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

OPIOID MASTER DISBURSEMENT TRUST II, AKA OPIOID MDT II, Plaintiff, v. ACE AMERICAN INSURANCE COMPANY, et al., Defendants.	Case No. 22SL-CC02974 Div. No. 2

CERTAIN UK INSURERS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED PETITION FOR DECLARATORY RELIEF

Defendants Allianz Global Corporate & Specialty SE, incorrectly sued as "Allianz Global Risks US Insurance Company," HDI Global SE, Lloyd's of London Syndicate #1218 a/k/a Newline Syndicate 1218, and SJ Catlin Syndicate SJC 2003 (collectively, "Certain UK Insurers"), for Their Reply in Further Support of Their Motion to Dismiss Plaintiff's First Amended Petition for Declaratory Relief ("FAP"), state as follows:

INTRODUCTION

The Trust ignores the law the Parties chose to govern their insurance policies, including the forum selection clause, which is English law. English law requires that the Parties' dispute be litigated in the UK, not Missouri. The Trust does not dispute English law on this point, or the other, substantive legal points made by Gavin Kealey, K.C. (*see* Ex. 1 to Certain UK Insurers' Motion to Dismiss ("Motion")), and instead argues that English law cannot be used to interpret and enforce the forum selection clause. This Court should honor the Parties' decision that English law governs their insurance policies, and should find that English law should be used to interpret and enforce the forum selection clause.

Regardless, even if the Trust was correct, and Missouri law should be used to interpret the forum selection clause, the result would be the same as the focus under Missouri law is whether enforcement of the forum selection clause would be unfair or unreasonable. Further, under Missouri law, the Trust bears the heavy burden of proving that enforcement would be unfair or unreasonable, and it does not even attempt to satisfy that heavy burden.

Finally, while the Trust argues that the forum selection clause should be interpreted under Missouri law because forum selection is a procedural question, it does not contest that English substantive law governs Certain UK Insurers' policies. This means that even if the forum selection clause is not honored, English law experts will still be required on an ongoing basis to prove English law on various insurance coverage-related issues that will necessarily be addressed throughout the course of this action, including, for example, English law regarding trigger of coverage, occurrence, and number of occurrences issues.

I. English Law Governs the Interpretation of the Forum Selection Clause in Certain UK Insurers' Insurance Policies.

In its Opposition, the Trust argues that Missouri law governs the interpretation of the forum selection clause in Certain UK Insurers' insurance policies because the choice of forum is procedural, not substantive. *See* the Trust's Opposition Brief ("Opposition"), pp. 9-12. In support of this argument, the Trust cites several cases in an attempt to avoid the application of *Raydiant Tech., LLC v. Fly-N-Hog Media Grp., Inc.*, 439 S.W.3d 238, 240 (Mo. Ct. App. S.D. 2014), which held that "[w]here, as here, the case turns on the enforcement of a forum-selection clause, and the contract includes a choice-of-law provision, the law chosen by the parties controls the interpretation of the forum-selection clause." The cases cited by the Trust are inapposite in the most fundamental way: None of the clauses at issue in those cases contains language specifically incorporating the procedural law of the chosen forum, as the clause at issue here does.

Specifically, the clause in Certain UK Insurers' policies states:

> Any dispute concerning the interpretation of the terms, conditions, limitations and/or exclusions contained [in the policies], 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***. (Emphasis added.)

The last sentence is unusual in forum selection clauses (as is apparent from the Missouri precedent relied on by the Trust, which omits such language). As the Trust notes, this language sometimes appears in a service-of-suit clause, which is not a forum selection clause. In any event, the phrase "[a]ll matters arising hereunder shall be determined in accordance with the law and practice of such court" obviously refers to substantive ***and*** procedural law. *See, e.g., W.R. Grace & Co. v. Hartford Acc. & Indem. Co.*, 407 Mass. 572, 580, 555 N.E.2d 214, 218-19 (1990) ("[a] 'determination in accordance with the law and practice' of the court that the insured has selected refers to the whole law of the jurisdiction, including principles of forum non conveniens and rules governing the choice of law"); *Roberts v. Lexington Ins. Co.*, 305 F. Supp. 47, 48 (E.D.N.C. 1969) ("The language in the clause, '… all matters arising hereunder shall be determined in accordance with the law ***and practice*** of such court,' makes plain the intent to have the matters in dispute determined by the procedure of the North Carolina courts rather than federal procedure. Practice is defined as '… those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in.") (emphasis in original) (quoting *Kring v. Missouri*, 107 U.S. 221, 232 (1882)).

In sharp contrast, none of the cases cited by the Trust—*Thieret Family, LLC v. Delta Plains Servs., LLC*, 637 S.W.3d 595, 600 (Mo. Ct. App. E.D. 2021), *Corel Corp. v. Ferrellgas Partners, L.P.*, 633 S.W.3d 849, 852 (Mo. Ct. App. E.D. 2021), *Reed v. Reilly Co., LLC,* 534

S.W.3d 809, 810-11(Mo. 2017), *Peoples Bank v. Carter*, 132 S.W.3d 302, 304 n.2 (Mo. Ct. App. W.D. 2004), and *Consol. Fin. Invs. v. Manion*, 948 S.W.2d 222, 224 (Mo. Ct. App. E.D. 1997)—include a clause which specifies the procedural law that governs any dispute that may arise.

Indeed, as noted in Certain UK Insurers' Motion, the case that is most closely analogous to this case, and involved nearly identical language, included a discussion of this very point:

> … [A]nalyzing the enforceability of the forum selection clause under the law of The Netherlands is consistent with the parties" intent, as manifested by the plain language of the provision. It provides that "any dispute concerning the interpretation of the terms [and] conditions … contained in [the] Policy" shall be subject to the law of The Netherlands. The forum selection clause is such a "term" or "condition" contained in the policies. If that were not enough, the third sentence of the provision further provides that "all matters arising hereunder shall be determined in accordance with the law ***and practice*** of such Court" (emphasis added), meaning a court in The Netherlands. By its plain terms, then, this clause provides not only that interpretational issues regarding the terms and conditions of the policies are governed by the law of The Netherlands, but also that all matters arising under the policies is to be determined in accordance with the "practice" of the courts in The Netherlands. Thus, this provision unambiguously states that the issue of the enforceability of the forum selection clause is to be determined in accordance with the laws and practices of the courts in The Netherlands. As such, applying the law of The Netherlands to this issue is consistent with the parties' intent.

See TH Agric. & Nutrition, L.L.C. v. Ace European Group, Ltd., 416 F. Supp. 2d 1054, 1076 (D. Kan. 2006) ("*THAN*") (quoted at p. 13 of Certain UK Insurers' Motion).

The Trust goes so far as to argue that *THAN* supports ***its*** position because, "[w]hile 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 …." Opposition, p. 16. Yet *THAN*'s holding in this respect rests on a very basic

proposition, also recognized in Missouri,[1] that the parties are free to choose the law that will interpret their contract:

> Although Kansas courts have not been squarely confronted with the issue of what law applies to the enforceability of a forum selection clause when a combined choice-of-law/forum selection clause exists, the court believes that the Kansas Supreme Court would find persuasive, and hence follow, other cases in which courts have not hesitated to apply the parties' contractually chosen law to determining the enforceability of a forum selection clause. *See, e.g., Dunne v. Libbra*, 330 F.3d 1062, 1064 (8th Cir. 2003) (enforcing Ohio choice-of-law provision and applying Ohio law to determining the enforceability of a forum selection clause); *Lambert v. Kysar*, 983 F.2d 1110, 1118-19 (1st Cir. 1998) (predicting that Massachusetts courts would enforce Washington choice-of-law provision; applying Washington law to determining the enforceability of a forum selection clause); *Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 358 (3d Cir. 1986) (enforcing Maryland choice-of-law provision and applying Maryland law to determining the enforceability of a forum selection clause); *see also* Jason Webb Yackee, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. Int'l L. & Foreign Aff. 43, 46 (2004) (courts faced with an international foreign selection agreement should apply basic conflict of law principles and, first and foremost, examine whether the parties have chosen the law to govern their forum selection agreement). Thus, under Kansas law, the parties' contractually chosen law, which is the law of The Netherlands, governs interpretation of the forum selection clause.

THAN, 416 F. Supp. 2d at 1075 (footnote omitted).

II. Missouri Law Supports the Enforcement of the Forum Selection Clause.

Although English law should apply to the interpretation of the policies' forum selection clauses, if the Court were inclined to apply Missouri law, the clauses would still be enforceable because enforcement is neither unjust nor unreasonable—this, of course, is the ***actual*** test under

[1] "[G]enerally, parties may choose the state whose law will govern the interpretation of their contractual rights and duties." *Sturgeon v. Allied Prof'ls Ins. Co.*, 344 S.W.3d 205, 210 (Mo. Ct. App. E.D. 2011); *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 600 (Mo. banc 2012); *see also Restatement (Second) Conflict of Laws*, §187 ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue").

Missouri law for determining whether a forum selection clause is enforceable. The Trust also otherwise misconstrues and misapplies Missouri law, as explained below.

A. The Only Relevant Test Under Missouri Law is Whether Enforcing the Forum Selection Clause Would be Unfair or Unreasonable.

As the cases cited by the Trust establishes, under Missouri law, "[o]nce a party seeking to dismiss shows the ***existence*** of a forum selection clause, the burden shifts to the non-moving party to demonstrate that enforcement of the clause would be unjust or unreasonable." *State ex rel. J.C. Penny Corp. v. Schroder*, 108 S.W.3d 112, 113 (Mo. Ct. App. E.D. 2003) (emphasis added); *see also GP&W Inc. v. Daibes Oil, LLC*, 497 S.W.3d 866, 869 (Mo. Ct. App. E.D. 2016) ("Missouri has long held that freely negotiated forum selection agreements are enforceable 'so long as doing so is neither unfair nor unreasonable'") (quoting *High Life Sales Co. v. Brown-Forman Corp*., 823 S.W.2d 493, 496-97 (Mo. banc 1992)); *Burke v. Goodman*, 114 S.W.3d 276, 279-80 (Mo. Ct. App. E.D. 2003) (noting the Missouri Supreme Court in *High Life* held that "an outbound forum selection clause should be enforced unless it is unfair or unreasonable to do so") (each case cited in Opposition at p. 13). Indeed, under Missouri law, courts "enforce a forum selection clause unless the party seeking to avoid its application sustains a 'heavy burden' to show that the clause is unfair or unreasonable." *Schroder*, 108 S.W.3d at 113-14; *GP&W Inc*., 497 S.W.3d at 869 ("party resisting enforcement of the forum selection clause bears a heavy burden in convincing the court that he or she should not be held to the bargain because it is unfair or unreasonable"); *Burke*, 114 S.W.3d at 280 (same). The Trust has not made ***any*** attempt to meet its "heavy burden."

It is not surprising that the Trust has not attempted to meet its heavy burden because there is nothing unfair or unreasonable about enforcing a forum selection clause in a contract between two large, successful companies with substantially equal bargaining power. *Corel Corp.*, 633

S.W.3d at 855 (rejecting forum selection clause was unfair or unreasonable because there was a lack of negotiation where two large, successful companies had substantially equal bargaining power and there was no evidence that either party could not have looked elsewhere for business-related needs). Nor is there any evidence that Mallinckrodt could not, or did not, have counsel review the policies or that Mallinckrodt could not have obtained insurance without such clauses, as clearly is the case given the number of other policies at issue in this action do not have such a clause. *See, e.g., Burke*, 114 S.W.3d at 280 (enforcing forum selection clause in one-page purchase order because there was no "fraud" or "overreaching" where non-movant was a business entrepreneur and there was no evidence that he was prevented from obtaining counsel to review the purchase order or suggesting modifications); *Whelan Sec. Co., Inc. v. Allen*, 26 S.W.3d 592, 596 (Mo. Ct. App. E.D. 2000) (enforcing a forum selection clause in an employment contract because the court found it was not unfair where "[t]he fact that an employment contract is a prerequisite to employment does not force the employee to accept and execute it; the employee has the option of foregoing the employment if the terms of the agreement are not satisfactory").

Nor is enforcement of the forum selection clause unreasonable where the named insured for each of the policies is an Ireland company and the insurers are companies domesticated in the UK. While some of the additional insureds/debtors may be located in the United States, or even Missouri, the policies do not involve matters of particular Missouri state interest because the policies call for the application of the law of England and Wales. *Compare High Life Sales*, 823 S.W.2d at 497-98 (holding forum selection clause that called for litigation to be located in the jurisdiction of the principal place of business of the defendant, *i.e.*, Kentucky, was unreasonable

because the controlling substantive issue in the case concerned the application of Missouri's statute governing termination of liquor franchises).

Certain UK Insurers' insurance policies, which were in effect from 2011 to 2014, were freely negotiated by large, sophisticated, international commercial entities, including the policies' "Named Insureds," Covidien plc. and, after Covidien plc's pharmaceuticals business had been spun-off from Covidien plc., Mallinckrodt plc.[2] It seems highly unlikely that the Plaintiff would make any argument to the contrary. Second, Covidien plc., and then Mallinckrodt plc., procured those policies through one of the largest, most sophisticated and most international insurance brokers, Marsh—which, to be clear, was their representative with respect to procurement of those policies. Third, it is eminently fair and reasonable to hold the Trust, which seeks the benefits of Certain UK Insurers' insurance policies, to the "burdens" of those policies,

[2] During that timeframe, Covidien plc. described itself as a "large global healthcare company" that was a "leading manufacturer of medical devices and supplies, diagnostic imaging agents and pharmaceuticals, with 2009 revenue of $10.7 billion and industry-leading profit margins," with "42,000 employees worldwide in more than 60 countries, [and] products sold in over 140 countries," with "key brands" Autosuture, Kendall, Mallinckrodt, Nellcor, Puritan Bennett and Valleylab, and with a medical devices" "business segment" that included "endomechanical, soft tissue repair, energy, oximetry and monitoring, airway and ventilation, vascular and other products," a medical supplies segment that included nursing care, medical surgical, SharpSafety and OEM products," and a pharmaceuticals segment that included "specialty pharmaceuticals, active pharmaceutical ingredients, specialty chemicals, contrast products and radiopharmaceuticals." *See* https://web.archive.org/web/20101221131736/http://www.covidien.com/covidien/pages.aspx?page=AboutUs/CorporateFactSheet. In December 2011 Covidien plc. announced that its planned spin-off of its pharmaceuticals business, which it named Mallinckrodt plc. *See* https://www.mallinckrodt.com/about/news-and-media/news-detail/?id=6976. It appears that the spin-off occurred in June 2013. At that time, Mallinckrodt plc. described itself as "a leading global specialty pharmaceuticals business that develops, manufactures, markets and distributes specialty pharmaceutical products and medical imaging agents," noting that it had "approximately 5,500 employees worldwide with direct sales in roughly 50 countries and distribution in approximately 40 countries," and that its "2012 revenue totaled $2.1 billion." *Id.*; *see also* 2013 Information Statement to Covidien plc. Shareholders, page 8, found at https://www.sec.gov/Archives/edgar/data/1567892/000119312513248757/d467783dex991.htm.

assuming for the sake of argument that the policies' forum selection clause could even be regarded as a burden. After all, if the Trust has legal standing to pursue coverage under Certain UK Insurers' policies, as it alleges, then it must stand in the insureds' shoes with respect to those policies, and therefore must have no right to step out of the insureds' shoes solely with respect to the policies' valid and enforceable dispute-related choice of law and forum selection requirements.[3] Fourth, the forum selection clause obviously was not the product of fraud, and also would not violate any fundamental policy or public policy of Missouri.[4] There is no Missouri public policy that would be violated by litigating this matter in the UK. Further, while this case involves multiple claims and several parties, there is no risk of conflicting judgments because each insurer has separate contracts with their respective insureds and there are no duplicative cross-claims that would remain in this Court post-dismissal.

B. Missouri Law does not Focus on a Mandatory Versus Permissive Test.

Rather than attempt to meet its heavy burden of demonstrating that the forum selection clauses are unjust and unreasonable—as required by the very Missouri case law the Trust cites in its opposition brief—the Trust instead relies upon a ***nonexistent*** distinction under Missouri law between so-called "permissive" and "mandatory" clauses. The Trust claims that "Missouri courts

[3] Further, it is well established that when a contract is clear and unambiguous the court is bound to enforce the contract as written. It is not the function of the court to make a better contract for the parties than they themselves have seen fit to enter into or to alter it for the benefit of one party and to the detriment of the other. And under the contracting parties' chosen law, the forum selection clause and its effect is clear and unambiguous, as demonstrated by Certain UK Insurers' foreign-law expert's Declaration, and so the court is bound to enforce the forum selection clause, and not to alter it for the Plaintiff, which wasn't even a contracting party (and instead, at most, is a non-contracting party standing in the shoes of some of the contracting parties).

[4] Here, it is worth emphasizing, again, that because Missouri law holds that a forum selection clause should be enforced unless it is unfair or unreasonable to do so, the party resisting enforcement of the forum selection clause bears a heavy burden in convincing the court that he or she should not be held to the bargain.

will dismiss an action because of a purported forum selection clause only if it contains explicit mandatory and exclusive language." Opposition at p. 13. However, the cases cited by the Trust do not stand for this proposition. Indeed, no Missouri case stands for this proposition.

The Trust cites *Bouquette v. Suggs*, 928 S.W.2d 412, 413 (Mo. Ct. App. E.D. 1996), for the argument that a forum selection clause must "mandate" another forum where the lawsuit "must" be filed and heard. Opposition at p. 13. But the issue in *Bouquette* was not whether a forum selection clause was enforceable; rather, the clause at issue was a choice of law clause calling for the application of Missouri law. The defendant argued that the clause also required that all litigation take place in Missouri. 928 S.W.2d at 413. Rejecting the defendant's argument, the court noted that the clause was not a forum a selection clause, and in explaining the difference between a forum selection and choice of law clause, merely stated that the clause "does not mandate that Missouri be the forum where the lawsuit must be filed and heard; rather, it mandates that Missouri law be used in construing the contract." *Id*. at 413-14. The court said nothing about specific language being required in order for a forum selection clause to be enforceable. Notably, the choice of law clause at issue in *Bouquette* stated that the contract "shall" be governed under Missouri law, much like the Certain UK Insurers' forum selection clause states that "[a]ll matters arising hereunder ***shall*** be determined in accordance with the *law and practice* of such court [*i.e.*, courts in England and Wales]." (Emphasis added.)

Similarly, in *Arizon Structures Worldwide, LLC v. Glob. Blue Techs.-Cameron, LLC*, 481 S.W.3d 542, 544-45 (Mo. Ct. App. E.D. 2015), the issue before the court was not whether a forum selection clause was enforceable because it was mandatory or permissive. Rather, the issue was which of two forum selection clauses controlled—an arbitration clause in the first-executed contract or a forum selection clause in a subsequently-executed contract, which

provided that disputes be settled in Missouri state courts, or, at the seller's option, by arbitration. *Id.* In reaching its decision, the court relied upon the principle that "when two writings are inconsistent, the contract last executed, if valid, will supersede the first to the extent that the two are inconsistent." *Id.* at 547. The court reasoned that the latter executed forum selection clause controlled because it was inconsistent with the arbitration clause where the forum selection clause was mandatory and all-inclusive. *Id*. at 550. The issue of whether the forum selection clause was mandatory and exclusive was only pertinent to whether the two clauses were inconsistent. *Id*. Notably, as in *Bouquette*, the court labeled the arbitration clause as "mandatory" where it merely used the term "shall" (as is also the case with Certain UK Insurers' forum selection clause). *Id*. at 544, 550.

The other cases cited by the Trust similarly do not support a distinction between permissive and mandatory language under Missouri law. Opposition at p. 13 (citing *Schroeder, Burke, and GP&W*). *Schroeder* did not discuss mandatory or permissive language; rather, the court analyzed whether the non-moving party met its "heavy burden" of demonstrating that the forum selection clause was unjust or unreasonable. *Schroeder*, 108 S.W.3d at 113-14. Because the non-movant did not present evidence to show that the clause was unfair or unreasonable, as is the case here with the Trust, the court held the movant's motion to dismiss should have been granted. *Id*.; *see also GP&W*, 497 S.W.3d at 869 (court noted the actual test under Missouri law for the enforceability of forum selection clauses but held that the issue of whether the clause was unfair or unreasonable was not properly preserved for appeal because the party did not argue the issue before the trial court); *Burke*, 114 S.W.3d at 279-82 (with no discussion of whether a clause was mandatory or permissive, holding non-movant had not met his "heavy burden" under

the unfair or unreasonable test to convince the court that he should not be held to his bargain under the contract's forum selection clause).

Whether the language in the forum selection clauses are "mandatory" or "permissive" is simply not a consideration under Missouri law. The Trust, which steps into the shoes of Mallinckrodt, has not met its "heavy burden" of demonstrating that it should not be held to Mallinckrodt's bargain in litigating this matter with the UK Insurers in England. Accordingly, even under Missouri law, the Court should grant Certain UK Insurers' Motion.

C. The Trust's Reliance on *Reed v. Reilly Co.* is Misplaced.

The Trust argues that the ruling of the Missouri Supreme Court in *Reed v. Reilly Co., LLC*, 534 S.W.3d 809 (Mo. banc 2017), means that the forum selection clause should not be enforced. Opposition, p. 11. However, in *Reed,* the Missouri Supreme Court simply held that if the parties' contract includes a choice of law clause and an outbound forum selection clause, if the choice of law clause provides that some other state's or country's law governs the parties' dispute, and if it is alleged that enforcement of the forum selection clause is unfair or unreasonable, then, as a threshold proposition, the alleged unfairness or unreasonableness should be assessed with reference to Missouri law. Therefore, the Trust is mistaken when it argues that, on account of *Reed*, this Court should assess—with reference to Missouri law—whether the forum selection clause in Certain UK Insurers' insurance policies is permissive or mandatory. To the contrary, pursuant to the policies' choice of law clause, any such assessment must be made with reference to the English law only, not Missouri law. Missouri law is only relevant, as noted, if a plaintiff alleges that enforcement of the forum selection clause is unfair or unreasonable. The Trust has made no such argument here.

The parties in *Reed* did not argue, and the Supreme Court did not hold *sua sponte*, or even suggest, that even though the employment agreement's choice of law clause provided that Kansas law governed any dispute concerning the employment agreement, the forum selection clause should be interpreted with reference to Missouri law—except that the Supreme Court reinforced longstanding, firmly entrenched Missouri precedent holding that if the party opposing enforcement argues that enforcement would be unfair and unreasonable, then the Missouri court should assess that alleged unfairness and unreasonableness with reference to Missouri law.[5] Certain UK Insurers have no quarrel with that precedent. In fact, their Motion to Dismiss cites this precedent for precisely this proposition:

> "Freely negotiated" forum-selection clauses will be enforced, "so long as doing so is neither unfair nor unreasonable." *Corel Corp. v. Ferrellgas Partners, L.P.*, 633 S.W.2d 849, 853 (Mo. App. E.D. 2021); *see also High Life Sales Co. v. Brown–Forman Corp.*, 823 S.W.2d 493, 497 (Mo. banc 1992) ….

[5] The fact that *High Life*, *Reed* and other Missouri precedent hold that a Missouri court should look to Missouri law when assessing whether enforcement of a forum selection clause would be unfair and unreasonable is underscored by a law review article from the University of Missouri School of Law regarding the Supreme Court's decision in *High Life*, which makes precisely this point in the article's introduction:

> When parties enter into contracts, they want their rights and duties to be as certain and predictable as possible. One way to achieve such predictability is to include a provision in a contract which stipulates that all disputes arising out of that contract will be resolved in a particular court, state, or country. Such a provision is known as a forum selection clause. * * * [A] trend has developed in which courts will enforce forum selection clauses unless enforcement is unfair or unreasonable. In *High Life* … the Missouri Supreme Court followed this trend and made forum selection clauses *prima facie* enforceable. * * *

C. Cunningham, Note, *The Enforceability of Forum Selection Clauses: Missouri Finally Joins the Majority*, 58 Missouri L. Rev. 237 (1993) (footnotes omitted). Again, this article makes it clear that Missouri law is only applicable to an argument, if asserted, that enforcement of an outbound forum selection clause is unfair and unreasonable.

See Certain UK Insurers' Motion, p. 11. This really is the key Supreme Court take-away: Missouri courts do not lightly interfere with freedom of contract, and therefore freely-negotiated outbound forum selection clauses will be enforced unless they are so unconscionable that enforcement would be truly unfair and unreasonable.

Further, it is worth emphasizing that, in *Reed*, there was no issue about whether the clause at issue was permissive or mandatory. Again, the clause stated that "the sole proper jurisdiction and venue to interpret and enforce any and all terms of this Agreement shall be the District Court of Johnson County, Kansas," so it was indisputably mandatory, neither of the parties made arguments to the contrary, and neither the circuit court nor the Supreme Court would have or did make findings to the contrary.

III. <u>There Is No Dispute Regarding What English Law Is.</u>

Certain UK Insurers set forth how English law interprets the forum selection clause at issue, and how, under English law, it is exclusive and mandatory. *See* Certain UK Insurers' Motion, p. 10. Indeed, in the lengthy Declaration of Gavin Kealey K.C., attached as Exhibit 1 to the Motion, the following opinion is provided:

> I am of the firm opinion that the Policies are governed by English law and that they provide for the English courts to have exclusive jurisdiction over all contractual disputes which arise in connection with the Policies and their terms. I consider that the claims brought by the Trust in the present proceedings are within the scope of the relevant choice of law and jurisdiction provisions in the Policies, and that the Plaintiff is bound to comply with these provisions in respect of such claims. As such, I believe that the Plaintiff is obliged under English law to submit all such claims to the exclusive jurisdiction of the courts of England and Wales, to be resolved in accordance with English law.

See Ex. 1, ¶ 8; *see also id.* at ¶ 53.1 ("the choice of English law in conjunction with [a] reference to English jurisdiction is a powerful factor in favour of construing the choice of English

jurisdiction as exclusive"). The Trust does not dispute, nor does it even address, the substance of this opinion.

IV. Conclusion

For the foregoing reasons, Certain UK Insurers respectfully request that this Court grant their Motion to Dismiss Plaintiff's First Amended Petition for Declaratory Relief, dismissing the First Amended Petition as to Certain UK Insurers, with prejudice, and granting all further relief as may be appropriate.

Dated: December 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2022, the foregoing was filed electronically with the Court's CM/ECF system, which will send electronic notices to all counsel of record. In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that he has signed the original of this Certificate and the foregoing pleading.

/s/ Jonathan H. Ebner