan. In the Complaint, the plaintiffs set forth claims for fraud (Count I), fraud in the inducement (Count II), intentional misrepresentation (Count III), negligent misrepresentation (Count IV), tortious interference with contractual relations (Count V), tortious interference with business expectations (Count VI), breach of contract (Count VII), conversion (Count VIII), breach of the covenant of good faith and fair dealing (Count IX), promissory estoppel (Count X), violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 (Count XI), a declaratory judgment (Count XII), violation of the Connecticut Unfair Trade Practices Act (Count XIII), and unjust enrichment (Count XIV). In describing the nature of the action, the Complaint alleges *inter alia*, that:

During the time that the Gottex Funds were shareholders in the Hedge Fund,

Defendants repeatedly, willfully, and fraudulently misled the Gottex Funds and refused to live up to their agreements. Specifically, Defendants deliberately tried to avoid the consequences of allowing the Gottex Funds to exercise their right to redeem their Class A shares in the Hedge Fund by willfully, fraudulently, and deliberately (i) misleading the Gottex Funds into believing that Defendants would lower the fees charged to the Gottex Funds, and (ii) misleading the Gottex Funds into believing that Defendants would cause the Hedge Fund to redeem the Gottex Funds in cash if the Gottex Funds delayed their redemptions, all in a blatant attempt by Defendants to continue collecting fees and to avoid liquidating assets of the Hedge Fund. Once Defendants finally purported to pay the price owed to the Gottex Funds for their Class A shares, Defendants purported to convey so-called “participation notes” that are defective and fraudulent instruments and that fail entirely to meet the requirements of the redemption provisions of the Hedge Fund’s Bye-laws and Private Placement Memorandum.

(Compl.¶ 3.) At or around the same time the plaintiffs commenced this action, they commenced litigation against the Fund in the Supreme Court of Bermuda. In the Bermuda action, the plaintiffs claim that the Fund breached its obligation to pay the plaintiffs the redemption price for their shares in the Fund.

1. The defendants bring their motion to dismiss pursuant to Rule 12(b)(3). The plaintiffs cite *J.B. Harris, Inc. v. Razei Bar Indus., Ltd.*, 181 F.3d 82 (2d Cir.1999) (unpublished opinion) for the proposition that when a motion to dismiss is based on a forum selection clause, Rule 12(b)(3) may not be the appropriate procedural mechanism. The Second Circuit has more recently stated that “[t]he Supreme Court has not specifically designated a single

II. LEGAL STANDARD

[1] In deciding a Rule 12(b)(3) motion to dismiss based on improper venue, “[t]he court must take all allegations in the complaint as true, unless contradicted by the defendants’ affidavits, and [w]hen an allegation is so challenged [a] court may examine facts outside the complaint to determine whether venue is proper.”¹ *Indymac Mortgage Holdings, Inc. v. Reyard*, 167 F.Supp.2d 222, 237 (D.Conn.2001) (internal quotation marks and citation omitted). Furthermore, “[t]he court must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff,” who has “the burden of showing that venue in the forum is proper.” *Id.* If the venue is not proper, the district court “shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a) (2000). “Whether dismissal or transfer is appropriate lies within the sound discretion of the district court.” *Minnette v. Time Warner* 997 F.2d 1023, 1026 (2d Cir.1993).

III. DISCUSSION

“In the absence of an applicable choice of law provision, it is well established in this Circuit that the rule set out in *M/S Bremen* applies to the question of enforceability of an apparently governing forum selection clause, irrespective of whether a claim arises under federal or state law.” *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir.2007). While choice of law

clause of Rule 12(b) as the ‘proper procedural mechanism to request dismissal of a suit based upon a valid forum selection clause,’ nor have we.” *Asoma Corp. v. SK Shipping Co., Ltd.*, 467 F.3d 817, 822 (2d Cir.2006) (quoting *New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG*, 121 F.3d 24, 28 (2d Cir. 1997)). Therefore, the court considers the motion under the rule pursuant to which the defendants bring it.

clauses are presumed valid, “our precedent indicates that federal law should be used to determine whether an otherwise mandatory and applicable forum clause is enforceable under *Bremen*.” *Id.* Moreover, “choice of law provisions generally implicate only the substantive law of the selected jurisdiction.” *Id.* “Questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature.” *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir.1990).²

In deciding whether an action should be dismissed based on a forum selection clause, the Second Circuit has used a four-part analysis.

The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement. *See, e.g., D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir.2006). The second step requires us to classify the clause as mandatory or permissive, i.e., to decide whether the parties are *required* to bring any dispute to the designated forum or simply *permitted* to do so. *See John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc.*, 22 F.3d 51, 53 (2d Cir.1994). Part three asks whether the claims and parties involved in the suit are subject to the forum selection clause. *See, e.g., Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1358–61 (2d Cir.1993).

If the forum clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable. *See id.* at 1362–63. The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that “enforcement would be unreason-

able or unjust, or that the clause was invalid for such reasons as fraud or overreaching.” *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) (establishing federal standard relating to enforcement of forum clauses applicable in admiralty and international transactions); *see Bense v. Interstate Battery Sys. of Am., Inc.*, 683 F.2d 718, 721 (2d Cir.1982) (applying Bremen standard to contractual dispute between domestic parties in non-admiralty context).

Phillips, 494 F.3d at 383–84.

[2] With respect to the first inquiry, it is not disputed here that the plaintiffs knew about the forum selection clause. With respect to the second step, the clause is mandatory. “The general rule in cases containing forum selection clauses is that ‘[w]hen only jurisdiction is specified[,] the clause will generally not be enforced without some further language indicating the parties’ intent to make jurisdiction exclusive.’” *John Boutari & Son v. Attiki Imps.*, 22 F.3d 51, 52 (2d Cir.1994) (quoting *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764 (9th Cir.1989)). Some form of the word “exclusive” as it relates to jurisdiction or the place where the action may be brought appears in Section 15(e) of the Share Application three times. There is no question that the parties are required to bring any action or proceeding covered by the clause in Bermuda.

[3] The most hotly contested issue for purposes of this motion is the third step in the analysis: “whether the claims and parties involved in the suit are subject to the forum selection clause.” *Phillips*, 494 F.3d at 383. The court concludes that both the parties and the claims in the

2. The Share Application states that it is to be governed by Bermuda law. However, the parties have briefed the issues under federal

law, and the court likewise analyzes the issues presented by this motion under federal law.

instant action are subject to the forum selection clause.

[4] A party does not have to be a signatory to the contract to be subject to a forum selection clause. “A non-party to a contract may invoke a contractual forum selection clause if the non-party is ‘closely related’ to one of the signatories . . . such that ‘the non-party’s enforcement of the . . . clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound.’” *Morag v. Quark Expeditions, Inc.*, No. 3:07-cv-1062 (PCD), 2008 WL 3166066, at *5 (D.Conn. Aug. 5, 2008) (quoting *Cfirstclass Corp. v. Silverjet PLC*, 560 F.Supp.2d 324, 328 (S.D.N.Y.2008)). “In order to bind a non-party to a forum selection clause, the party must be ‘closely related’ to the dispute such that it becomes ‘foreseeable’ that it will be bound.” *Hugel v. Corp. of Lloyd’s*, 999 F.2d 206, 209 (7th Cir.1993) (citations omitted). “[W]here the alleged conduct of the nonparties is closely related to the contractual relationship, ‘a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses.’” *Morag*, 2008 WL 3166066, at *5 (quoting *Holland Am. Line Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 456 (9th Cir.2007)).

The determination as to whether the closely-related test has been satisfied is one that requires an inquiry that is highly fact-specific. One situation where a non-party may invoke a contractual forum selection clause, or it can be invoked against the non-party, is where the non-party is a third-party beneficiary of the contract. In *Hugel*, the court observed:

Plaintiffs argue that the court must make a threshold finding that a non-party to a contract is a third-party beneficiary before binding him to a forum selection clause. While it may be true that third-party beneficiaries of a contract would, by definition, satisfy the

“closely related” and “foreseeability” requirements, a third-party beneficiary status is not required.

Hugel, 999 F.2d at 209–10 n. 7 (internal citations omitted).

In *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353 (2d Cir.1993), the court did not invoke the closely-related test. However, it stated that “a third party will have an enforceable right if the promised performance will be of pecuniary benefit to him and the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract.” *Roby*, 996 F.2d at 1359 (internal quotation marks and citation omitted); see also 4 Arthur L. Corbin, *Corbin on Contracts* § 776, at 18 (1st ed.1951); *Novak v. Tucows, Inc.*, No. 06-CV-1909(JFB)(ARL), 2007 WL 922306, at *13 n. 11 (E.D.N.Y. Mar. 26, 2007).

Officers of a corporate signatory can also satisfy the closely-related test. For example, in *Nanopierce Techs., Inc. v. Southridge Capital Mgmt. LLC*, No. 02 Civ. 0767(LBS), 2003 WL 22882137 (S.D.N.Y. Dec. 4, 2003), the counterclaim plaintiff, Harvest Court LLC, sued Kristi Kampmann, who was Nanopierce Technologies Inc.’s chief financial officer, alleging that she violated the securities laws when she signed a registration statement omitting material facts and containing false and misleading assertions. *Nanopierce Techs.*, 2003 WL 22882137, at *1. Kampmann had not signed the Purchase Agreement between Harvest Court and Nanopierce Technologies, Inc., which contained the forum selection clause. *Id.* at *5–6. The court nonetheless found that:

Here, the Court is satisfied that Kampmann, as Chief Financial Officer, was “closely related” to [Nanopierce Technologies, Inc.’s] transaction with Harvest Court such that it was foresee-

able that she would be bound by the Forum Selection Clause in the Purchase Agreement. *See e.g., Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993) (finding that the “complaints against the individual Chairs are completely dependent on the complaints against the [principals] . . . [and] arise [] out of the same misconduct charged against the [principals]”); *Cinema Laser Technology, Inc. v. Hampson*, 1991 WL 90913, at *3 (D.N.J. May 30, 1991) (“Defendants might also argue that it would be unfair to apply the forum selection clause to individuals who were not parties to the Joint Venture Agreement, such as Sweatt, Berkowitz and McCurdy. However, these individuals were all directors of Hampson’s corporation, Digital, who was a party.”).

Id. at *6.

In *Hugel*, “GCM and OMI assert[ed] that only Hugel [was] bound by the forum selection clause because GCM and OMI [were] not and never [had] been parties to the General Undertaking.” *Hugel*, 999 F.2d at 209. The following facts were material to the court’s analysis there:

Hugel is President and Chairman of the Board of both GCM and OMI. In addition, Hugel owns 99% of the stock of GCM which, in turn, owns 100% of the stock of OMI. The alleged assurances of confidentiality were made to Hugel alone and Hugel alone decided that his corporations would participate in Lloyd’s investigation.

Hugel and Lloyd’s contracted to settle all of their disputes in England. Although GCM and OMI were not members of Lloyd’s, in the course of a dispute between Hugel and Lloyd’s, Hugel alone involved his two controlled corporations and supplied information allegedly belonging to those corporations. The district court found that the corporations owned and controlled by Hugel

are so closely related to the dispute that they are equally bound by the forum selection clause and must sue in the same court in which Hugel agreed to sue.

Id. at 209–10.

In *In re Lloyd’s Am. Trust Fund Litig.*, 954 F.Supp. 656 (S.D.N.Y.1997), the court observed that “the phrase ‘closely related’ is not particularly illuminating,” but it found it helpful to refer to the principle of mutuality:

Thus, if Plaintiffs were entitled to enforce the forum selection clause against Citibank in a suit in England, Citibank should be able to enforce the clause against the Plaintiffs. If, on the other hand, Citibank is not bound by the choice of forum provided in the various agreements entered into by Plaintiffs, it should not be able to enforce the clauses against them.

In re Lloyd’s Am. Trust Fund, 954 F.Supp. at 669.

Courts have concluded that the closely-related test has been satisfied in a number of other circumstances. *See, e.g., Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir.1988) (holding that the claims were in the scope of the forum selection clause where the claims against non-signatories to the contract could not “be adjudicated without analyzing whether the parties were in compliance with the contract”); *Weingrad v. Telepathy, Inc.*, No. 05 Civ.2024(MBM), 2005 WL 2990645 (S.D.N.Y. Nov. 7, 2005) (finding the test satisfied where the plaintiff alleged the defendants acted in concert and his claims against each defendant were substantially the same and arose out of their relationships with each other); *Direct Mail Prod. Servs. Ltd. v. MBNA Corp.*, No. 99 CIV. 10550(SHS), 2000 WL 1277597, *4 (S.D.N.Y. Sept. 7, 2000) (stating that “provisions of the Agreement plainly gave Di-

rect Mail reason to know that one of the reasons motivating MBNA Direct to enter the contract was a desire to confer a pecuniary benefit on related MBNA companies"); *Int'l Private Satellite Partners, L.P. v. Lucky Cat Ltd.*, 975 F.Supp. 483, 486 (W.D.N.Y.1997) (denying the motion to dismiss where plaintiff had alleged a *de facto* merger between non-party and the party to the contract containing the forum selection clause); *Cinema Laser Tech., Inc. v. Hampson*, Civ. A. No. 91-1018, 1991 WL 90913 (D.N.J. May 30, 1991) (relying on foreseeability in finding the forum selection clause applied to directors of one of the signatories, even though the closely-related test was not explicitly invoked).

Here, the plaintiffs argue that the defendants are not third party beneficiaries of the forum selection clause because, whereas the Investment Manager is specifically mentioned in other provisions of the Share Applications, the forum selection clause makes reference only to "the parties" and neither defendant is a party to a Share Application. The court concludes that it is not necessary to determine whether the defendants are third-party beneficiaries of the forum selection clause because third-party beneficiary status is simply one way in which a non-party can be closely related and the defendants satisfy the requirements of the closely-related test even if they are not third party beneficiaries.

Quan is one of the four Directors of the Fund, and SIA is the Investment Manager and makes all investment decisions on behalf of the Fund under the direction and control of Quan, who is SIA's sole member. The plaintiffs' claims focus on the amount of management fees being charged and the alleged failure of Quan and SIA to comply with the redemption provisions of the Fund's Bye-laws and the PPM. According to the Complaint, it was SIA and Quan who misled "the Gottex Funds into believ-

ing that [Quan and SIA] would lower the fees charged to the Gottex Funds" and "that [Quan and SIA] would cause the Hedge Fund to redeem the Gottex Funds in cash if the Gottex Funds delayed their redemptions." (*Compl.* ¶ 3.) Not only are Quan and SIA closely related to the Fund, but the Fund is so closely related to the dispute being litigated in this case that it is foreseeable that it will be bound by the outcome. Thus, it is foreseeable that the nonparties, Quan and SIA, would enforce the forum selection clause by virtue of the relationship between the Fund and the plaintiffs.

[5] In addition, under the Share Applications, the plaintiffs have obligations to SIA with respect to maintaining the confidentiality of certain information, and they also agree to indemnify "the Fund and the Investment Manager and each of their affiliates and their officers, directors and employees" for losses occurring in connection with misrepresentations or breaches made by the subscriber or its agents or the subscriber's failure to fulfill agreements or covenants under the Share Application. (Pls.' *Opp'n*, Ex. A at A-4, § 12.) If the plaintiffs breached their obligations to Quan and/or SIA under these provisions of the Share Applications, the plaintiffs would be able to enforce the forum selection clause against Quan or SIA. Thus, the principle of mutuality also supports the conclusion that the requirements of the closely-related test are satisfied here with respect to the parties involved in this action.

[6] The second aspect of the third step in the analysis set out in *Phillips* is that the claims involved in the suit are subject to the forum selection clause. The court concludes that they are.

The forum selection clause here applies to "any action or proceeding arising, directly, indirectly or otherwise, in connec-

tion with, out of, related to, or from, this Share Application, any breach hereof, or any transaction covered hereby.” (Pls.’ Opp’n, Ex. A at A-8, § 15(e).) The Second Circuit has distinguished the words “arise out of” from some of the other words in the forum selection clause here. In *Phillips*, it noted that it did “not understand the words ‘arise out of’ as encompassing all claims that have some possible relationship with the contract, including claims that may only ‘relate to,’ be ‘associated with,’ or ‘arise in connection with’ the contract.” *Phillips*, 494 F.3d at 389; see also *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001) (noting that “the ordinary meaning of the term ‘related to’ as used in the Provision is broader than the term ‘arising out of’”). “Webster’s Dictionary defines ‘related’ simply as ‘connected by reason of an established or discoverable relation.’” *Coregis Ins.*, 241 F.3d at 128 (quoting Webster’s Third New International Dictionary 1916 (1986)); see also Black’s Law Dictionary 1288 (6th ed.1990) (defining “related” as “standing in relation; connected; allied; akin”).

The claims here fall within the broad language of the forum selection clause. The Complaint alleges that “[i]n connection with its initial purchase of Class A shares of the Hedge Fund, BNY for and on behalf of the Gottex Funds executed Share Applications pursuant to the terms of the [PPM].” (Compl.¶ 22.) The Share Applications reflect that the subscriber’s subscription is “upon the terms of the [PPM].” (Pls.’ Opp’n, Ex. A at A-2, § 1.) Each Additional Subscription Request provided that the subscriber restated all of the agreements, etc. made in the subscriber’s original Share Application. Each of the claims in the Complaint is directly or indirectly related to the purchase of shares in the Fund as each is based on either the amount of management fees being charged or the alleged failure by the defendants to

comply with the redemption provisions of the Fund’s Bye-laws and the PPM.

[7] The final step of the analysis under *Phillips* is determining whether the plaintiffs have rebutted the presumption of enforceability of the forum selection clause. The plaintiffs have not met their “heavy burden” of showing that enforcement of the clause would be unreasonable or unjust. See *New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG*, 121 F.3d 24, 32 (2d Cir.1997). “[T]o escape the contractual clause, [one] must show ‘that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.’” *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)). The potential unavailability in a Bermuda forum of certain legal theories of recovery is not sufficient to make the forum selection clause unreasonable or unjust. See *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1360-61 (2d Cir.1993) (“In the absence of other considerations, the agreement to submit to . . . the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum.”) Furthermore, the Second Circuit “giv[es] substantial deference to the parties’ selected forum” where “[t]he choice of [a] forum was made in an arm’s-length negotiation by experienced and sophisticated businessmen.” *New Moon Shipping Co.*, 121 F.3d at 29 (quoting *M/S Bremen*, 407 U.S. at 12, 92 S.Ct. 1907). The Gottex Funds are sophisticated mutual fund companies managed by a Swiss company registered with the SEC as an investment advisor. Finally, they have already commenced a parallel action against the Fund in Bermuda. Therefore, the court concludes that enforcement of

the forum selection clause would not be unreasonable or unjust.

IV. CONCLUSION

For the reasons set forth above, the Defendants' Motion to Dismiss This Action for Improper Venue (Doc. No. 39) is hereby GRANTED.

The Clerk shall close this case.

It is so ordered.



CORNELL UNIVERSITY, a nonprofit New York corporation, and Cornell Research Foundation, Inc., a nonprofit New York corporation, Plaintiffs,

v.

HEWLETT-PACKARD COMPANY, a Delaware corporation, Defendant.

Hewlett-Packard Company, a Delaware corporation, Counterclaimant,

v.

Cornell University, a nonprofit New York corporation, and Cornell Research Foundation, Inc., a nonprofit New York corporation, Counterdefendants.

No. 01-CV-1974.

United States District Court,
N.D. New York.

March 30, 2009.

Background: Patent owner filed action against competitor alleging infringement of patent on instruction-issuing mechanism for computer processors having multiple functional units. Jury rendered verdict for owner. Competitor moved for judgment as matter of law (JMOL) to reduce royalty base to include only its earnings attributed to infringing technology or, in the alternative, remittitur of damages award.

Holdings: The District Court, Randall R. Rader, Circuit Judge, sitting by designation, held that:

- (1) entire market value rule could not be applied to damages calculation;
- (2) hypothetical processor revenue was appropriate royalty base;
- (3) testimony of patent damages expert could be excluded on basis that expert had not complied with court's exclusion order;
- (4) competitor, as customer of licensee, had implied license to use and sell processors made by licensee;
- (5) jury included quantifiable amount in verdict that could be stricken, allowing for remittitur; and
- (6) maximum recovery rule would have been violated by making upward adjustment to unchallenged royalty rate component of verdict.

Motion granted.

1. Federal Civil Procedure ⇨2194.1

A jury's damages award must be upheld unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork.

2. Courts ⇨96(7)

Judgment as a matter of law (JMOL) is not an issue unique to patent law, and thus regional circuit law governs a court's analysis. Fed.Rules Civ.Proc.Rule 50(a)(1), 28 U.S.C.A.

3. Federal Civil Procedure ⇨2152, 2608.1

Although a court is prohibited from assessing the credibility of witnesses or weighing the evidence in a case, judgment as a matter of law (JMOL) is appropriate where there can be but one conclusion as to the verdict that reasonable persons