IN THE CIRCUIT COURT FOR THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

OPIOID MASTER DISBURSEMENT TRUST II, A/K/A OPIOID MDT II, Plaintiff, v. ACE AMERICAN INSURANCE COMPANY, ET AL., Defendants.	Case No. 22SL-CC02974 Division 2

PLAINTIFF'S OPPOSITION TO CERTAIN UK INSURERS' MOTION TO DISMISS FIRST AMENDED PETITION FOR DECLARATORY RELIEF

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Plaintiff, the Opioid Master Disbursement Trust II, also known as the Opioid MDT II (the "Trust"), for its Opposition to Defendants Allianz Global Corporate & Specialty SE[1], HDI Global SE, Lloyd's of London Syndicate #1218 a/k/a Newline Syndicate 1218, and SJ Catlin Syndicate SJC 2003 (collectively, the "Moving Insurers") Motion to Dismiss Plaintiff's First Amended Petition for Declaratory Relief ("Motion to Dismiss") states as follows:

The Trust is a statutory trust created by the Fourth Amended Plan of Reorganization (the "Plan") of Mallinckrodt plc, et al. ("Mallinckrodt" or the "Debtors"), for the benefit of individuals and entities harmed by the Debtors' role in creating, perpetuating, and contributing to the nationwide opioid crisis across the United States.[2] Moving Insurers ask this Court to deprive the Trust, which filed this action promptly on the effective date of the Plan to secure insurance proceeds to compensate victims of the opioid crisis in Missouri and around the country, of the right to choose its forum. Moving Insurers seek to force the Trust to litigate its claims in the courts of England or Wales, even though those jurisdictions are largely strangers to the matters in dispute here, which revolve around Mallinckrodt's liability arising out of activities of Mallinckrodt entities located in Missouri that played a substantial role in the opioid crisis in Missouri and throughout the United States. To justify that extraordinary request, Moving Insurers rely on a forum selection clause in their policies that, under its plain meaning and Missouri law, permits, but does not require, jurisdiction in the courts of England or Wales, if an action in those courts is otherwise proper.

[1] The Trust named Allianz Global Risks US Insurance Company as a defendant in its Petition, but has been informed by Allianz Global Corporate & Specialty ("AGCS"), which filed the Motion to Dismiss, that it is the proper defendant in this action.

[2] A complete list of the Debtors is available at http://restructuring.primeclerk.com/Mallinckrodt, and is incorporated herein by reference. The Debtors principally responsible for developing, manufacturing, promoting, and distributing branded and generic opioid pharmaceuticals, and active pharmaceutical ingredients that were included in opioid pharmaceuticals, are Mallinckrodt LLC, Mallinckrodt APAP LLC, Mallinckrodt Enterprises LLC, SpecGx LLC, and SpecGx Holdings LLC. All were located in Missouri at all relevant times. *See* First Am. Pet. for Declaratory Relief ("FAP") ¶¶ 19–24.

Moving Insurers' Motion to Dismiss should be denied for at least two fundamental reasons:

First, Moving Insurers' reliance on English law[3] to argue that the clause at issue here is mandatory and exclusive is misplaced. Under Missouri law, forum selection clauses are procedural and must be construed under Missouri law, notwithstanding the presence of a choice of law clause purportedly selecting the law of another jurisdiction.

Second, the clause on which Moving Insurers rely is not a mandatory and exclusive forum selection clause because it does not clearly and explicitly exclude suit in other jurisdictions. Under Missouri law, a plaintiff's choice of forum ordinarily is respected. While parties to a contract may agree in advance to constrain their rights as potential plaintiffs to select a forum, Missouri law requires any such agreement to be clear and explicit. That requirement is even more important where, as here, the party seeking to enforce the supposed agreement also drafted and supplied its language. Therefore, to support the dismissal of this action, the forum selection clause on which Moving Insurers rely must state clearly and explicitly that litigation in the courts of England or Wales is mandatory and exclusive. Otherwise, the clause is merely permissive, and operates only as consent to jurisdiction in those foreign courts, if proceeding there is otherwise appropriate in the circumstances. The clause on which Moving Insurers rely is not a mandatory and exclusive forum selection clause because it does not include any such explicit mandatory and exclusive language. For example, the clause does not include terms like "exclusively," "solely," or "only" when referring to English or Welsh jurisdiction. Moving Insurers knew how to do this, as evidenced by their use of mandatory and exclusive language in other provisions throughout their policies. Instead, the language used in the clause at issue here mirrors language that London Market insurers have long used in their standard service of suit clauses to indicate consent to a

[3] For convenience, English and Welsh law shall be referred to collectively as "English law."

permissive, but not mandatory, jurisdiction. London Market insurers have argued for decades that those clauses merely provide consent to a designated jurisdiction, and do not prevent them from bringing their own actions in a different one. So too here.

FACTUAL BACKGROUND

I. The U.S. Opioid Crisis and Mallinckrodt's Role.

The opioid crisis is a disproportionately American problem. It is beyond dispute that Mallinckrodt and the rest of the United States opioid industry caused and fueled an epidemic of opioid abuse that has devastated the United States in general and Missouri in particular.

In the wake of the national opioid crisis, individuals, state, local, and tribal governments, and private entities began to bring claims against pharmaceutical companies and others for damages they incurred because of opioid-related bodily injuries. The Debtors' contribution to the opioid crisis, which included the manufacture, marketing, distribution, and sale of its opioid drugs, and its unbranded promotion of opioids generally that changed the longstanding medical consensus regarding the proper uses and risks of opioids, did not go unnoticed. "By early 2020, the Debtors had been named in over 3,000 Opioid Mass Tort Claims[4]. . . . [had] spent more than $100 million defending Opioid Mass Tort Claims, with litigation expenses exceeding a million dollars a week. . . . [And had already] spent $30 million . . . to settle just two Opioid Mass Tort Claims." FAP ¶ 3.

Facing this avalanche of litigation, on October 12, 2020, Debtors commenced in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") a voluntary case

[4] Capitalized terms used or quoted in this Motion and not otherwise defined herein have the meanings ascribed to them in the Petition, or to the extent not defined in the Petition, in the Plan. The Plan was provided to the Court as an attachment to the FAP. Attach. 1 to FAP. Opioid Mass Tort Claims include claims brought by individuals (or in the case of decedents, their estates) seeking damages because of bodily injuries for which they allege the Debtors are responsible. They also include claims brought by certain public and private entities seeking damages because of amounts they incurred because of opioid-related bodily injuries suffered by their citizens, patients, insureds, or others. FAP ¶ 102.

under chapter 11 of the Bankruptcy Code, captioned *In re: Mallinckrodt plc*, No. 20-12522 (JTD) (the "Bankruptcy Proceedings").

II. The Mallinckrodt Plan Assigned Debtors' Rights to the Proceeds of Insurance Policies Covering Mallinckrodt's Opioid Liabilities, Including Those Issued by Moving Insurers, to the Trust.

On March 2, 2022, the Bankruptcy Court confirmed the Mallinckrodt Plan. *See* FAP ¶¶ 5, 113. The Plan discharged Debtors from liability for Opioid Mass Tort Claims. Pursuant to the terms of the Plan, the Debtors' opioid liabilities were transferred to and assumed by, and the Opioid Mass Tort Claims were channeled to, the Trust and certain related trusts. *Id.* ¶¶ 7, 115. Along with that liability, the Plan also transferred the Debtors' rights to insurance coverage ("Assigned Insurance Rights") under the specified policies arising out of, relating to, or in connection with any Opioid Mass Tort Claims to the Trust under policies providing opioid-related coverage to Mallinckrodt ("Opioid Insurance Policies"). *Id*. ¶ 7, 115.

Included among the Opioid Insurance Policies are the insurance policies that are the subject of Moving Insurers' Motion to Dismiss ("At Issue Policies"). *See* Ex. A to FAP. The aggregate limits of liability of the At Issue Policies, where applicable, is approximately $435 million.[5] The Plan charged the Trust with preserving, holding, collecting, managing, maximizing, and liquidating the Assigned Insurance Rights, and requires the Trust to distribute proceeds to the related trusts which, in turn, will distribute funds to Opioid Claimants. FAP ¶ 115. To meet this charge, the Plan granted the Trust the sole right to "enforce, initiate, pursue, prosecute, defend, compromise, and/or resolve the Assigned Insurance Rights." *Id*.

[5] The total aggregate limits of liability, where applicable, of the known insurance policies at issue in this action are $1.535 billion.

A. On the Effective Date of the Mallinckrodt Plan, the Trust Filed Its Petition in This Action, Selecting as Its Forum a State Court in Missouri, the Jurisdiction with the Greatest Connection to the Matters in Dispute.

On June 16, 2022, the Effective Date of the Mallinckrodt Plan, the Trust filed its petition for declaratory relief in this action under Missouri's declaratory judgment statute, Missouri Revised Statute §§ 527.010–527.130, and Missouri Supreme Court Rules 87.01–87.11. The Trust filed its first amended petition for declaratory judgment on July 28, 2022.[6] In its Petition, the Trust seeks a declaratory judgment that each of the Defendant insurers is obligated, under each of the insurance policies it issued, to provide coverage in full for the Debtors' liability for Opioid Mass Tort Claims (subject to any applicable limits of liability). FAP ¶ 141. Further, the Trust seeks a judgment "[a]warding money damages that have accrued as of the time of trial as a result of the Court's declaration of the Trust's entitlement to coverage under or with respect to the Insurance Policies and Assigned Insurance Rights with respect to the Debtors' liability for the Opioid Mass Tort Claims." *Id*. at 60.

The Trust's choice to pursue the Assigned Insurance Rights in a Missouri state court is consistent with the fact that Mallinckrodt, Mallinckrodt's opioid-related liability, and the coverage rights at issue in this action are inextricably connected to Missouri. Moving Insurers issued the At Issue Policies to holding companies (either Mallinckrodt plc or Covidien plc) located in Dublin, Republic of Ireland, to cover risks of subsidiary businesses located principally in the United States, including, for purposes relevant here, in Missouri.

For example, Mallinckrodt plc was the ultimate parent company of "Specialty Generics," which, in turn, was comprised of the following Debtors conducting Mallinckrodt's opioid-related pharmaceutical business that comprises the covered risk here: Mallinckrodt LLC, Mallinckrodt

[6] The petitions are referred to hereinafter individually and together as the "Petition."

APAP LLC, Mallinckrodt Enterprises LLC, SpecGx LLC, and SpecGx Holdings LLC.[7] The principal place of business of all of these entities was, at all relevant times, Missouri. *See id.* ¶ 92. Indeed, Mallinckrodt entities have had "a continuous and significant corporate presence in Missouri since the original Mallinckrodt entity . . . was founded in St. Louis in 1867." *Id.* ¶ 16; *see also id.* ¶ 92. Debtors made the decision to negligently market and promote opioid pharmaceuticals while located in Missouri. *Id.* ¶¶ 18–24, 86, 91. Debtors negligently marketed and promoted opioid pharmaceuticals while they were located in Missouri, to United States residents, including Missouri residents. *Id.* ¶¶ 98, 102. As a result of Debtors' conduct, Missouri residents (and individuals across the United States) suffered bodily injuries, and Missouri state, local, and other governmental entities (as well as state and governmental entities throughout the country) sustained losses that are directly traceable to those bodily injuries. *Id.* ¶¶ 98, 102. These Missouri residents and Missouri governmental entities became many of the Opioid Mass Tort Claimants. *Id.* ¶¶ 86, 102–103. The insured opioid-related risk was located primarily in Missouri because, among other reasons, Debtors' opioid-related business was located in Missouri. *Id.* ¶ 86.

Moving Insurers do not argue that they lack sufficient contacts with Missouri or otherwise challenge the Court's exercise of personal jurisdiction over them in Missouri. On the contrary, the Petition alleges, and Moving Insurers do not dispute, that each of them specifically availed itself of the benefits of transacting business in Missouri by, among other things, selling insurance policies in Missouri or covering insureds and risks located in Missouri. *See id.* ¶¶ 31, 36, 38, 39. Instead, they merely ask this Court to enforce a contractual provision that they contend, incorrectly, restricts the Trust's ability to select a forum.

[7] Despite its name, Specialty Generics conducted Mallinckrodt's branded and generic opioid businesses. FAP ¶ 80.

III. The At Issue Policies Provide Sweeping Coverage and Include a Permissive Forum Selection Clause.

The At Issue Policies provide sweeping coverage for Mallinckrodt's liability because of bodily injury, such as its opioid-related liability resolved by the Plan. In their affirmative grants of coverage, the policies promise, with varying wording, to indemnify the Debtors for all sums the Debtors become legally obligated to pay because of or on account of bodily injury during the policy period. *Id.* ¶ 122.[8] Under the terms of the At Issue Policies, they provide coverage for the Debtors' liability and defense costs for or in connection with the Opioid Mass Tort Claims. Pursuant to the Assigned Insurance Rights, the Trust is entitled to enforce the Debtors' rights to such coverage and to receive the proceeds of the At Issue Policies with respect to the Debtors' liability and defense costs for or with respect to the Opioid Mass Tort Claims. *See id.* No exclusions or limitations in the At Issue Policies (other than any applicable limits of liability) apply to preclude or limit the expansive coverage provided in the policies with respect to Mallinckrodt's opioid-related liability. *Id*. ¶ 133.

The At Issue Policies include a "Choice of Law and Jurisdiction" endorsement, which states:

> [A]ny dispute concerning the interpretation of the terms, conditions, limitations and/or exclusions contained herein, is understood and agreed by both the Named Insured and the Insurers to be governed by the laws of England and Wales. Each party agrees to submit to the jurisdiction of any court of competent jurisdiction within England and Wales and to comply with all requirements necessary to give such court jurisdiction. All matters arising hereunder shall be determined in accordance with the law and practice of such court.

[8] The Trust is entitled to have the At Issue Policies interpreted or construed in a manner that maximizes insurance protection for liability for the Opioid Mass Tort Claims. Provisions of the At Issue Policies that grant or extend coverage must be construed broadly in favor of coverage; provisions that purport to exclude or limit coverage must be construed narrowly against the Defendants, and the Defendants bear the burden of establishing by a preponderance of the evidence or other applicable standard the applicability of any exclusions or other limiting language on which they seek to rely. FAP ¶ 123. Because the At Issue Policies are voluminous, they have not been attached as exhibits, but more detailed information about the policies and their relevant provisions is set forth in the Petition (and complete copies of the At Issue Policies, and all other policies in this action, are available at the Court's request).

Mot. to Dismiss at 7.[9]

ARGUMENT

IV. Standards of Review.

"When reviewing the grant of a motion to dismiss a petition, all facts alleged in the petition are deemed true and the plaintiff is given the benefit of every reasonable intendment." *Hollinger v. Sifers*, 122 S.W.3d 112, 115 (Mo. Ct. App. 2003) (quoting *Shouse v. RFB Constr. Co.*, 10 S.W.3d 189, 192 (Mo. Ct. App. 1999)).

In their Motion to Dismiss, Moving Insurers contend that the Choice of Law and Jurisdiction clause quoted above limits jurisdiction to resolve any and all coverage disputes under the Policies at Issue to the courts of England or Wales. To be entitled to dismissal, the moving party must demonstrate the existence of an exclusive forum selection clause, and carries the burden of demonstrating what the clause means and that it applies to the plaintiff's claims. *See, e.g.*, *Luebbering v. Varia*, 637 S.W.3d 366, 372 (Mo. Ct. App. 2021), *reh'g and/or transfer denied* (Nov. 8, 2021), *transfer denied* (Feb. 8, 2022) (finding that moving party failed to demonstrate the forum selection clause applied to the claims at issue, and reversing dismissal order).

V. Moving Insurers Have Not Established That the Trust's Choice of Forum Should Be Disturbed, and Accordingly Their Motion Should Be Denied.

Moving Insurers' Motion to Dismiss fails for at least two fundamental reasons. First, Moving Insurers are wrong to rely on English law, because in a Missouri state court, Missouri law governs the interpretation of forum selection clauses. And second, the forum selection clause on which Moving Insurers rely does not mandate exclusive jurisdiction in the courts of England or Wales; under its plain language and Missouri law, it merely permits jurisdiction there where

[9] As Moving Insurers explained, the primary policies contain a substantively identical clause with a non-material additional phrase stating that it applies "[n]otwithstanding anything to the contrary contained" in the policies, and that "[a]ll other terms, definitions, conditions, and exclusions of this policy remain unchanged" in the policy. *See* Mot. to Dismiss at 7.

otherwise appropriate, and thus the Trust's choice of a Missouri forum, as the plaintiff in this case, must be respected.

In Missouri, a plaintiff generally has the "right to choose any forum where there is proper jurisdiction and venue," and that "choice of forum is not to be disturbed except for 'weighty reasons.'" *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 219, 220 (Mo. banc 2008) (quoting *Anglim v. Missouri Pac. R.R. Co.*, 832 S.W.2d 298, 302 (Mo. banc 1992)). Moving Insurers do not dispute that, aside from their erroneous contention that the Choice of Law and Jurisdiction Clauses in their policies confer exclusive jurisdiction on the courts of England and Wales, jurisdiction and venue are proper in this Court. Moving Insurers have failed to present any weighty reasons to disturb the Trust's choice of forum. On the contrary, the Choice of Law and Jurisdiction Clauses relied on by Moving Insurers do not divest this Court of jurisdiction over Moving Insurers and, therefore, are no reason at all to disturb the Trust's choice of a Missouri forum. Accordingly, the Motion to Dismiss should be denied.

VI. Missouri Law Governs the Interpretation of This Forum Selection Clause Because the Choice of Forum Is Procedural, Not Substantive.

Moving Insurers' reliance on English law, which they contend mandates exclusive jurisdiction in the courts of England or Wales under the clause at issue, is misplaced. Missouri law "governs interpretation of the forum selection clause, even in the presence of a choice of law provision that applies the substantive law of another state." *See Corel Corp. v. Ferrellgas Partners, L.P.*, 633 S.W.3d 849, 853 n.1 (Mo. Ct. App. 2021) (citing *Reed v. Reilly Co., LLC*, 534 S.W.3d 809, 809 (Mo. banc 2017)); *see also Thieret Family, LLC v. Delta Plains Servs., LLC*, 637 S.W.3d 595, 606 (Mo. Ct. App. 2021) (same). Indeed, the Supreme Court of Missouri recently applied Missouri law to determine the validity of a forum selection clause, notwithstanding that

the contract at issue had a choice of law provision stating that Kansas law governed. *See Reed*, 534 S.W.3d at 811.

Missouri law governs the interpretation of these forum selection clauses because "[p]rocedural questions are determined by the state law where the action is brought." *Peoples Bank v. Carter*, 132 S.W.3d 302, 305 (Mo. Ct. App. 2004) (quoting *Consol. Fin. Invs. v. Manion*, 948 S.W.2d 222, 224 (Mo. Ct. App. 1997)); *Grosshart v. Kansas City Power & Light Co*., 623 S.W.3d 160, 167 (Mo. Ct. App. 2021) (same). Procedural questions "relate to the machinery for processing the cause of action," and are distinguished from substantive questions which "relate to the rights and duties giving rise to a cause of action." *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341 (Mo. banc 1993) (citing *Wilkes v. Missouri Highway and Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988)). The interpretation of a forum selection clause is a procedural question governed by Missouri law because the clause does not determine the rights and duties of each party, but only where the rights and duties of each party will be determined. *See Carter*, 132 S.W.3d at 305 (citing *State ex rel. Peabody Coal Co. v. Powell*, 574 S.W.2d 423, 426 (Mo. banc 1978) and explaining that forum selection clauses "pertain only to what court may be the proper forum or venue for a particular case, not to what the law actually governing the underlying cause of action" and, therefore, are "procedural, not substantive, in nature").

Moving Insurers rely on a single, since-rejected Missouri state court decision, *Raydiant Technology, LLC v. Fly-N-Hog Media Group,* Inc., 439 S.W.3d 238, 240 (Mo. Ct. App. 2014), to support their contention that English law governs the interpretation of the forum selection clause. *See* Mot. to Dismiss at 9–10. In *Raydiant Technology,* a Missouri plaintiff filed a fraudulent inducement claim against an Arkansas defendant in Missouri state court. 439 S.W.3d at 240. When the Arkansas defendant moved to dismiss, arguing that the contract's forum selection clause

required the Missouri plaintiff to bring its claim in Arkansas state court, the *Raydiant Technology* court noted that Missouri and Arkansas law would yield the same result, but nominally applied Arkansas law to the interpretation of the forum selection clause, and dismissed the case. *Id*. at 241.

Moving Insurers' reliance on *Raydiant Technology* is misplaced because the *Raydiant Technology* court did not evaluate whether the interpretation of a forum selection clause was procedural or substantive in nature. Instead, it merely cited a similar holding from *Hope's Windows, Inc. v. McClain*, 394 S.W.3d 478, 482 n.3 (Mo. Ct. App. 2013), which, in turn, relied on federal cases out of the Southern District of New York's interpreting federal law—not Missouri cases interpreting Missouri law—to determine whether a New York court had jurisdiction to act. *Id.*

Every Missouri case to subsequently consider *Raydiant Technology* has rejected its holding for that very reason. For example, the *Thieret Family* court explicitly rejected *Raydiant Technology*, explaining that it was wrongly decided because forum selection clauses are procedural, not substantive, and that "procedural questions are determined by the state law where the action is brought." 637 S.W.3d at 606 (quoting *Carter*, 132 S.W.3d at 305). In rejecting *Raydiant Technology*, the *Thieret Family* court specifically cited the Missouri Supreme Court's decision in the *Reed v. Reilly* case, noting that the Missouri Supreme Court had applied Missouri law, notwithstanding the presence of a choice of law provision stating that Kansas law governed the agreement. 637 S.W.3d at 605 n.6 (citing *Reed*, 534 S.W.3d at 811); *see also Corel Corp*., 633 S.W.3d at 835 n.1 (same).

This Court should follow controlling Missouri precedent regarding the procedural-substantive distinction, including the weight of recent authority on this very issue, to hold that Missouri law governs the interpretation of this forum selection clause.[10]

VII. Under Missouri Law, the Forum Clause Relied on by Moving Insurers Is Merely Permissive, Not Mandatory and Exclusive.

Missouri courts interpret "insurance contracts by applying general rules of contract interpretation." *Miller v. Ho Kun Yun*, 400 S.W.3d 779, 784 (Mo. Ct. App. 2013) (citing *Todd v. Missouri United Sch. Ins. Council,* 223 S.W.3d 156, 160 (Mo. banc 2007)). When determining the meaning of a particular clause, Missouri courts look to how an "ordinary person of average understanding" would interpret the plain meaning of the policy language at issue. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007) (citation omitted). "An ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the language in the policy. Language is ambiguous if it is reasonably open to different constructions." *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. 2010) (quoting *Seeck v. Geico Gen. Ins. Co*., 212 S.W.3d 129, 132 (Mo. banc 2007). If the language is ambiguous, Missouri courts should adopt the insured's interpretation because in construing the terms of an insurance policy, Missouri Courts "resolve[] ambiguities in favor of the insured." *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo. banc 2009) (quoting *Seeck*, 212 S.W.3d at 132). In this context, the insured's preferred interpretation should be afforded even greater deference because Missouri law is clear that a "plaintiff is not lightly to be deprived of [its] chosen forum." *Acapolon Corp. v. Ralston Purina Co*., 827 S.W.2d 189, 191 (Mo. banc 1992).

[10] Moving Insurers include and rely on the Declaration of Gavin Kealey, an English lawyer in private practice, who primarily represents insurers when involved in policyholder disputes. Decl. of Gavin Kealey, Ex. 1 to Mot. to Dismiss (hereinafter, the "Kealey Declaration"). While the Trust does not concur in Mr. Kealey's legal conclusions, because Missouri law, not English law, governs the interpretation of forum selection clauses, the Trust will not burden the Court with a response regarding English law.

As a result, under Missouri law, Missouri courts do not dismiss actions unless a purported forum selection clause "mandates" that another identified forum "be the forum where the lawsuit *must* be filed and heard." *Bouquette v. Suggs*, 928 S.W.2d 412, 414 (Mo. Ct. App. 1996) (emphasis added). In other words, Missouri courts will dismiss an action because of a purported forum selection clause only if it contains explicit mandatory and exclusive language. *See, e.g.*, *State ex rel. J.C. Penney Corp. v. Schroeder*, 108 S.W.3d 112, 114 (Mo. Ct. App. 2003) (finding clause "requiring litigation to take place" in the identified forum was a mandatory forum selection clause); *Arizon Structures Worldwide, LLC v. Global Blue Technologies–Cameron, LLC*, 481 S.W.3d 542, 545 (Mo. Ct. App. 2015) (finding clause that stated disputes "*shall be settled exclusively*" was "mandatory" and an enforceable forum selection clause); *Burke v. Goodman*, 114 S.W.3d 276, 279 (Mo. Ct. App. 2003) (finding a clause providing that "exclusive venue for the resolution of disputes shall be" the selected forum was a mandatory forum selection clause); *GP&W Inc. v. Daibes Oil, LLC*, 497 S.W.3d 866, 871 (Mo. Ct. App. 2016) (same).[11]

[11] Courts around the country also recognize the distinction between permissive and mandatory clauses, and require the latter to include explicit mandatory and exclusive language. *See, e.g.*, *Dunne v. Libbra*, 330 F.3d 1062, 1064 (8th Cir. 2003) (requiring mandatory and exclusive language); *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Defense Acquisition Program Admin.*, 884 F.3d 463, 470, 472 (4th Cir. 2018), *as amended*, (Mar. 27, 2018) (emphasizing that the word "shall" may not be dispositive on whether a clause is mandatory or permissive, since a mandatory clause requires "specific language of exclusion" that not only confers venue on one forum, but also excludes other forums; thus, the court held that clause providing that disputes "shall be resolved through litigation and the Seoul Central District Court shall hold jurisdiction" was a permissive and not a mandatory clause, because this clause states that the Seoul court "shall hold jurisdiction," but does not exclude other forums); *Weber v. PACT XPP Tech., AG*, 811 F.3d 758 (5th Cir. 2016) ("Our caselaw recognizes a sharp distinction between mandatory and permissive [forum selection clauses]."); *American Soda, LLP v. U.S. Filter Wastewater Grp., Inc.*, 428 F.3d 921, 926–27 (10th Cir. 2005) (highlighting the distinction between forum selection clauses that "contain clear language showing that jurisdiction is appropriate only in the designated forum," and permissive clauses that do "not prohibit litigation elsewhere"); *Florida Polk Cnty. v. Prison Health Servs.*, 170 F.3d 1081, 1084 n.8 (11th Cir. 1999) ("[W]e have analyzed these clauses under a 'mandatory/permissive' test, enforcing only those clauses that unambiguously designate the forum in which the parties must enforce their rights under the contract.") (citation omitted); *Barrett v. USA Serv. Fin., LLC*, No. 4:18-cv-155-FL, 2019 WL 1051177, at *10–11 (E.D.N.C. 2019) (drawing on the precedents of intermediate North Carolina appellate courts, and holding that mandatory forum selection clauses recognized by such cases "have contained words such as 'exclusive' or 'sole' or 'only' which indicate that the contracting parties intended to make jurisdiction exclusive; . . . 'the use of "shall" in a forum selection clause is not dispositive, because, in context, the clause may still permit jurisdiction in one court but not prohibit jurisdiction in another'"); *Lavera Skin Care N. Am., Inc. v. Laverana GmbH & Co. KG*, No. 2:13-cv-02311, 2014 WL 7338739, at *6 (W.D. Wash. 2014),

The clause on which Moving Insurers rely notably lacks any language stating that jurisdiction in the courts of England or Wales is mandatory and exclusive, stating only that the parties "agree to submit to the jurisdiction of any court . . . within England or Wales"—such language shows that the parties may bring an action in England or Wales, but it does not require that all such actions be brought there and that they cannot be brought in any other jurisdiction. If Moving Insurers wanted to limit jurisdiction to the courts of England or Wales, it was incumbent on them to make that clear. *See also Graue v. Missouri Property Ins. Placement Facility*, 847 S.W.2d 779, 785 (Mo. banc 1993) (holding any ambiguities in language drafted by one party is construed against the drafter). The requirement for clarity is particularly pronounced here because insurers drafted and supplied the language at issue. *See* FAP ¶ 121. And they easily could have accomplished that goal. For example, Moving Insurers could have provided that the parties agree to submit *only* to the jurisdiction of a court of competent jurisdiction in England or Wales. Or *solely*. Or *exclusively*.

Moving Insurers knew how to include explicit and mandatory language in their policy provisions. Indeed, many of the other provisions in their policies do include that language. *See*

aff'd, 696 F. App'x. 837 (9th Cir. 2017) (holding that "[t]he place of jurisdiction shall be Hanover, Germany" is a permissive clause, because it only specifies that such place shall have jurisdiction); *Irsik & Doll Feed Servs., Inc. v. Roberts Enters. Invs., Inc.*, No. 6:16-1018-EFM-GEB, 2016 WL 3405175, at *10 (D. Kan. June 21, 2016) (applying Kansas law and using a clause with identical language as an exemplar of a non-exclusive forum selection clause); *Appistry, Inc. v. Amazon.com, Inc*., No. 4:13-CV-2547 HEA, 2015 WL 881507, at *2 (E.D. Mo. Mar. 1, 2015) ("The use of the term 'exclusive' makes clear that this is a mandatory forum selection clause, rather than a permissive forum selection clause."); *Rudman v. Numismatic Guar. Corp. of Am*., 298 So.3d 1212, 1214 (Fla. Dist. Ct. App. 2020) ("forum selection clauses that 'lack mandatory or exclusive language' are generally found to be permissive," and "mandatory choice of law provision and a construction of the venue provision as permissive can co-exist"); *Barshaw v. Allegheny Performance Plastics, LLC*, 965 N.W.2d 729, 739 (Mich. Ct. App. 2020) (adopting test that requires court to "examine the language of the clause for words of exclusivity"); *Phoenix Network Techs. (Eur.) Ltd. v. Neon Sys., Inc*., 177 S.W.3d 605, 615 (Tex. App. 2005) (distinguishing exclusive forum selection clause that identified "the venue" for all disputes to be litigated from permissive clause that specified "a" venue for all disputes); *Caperton v. A.T. Massey Coal Co*., 690 S.E.2d 322, 339 (W. Va. 2009) (finding if the "jurisdiction is not modified by mandatory or exclusive language, the clause will be deemed permissive"); *St. Paul Surplus Lines Ins. v. Mentor Corp.*, 503 N.W.2d 511, 515–16 (Minn. Ct. App. 1993) (rejecting argument that the clause with substantially identical language was a mandatory forum selection clause that precluded litigation in another forum).

e.g., HDI Policy No. B0509DR557413 (including the word "only" and "solely" more than ten times each in order to signify exclusivity in various provisions throughout the policy). Moving Insurers, some of whom are members of the Society of Lloyd's, also presumably were familiar with explicit mandatory and exclusive forum selection clause language because it is used in the Lloyd's membership agreement. *See Stamm v. Barclays Bank of New York*, 153 F.3d 30, 31–32 (2d Cir. 1998) (explaining that the Lloyd's membership agreement includes a provision stating that "[e]ach party hereto irrevocably agrees that the courts of England shall have *exclusive* jurisdiction to settle *any* dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at Lloyd's, and that accordingly *any suit, action, or proceeding . . . arising out of or relating to such matters shall be brought in such courts*, and to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England . . .") (emphasis added).

But Moving Insurers did not include any explicit mandatory or exclusive language in these forum selection clauses, and they cannot revise their policies at the point of claim because they now prefer to litigate this dispute in England or Wales. It is telling that Moving Insurers do not argue how or why the plain language of the forum selection clause itself mandates exclusive jurisdiction in the courts of England or Wales; they merely rely on English cases, inapplicable under Missouri law, to support their position.

One of the key cases on which Moving Insurers rely to argue that English law applies actually supports the Trust's position that the clause at issue is a permissive forum selection clause. *See TH Agriculture & Nutrition, LLC v. Ace Europe Group Ltd.*, 416 F. Supp. 2d 1054 (D. Kan. 2006), *order aff'd, appeal dismissed sub nom. TH Agriculture & Nutrition, LLC v. Ace Europe Group Ltd.*, 488 F.3d 1282 (10th Cir. 2007). In this case, the court held that substantially identical

language to that at issue here would *not* require a dismissal under Kansas law because it did not contain explicit language stating that jurisdiction in the Netherlands was mandatory and exclusive. *See id.* at 1074. While the court granted the insurers' motion to dismiss in that case, it did so only because it determined that Kansas's choice of law rules required it to interpret the forum selection clause under Netherlands law, and that Netherlands law did not require explicit mandatory language for the clause to operate as an exclusive forum selection clause. *Id*. Because Missouri courts interpret forum selection clauses under Missouri law, and Missouri law is like Kansas in requiring explicit mandatory and exclusive language for jurisdiction in the referenced forum to be mandatory and exclusive rather than merely permissive, *TH Agriculture & Nutrition* weighs against dismissal in this case, not in favor of it.

Moving Insurers' attempt to revise their policies now, by persuading the Court that the language used in this forum selection clause is mandatory and exclusive, is made even less credible by a fact that they failed to mention: the clause on which they rely mirrors language that London Market insurers use in their standard service of suit clauses to consent to the non-exclusive jurisdiction of United States courts.[12] For decades, London Market insurers have successfully argued that the standard service of suit clause, which uses substantively identical language to the Choice of Law and Jurisdiction clause at issue here in order to guarantee the availability of a United States forum, does not prevent them from bringing coverage actions of their own in the United Kingdom.

[12] The standard service of suit clause language is as follows: "It is agreed that in the event of the failure of the Company hereon to pay any amount claimed to be due hereunder, the Company hereon, at the request of the Insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States of America and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court." *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 948 A.2d 1285, 1291 (N.J. 2008).

For example, in *Brooke Group Ltd. v. JCH Syndicate 488*, 663 N.E.2d 635 (N.Y. 1996), a United States-based policyholder brought a coverage action against certain London Market insurers in New York. The insurers responded by initiating a competing proceeding in England and moving to dismiss the New York action. *Id.* at 637. The policyholder argued that the service of suit clause in the policies at issue was a mandatory forum selection clause requiring the parties to litigate disputes in the United States. *Id*. The service of suit clause used substantially identical language to the clause at issue here—stating that the company would "submit to the jurisdiction of [any] court of competent jurisdiction within the United States." 663 N.E. 2d at 637–38. The London Market insurers contended that the clause was permissive rather than mandatory and exclusive—exactly the opposite of Moving Insurers' position here—and did not preclude them from bringing their own action in England. The New York Court of Appeals sided with the insurers, holding that the service of suit clause was permissive rather than mandatory and exclusive. *Id.*[13]

While the standard service of suit clause has undergone a revision—insurers now include a final clause stating that "all matters arising hereunder shall be determined in accordance with the law and practice of such Court"—courts continue to apply it permissively. *See, e.g., Chubb Custom Ins. Co.*, 948 A.2d at 1291 (detailing the clause's history and applying it permissively where the clause included a new, third sentence requiring "all matters arising hereunder" to be "determined in accordance with the law and practice of such Court" was added to the standard language because that clause only concerned choice of law).

[13] *See also Columbia Casualty Co. v. Bristol-Myers Squibb Co*., 215 A.D.2d 91, 98 (N.Y. App. Div. 1995) (finding the same clause was permissive); *Whirlpool Corp. v. Certain Underwriters at Lloyd's London*, 662 N.E.2d 467 (Ill. App. Ct. 1996) (same).

Moving Insurers have failed to show that the At Issue Policies contain language requiring exclusive, mandatory jurisdiction in the courts of England and Wales. Under the plain language of the Choice of Law and Jurisdiction clause and Missouri law, the clause on which they rely does not preclude jurisdiction in U.S. courts, and it does not support, let alone require, dismissal of this action. The Trust's choice of forum as the plaintiff in this action therefore should be honored.

CONCLUSION

For the foregoing reasons, the Trust respectfully requests that this Court deny Certain UK Insurers' Motion to Dismiss Plaintiff's First Amended Petition for Declaratory Relief.

Dated: November 23, 2022
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CERTIFICATE OF SERVICE

Pursuant to Missouri Rule of Civil Procedure 55.03(a), the undersigned hereby verifies that he signed the original foregoing document.

The undersigned hereby certifies that on November 23, 2022, a true copy of the foregoing was served, via electronic filing pursuant to Missouri Rules of Civil Procedure Rule 103.08, to all parties of record, and that a true copy of the foregoing was served via email pursuant to Missouri Rules of Civil Procedure Rule 43.01(c)(1)(D), to the attached service list.

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