

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

VIRGIN ISLANDS WATER AND
POWER AUTHORITY,

CASE NO: 3:21-cv-00024

Plaintiff,

vs.

APR ENERGY PLC AND
POWER RENTAL OP CO, LLC,

Defendants.

**DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS MOTION TO TRANSFER,
OR ALTERNATIVELY, MOTION TO DISMISS THE COMPLAINT**

Defendants, APR ENERGY PLC (“APR”),¹ and POWER RENTAL OP CO, LLC (“OpCo”) (collectively, the “Defendants”) by and through undersigned counsel, and pursuant to 28 U.S.C. §§ 1404(a), 1406(a) and Federal Rule of Civil Procedure 12(b), respectfully submit this Memorandum in Support of Defendants’ Motion to Transfer, or Alternatively, Motion to Dismiss the Complaint in the above-styled cause (the “Action”). In support thereof, Defendants state as follows:

I. INTRODUCTION

The Virgin Islands Water and Power Authority’s (“Plaintiff” or “WAPA”) decision to file suit in the courts of the United States Virgin Islands (the “USVI”), a non-agreed upon forum, defies mandatory provisions contained in the parties’ Rental Agreement (as defined below), which agreement Plaintiff has conceded is controlling. *See* Plaintiff’s Complaint (“Compl.”) at Exhibit

¹ In its Complaint, WAPA mistakenly equates APR ENERGY, PLC with APR Energy Holdings Limited. However, APR Energy, PLC’s successor in interest is APR Energy Limited, *not* APR Energy Holdings Limited (Company No. 07105073). *See* Compl. at ¶ 18. For purposes of this Motion, Defendants assume Plaintiff intended to refer “APR Energy PLC” to APR ENERGY, PLC, now known as APR Energy Limited (Company No. 07062201), and not APR Energy Holdings Limited (Company No. 07105073).

A. All of WAPA's claims relate to the Rental Agreement.

The Rental Agreement contains a mandatory, valid, unambiguous and enforceable forum-selection clause requiring that any action related to the Rental Agreement be brought in the United States District Court for the Southern District of New York ("SDNY"). WAPA also irrevocably waived any and all objections to exclusive venue in the SDNY, and WAPA submitted to the jurisdiction of the SDNY court. In particular, paragraph 28 of the Rental Agreement requires that:

Any legal action or proceeding with respect to this Contract **shall be brought in the United States District Court for the Southern District of New York** or, if such court lacks jurisdiction, in the Supreme Court of the State of New York in New York County. **Each of the Parties hereby accepts and consents to, generally and unconditionally, the jurisdiction of the aforesaid courts and . . . irrevocably waives any objection** which it may now or hereafter have to the laying of venue of any of the aforesaid actions or proceedings arising out of or in connection with this Contract brought in the courts referred to above and hereby further irrevocably waives and agrees not to plead or claim in any such court that any such action or proceeding brought in any such court has been brought in an inconvenient forum.

See Compl. at Exh. A ¶ 28 (emphasis added). Accordingly, the Court should transfer this Action to the SDNY because it is the exclusive, proper forum agreed upon and designated by the parties in the Rental Agreement, and which governs over any inconsistent allegations in the Complaint.

Defendants now move to enforce that mandatory and exclusive venue clause and either seek transfer of this action to the SDNY or dismiss the Action because: (i) venue has been improperly laid in the USVI; (ii) the Court lacks subject matter jurisdiction over the matter because of the mandatory forum-selection clause; and, alternatively (iii) Plaintiff has failed to state a claim upon which relief can be granted.

II. FACTUAL AND PROCEDURAL BACKGROUND

1. On February 15, 2012, General Electric International, a subsidiary of General Electric Company ("GE"), entered into a contract with WAPA for the rental of certain power generation equipment, water treatment systems, and related provision of services, wherein GE

agreed to lease power generation equipment to WAPA. *See* Compl. ¶¶ 1-2, 5, and at Exh. A.

2. On or about October 2013, APR acquired the power rental business from GE, including the Rental Agreement with WAPA by virtue of an assignment of the Rental Agreement. Pursuant to the acquisition from GE, Defendants agreed to lease for a monthly fee one large TM2500+ turbine (Unit 25) to WAPA along with associated equipment, and to provide the necessary services to install, test, operate, and maintain the equipment. *Id.* at ¶¶ 3-4.

3. Over time, the parties executed thirteen (13) change orders (each, a “Change Order,” and together, the “Change Orders”) to the Rental Agreement. The Change Orders amended the terms of the Rental Agreement and extended the termination date of the Rental Agreement. These Change Orders include, but are not limited to, two specific change orders through which WAPA sought to lease from OpCo two additional turbines and associated equipment, increasing the number of turbines leased by WAPA from OpCo to three (3). The three leased turbines are Units 25, 26, and 27 (collectively, the “Turbines”). *See* Compl. ¶¶ 8-9, 11 and at Exh. B.

4. Each of the Change Orders was made pursuant to, and subject to, the terms of the Rental Agreement. *See id.* at Exh. B.

5. Since October of 2013, OpCo has delivered power generation services consisting of electrical power services for the citizens and residents of the USVI. Unfortunately, over time, WAPA failed to make the monthly rental payments to OpCo as required under the Rental Agreement. As of May 1, 2019, the total amount due and owing by WAPA to OpCo under the Rental Agreement was \$14,291,986.00, which included \$981,015.00 of accrued but unpaid interest. *See* Compl. at Exh. B, Thirteenth Change Order.

6. Under the terms of the Thirteenth Change Order, WAPA agreed to release Defendants from “any and all claim(s) by WAPA in connection with WAPA’s use of diesel fuel

instead of propane” and in exchange Defendants agreed to release “WAPA with respect to all amounts owed prior to the effective date of this Thirteenth Change Order pursuant to the Contract other than the Agreed Contract Arrearage.” *See id.* In other words, Defendants agreed to reduce WAPA’s then outstanding balance to \$9,310,971.00, and to release WAPA from its obligations to pay an additional \$4,981,015.00 in consideration for WAPA releasing the Defendants. *See id.*

7. The Thirteenth Change Order is the last Change Order to the Rental Agreement, and states that it “supersedes any prior or contemporaneous agreements . . .” and that “[a]ll other terms and conditions set forth in the Contract dated February 15, 2012 [the Rental Agreement] . . . except as expressly modified herein, shall remain in full force and effect . . .” *See id.*

8. Thus, the mandatory venue selection clause in paragraph 28 of the Rental Agreement, remains in full force and effect for claims with respect to the Rental Agreement. *See id.* at Exh. A and B.

9. New York law applies. Pursuant to Paragraph 28(d), the parties agreed that: “[t]his Contract, including but not limited to, the validity, performance and all matters relating to the interpretation and effect of this Contract and all further documents executed pursuant to it, shall be construed and interpreted in accordance with the laws of the State of New York . . .” *See id.*

10. On January 20, 2021, Plaintiff improperly filed the instant Action in the Superior Court of the United States Virgin Islands for the Division of St. Thomas and St. John, Case No. ST-2021-CV-00040, in contravention of the mandatory forum-selection clause contained in the Rental Agreement. The Complaint – attaching and incorporating the Rental Agreement and all thirteen Change Orders – alleges one cause of action for breach of the Rental Agreement against Defendants based upon the alleged breach “by Defendants including . . . the failure to convert Units 26 and 27 to burn [liquid petroleum gas] and the [resulting] unplanned outages due to

unreliable service.” See Compl. ¶¶ 1, 9, 10, 11, 14, 26, 32.

11. The Complaint was also filed without WAPA first complying with the conditions precedent set forth in paragraph 28(a) of the Rental Agreement, which provides:

Any and all controversies, dispute or differences between the Parties to this Contract, if not amicably settled by the Parties within thirty (30) Days following written notice of dispute, shall be referred to senior management of the Parties for resolution in accordance with the Notices provisions of Article 43, Notices. In the event the dispute has not been resolved within forty-five (45) Days following referral to senior management, or such longer period as the Parties may mutually agree, then either Party may, subject to limitations and exclusions of liability and remedies herein, upon ten (10) days notice to the other Party, pursue their remedies at law.

See Compl. at Exh. B, Thirteenth Change Order ¶ 28(a). WAPA has failed to comply with these conditions precedent (and has not even alleged compliance therewith).

12. On March 11, 2021, Defendants properly removed this Action to this Court, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 [ECF No. 1]. On this same date, Defendants filed a Declaration in Support of Defendants’ Notice of Removal, further attesting to the complete diversity of citizenship of the Parties [ECF No. 2].

III. ARGUMENT

First, this Action should be transferred to the SDNY pursuant to the Parties’ forum-selection clause. *CAT Aircraft Leasing, Inc. v. Cessna Aircraft Co.*, 22 V.I. 442, 650 F. Supp. 57 (D.V.I. 1986). Second, in the alternative, this Action should be dismissed because of lack of subject matter jurisdiction, improper venue, and/or due to Plaintiff’s failure to state a cause of action upon which relief can be granted, for the reasons set forth in detail below.

This Action could have been, and should have been, brought in SDNY. Diversity of citizenship forms the basis for federal jurisdiction in this case. 28 U.S.C. § 1391(a) states that, in diversity cases, venue is proper in: “(3) a judicial district in which any defendant is subject to personal jurisdiction . . . ” In this case, WAPA entered into the Rental Agreement with General

Electric International Inc. (“GEII”), a company headquartered in New York, which provided for delivery of a power generation turbine and associated equipment, from GEII in New York, and which had a mandatory venue provision calling for all disputes to be litigated in SDNY in New York. *See* Compl. ¶¶ 2-5. Indeed, under the Rental Agreement, WAPA agreed that it was subject to jurisdiction in New York for claims in connection with the Rental Agreement. *See id.* at Exhibit A.² This Action could have been brought in SDNY, and for the reasons below, should be transferred to SDNY in New York.

A. THE AGREED-UPON FORUM-SELECTION CLAUSE IN THE RENTAL AGREEMENT WARRANTS A TRANSFER OF THE ACTION

The forum-selection clause in the Rental Agreement is valid, enforceable, and mandatory. Therefore, the clause should be given controlling weight in accordance with binding jurisprudence. Indeed, Defendants are entitled to the benefit of the bargained-for and agreed-upon forum-selection clause prior to the Court’s determination on the merits. *See, e.g., Hanover v. Zapata Corp.*, No. 72 CIV. 2025, 1973 WL 377, at *8 (S.D.N.Y. Mar. 16, 1973) (quoting *McDonnell Douglas Corp. v. Polin*, 429 F.2d 30, 30 (3d Cir. 1970)) (“to undertake a consideration of the merits of the action is to assume, even temporarily, that there will be no transfer before the transfer issue is decided. Judicial economy requires that another district court should not burden itself with the merits of the action until it is decided that a transfer should be effected . . .”) (emphasis added).

(i) This Action Should be Transferred to SDNY Pursuant to 28 U.S.C. § 1404(a)

Motions to transfer venue are governed by 28 U.S.C. § 1404(a), which provides that, “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court*

² New York law governs this Action, pursuant to Paragraph 28(d) of the Rental Agreement.

for the Western District of Texas, 571 U.S. 49, 134 S. Ct. 568 (2013) (emphasis added); *Danielson v. Tropical Shipping & Constr. Co.*, No. CV 15-00045, 2017 WL 675178, at *2 (D.V.I. Feb. 15, 2017) (“In the Third Circuit, the procedure for enforcing a forum selection clause is by motion to transfer venue under 28 U.S.C. § 1404(a)”). When a motion to transfer venue seeks to enforce a forum-selection clause, the agreed-upon forum is typically given controlling weight in all but the most exceptional cases. *Id.* at 574, 581 (emphasis added). “In federal court, the effect to be given a contractual forum selection clause in diversity cases is determined by federal not state law.” *Loc. Towing, Inc. v. Comm’r of Pub. Works/Gov’t of the Virgin Islands*, No. CIV. 2003/087, 2003 WL 23218492, at *2 (D.V.I. Oct. 15, 2003). *But see Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3d Cir. 1986) (explaining instances in which state law may govern the analysis).

WAPA is not entitled to its choice of forum in contravention of the parties’ express, mandatory, forum selection agreement. The Supreme Court has held that “a valid forum-selection clause requires district courts to adjust their usual § 1404 analysis” to disregard “the plaintiff’s choice of forum,” to ignore “arguments about the parties’ private interests,” and to discard “the original venue’s choice-of-law rules.” *Atlantic Marine*, 571 U.S. at 581–82. Thus, when a section 1404(a) motion to transfer is premised on a valid forum selection clause, as is the case here, “the calculus changes,” and the court may only consider the public interest factors, which “will rarely defeat a transfer motion”; *OTL Mech., Inc. v. K-Con, Inc.*, CV 13-99, 2015 WL 507346, at *1 (D.V.I. Feb. 3, 2015) (granting motion to transfer, pursuant to mandatory forum selection clause, when the “weight of the public-interest factors [was] basically equal.”) (quoting *Atlantic Marine*, 571 U.S. at 581 (“[The] forum-selection clause should control except in unusual cases.”)).

The public interest factors are insufficient to defeat Defendants’ Motion to Transfer to

SDNY, pursuant to the Rental Agreement. As the first, second, and third public interest factors are neutral (or weigh in favor of SDNY), Defendants will focus on the fourth, fifth, and sixth public interest factors, each of which weigh in favor of SDNY.³

The fourth and fifth public interest factors concern public policies of the fora and local interests in deciding local controversies at home. In this case, because the Rental Agreement was negotiated in New York, and entered into with GEII in New York, New York has a strong local interest in resolving this matter. *See R. Maganlal & Co. v. M.G. Chem. Co., Inc.*, 942 F.2d 164, 165 (2d Cir. 1991). The Rental Agreement was freely and fairly negotiated, executed and implemented for a period of over seven (7) years, and amended by thirteen (13) Change Orders – none of which modified the mandatory venue provision. However, the fundamental public policy of the State of New York is that contracts will be enforced as written, notwithstanding public policy arguments, particularly when the agreement is executed by sophisticated parties. *See 159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 361, 128 N.E.3d 128, 134 (2019), *reargument denied*, 33 N.Y.3d 1136, 132 N.E.3d 1097 (N.Y. Ct. App. 2019) (quotations omitted) (“The fact that a contract term may be contrary to a policy reflected in the Constitution, a statute or a judicial decision does not render it unenforceable; that a public interest is present does not erect an inviolable shield to waiver . . . Indeed, we regularly uphold agreements waiving statutory or constitutional rights, indicating that we look for more than the impingement of a benefit provided by law before deeming a voluntary agreement void as against public policy . . .

³ The first public interest factor is the enforceability of the judgment. *See Consol. Properties, Inc. v. Sherwin-Williams Co.*, No. CV 2017-13, 2018 WL 4610622, at *4 (D.V.I. Sept. 25, 2018). A judgment for damages entered in any district court may be registered in any other district under 28 U.S.C. § 1963. The second and third public interest factors are the practical considerations that could make the trial easy, expeditious, or inexpensive, and the relative administrative difficulty in the two fora. Defendants are unaware of any circumstances which would prevent it from being easy, expeditious, and inexpensive in SDNY, as previously contemplated and agreed-to by the parties, and Defendants are unaware of the relative congestion between the relevant fora. Thus, the second and third factors weigh in favor of SDNY.

Many rights implicate societal interests and, yet, they have been determined to be waivable.”). Accordingly, the fourth and fifth factors weigh in favor of SDNY.

The sixth public interest factor is the familiarity of the trial judge with the applicable state law in diversity cases. The issue is not whether or not this Court is capable of presiding over this case, here the parties have validly agreed to New York law as the applicable law and the SDNY court would have greater familiarity with New York law. Courts have not hesitated to transfer venue in circumstances where, as here, the transferee court would be more familiar with the applicable state law. *See, e.g., Connors v. R & S Parts & Servs., Inc.*, 248 F. Supp. 2d 394, 396 (E.D. Pa. 2003) (transferring action to District of New Jersey in part because “a New Jersey District Judge would be more familiar with the applicable state law”); *Miller v. Atkins Nutritionals, Inc.*, No. 04-5775, 2005 WL 503261, at *3 (E.D. Pa. Mar. 3, 2005) (transferring in part because a “trial judge in the Eastern District of New York is more familiar with New York law than this Court”). Accordingly, the sixth factor weighs in favor of SDNY.

(ii) Alternatively, this Action Should be Transferred to SDNY Pursuant to 28 U.S.C. § 1406(a)

Determining whether to dismiss a claim based on a forum selection clause pursuant to 28 U.S.C. § 1406(a) involves a four-part analysis. At the first three steps, a court asks: (1) whether the clause was reasonably communicated to the party resisting enforcement; (2) whether the clause is mandatory, *i.e.*, whether the parties are required to bring any dispute to the designated forum; and (3) whether the claims and parties involved in the suit are subject to the forum selection clause. If the answer to all three questions is yes, the clause is “presumptively enforceable.” *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383 (2d Cir. 2007). At the final step, a court asks (4) whether the resisting party has rebutted that presumption by making “a sufficiently strong showing that ‘enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as

fraud or overreaching.’” *Id.* at 383–84 (quotation omitted). The forum selection clause here should be given full effect because it is presumptively valid, reasonable, and there is no allegation that it is the product of fraud, undue influence or overwhelming bargaining power.

1. The Forum Selection Clause Was Communicated to WAPA

The forum selection clause at issue was indisputably communicated to WAPA. In fact, WAPA specifically alleges that it entered into the Rental Agreement in 2012, and has been doing business with Defendants since 2013 – during that time, the parties have entered into thirteen (13) Change Orders modifying the Rental Agreement. *See* Compl. ¶¶ 8-9, 11 and at Exh. B. The parties could have modified the mandatory venue provision at any time, but chose not to do so. Indeed, in the parties’ ultimate Change Order, they reaffirmed that the provisions of the Rental Agreement remained in full force and effect. *See id.* at Thirteenth Change Order.

Here, enforcing the bargained for and agreed-upon forum-selection clause protects the parties’ “legitimate expectations and furthers vital interests of the justice system.” *Atlantic Marine*, 571 U.S. at 581 (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)). The existence of the forum-selection clause means that Plaintiff’s choice of forum in the USVI is not afforded any deference or weight. The Court may only consider public-interest factors in making its determination on whether to grant the transfer, and because WAPA has ignored and breached its contractual obligation and filed suit in a different venue, the transfer of venue will not carry with it the original venue’s choice-of-law rules. *See Atlantic Marine*, 571 U.S. at 581–82. By agreeing to the forum-selection clause in the Rental Agreement, Plaintiff has already exercised any “venue privilege” and only that initial choice, in favor of the SDNY, deserves any deference. *See id.* at 582; *OTL Mech., Inc.*, 2015 WL 507346, at *1. Plaintiff bears the burden of showing any reasons why the court should not transfer the case pursuant to the Rental Agreement’s

forum-selection clause. *Id.*

2. The Forum Selection Clause Is Mandatory and Exclusive

By agreeing to the forum-selection clause, WAPA waived its right to challenge the preselected forum (SDNY) as inconvenient or less convenient for itself or its witnesses, or for their pursuit of the litigation. *See id.*; 28 U.S.C. § 1404. *See also Global Seafood Inc. v. Bantry Bay Mussels Ltd.*, 659 F.3d 221, 225 (2d Cir. 2011) (holding that mandatory forum selection clauses “require that disputes **must be brought** in the designated forum, to the exclusion of all other fora where jurisdiction may also lie.”) (emphasis added); *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 389 (1st Cir. 2001) (finding forum clause stating that “actions involving this agreement **must be brought** in the State of Illinois” to be mandatory) (emphasis added).

In the case at bar, the forum-selection clause is presumptively enforceable because it is clearly and unambiguously written, and it was plainly set forth in the body of the Rental Agreement, an agreement that Plaintiff has admitted is controlling. *See* Compl., Exhibit A; *HCB, LLC v. Krishan*, No. CIV. 2006-207, 2007 WL 4800353 at *2 (D.V.I. Dec. 21, 2007). Additionally, the forum-selection clause in the Rental Agreement is mandatory, not permissive, because the plain language of the clause illustrates its obligatory nature (“**any** legal action . . . **shall** be brought in the United States District Court for the Southern District of New York”). *Id.* (emphasis added). In addition, WAPA relinquished any objection to the mandatory and exclusive SDNY forum by expressly waiving “any objection which it may now or hereafter have to the laying of venue of any of the aforesaid actions or proceedings arising out of or in connection with this Contract . . .” *Id.*

Thus, the forum selection clause makes clear that jurisdiction is mandatory and exclusive in the courts in SDNY and that WAPA has waived any rights to challenge the venue clause or exclusive venue in SDNY. This provides additional support for the enforcement of the mandatory

and exclusive forum selection clause as written.

3. WAPA's Claims Fall Within the Scope of the Forum Selection Clause

The mandatory forum selection clause provides that “[a]ny legal action or proceeding **with respect to this Contract** [the Rental Agreement] shall be brought in the United States District Court for the Southern District of New York” *See* Compl. at Exh. A ¶ 28 (emphasis added). WAPA’s Complaint makes clear that its claims in this action arise out of or are related to the Rental Agreement. For example, WAPA has asserted an explicit breach of contract claim in which it contends that it is owed damages under the parties’ contract. *See, e.g.*, Compl. ¶¶ 34-35 (“Defendants entered into a contractual agreement with Virgin Islands WAPA through an assignment of the Rental Agreement and executing the subsequent Change Orders. Defendants breached their contractual obligations”). *See also* Compl. at 7 (alleging that “Defendants materially breached the Rental Agreement and subsequent Change Orders” and demanding judgment against the Defendants for damages for breach of contract in an amount of “approximately \$19,100,000.00”).⁴

“The Second Circuit has endorsed an expansive reading of the scope of forum selection clauses, in keeping with the policy favoring their use.” *Bluefire Wireless, Inc. v. Cloud9 Mobile Communications, Ltd.*, 09 CIV. 7268 (HB), 2009 WL 4907060, at *3 (S.D.N.Y. Dec. 21, 2009) (quotation omitted). “Courts have held that a forum selection clause will also [even] encompass tort claims if the tort claims ultimately depend on the existence of a contractual relationship between the parties, or if the resolution of the claims relates to interpretation of the contract, or if the tort claims involve the same operative facts as a parallel claim for breach of contract.” *Id.* (quotation omitted).

⁴ Defendants dispute WAPA’s entitlement to any payments or damages, and Defendants expressly reserve any and all objections and/or defenses to WAPA’s substantive claims.

Thus, it is clear that this lawsuit falls within the scope of the mandatory and exclusive forum selection clause because it asserts claims which constitute a legal action “with respect to the Contract.” Indeed, a reading of the Rental Agreement illustrates that the forum-selection clause is broad and Plaintiff’s alleged breach of Rental Agreement claim falls squarely under the scope of the clause. *See ICICI Bank Ltd. v. Essar Glob. Fund Ltd.*, 565 B.R. 241, 252 (S.D.N.Y. 2017) (quoting *Brooke Grp. Ltd. v. JCH Syndicate* 488, 87 N.Y.2d 530, 534, 640 N.Y.S.2d 479, 663 N.E.2d 635 (1996)) (“Under New York law, the words and phrases used by the parties in a forum-selection clause ‘must, as in all cases involving contract interpretation, be given their plain meaning.’”); *Martinez v. Bloomberg LP*, 740 F.3d 211, 217 (2d Cir. 2014) (citing *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383 (2d Cir. 2007)) (“If the forum clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable.”).

4. Enforcement Would Not Be Unreasonable or Unjust

WAPA may not avoid the forum selection clause by contending that its claims are not covered by the Agreement and yet also relying on that Agreement as the source of its alleged rights and relief. As courts have held, a “[p]laintiff’s artfully drawn pleadings will not work to circumvent [an] otherwise applicable forum selection clause.” *See, e.g., Bus. Integration Tech., Inc. v. Mulesoft, Inc.*, No. 4:10CV2185 FRB, 2011 WL 4345723, at *5-7 (E.D. Mo. Sept. 16, 2011)(enforcing forum selection clause where plaintiff’s contract claims were “based upon the same terms of the relationship between the parties as encompassed by the [parties’ written agreement]”). Indeed, Plaintiff’s own exhibits to the Complaint corroborate and support Defendants’ instant Motion.

Plaintiff attached the Rental Agreement to the Complaint as Exhibit A. Although Plaintiff alleges that “[v]enue in the present action is proper in the Superior Court of the Virgin Islands,

Division of St. Thomas and St. John” such an allegation contradicts the Exhibits. *See* Compl. ¶ 24, Exhibits A and B. Because Plaintiff’s own pleadings are internally inconsistent with Plaintiff’s filing suit in the USVI, a court is “is neither obligated to reconcile nor accept the contradictory allegations in the pleadings as true in deciding a motion to dismiss.” *U.S. Bank Nat. Ass’n v. Bank of America, N.A.*, No. 12 Civ. 4873, 2012 WL 6136017, at *7 (S.D.N.Y. Dec. 11, 2012). *See also Amidax Trading Group v. S.W.I.F.T. SCRL*, 607 F. Supp. 2d 500, 502 (S.D.N.Y. 2009) (same).

Indeed, enforcement of the agreed-upon venue provision would be neither unreasonable nor unjust. The evidence in this case will largely consist of documents, which, in this digital age, can be scanned electronically and sent via e-mail, Dropbox, or another one of the inexpensive and readily-available document-sharing platforms.. “As the Supreme Court has explained, where—as here—it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable.” *See Donnay USA Ltd. v. Donnay Int’l S.A.*, 705 Fed. Appx. 21, 25 (2d Cir. 2017) (internal quotation and citation omitted).

For the foregoing reasons, the Rental Agreement and the mandatory, valid and enforceable forum-selection clause contained therein warrant a transfer of the Action to SDNY.

B. ALTERNATIVELY, THE COURT SHOULD DISMISS WAPA’S COMPLAINT⁵

In the alternative, WAPA’s Complaint should be dismissed due to, among other things: (1) venue being improperly laid; (2) Plaintiff’s failure to allege sufficient facts to support its claim for

⁵ Defendants submit that the Court should transfer this Action, without reaching any of the issues on the merits, in order to “secure the just, speedy, and inexpensive determination of every action and proceeding” pursuant to Federal Rule of Civil Procedure 1. Accordingly, Defendants have not fully briefed these issues but preserve the right to do so, as permitted pursuant to Fed. R. Civ. P. 12. Defendants assert these arguments, without waiver or consent to the jurisdiction of this Court, or the U.S. Virgin Islands.

relief, and indeed, Plaintiff already released Defendants' liability, if any, pertaining to the Rental Agreement and the Turbines, (3) the fact that Plaintiff's allegations are contradicted by the Exhibits attached to the Complaint, and (4) Plaintiff's failure to satisfy the conditions precedent in the Rental Agreement. *See* Compl. ¶¶ 1, 9, 10, 11, 14, 26, 32, and at Exh. A and B.

1. The Action Should Be Dismissed for Improper Venue

WAPA commenced this action in the Superior Court of the United States Virgin Islands for the Division of St. Thomas and St. John, a forum which is clearly contravened by the parties' agreed upon exclusive and mandatory forum selection clause. Moreover, venue is not proper in the USVI and the Court should therefore dismiss this action for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). "Pursuant to 28 U.S.C. § 1406(a), if a case is filed 'laying venue in the wrong division or district,' then the district court shall either dismiss the case, 'or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.' 28 U.S.C. § 1406(a)." *Consol. Properties, Inc. v. Sherwin-Williams Co.*, No. CV 2017-13, 2018 WL 4610622, at *2 (D.V.I. Sept. 25, 2018). *See also M.B. Restaurants, Inc. v. CKE Restaurants, Inc.*, 183 F.3d 750, 753 (8th Cir. 1999) (affirming district court dismissal of action for improper venue where non-moving party could not overcome presumption of validity of forum selection clause); 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought").

2. The Action Should Be Dismissed for Failure to State a Claim

Pursuant to the Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss should be granted if it appears beyond doubt that "no relief could be granted under any set of facts that could be proved consistent with the allegations." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229,

249-50 (1989). While the court should draw all reasonable inferences in favor of the non-moving party, it need not accept as true “conclusions of law or unwarranted deductions of fact.” *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995) (quoting 2A Moore & Lucas, Moore’s Federal Practice P 12.08 at 2266-69 (2d ed. 1984)). Many courts have held that dismissal under Rule 12(b)(6) is proper to enforce a forum selection clause.⁶ *E.g.*, *Claudio-de León v. Sistema Universitario Ana G. Méndez*, 775 F.3d 41, 46, 49 (1st Cir. 2014) (quoting *Rivera v. Centro Médico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009)) (“[W]e treat a **motion to dismiss** based on a forum selection clause as a motion alleging the **failure to state a claim** for which relief can be granted under Rule 12(b)(6).”) (emphasis added). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must do more than allege mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As a result, Plaintiff should be barred from bringing this Action in the USVI given the forum-selection clause the Parties agreed upon in the Rental Agreement.

Here, WAPA has failed to state a claim. Plaintiff’s Complaint fails to plead the material facts that establish the rights and obligations of the Parties, the specific provisions of the Rental

⁶ Although there appears to be a split of authority in the Second Circuit regarding the appropriate procedural mechanism by which to enforce a forum-selection clause, Defendants submit that the Action should be dismissed due to both: lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted. *See, e.g.*, *Cfirstclass Corp. v. Silverjet PLC*, 560 F. Supp. 2d 324, 326–27 (S.D.N.Y. 2008) (explaining the split of authority); *Lambert v. Kysar*, 983 F.2d 1110, 1112 (1st Cir. 1993) (We have held that such dismissals [based upon forum-selection clauses] are founded on Rule 12(b)(6), *see LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4, 7 (1st Cir.1984). No matter, however, since “we are not bound by the label employed below, and we agree that the case should have been dismissed.” *See id.* (quoting *Carr v. Learner*, 547 F.2d 135, 137 (1st Cir. 1976)). Indeed, the *Lambert* court affirmed a dismissal of an action upon its finding that the forum-selection clause was valid and enforceable. *Lambert*, 983 F.2d at 1122.

Agreement that were allegedly breached, and the nexus between the alleged breach caused by Defendants and Plaintiff's actual damages. Plaintiff, instead, pleads an approximation of damages with no ultimate factual support. In addition, as noted below, Plaintiff's exhibits negate Plaintiff's claims, which renders the pleadings a nullity. The factual shortcomings highlighted herein are fatal to Plaintiff's breach of Rental Agreement claim and fail to escape dismissal. *See, e.g.*, Complaint at *Wherefore* clause.

Indeed, the Action should be dismissed because, among other things, Plaintiff is contractually barred from raising its alleged breach of Rental Agreement claim due to Plaintiff's contractual release of the very claims asserted in the Complaint, as evidenced by the Thirteenth Change Order, which documents entirely and wholly release Defendants from any liability related to the Turbines and the type of gas utilized. *See Cheung v. New York Palace Hotel*, 03-CV-0091 DLI WDW, 2005 WL 2387573, at *5 (E.D.N.Y. Sept. 28, 2005) (granting the defendant's motion to dismiss where the relief sought was barred by a release.); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (stating that even if a document is not incorporated by reference, the court may consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint).

More specifically, Plaintiff improperly seeks damages for the alleged breach of the Rental Agreement by Defendants, supposedly as a result of Defendants' failure to convert the Units to burn liquid petroleum gas ("LPG"), instead of diesel, despite the fact that the Parties entered into an agreement, expressed in the Thirteenth Change Order, (*see* Compl., Exhibit B), wherein the plain language of the Change Order confirms that "in order to compensate WAPA for its use of diesel fuel instead of propane, and in consideration for the execution of this Thirteenth Contract Change Order, APR and WAPA have agreed to reduce the [Rental Agreement] Arrearage to a total

of \$9,310.971.” Importantly, the same Change Order provides, under the Terms and Conditions section, that “**execution of this Thirteenth Change Order constitutes a release** (a) by WAPA in favor of APR from any and all claim(s) by WAPA in connection with WAPA’s use of diesel fuel instead of propane and (b) by APR in favor of WAPA with respect to all amounts owed prior to the effective date of this Thirteenth Change other” (emphasis added). Indeed, Plaintiff’s allegations in the Complaint and any resulting liability therefrom were **contractually released** by Plaintiff when it executed the Thirteenth Change Order on May 13, 2019. *See* Compl. ¶¶ 9, 10, 11, 14, 26, 28, 29 (discussing the use of diesel instead of other types of gas and alleging that diesel use caused damages to Plaintiff and was Defendants’ fault). Plaintiff cannot now claim additional damages for an alleged breach which, in any event, the Parties agreed to settle by agreeing to waive approximately \$5 million in debt which WAPA owed OpCo. Because WAPA released OpCo from any liability as set forth in the Thirteenth Change Order (which has been incorporated into, and made part of the Complaint), WAPA has failed to state a claim upon which relief may be granted, and therefore the Complaint should be dismissed.

3. Plaintiff’s Allegations are Contradicted by the Exhibits to the Complaint

Third, where, as in this case, a plaintiff references and attaches written documents in the complaint, the Court may take the documents into consideration in ruling on a Rule 12(b)(6) motion. *Sazerac Co., Inc. v. Falk*, 861 F. Supp. 253, 257 (S.D.N.Y. 1994) (citing *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991), *cert. denied* 503 U.S. 960 (1992)); *Meyer Pincus & Assoc, P.C v. Oppenheimer & Co.*, 936 F.2d 759, 762, (2d Cir. 1991). Here, Plaintiff attached a copy of the Rental Agreement to its Complaint. *See* Complaint, Exhibit A. Moreover, because the release contained in the Thirteenth Change Order contradicts the allegations made by Plaintiff in ¶¶ 9, 10, 11, 14, 26, 28, 29 of the Complaint, the Thirteenth Change Order is the

controlling document and Plaintiff's allegations should not be taken as true. It is well established that when the terms of an attached contract conflict with the allegations of the complaint, **the contract controls to the extent the terms of an attached contract conflict with the allegations of the complaint.** *Matusovsky v. Merrill Lynch, Pierce & Smith, Inc.*, 186 F. Supp. 2d 397, 400 (D.C.N.Y. 2002) (emphasis added). In such situations, "[t]he court is not bound to accept the pleader's allegations as to the effect of the exhibit, but can independently examine the document and form its own conclusions as to the proper construction and meaning to be given to the material." 5 Wright & Miller, Federal Practice and Procedure: Civil 2d, § 1327 at 766 (1990). See *Orange County Choppers, Inc.*, 497 F.Supp.2d at 551 ([W]ords and phrases . . . should be given their plain meaning,' and the contract 'should be construed so as to give full meaning and effect to all of its provisions.'").

Therefore, Plaintiff's decision to attach a copy of the Rental Agreement and Change Orders to the Complaint completely undermines and conflicts with Plaintiff's attempt to contradict the agreed to, and bargained for, forum-selection clause, and similarly negated Plaintiff's allegations for damages against Defendants as related to the type of gas utilized to operate the Turbines because the Thirteenth Change Order releases such damages. In summary, Plaintiff's pleading, including the Complaint and the attached Exhibits, conclusively establish that the Plaintiff's Complaint must be dismissed.

4. Plaintiff Failed to Satisfy the Conditions Precedent

The Complaint should also be dismissed for failure to state a claim for breach of contract, due to WAPA's failure to satisfy conditions precedent to bringing a claim under the Rental Agreement. Under the express terms of the Rental Agreement, before bringing this Action, WAPA was first required to: (i) refer the dispute to "senior management" for a period of at least forty-five

(45) days; and if the dispute were not resolved, then WAPA was required to then (ii) provide ten (10) days' notice to the Defendants of WAPA's intent to pursue their remedies at law, prior to filing suit. *See* Compl. at Exh. B, Thirteenth Change Order ¶ 28(a). Because WAPA failed to plead that it satisfied conditions precedent, and because WAPA actually failed to satisfy the conditions precedent for bringing an action for breach of contract, its claims should be dismissed.

Conditions precedent are strictly enforced in order to implement the parties' express agreement. *PaineWebber Inc. v. Campeau Corp.*, 670 F.Supp. 100, 105 (S.D.N.Y.1987). In similar circumstances, another court applying New York law dismissed claims for breach of contract where plaintiff failed to satisfy the conditions precedent for a suit. In *Eastman Kodak Co. v. Bostic*, 91-Civ-1797 (LJF), 1991 WL 243378, at *2-3 (S.D.N.Y. Nov. 14, 1991), the court held that because the plaintiff failed to satisfy the conditions precedent to suit, the action must be dismissed. *Id.* WAPA has failed to satisfy the conditions precedent under the Rental Agreement (as modified by the Change Orders), and thus dismissal is appropriate for this alternative ground as well.

IV. CONCLUSION

Based on the foregoing, Defendants, APR ENERGY PLC and POWER RENTAL OP CO, LLC, respectfully request this Court: (A) grant the instant motion to transfer the Action to the United States District Court for the Southern District of New York, in accordance with the forum-selection clause in the Rental Agreement and pursuant to 28 U.S.C. §§ 1404, 1406, and Federal Rule of Civil Procedure 12(b)(3), or (B) in the alternative⁷, grant the instant motion to dismiss (without prejudice to WAPA refiling in SDNY) for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

⁷ Defendants submits that the Court should dismiss WAPA's Complaint, in the alternative, without waiver of its venue arguments, the arguments raised in its Motion to Transfer, and without submitting to the jurisdiction of this Court.

Dated: March 18, 2021.

Respectfully submitted,

/s/ J. Daryl Dodson

J. Daryl Dodson, Esq.
MOORE, DODSON, RUSSELL &
WILHITE, P.C.
V.I. Bar No. 241
5035 Norre Gade, Suite 201
P.O. Box 310
St. Thomas, V.I. 00804
Tel: (340) 777-5490
Fax (340) 777-5498
Attorneys for Defendants
APR ENERGY, PLC, and
Power Rental Op Co, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of March, 2021 the foregoing was served by email
transmission upon:

Aysha R. Gregory, Esq.
Deputy General Counsel
V.I. Water and Power Authority
P.O. Box 1450
St. Thomas, U.S. Virgin Islands 00804-1430
Email: aysha.gregory@viwapa.vi

/s/ J. Daryl Dodson