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USA-India Export-Import, Inc. v Coca-Cola Refreshments USA, Inc.
2015 NY Slip Op 50091(U)
Decided on January 30, 2015
Supreme Court, Westchester County
Scheinkman, J.
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USA-India Export-Import, Inc., d/b/a FAIR DEAL DELI-GROCERY & GIFTS, and MAMA TINA'S PIZZA CORP., on behalf 2014 of themselves and all others similarly situated, Plaintiffs,

against

Coca-Cola Refreshments USA, Inc., Defendants.

53047/2014

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Alan D. Scheinkman, J.

Scheinkman, J:

Defendant Coca-Cola Refreshments USA, Inc. ("Defendant" or "Coca-Cola") moves pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) for an order dismissing the complaint in its entirety. Putative Class Representative Plaintiffs USA-India Export-Import, Inc. (d/b/a Fair Deal Deli-Grocery & Gifts) ("Fair Deal") and Mama Tina's Pizza Corp. ("Mama Tina") ("Plaintiffs") oppose the motion.

The fundamental question presented is whether the forum selection clause contained in the agreements between the parties, which designate the courts in Georgia as the exclusive forum for

litigation, is enforceable over Plaintiffs's objections that enforcement would violate New York public policy.

FACTUAL AND PROCEDURAL HISTORY

This action is predicated upon allegations that Coca-Cola has violated New York's Returnable Container Act (Environmental Conservation Law Article 27, Title 10) ("ECL") (the "Bottle Bill") and New York's General Business Law ("GBL") § 349. It was initiated by filing of a Summons and Complaint on March 3, 2014. **[FN1]**

Coca-Cola moved to dismiss. At a conference held on July 24, 2014, it was agreed that Plaintiffs would be afforded the opportunity to amend the Complaint to address deficiencies raised by Coca-Cola's motion. An Amended Class Action Complaint was filed on August 26, 2014. Coca-Cola elected to move against the Amended Class Action Complaint. Because counsel agreed that the motion was potentially dispositive, discovery was stayed pending the determination of the motion.

THE ALLEGATIONS OF THE AMENDED CLASS ACTION COMPLAINT

Plaintiffs purport to bring this action on behalf of themselves and others similarly situated who have been charged a $1.20 deposit handling fee ("deposit handling fee" or "Code 1100 charge") for every 24-bottle case of beverages Plaintiffs purchased from Defendant that was eligible for a five cents per bottle refund (Amended Class Action Complaint at ¶ 2).[FN2]

The background of Plaintiffs' claims is found in the legislative findings underlying the Bottle Bill. As recounted in ECL §27-1001, the Bottle Bill was enacted to address the litter problem caused by discarded beverage containers which presented a direct threat to the health and safety of the citizens of New York State (*id.* at ¶ 12). Plaintiffs point to increases in the public's use and consumption of individual plastic water containers as well as other beverage containers and the economic impact such increased use has had on New York's taxpayers in terms of litter and disposal clean up costs (*id.* at ¶¶ 14-15).

According to Plaintiffs, in 2009, the Bottle Bill was amended to include, *inter alia,* ECL § 27-1012, which required that "deposit initiators (such as Defendant) are required to pay all deposits received from the sale of containers into a special interest-bearing account (called a refund value account') in trust for the state of New York. From that account, deposit initiators may deduct deposits actually refunded to consumers; the balance of the account represents

unredeemed deposits. Section 27-1012 requires deposit initiators to pay 80% of the unredeemed deposits to the state as an escheat on a quarterly basis" (*id.* at ¶ 16).

Plaintiffs posit that the Bottle Bill puts the costs of compliance with this and the other sections on the deposit initiators and precludes cost shifting to dealers like Plaintiffs (*id.* at ¶ 12). To support their position, Plaintiffs point out that ECL § 27-1007(8) expressly provides that it was the responsibility of the deposit initiator to provide to a dealer or a redemption center a sufficient number of suitable containers at no cost for the handling of the empty beverage containers and ECL § 27-1007(8)(a) provides that a deposit initiator cannot require a dealer or redemption center to load their own containers onto the deposit initiator's vehicle or require that it provide the staff or equipment needed to do so. Further, Plaintiffs contend that "[i]n specifying the refund value of a beverage container, Section 27-1007(6) provided that the deposit initiator shall pay to any dealer ... a handling fee of three and one-half cents for each beverage container ....' and that such fee may not be conditioned on the purchase of any goods or services, nor may such payment be made out of the refund value account' 80% of the proceeds of which now escheat to the state" (*id.* at ¶ 18). Plaintiffs assert that the regulations promulgated in furtherance of the Bottle Bill "prohibit contracts or agreements made in derogation of the statute" — *i.e.,* " No contract may be designed to [*2]hinder of frustrate the purpose or intent of this Part'" (*id.* at ¶ 19,

quoting 6 NYCRR § 367.12).

Plaintiffs allege that Defendant added the Code 1100 charges at or about the effective date of the 2009 amendments and in so doing, Defendant frustrated the purpose and effect of the Bottle Bill by avoiding the economic impact on it of the amendments by shifting it to Plaintiffs and other similarly situated putative class members. This is because, while Plaintiff "paid the state the required 80% of unredeemed deposits ... at the same time [it] collected and retained 100% of the deposits from its dealers" (*id.* at ¶ 20, *see also* ¶ 31).

Plaintiff Fair Deal asserts that it was required to enter into a written agreement in November 2013 (the "Club Coke Agreement"), which contained a forum selection and choice of law clause requiring that the Club Coke Agreement " be governed and construed in accordance with the laws of the State of Georgia *without reference to its conflict of law rules*'" (*id.* at ¶ 21, *quoting* Club Coke Agreement [emphasis added]). Plaintiffs allege that the forum selection and choice of law clauses represent an attempt to frustrate the purpose and intent of the Bottle Bill since Georgia has not enacted a bottle bill. Therefore, say Plaintiffs, if the choice of law provision were enforced, Plaintiff Fair Deal would be precluded from litigating its claims under the Bottle Bill (*id.*). Plaintiffs further allege, on information and belief, that Defendant required Mama Tina to enter into a similar agreement (*id.*).

The Amended Class Action Complaint also alleges that "the invoice generated by Defendant and provided to Plaintiffs was materially misleading ... [because] it failed to explain that Code 1100 was a deposit handling fee being charged to Plaintiffs that duplicated the total deposit' charge the Bottle Bill empowered Defendant to charge. Defendant thus improperly charged Plaintiffs in derogation of the Bottle Bill as amended" (*id.* at ¶ 31).

Based on these causes of action, Plaintiffs assert claims for (1) Defendant's violation of ECL § 27-1001 *et seq.* based on Defendant's unlawfully charging Plaintiffs and the Class a second duplicative deposit handling fee; (2) the same claim on behalf of the Subclass; (3) Defendant's violation of GBL § 349 on behalf of the Class and Subclass; and (4) Defendant's unjust enrichment.

DEFENDANT'S MOTION TO DISMISS

Coca-Cola submits copies of the agreement between Fair Deal and Defendant and the agreement between Mama Tina's and Defendant (Affirmation of [*3]Mitchell P. Hurley, Esq. dated September 26, 2014 ["Hurley Aff."], Exs. D and E, respectively), which Plaintiff admits were entered into (Amended Class Action Complaint at ¶ 7). The forum selection clause in these agreements provide that:

Disputes and Governing Law: This Agreement and any dispute arising out of or relating to it will be governed by and construed in accordance with the laws of the state of Georgia without reference to its conflict of law rules. The prevailing party in any dispute arising out of or relating to this Agreement will be entitled to recover its reasonable attorneys' fees and other costs and expenses of litigation. The exclusive venue for litigation will be in the federal or state courts located in Atlanta, GA, and the parties agree to submit to the personal jurisdiction of the courts in the State of Georgia .... (Hurley Aff., Exs. D and E at 3).

Defendant argues that "[b]ecause forum-selection clauses provide certainty and predictability in the resolution of disputes,' ... they are *prima facie* valid and strictly enforced by the courts of this State" (Def's Mem. at 7, *quoting Boss v American Express Fin. Advisors, Inc.*, 6 NY3d 242, 247 [2006], *lv denied* 12 NY3d 716 [2009]). Thus, " dismissal is not discretionary, but is the necessary consequence of enforcing the contract between the parties'" (*id., quoting Lischinskaya v Carnival Corp.,* 56 AD3d 116, 123 [2d Dept 2008]). It is Defendant's position that the subject forum selection clauses contain the broadest and most comprehensive language parties can use and cover all of the claims asserted in this action since the Agreements "govern the marketing and sale of [Coca-Cola's] beverages at [Plaintiffs'] current and after-acquired outlets,' including product requirements, pricing and programs'" (Def's Mem. at 8). Defendant points out that Plaintiffs are not asserting that the contracts are contracts of adhesion and their argument is limited to their contention that it is unenforceable since "it contravenes New York

public policy, constitutes overreaching and/or would render a trial in the selected forum so gravely difficult that the named Plaintiffs and others similarly situated persons would for all practical purposes be deprived of their day in court'" (*id.* at 9, *quoting* Amended Class Action Complaint at ¶ 7).

According to Defendant, no public policy concerns are implicated since "the Code 1100 fee at issue in this case does not alter the incentives to recycle put in place by the Act ...." (*id.*). This, says Defendant, is because "[t]he stated purpose of the Act is to provide a necessary incentive for the economically efficient and environmentally benign collection and recycling of ... containers'" and the Code 1100 fee is imposed at the time the dealers purchase the Coca-Cola products (they are free to purchase or not to purchase such products) — not at the time when they return the products — therefore, the dealers have the same economic incentive to collect and return empty containers to Coca-Cola (Def's Mem. at 17, *quoting* ECL § 27-1001). Defendant asserts that even if public policy concerns were involved, under the [*4]controlling New York Court of Appeals' authority in *Boss, supra*, Plaintiffs' argument is in reality a choice of law, rather than a choice of forum argument, and such an argument should be made to the courts in Georgia, the forum chosen by the parties by contract (*id.* at 10).

In opposition to Defendant's motion, Plaintiffs submit a memorandum of law. As their legal argument against the branch of

Defendant's motion seeking to dismiss based on the forum selection clause, Plaintiffs summarize the 2009 amendments to the Bottle Bill that they believe show that the Code 1001 fee charged by Defendant is in contravention of the Bottle Bill. In this regard, Plaintiffs assert that those amendments "made clear that the costs of compliance with the Bottle Bill could not be shifted from deposit initiators, like Coke, to dealers, like Plaintiffs" (Plf's Opp. Mem. at 3). In support, Plaintiffs cite (1) ECL § 27-1007(8) which provides that it is " the responsibility of the deposit initiator to provide dealers with a sufficient number of suitable containers, at no cost, for the packaging, handling and pickup of empty beverage containers ...." (*id.*, *quoting* ECL § 27-1007[8]); (2) ECL § 27-1007(8)(a) which prohibits a deposit initiator from requiring "a dealer or redemption center to load their own ... containers onto or into the deposit initiator's ... vehicle ... or provide the staff or equipment needed to do so" (*id.*, *quoting* ECL § 27-1007[8][a]); and (3) ECL § 27-1007(6) which increased the statutory handling fee to be paid by the deposit initiators to the dealers or redemption centers to 3.5 cents and which prohibited the deposit initiator from conditioning the payment of the handling fee on the purchase of any goods or services and from paying such handling fees out of its refund value account (*id.*, *citing* ECL § 27-1007[6]). Plaintiffs also rely on the regulations enacted pursuant to the statute which provide that " *[a]ll contracts or agreements entered into between or among persons subject to this Part must be consistent with this Part and with title 10 of article 27 of the [ECL]. No such contract*

may be designed to hinder of frustrate the purpose or intent of this Part'" (*id., quoting* 6 NYCRR § 367.12 [emphasis added]).

Plaintiffs posit various scenarios by which they suggest Defendant unjustly enriched itself at the expense of Plaintiffs through the imposition of the Code 1100 charges and how Defendant "retained a greater percentage of the deposit charges collected than the 20% contemplated by the 2009 Amendments" (*id.* at 4). Further, Plaintiffs assert, the purpose of the Code 1100 charge was to "hinder and frustrate the purpose and intent of the Bottle Bill and to avoid the effect of the 2009 Amendments" — *i.e.,* "[i]t paid the State the required 80% of unredeemed deposits and at the same time collected 100% of the deposits from its dealers" (*id.*). Plaintiffs further claim that the invoices Defendant issued were misleading because Defendant failed to explain that "the Code 1100 was a deposit handling fee' that duplicated the total deposit' charge the Bottle Bill empowered Coke to charge .... Effectively, the Code 1100 charges let Coke avoid the effect of the 2009 Amendments that were designed to pass financial and logistical responsibilities upstream to the deposit initiator and to avoid the economic effect of requiring the deposit initiator to escheat 80% of unredeemed deposits to the [*5]State" (*id.*).

Plaintiffs also dispute that the forum selection clause may control all of the claims asserted because it was not until January 1, 2013 that Defendant and Mama Tina entered into the written Agreement

containing the choice of law and forum selection clause and it was not until November 21, 2013 that Defendant and Fair Deal entered in the written Agreement containing the choice of law and forum selection clause, yet the claimed wrongful Code 1100 charges emanate from March 3, 2011 (*id.* at 5, 7). It is Plaintiffs' position that to the extent this Court were to enforce the forum selection clause, "that would result in the dismissal of only claims asserted by the Subclass concerning beverage purchases made pursuant to and on or after the effective dates of the Agreements" — *i.e.,* the forum selection clause may only govern claims for purchases that post-date the execution of the Agreements (*id.*).[FN3]

Plaintiffs argue that because Georgia has no bottle bill, "[i]f the choice of law provision were enforced as written without reference to Georgia's conflict of laws, Plaintiffs would be precluded from litigating any claims under the Bottle Bill. The Agreements thus contravene New York's Bottle Bill, are designed to hinder and frustrate the purpose and intent of the Bottle Bill and regulations promulgated pursuant to it, constitutes overreaching and would render a trial in the selected forum so gravely difficult as to deprive Plaintiffs of their day in court" (*id.* at 6). Citing *Matter of Betlem* (300 AD2d 1026 [4th Dept 2002]), Plaintiffs further argue that New York courts have refused to enforce forum selection clauses in certain circumstances where to do so would contravene New York public policy (*id.* at 8). Plaintiffs then state, without providing any authority

for their position, that "[i]f this Court determines that the Subclass's claims should be litigated in Georgia, Plaintiffs will be unable to enforce the Subclass's rights under the ECL and Defendant will be permitted to circumvent in part the public policy concerns behind the 2009 Amendments" (*id.* at 9).

Plaintiffs contend that the same public policy concerns are implicated with their GBL claim since "[i]f the forum selection clause is enforced, a Georgia court applying Georgia substantive law without reference to its choice of law rules would apply the Georgia Fair Business Practices Act, § 10-1-391(a)", which is limited to conduct in the state of Georgia and, as pleaded, the deceptive practices occurred in New York (*id.* at 10). Therefore, Plaintiffs would have no claim for deceptive trade practices under Georgia law.

Plaintiffs seek to distinguish *Boss* by arguing that the forum selection clause there allowed "a Minnesota court to consider its own conflict of law rules in determining whether New York labor law should apply to the challenged conduct" whereas this Agreement provides that it will be governed by Georgia law without [*6]reference to its conflict of law rules. According to Plaintiffs if this Court does not address the enforceability of the forum selection clause and simply dismisses the case, "Plaintiffs will be deprived of their ability to bring claims under the ECL and GBL or to bring any analogous claims under Georgia law" (*id.* at 11).

In further support of its motion, Defendant submits a reply memorandum of law. In it, Defendant rebuts Plaintiffs' contention that only those claims emanating following the execution of the Agreements may be relegated (to the extent this Court were to wrongfully enforce the forum selection clause) to the courts in Georgia by arguing that because "the parties chose not to include any temporal or claim-specific limitation on their agreement to litigate in Georgia ... Plaintiffs cannot graft such a limitation on the contract now through this litigation" (Def's Reply at 3). Alternatively, Defendant argues that even if the forum selection clause could be read to cover litigation only arising out of Plaintiffs' 2013 Agreements, "Plaintiffs' four counts are all based on the same nexus of operative facts and allege the same legal theories, and thus all relat[e] to' the same dispute" and any other interpretation would cause an absurd result.

In response to Plaintiffs' position that public policy dictates that the forum selection clause be found unenforceable, Defendant again argues that because the Code 1100 charge is imposed at the time the bottles are sold and not when they are returned, they cannot subvert the Act's purpose of encouraging the recycling and collection of used beverage containers — *i.e.,* "the incentive to return empty containers remains exactly as contemplated by the Act: obtaining the 5 ¢ deposit, plus the 3.5 ¢ handling fee" and if anything, increasing the prices of beverages "is more likely to discourage sales and thus *reduce* litter in

the State" (*id.* at 9 [emphasis added]). According to Defendant, the sections cited by Plaintiffs which require distributors to bear certain costs (*i.e.,* the cost of providing dealers with suitable containers and to bear the costs of loading the bottles onto their trucks for removal) and under which Defendant is in full compliance, are related to increasing the likelihood that retailers will return bottles for recycling and Defendant's Code 1100 fee charged at the time of sale does nothing to discourage that.

Defendant also contends that *Boss*, *supra*, requires the selected forum to address any such public policy arguments. Defendant rebuts Plaintiffs' position that *Boss* is distinguishable since in that case, the forum selection clause permitted a Minnesota court to determine what law applied based on its own conflict of law rules by pointing out that in fact, the clause in *Boss* required the court to apply Minnesota law and the plaintiffs in *Boss* argued that the Minnesota choice of law clause should not be enforced as it would interfere with New York public policy. Defendant argues that the New York Court of Appeals rejected that argument finding that such an argument should be decided by the Minnesota courts, the forum the parties chose by contract. As such, Defendant contends that as in *Boss*, "Plaintiffs here are free to argue to the state or federal judge in Atlanta that their choice-of-law clause should be disregarded based [*7]on alleged New York public policy concerns, and that the court should apply GBL § 349 rather than the Georgia Fair Business Practices Act to the parties'

dispute" (*id.* at 5). Defendant further notes that New York's GBL (like Georgia's Fair Business Practices Act) only applies to deceptive practices occurring in New York, but that GBL claims may be brought (and have been brought) in courts outside New York (*id.* at 5, n.3).

LEGAL ANALYSIS

The initial question is whether New York law or Georgia law that governs the enforceability of the forum selection clause. The New York courts will enforce a choice of law provision so long as the chosen forum bears a reasonable relation to the agreement and "the enforcement of the provision applying a foreign rule of law [does] not violate a fundamental public policy of New York" (*Gambar Enter., Inc. v Kelly Serv., Inc.*, 69 AD2d 297, 303 [2d Dept 1979]; *Boss v American Express Fin. Advisors*, 15 AD3d 306, 307 [1st Dept 2005], *affd* 6 NY3d 242 [2006]). However, a choice of law provision only operates to import the substantive law of the chosen jurisdiction; any matters of procedure remain governed by New York law (*Gambar Enter., Inc. v Kelly Serv., Inc., supra* 69 AD2d at 304).

There is a division in authority as whether the law of the forum chosen pursuant to a choice of law clause governs the enforceability of the forum selection clause (*see, e.g., Yavuz v 61 MM, Ltd.: A New*

Federal Standard — Applying Contracting Parties' Choice of Law to the Analysis of Forum Selection Agreements, 85 Denv. U. L. Rev. 597 [2008]). In New York, it appears that the rule is that "[q]uestions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature" (*Korean Press Agency, Inc. v Yonhap News Agency*, 421 F Supp 2d 775, 778 [SD NY 2006], *quoting Jones v Weibrecht*, 901 F2d 17, 19 [2d Cir 1990]; *see also Wells Fargo Century, Inc. v Brown*, 475 F Supp 2d 368 [SD NY 2007]). Hence, courts have held that such clauses should be determined by the law of the forum (*id.; see also New York Trans Harbor LLC v Derektor Shipyards Conn., LLC*, 2008 NY Slip Op 50998[U], 19 Misc 3d 1134 [A] [Sup Ct, NY County 2008]). In *New York Trans Harbor LLC*, defendant argued that because the contract specified that English law was to govern, the law of England would determine the enforceability and interpretation of the forum selection clause (*id.* at *2). The court disagreed and applied New York law to determine the enforceability of the forum selection clause since the provision "requiring the application of English law operated only to import the substantive law of [England]" (*id., citing Sears, Roebuck & Co. v Enco Assoc., Inc.*, 43 NY2d 389, 397 [1977]).

Here, the Court shall apply New York law in determining the enforceability and scope of the forum selection clause.

"[I]t is now recognized that parties to a contract may freely select a forum which will resolve any disputes over the interpretation or

performance of the contract .... Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes ...." (*Brooke Group Ltd. v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). Where the parties have bargained for the use of a particular forum, the law favors holding the parties to their agreement except in very narrow circumstances. Especially in the commercial context, the courts are properly reluctant to re-write the parties' agreements or to thwart enforcement of their solemn contractual rights and obligations.

"A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court'" (*Trump v Deutsche Bank Trust Co. Am., 65 AD3d 1329*, 1131 [2d Dept 2009], *quoting Horton v Concerns of Police Survivors, Inc., 62 AD3d 836* [2d Dept 2009], *lv denied* 13 NY3d 706 [2009]).

"Regarding the public policy limitation, the party opposing enforcement of a contractual choice of law on this ground bears a heavy burden' of demonstrating that the foreign law is offensive to our public policy ... This burden is not met by a mere showing that our law is different from that of a sister State .... Rather, it must be demonstrated that the applicable foreign law would violate some

fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal' .... Stated otherwise, resort to the public policy exception should be reserved for those foreign laws that are truly obnoxious to the laws of our State'" (*Finucane v Interior Constr. Corp.*, 264 AD2d 618, 620 [1st Dept 1999]; *see also Hugh O'Kane Elec. Co. v MasTec N.A., Inc.*, 19 AD3d 126 [1st Dept 2005]). " Absent a strong showing that it should be set aside, a forum selection agreement will control'" (*Adler v 20/20 Companies*, 82 AD3d 918, 919-920 [2d Dept 2011]).

Thus, in general, New York public policy favors the enforcement of forum selection clauses (*Koob v IDS Fin. Serv., Inc.*, 213 AD2d 26, 33 [1st Dept 1995]) and, indeed, New York will mandate that agreements selecting New York as a forum be enforced in statutory-defined situations.[FN4]

In *Boss*, three financial advisors brought a putative class action based on their claim that their contracts with IDS Life Insurance Co. (IDS) violated New York's Labor Law based on IDS's requirement for each financial advisor to pay a certain amount each month in an expense allowance to cover the maintenance of office space and overhead expenses. The employment contract contained a clause that said, "[t]his Agreement is a Minnesota Contract, governed by Minnesota law. All of the payments you make to IDS Life are payable in Hennepin County, Minnesota. You expressly waive any privileges

contrary to this provision. You agree to the jurisdiction of [the] State of Minnesota courts for determining any controversy in connection with this Agreement" (*Boss*, 6 NY3d at 245-46). The trial court dismissed the action based on the forum selection clause over the plaintiffs' contention that the forum selection clause should not be enforced because the wage deductions contravened New York's Labor Law and were contrary to the public policy concerns of New York as the State forbids deductions of more than 10% from an employee's wages.

In affirming the dismissal based on the forum selection clause, the Court of Appeals found plaintiffs' argument to be "misdirected" since the issue raised was "really one of choice of law, not choice of forum; it is the choice of law clause that, according to plaintiffs, may not be enforced" (*Boss,* 6 NY3d at 247). The Court reiterated the notion that forum selection clauses are enforced because they " provide certainty and predictability in the resolution of disputes,'" and expressly declined to resolve the choice of law issue presented because

[i]t could and should have been made to a court in Minnesota—the forum the parties chose by contract. If New York's interest in applying its own law to this transaction is as powerful as plaintiffs contend, we cannot assume that Minnesota courts would ignore it, any more than we would ignore the interests or policies of the State of Minnesota where they were implicated. In short, objections to a

choice of law clause are not a warrant for failure to enforce a choice of forum clause (*Boss,* 6 NY3d at 247).

Similarly in *Erie Ins. Co. of NY v AE Design, Inc.* (104 AD3d 1319 [4th Dept 2013], *lv denied* 21 NY3d 859 [2013]), plaintiff's subrogar (Maplevale Farms, Inc.) hired defendant to provide the engineering services in connection with the construction of an addition. Subsequent to the construction in accordance with defendant's specifications, the roof collapsed which resulted in damage to the building and the inventory contained therein. In the agreement entered into between Maplevale and Defendant, the parties agreed that any litigation arising from the agreement would be brought in the Courts of Common Pleas of Pennsylvania and that the laws of Pennsylvania would govern the validity of the Agreement and its interpretation and enforcement. In opposing the enforcement of the forum selection clause, plaintiff contended that the enforcement of the limitation of liability provision in the agreement in accordance with Pennsylvania law violated New York's General Obligations Law § 5-322.1 and § 5-324. In rejecting this argument, the Appellate Division, Fourth Department followed the *Boss* decision and held that such an argument "concerns choice of law, not choice of forum, and it may properly be raised before a court in the forum chose by the parties in Pennsylvania" — *i.e.,* " [o]bjections to a choice of law clause are not a warrant for failure to enforce a choice of forum clause'" (*Erie Ins. Co.,* 104 AD3d at 1320, *quoting Boss,* 6 NY3d at 246).

Here, the Plaintiffs' real issue is not so much with the forum in which they agreed to litigate their disputes with Defendant; it is their fear that a court sitting in Georgia will enforce the parties' choice of law clause and find that New York's ECL has no applicability to the parties' dispute. That Georgia does not have a bottle bill does not mean that the courts in Georgia will inevitably be hostile to fair consideration of claims based on the laws of states which have such bill. But, more important, it is up to the courts in the parties' selected forum to decide whether or not the choice of law clause bars any such claim — not this Court. Because it is only the choice of law clause, and not the forum selection clause, that would potentially violate the public policy of this State, the Court shall enforce the parties' agreement with regard to their selected forum for litigation.

The Court observes that the Legislature has, on occasion, enacted an express prohibition against enforcement of forum selection clauses. In the Prompt Payment Act (Article 35-E of the General Business Law), the Legislature prohibited the enforcement of provisions in construction contracts calling for disputes to be heard in other states or which make the contracts subject to the laws of other states. But the Legislature has not so provided in this instance.

Georgia's lack of a Bottle Bill and the absence of any judicial decision in Georgia dealing with an agreement made in New York allegedly in contravention of New York's Bottle Bill do not suffice to show that Georgia's laws are truly obnoxious to New York's.

The Court finds the principal New York case relied upon by Plaintiffs *[*8]inapposite.* In *Matter of Betlem, supra*, petitioner had assigned 40% of his interest in his father's estate to respondent. Respondent had moved to dismiss the proceeding that was pending before the Surrogate because there was a forum selection clause in the parties' assignment providing exclusive venue in Florida. In affirming the Surrogate's denial of respondent's motion to dismiss, the Appellate Division, Fourth Department found the forum selection clause unenforceable since EPTL 13-23 "subjects to the scrutiny of a surrogate's court every assignment of an interest in the estate of a New York domiciliary" (*id.* at 1026-1027). The Fourth Department explained that the statute was enacted to protect out-of-state beneficiaries of New York estates from those who seek an assignment of a portion of the inheritance based on services provided that are of little or no value and "embodies a strong public policy to ensure that a New York court has subject matter jurisdiction over the assignment of an interest in an estate of a New York domiciliary" (*id.*). Here, there is no similar provision in the ECL or the GBL mandating that all claims arising under these acts be heard in the courts of the State of New York or, on the other hand, barring enforcement of a forum selection clause.

This Court sees no reason why courts in Georgia are not able to fairly decide whether there is any infirmity in Defendant's contractual requirement that its dealers agree at the time of entry into the contract

that they will pay Defendant a Code 1100 charge.

The Court also does not agree that requiring these claims to be pursued in Georgia will result in the denial to Plaintiffs of any ability to pursue their GBL § 349 claims. Because the choice of law clause does not state that Georgia law was to be applied to "any and all claims arising out of the relationship between the parties,"[FN5] a Georgia court may conclude that the choice of Georgia law in the parties' agreement does not foreclose Plaintiffs' GBL § 349 claim (*Baxter v Fairfield Fin. Serv., Inc.*, 307 Ga App 286, 292 [Ga Ct App 2010]; *Young v W.S. Badock Corp.*, 222 Ga App 218 [Ga Ct App 1996]). Indeed, courts outside New York have presided over actions involving claims of deceptive business practices occurring in New York pursuant to New York's GBL § 349 (*see, e.g., Coe v Philips Healthcare Inc.,* 2014 WL 5162912 [WD Wash 2014]; *Guido v L'Oreal, USA, Inc.,* 2013 WL 3353857 [CD Cal 2013]). But whether the GBL §349 claim can be prosecuted with effect in Georgia does not flow from the forum selection clause but from the choice of law provision, the scope of which should be decided in Georgia.

Nor does the Court agree with Plaintiffs that they may litigate their claims that predate the entry into the agreements in New York. The parties' agreements each state that they represent the complete agreement between the parties and that each [*9]"supercedes all previous agreements ...." Moreover, the forum selection provision has

no temporal limitation and provides that "[t]he exclusive venue for litigation will be in the federal or state courts located in Atlanta, GA, and the parties agree to submit to the personal jurisdiction of the courts in the State of Georgia." As such, the forum selection clause is all encompassing of any litigation between the parties no matter when the dispute arose (*see Smith/Enron Cogeneration Limited Partnership, Inc. v Smith Cogeneration Intl., Inc.*, 198 F3d 88 [2d Cir 1999], *cert denied* 531 US 815 [2000]; *Reid v Supershuttle Intl., Inc.*, 2010 WL 1049613 [ED NY 2010]).

There is no reason why parties who hail from different States cannot agree, after a dispute has arisen, to have that dispute heard in the courts situated in particular State. The language here is plain: the exclusive venue for litigation is in Georgia. No temporal limitation is expressed. There is no indication that the forum selection clause is divisible.

A contrary interpretation, which would allow the parties to litigate their disputes relating to the Code 1100 charge in any jurisdiction of their selection for purchases made prior to the entry into the written agreements, would lead to an absurd result which is contrary to the canons of contract construction (*Nassau Chapter, Civil Service Employees Assn., Inc. v County of Nassau*, 77 AD2d 563 [2d Dept 1980], *affd* 52 NY2d 925 [1981]; *Burrell Color, LLC v Burrell*, 2005 NY Slip Op 51848[U], 9 Misc 3d 1129[A] [Sup Ct, Monroe County 2005]).

Plaintiffs do not allege that they only became aware of their claims to invalidate the Code 1100 charges after they signed their present agreements with Coca-Cola. If they were so aware, plainly they should be held to their agreement. If they were not aware, it nevertheless would make no sense to hold that their pre-contract claims could be heard here but their contract claims could not.[FN6]

"In short, no reason appears to depart from the well-settled policy of the courts of this State to enforce forum selection clauses" (*Sydney Attractions Group Pty Ltd.*, 74 AD3d 476 [1st Dept 2010]). [FN7] Based on the foregoing, the branch of [*10]Defendant's motion pursuant to CPLR 3211(a)(1) to dismiss this action based on the forum selection clause shall be granted.[FN8]

CONCLUSION

The Court has considered the following papers:

(1) Notice of Motion to Dismiss dated September 26, 2014; Affirmation of Mitchell P. Hurley, Esq. in Support of Defendant Coca-Cola Refreshments USA Inc.'s Motion to Dismiss dated September 26, 2014, together with the exhibits annexed thereto;

(2) Memorandum of Law in Support of Coca-Cola Refreshments USA, Inc.'s Motion to Dismiss Plaintiffs' Amended Complaint;

(3) Plaintiffs' Memorandum of Law in Opposition to Coca-

Cola Refreshments USA, Inc.'s Motion to Dismiss the Amended Complaint dated October 24, 2014; and

(4) Coca-Cola Refreshments USA, Inc.'s Reply in Support of Motion to Dismiss Plaintiffs' Amended Complaint.

Based upon the foregoing papers, and for the reasons stated, it is hereby

ORDERED that the branch of the motion of Defendant Coca-Cola Refreshments USA, Inc. to dismiss the Complaint of Plaintiffs USA-India Export, Inc. d/b/a Fair Deal Deli-Grocery & Gifts and Mama Tina's Pizza Corp. pursuant to CPLR 3211(a)(1) based on the forum selection clause in the parties' agreements is hereby granted and the Complaint shall be, and is hereby dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York

January __, 2015

E N T E R :

Alan D. Scheinkman

Justice of the Supreme Court

Footnotes

Footnote 1: Plaintiffs styled their Complaint as a Class Action Complaint. While the Court understands that Plaintiffs seek to maintain this case as a class action, the Court has not certified that the case should proceed in that fashion.

Footnote 2: The class is defined as consisting of

who were charged a deposit handling fee by Coca-Cola Refreshments USA, Inc. in the State of New York from three years preceding the filing of this complaint through entry of judgment. Excluded from the Class claims are any claims arising out of purchases made pursuant to and under the Club Coke Agreement .... (Amended Class Action Complaint at ¶ 33).

Plaintiffs also seek to represent a subclass consisting of

All retailers who were charged a deposit handling fee by Coca-Cola Refreshments USA, Inc. in the State of New York arising out of purchases made pursuant to and under the Club Coke Agreement from three years preceding the filing of this complaint through entry of judgment .... (*id.* at ¶ 34).

Footnote 3: This, of course, is predicated upon the supposition that the Court would certify the Class and a Subclass as proposed by Plaintiffs.

Footnote 4: As part of its effort to cultivate the use of New York contract law and the use of New York courts to determine disputes over contracts governed by New York law, in 1984, the Legislature enacted General Obligations Law Section 5-1402 and amended CPLR 327, the forum non conveniens statute. These two statutes provide, in essence, that a New York court **must** entertain an action if: (a) it is an action in contract; (b) the underlying transaction involves $1,000,000 or more; (3) any foreign parties have agreed to submit to jurisdiction in New York; and (4) a choice of law clause designates New York law to govern disputes. If these conditions are met, a New York court must hear the case even if all of the parties are non-residents and even if the only nexus between the underlying transaction and New York is the contractual agreement which designates New York as a forum (*Credit Francais Intl., S.A. v Sociedad Financiera De Comercio, C.A.*, 128 Misc 2d 564, 570 [Sup Ct, NY County 1985]). These statutes reflect a public policy favoring the retention of jurisdiction by New York courts of lawsuits over agreements in which New York is designated as the forum (*id.*; *Babcock & Wilcox Co. v Control Components, Inc.*, 161 Misc 2d 636, 640-641 [Sup Ct NY County 1993]).

Footnote 5: Instead, the choice of law clause makes clear that it is limited to disputes arising from the Agreement as it states "This Agreement and any dispute arising out of or relating to it will be governed by and construed in accordance with the laws of the state of Georgia without reference to its conflict of law rules."

Footnote 6: In any event, even if the pre-contract claims are somehow outside the scope of hte forum selection clause, the interests of judicial economy and the prevention of inconsistent determinations would lead this Court to stay proceedings with respect to the pre-

contract claims pending the determination by the courts in Georgia as to Plaintiffs' post-contract claims.

Footnote 7: Because this action has not been certified as a class action, this decision does not bind the putative class that Plaintiffs purport to represent. Thus, if there are any putative class members who have not entered into written agreements requiring that all litigation be brought in Georgia, this decision does not govern their rights.

Footnote 8: In view of this determination, the Court need not address the other aspects of the motion made by Defendant.

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