

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**ROBERT and LAURIE GIBB, ET AL,**

**Plaintiffs,**

**v.**

**Case No. 14-138373-CB  
Hon. James M. Alexander**

**ANTONIO SCIACCA, ET AL,**

**Defendants.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on several motions for summary disposition that, in sum, include all defendants. While the defendants filed separate motions, most are founded on similar grounds – such as: (1) Plaintiffs’ suit should be dismissed based on a New York forum-selection clause contained in the subscription agreements; (2) in the alternative, Michigan litigation is improper under the doctrine of forum non conveniens; (3) Plaintiff failed to satisfy a demand requirement before bringing derivative claims; (4) Plaintiffs lack standing to bring a private cause of action under Section 17(a) the Securities Act; and (5) in that alternative, the Court should stay the proceedings and appoint a disinterested person to a special litigation committee to investigate Plaintiffs’ derivative claims.<sup>1</sup>

Plaintiffs are 40 shareholders in Defendant Transdermal Corporation. Defendants are officers or directors of Transdermal, their family members or affiliates. This case arises out of

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<sup>1</sup> Additionally, Defendants James D. Fornari and the Law Offices of James D. Fornari request summary based on Plaintiffs’ failure to state a valid claim.

Plaintiffs' allegations of "intentional, blatant and systematic bilking of Transdermal" and the unjust enrichment of defendants.

All Defendants seek summary disposition of Plaintiffs' Complaint under MCR 2.116(C)(4), (C)(7), (C)(8), or (C)(10).

A (C)(4) motion tests whether the Court has subject matter jurisdiction over Plaintiff's claims. A (C)(7) motion determines whether a claim is barred, among other grounds, by "an agreement to . . . litigate in a different forum." A (C)(8) motion tests the legal sufficiency of the complaint, and a (C)(10) motion tests the factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

It makes sense to first address Defendant Transdermal's motion based on the Subscription Agreements' forum-selection clause. All other Defendants join in Transdermal's motion on this basis. "It is undisputed that Michigan's public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions." *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 345; 725 NW2d 684 (2006).

It is also undisputed that 29 of the 40 Plaintiffs obtained Transdermal shares under the terms of a Subscription Agreement. The remaining 11 Plaintiffs (eight of which added after Transdermal's original motion) did not sign such an agreement. The Subscription Agreements provide (in relevant part):

This Agreement shall be construed and interpreted, and the rights and obligations of the parties arising hereunder governed, by the laws of the [State of New York]. The parties agree that the courts of [New York] shall have exclusive jurisdiction over any dispute, termination or breach of any kind or nature whatsoever arising out of or in connection with this Agreement.

The Revised Judicature Act, MCL 600.745(3), provides (in relevant part):

If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:

...

(b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.

(c) The other state would be a substantially less convenient place for the trial of the action than this state.

...

(e) It would for some other reason be unfair or unreasonable to enforce the agreement.

The *Turcheck* Court reasoned:

A party seeking to avoid a contractual forum-selection clause bears a heavy burden of showing that the clause should not be enforced. Accordingly, the party seeking to avoid the forum-selection clause bears the burden of proving that one of the statutory exceptions of MCL 600.745(3) applies. *Turcheck*, 272 Mich App at 348, citing *The Bremen v Zapata Off-Shore Co*, 407 US 1, 17-18; 92 S Ct 1907; 32 L Ed 2d 513 (1972).

In their Response, Plaintiffs first claim that the forum-selection clause is “unenforceable” under MCL 600.745(3)(e) because it is unfair and unreasonable.

In support, Plaintiffs, in part, argue that ten Plaintiffs “obtained their shares pursuant to a contract designating Michigan as the choice of forum for the litigation of any disputes arising thereunder.” This argument, however, is misleading.

While the ten referenced Plaintiffs apparently did obtain their shares under a 2012 Settlement Agreement, this Agreement merely provided that these parties would receive “stock issuances.” As a result, any Michigan forum-selection clause contained in the Settlement Agreement would merely apply to whether these Plaintiffs received said stock (and any other obligations under said Agreement).<sup>2</sup> It would not, however, apply to duties owed to these

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<sup>2</sup> Or other breach of that Settlement Agreement – which Plaintiffs fail to allege.

Plaintiffs **as shareholders** – which Plaintiffs do not argue was contemplated by the Settlement Agreement. As a result, the Settlement Agreement’s Michigan forum-selection clause has no significance in this case, and the only relevant forum-selection clause is found in the Subscription Agreements.

Also worth noting, eight of these eleven Plaintiffs (Deborah Mattatall, Lee Quenneville, Don Zurkan, Rob Fia, Sean Marsden, Mario DiFonzo, Som Soni, and Sashi Soni) allege wrongdoing that predates the October 1, 2012 Settlement Agreement. Under said Agreement,

Transdermal, . . . Mattatall and each Applicant,<sup>3</sup> . . . does hereby release, waive and forever discharge each other . . . from any and all claims . . . which a Party had, has or hereafter may have . . . because of or arising from any matter, event or thing which has happened, developed or occurred before the execution of this Settlement Agreement.<sup>4</sup>

As a result (and only for purposes of the forum-selection argument), the Court finds that any claims by these Plaintiffs that predate October 1, 2012 would be barred by the plain language of the Settlement Agreement. Therefore, these Defendants’ claims are much more limited in scope than the 29 remaining Defendants – who properly allege much broader claims. It is nonsensical to allow a limited minority of Plaintiffs to displace our 29 Plaintiffs who retain broad claims.

And as the Genuso Defendants point out, several courts have found forum-selection clauses valid even as to members that did not sign the agreements. See, e.g. *Elf Atochem North Am, Inc v Jaffari*, 727 A2d 286, 287 (Del 1999); *Harry Casper, Inc. v Pines Assoc, LP*, 53 AD3d 764, 765 (NY App Div 3d 2008).

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<sup>3</sup> Applicants are identified, in relevant part, as: Lee Quenneville, Don Zurkan, Rob Fia, Sean Marsden, Mario DiFonzo, Som Soni, and Sashi Soni.

<sup>4</sup> In fact, on April 18, 2014, United States District Court Judge Hon. John Corbett O’Meara dismissed Plaintiff Deborah Mattatall’s federal Complaint against Transdermal based on this same provision.

The Court is persuaded that, for the efficient administration of justice and to conserve the resources of the parties, the forum-selection clause should apply to all Plaintiffs – regardless of whether they signed Subscription Agreements. Further, the Court is suspicious of Plaintiffs’ addition of eight non-signing Plaintiffs after Defendants filed their original motions. This addition suggests improper forum shopping. And although not dispositive, the Court also is persuaded that the non-signing Plaintiffs voluntarily joined in a suit brought almost entirely by Plaintiffs bound by a New York forum-selection clause.

Next, Plaintiffs argue that only Transdermal can assert the forum-selection clause as a defense to the present filing because the remaining Defendants are not parties to the Subscription Agreements. This argument, however, misses the mark.

First, Plaintiffs’ argument ignores the derivative nature of their claims. They are not suing Transdermal for its own mismanagement and fleecing. They are suing the officers or directors of Transdermal, certain of their family members and affiliates for the “intentional, blatant and systematic bilking of Transdermal.” And they bring this suit on behalf of Transdermal.

Next, Plaintiffs argue that the forum-selection clause is unenforceable under MCL 600.745(3)(b) because they cannot secure effective relief in New York. This is so, Plaintiffs argue, because some Defendants aren’t subject to the specific jurisdiction of New York’s long-arm statute. Plaintiffs’ brief argument on this issue is unconvincing. Even assuming *arguendo* that Plaintiffs’ claim is true, Plaintiffs failed to allege that they could not be fully compensated by the allegedly reachable Defendants. Further, at oral argument, all Defendants affirmatively consented to jurisdiction in New York. As a result, the Court rejects this argument.

Finally, Plaintiffs argue that that the clause is unenforceable under MCL 600.745(3)(c) because it would be substantially less convenient to litigate this dispute in New York.

The Court will note that the United States Supreme Court recently reaffirmed its support for forum selection clauses in *Atlantic Marine Constr Co v United States Dist Court*, \_\_\_ US \_\_\_; 134 S Ct 568, 582; 187 L Ed 2d 487 (2013). The *Atlantic Marine* Court reasoned “[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation.” *Id.* at 582.

This is so, as the Court reasoned, because “[w]hatever ‘inconvenience’ [the parties] would suffer by being forced to litigate in the contractual forum as [they] agreed to do was clearly foreseeable at the time of contracting.” *Id.*; quoting *The Bremen v Zapata Off-Shore Co*, 407 US 1, 17-18; 92 S Ct 1907; 32 L Ed 2d 513 (1972).

The *Atlantic Marine* Court concluded:

When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties’ settled expectations. A forum-selection clause, after all, may have figured centrally in the parties’ negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, “the interest of justice” is served by holding parties to their bargain. *Id.* at 583

The Supreme Court’s reasoning is sound. And our Plaintiffs are almost all Canadian citizens.<sup>5</sup> As a result, they face the inconvenience of foreign litigation – whether Michigan or New York.

Finally the Subscription Agreements created Plaintiffs’ shareholder status, and as a result, their derivative claims qualify as “any dispute . . . of any kind or nature whatsoever arising out of

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<sup>5</sup> According to the Complaint, 39 of 40 Plaintiffs are residents of Canada or Canadian business entities. The remaining Plaintiff is a resident of Minnesota.

or in connection with this Agreement.” In other words, Plaintiffs’ claims fit squarely within the terms of the forum-selection clause.

To conclude, the Court finds that Plaintiffs have failed to carry their “heavy burden” to establish that the contractual New York forum-selection clause should not be enforced. As a result, Defendants’ Motions for Summary Disposition under (C)(7) is GRANTED, and Plaintiffs’ Complaint is DISMISSED in its entirety.

Because the Court has determined that venue is appropriate in New York, it would be inappropriate to address the remainder of Defendants’ summary arguments, many of which are substantive.

This Order is a Final Order that resolves the last pending claim and closes the case.

**IT IS SO ORDERED.**

June 11, 2014  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge