APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 16-1438, 16-1447

AUTORIDAD DE ENERGÍA ELÉCTRICA DE PUERTO RICO,

Plaintiff, Appellee,

v.

VITOL S.A.; Vitol, Inc.,

Defendants, Appellants,

Fidelity and Deposit Co. of Maryland; Fulano de Tal; Fiadoras A, B and C; Aseguradoras X, Y and Z; Carlos M. Benítez, Inc.,

Defendants

Appeal from United States District Court
for the District of Puerto Rico

June 13, 2017

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859 F.3d 140

Before TORRUELLA, KAYATTA, and BARRON, Circuit Judges.

TORRUELLA, Circuit Judge.

The district court remanded this case to the Commonwealth of Puerto Rico Court of First Instance, San Juan Part, because it determined that the forum selection clauses at issue were enforceable, and that the unanimity requirement of

28 U.S.C. § 1446(b)(2)(A) therefore could not be satisfied. We affirm.

I. Background[1]

Between August 2005 and December 2008, the Autoridad de Energía Eléctrica de Puerto Rico (the Puerto Rico Electric Power Authority or "PREPA") executed six contracts for the delivery of fuel oil with entities whose names all began with "Vitol"—and we shall refer to them as such here. For present purposes, it suffices that at least one of the entities before us—namely Vitol, Inc., a Delaware corporation headquartered in Houston, Texas—admits that it is a party or assignee to the six contracts before us. PREPA is a public corporation and governmental instrumentality of the Commonwealth of Puerto Rico. P.R. Laws Ann. tit. 22, § 193.

After PREPA learned that Vitol, S.A.—following a United Nations investigation that concluded that Vitol, S.A. had paid, or had caused illegal surcharges to be paid, to Iraqi public officials—had pled guilty to first degree grand larceny in New York state court, PREPA filed suit under, inter alia, Puerto Rico Law No. 458 of December 29, 2000, P.R. Laws Ann. tit. 3, §§ 928-928i ("Law 458"). This law prohibits government instrumentalities and public corporations, such as PREPA, from awarding bids or

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[1] Given the significant number of disagreements between the parties about the facts of the case, we present only a brief summary of the facts, with a focus on resolving only the question that is before us—whether to remand this case to the courts of the Commonwealth. We do this in large part because we do not wish to predetermine the outcome of the litigation in the Commonwealth courts.

contracts to persons (including juridical persons) who have been convicted of "crimes that constitute fraud, embezzlement or misappropriation of public funds listed in § 928b of this title." P.R. Laws Ann. tit. 3, § 928. "Undue intervention in the processes of awarding bids or in government operations," "[b]ribery, in all its modalities," and "[o]ffer[s] to bribe" are among the crimes listed in section 928b. Id. § 928b.

Each of the contracts at issue in this case included a substantively identical choice of law and forum selection clause:

> The Contract shall be governed by, and construed in accordance with the laws of the Commonwealth of Puerto Rico. Also, the contracting parties expressly agree that only the state courts of Puerto Rico will be the courts of competent and exclusive jurisdiction to decide over the judicial controversies that the appearing parties may have among them regarding the terms and conditions of this Contract.

All but the first contract also included a "Sworn Statement" clause which read as follows:[2]

> Previous to the signing of this Contract, the Seller will have to submit a sworn statement that neither [the] Seller nor any of its partners have been convicted, nor have they plead [sic] guilty of any

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[2] Although the first contract did not include a "Sworn Statement" clause, such a sworn statement was provided, as it had to be pursuant to Law 458. P.R. Laws Ann. tit. 3, § 928f.

> felony or misdemeanor involving fraud, misuse or illegal appropriation of public funds as enumerated in Article 3 of Public Law number 428 of September 22, 2004, as amended.[3]

Note that, although the "Sworn Statement" clauses only speak to convictions and guilty pleas, in the actual sworn statements, the seller also stated—as Law 458 required—that it had "no knowledge of being under judicial, legislative or administrative investigation in Puerto Rico, the United States, or in any other country." See P.R. Laws Ann. tit. 3, § 928f.

Each contract also included a "Contingent Fees" clause, which provided, inter alia:

> The Seller represents and warrants that it is authorized to enter into, and to perform its obligations under this Contract and that it is not prohibited from doing business in Puerto Rico or barred from contracting with agencies or instrumentalities of the Commonwealth of Puerto Rico.

In addition, pursuant to Law 458, each contract was "deemed to have . . . included . . . for all legal purposes" a "penal clause or clauses that expressly set forth the provisions contained [in] § 928c of this

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[3] Puerto Rico Law No. 428-2004 amended Law 458. It obligates any person interested in bidding on and being awarded a government contract to submit a sworn statement representing that said person has not been convicted of any of the crimes listed in Law 458, and whether said person is being investigated for any such crime.

title." Id. § 928e. In turn, section 928c provides:

> The conviction or guilt for any of the crimes listed in § 928b of this title shall entail, in addition to any other penalty, the automatic rescission of all contracts in effect on said date between the person convicted or found guilty and any agency or instrumentality of the Commonwealth government, public corporation, municipality, the Legislative Branch or the Judicial Branch of Puerto Rico. In addition to the rescission of the contract, the Government shall have the right to demand the reimbursement of payments made with regard to the contract or contracts directly affected by the commission of the crime.

Id. § 928c (emphasis added).

Four of the six contracts also contained a "Code of Ethics" clause, by which Vitol agreed "to comply with the provisions of . . . [the] Code of Ethics for the Contractors, Suppliers and Economic Incentive Applicants of the Executive Agencies of the Commonwealth of Puerto Rico"—which meant that Vitol accepted, inter alia, the obligation to "disclose all the information needed for [PREPA] to evaluate the transaction in detail, and make correct and informed decisions." Id. § 1756(b).[4]

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[4] The Code of Ethics at issue also contains a provision that requires a person who contracts with any executive agency of the Commonwealth to certify that this person has not been convicted of certain crimes, and further imposes a continuous duty to inform. However, it appears that this provision only applies to convictions in the "federal or Commonwealth

Vitol never informed PREPA that: in 2004 (before any of the six contracts with PREPA had been signed) the Independent Inquiry Committee of the United Nations Oil-for-Food Programme began investigating Vitol S.A. regarding its participation in that program;[5] on October 27, 2005, the Independent Inquiry Committee issued a final report (at which point only the first of the six contracts before us had been signed) concluding that Vitol S.A. had paid or had caused illegal surcharges to be paid to Iraqi public officials in order for Vitol S.A. to be awarded contracts to lift Iraqi oil during and as part of Vitol S.A.'s participation in the Oil-for-Food Programme; on November 20, 2007 (at which point four of the six contracts before us had been signed), Vitol S.A. pled guilty to first degree grand larceny in New York state court pursuant to a plea agreement for actions related to its participation in the United Nations Oil-for-Food Programme.

PREPA eventually learned of the guilty plea,[6] and, in November 2009, filed a complaint in the

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jurisdiction," and therefore is not pertinent here, for Vitol, S.A. was convicted in state court in New York. P.R. Laws Ann. tit. 3, § 1756(p).

5 PREPA alleges that Vitol learned of the investigation between December 2005 and April 25, 2006. For the purposes of affirming this remand order, we do not need to decide whether this allegation is accurate.

6 The precise date on which PREPA learned of Vitol S.A.'s guilty plea is disputed. PREPA argues that it learned about the guilty plea between May 13, 2009 and June 23, 2009, whereas the defendants argue that PREPA learned about it by at least May 13, 2009. We need not resolve this matter, however, to determine that this case was rightly remanded to the Puerto Rico courts.

Commonwealth of Puerto Rico Court of First Instance, San Juan Part, against Vitol, Inc. and Vitol, S.A., alleging that two oil supply contracts it held with Vitol, Inc. were null due to Law 458 and the Puerto Rico Civil Code,[7] and seeking reimbursement of all payments made under the contracts. On December 14, 2009, invoking diversity jurisdiction, defendants removed the claim to federal court. In December 2012, PREPA filed a second complaint in the Commonwealth court regarding four additional oil supply contracts, seeking similar relief. The total amount of the payments PREPA seeks to have reimbursed is approximately $3.89 billion. The defendants removed this second action to federal court as well, where the two cases were consolidated.

After various developments not relevant here, on March 15, 2016, the district court issued an order remanding the case to the Commonwealth Court. The district court reasoned that the forum selection clauses applied to the dispute and bound Vitol, Inc., who could therefore not consent to a co-defendant's removal. The unanimity requirement thus could not be satisfied, and the case had to be remanded. See 28 U.S.C. § 1447(d). We agree.

II. Discussion

It is dubitable whether we have jurisdiction to hear this appeal. A remand order that is based on a breach of the unanimity requirement is not appealable pursuant to 28 U.S.C. § 1447(d). Esposito v. Home Depot U.S.A., Inc., 590 F.3d 72, 77

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[7] The complaint also listed two of Vitol's insurers, Carlos Benítez, Inc., and Fidelity & Deposit Company of Maryland, as defendants, but they are no longer parties to this case.

(1st Cir. 2009). However, "§ 1447(d) is not a bar to review of a remand order based on a forum-selection clause." Autoridad de Energía Eléctrica de P.R. v. Ericsson Inc., 201 F.3d 15, 17 (1st Cir. 2000). This raises the question whether a remand order based on a lack of unanimity due to a forum selection clause is reviewable. Such a remand order may not be appealable as long as the district court colorably characterizes the remand order as based on a lack of unanimity. See Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 234, 127 S.Ct. 2411, 168 L.Ed.2d 112 (2007) ("[R]eview of the District Court's characterization of its remand as resting upon lack of subject-matter jurisdiction, to the extent it is permissible at all, should be limited to confirming that that characterization was colorable . . . .").

We need not decide, however, whether we have jurisdiction to hear the present appeal. "The rule is well established in this Circuit that resolution of a complex jurisdictional issue may be avoided when the merits can easily be resolved in favor of the party challenging jurisdiction." Cozza v. Network Assocs., Inc., 362 F.3d 12, 15 (1st Cir. 2004). Because we find no difficulty in holding that the forum selection clauses are enforceable, and the unanimity requirement is consequently not satisfied, we bypass the jurisdictional issue and proceed to the merits.

Determining whether a forum selection clause is enforceable involves three steps. "Under federal law, the threshold question in interpreting a forum selection clause is whether the clause at issue is permissive or mandatory." Claudio-De León v. Sistema Universitario Ana G. Méndez, 775 F.3d 41, 46 (1st Cir. 2014) (quoting Rivera v. Centro Médico de Turabo, Inc., 575 F.3d 10, 17 (1st Cir. 2009)).

"Permissive forum selection clauses . . . authorize jurisdiction and venue in a designated forum, but do not prohibit litigation elsewhere. . . . In contrast, mandatory forum selection clauses contain clear language indicating that jurisdiction and venue are appropriate exclusively in the designated forum." Id. (alterations in original) (quoting Rivera, 575 F.3d at 17). Next, we ascertain the clause's scope to determine whether it encompasses the claims—an analysis that is "clause-specific," id., meaning that "it is the language of the forum selection clause itself that determines which claims fall within its scope." Id. (quoting Rivera, 575 F.3d at 19). If we find that the clause encompasses the claims, the final step is to determine whether "a strong showing" has been made that the clause should not be enforced because:

> (1) the clause is the product of fraud or overreaching; (2) enforcement is unreasonable and unjust; (3) its enforcement would render the proceedings gravely difficult and inconvenient to the point of practical impossibility; or (4) enforcement contravenes "a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision."

Carter's of New Bedford, Inc. v. Nike, Inc., 790 F.3d 289, 292 (1st Cir. 2015) (quoting Huffington v. T.C. Group, LLC, 637 F.3d 18, 23 (1st Cir. 2011)).

Here, the forum selection clauses are plainly mandatory, because they contain the following language: "the contracting parties expressly agree that only the state courts of Puerto Rico will be the courts of competent and exclusive jurisdiction to

decide over the judicial controversies that the appearing parties may have among them . . . ." (Emphasis added). See, e.g., Summit Packaging Sys., Inc. v. Kenyon & Kenyon, 273 F.3d 9, 13 (1st Cir. 2001) ("[W]hen parties agree that they 'will submit' their dispute to a specified forum, they do so to the exclusion of all other forums"); Rivera, 575 F.3d at 17 n.5 (" '[T]ypical mandatory terms' [include] 'shall,' 'exclusive,' 'only,' or 'must' . . . .").

The forum selection clauses also encompass the claims at issue. Vitol seeks to persuade us that PREPA is bringing statutory (rather than contractual) claims, and that these claims thus are not ones "regarding the terms and conditions of this Contract." Even if we assume, favorably to Vitol, that PREPA's claims are indeed statutory in nature, they still fall under the forum selection clauses. In Huffington, this court held that a forum selection clause that used the phrase "with respect to" encompassed "statutory and common-law tort claims [that] rest on alleged misrepresentations that occurred before [the signing of] the agreement," because "a suit is 'with respect to' the agreement if the suit is related to that agreement—at least if the relationship seems pertinent in the particular context." 637 F.3d at 21-22. This court noted that "the phrase 'with respect to' [is] synonymous with the phrase 'with reference or regard to something.'" Id. at 22 (emphasis added). Because we see no difference between "with regard to" and "regarding," the forum selection clauses in the present case encompasses statutory claims. The statutory claims here also plainly relate to the agreements at issue—for PREPA would have no claim against Vitol if it had not been for the contracts.

Although Vitol may be correct that the words "terms and conditions of this Contract" narrow the forum selection clauses at issue (as compared with clauses regarding "the contract"), PREPA's claims here plainly do regard the "terms and conditions of this Contract." As noted above, the contracts contained "Sworn Statement" clauses that specifically referenced Law 458; the sworn statements Vitol provided also specifically referenced Law 458, and were indeed required by Law 458. Supra at 143. Pursuant to Law 458, the contracts also contained de jure penal clauses that lay out the consequences Law 458 imposes for having been convicted, or having pled guilty to, a crime listed in Law 458. Supra at 143–44. In addition, the contracts contained "Contingent Fees" clauses, which required Vitol to certify that it was not "barred from contracting with agencies or instrumentalities of the Commonwealth of Puerto Rico." Supra at 143. PREPA alleges that, due to Law 458, Vitol was barred from exactly that. "Code of Ethics" clauses were also to be found in the contracts, and required Vitol to disclose such matters as guilty pleas to crimes listed in Law 458. Supra at 144. Thus, a statutory claim based on Law 458 is also a claim regarding the terms and conditions of the contracts at issue.

At the third and final step of the analysis of the forum selection clauses, Vitol seeks to convince us that it has made the requisite strong showing that enforcement of the clauses would be unreasonable and unjust because PREPA takes seemingly inconsistent positions by seeking enforcement of forum selection clauses while arguing that the contracts containing those clauses are void ab initio.

Vitol also argues that equitable estoppel precludes PREPA from maintaining these positions. See InterGen N.V. v. Grina, 344 F.3d 134, 145 (1st Cir. 2003) (explaining that equitable estoppel "precludes a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations"). Vitol fails to cite even a single case in which enforcement of a forum selection clause was denied because it would be unreasonable and unjust, or precluded by equitable estoppel. In disposing of similar arguments, one of our sister circuits showed the absurdity of the position Vitol is taking:

> Appellants also spend a good deal of time trying to convince us that because the contracts themselves are void and unenforceable . . . the forum selection clauses are also void. The logical conclusion of the argument would be that the federal courts . . . would first have to determine whether the contracts were void before they could decide whether, based on the forum selection clauses, they should be considering the cases at all. An absurdity would arise if the [federal] courts . . . determined the contracts were not void and that therefore, based on valid forum selection clauses, the cases should be sent to [the state court]—for what? A determination as to whether the contracts are void?

Muzumdar v. Wellness Int'l Network, Ltd., 438 F.3d 759, 762 (7th Cir. 2006).

Vitol tries to remedy its failure to cite any precedent involving forum selection clauses by instead citing precedents involving arbitration clauses. Even if we assume, for the sake of argument, that these precedents can be extended to apply to forum selection clauses, they do not help Vitol here.[8] The Supreme Court has made clear that the three cases Vitol seeks to rely on do not apply, where, as here, the contracts were entered into, but are later argued to have been invalid:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents . . . which hold that it is for courts to decide whether the alleged obligor ever signed the contract, Chastain v. Robinson–Humphrey Co., 957 F.2d 851 ([11th Cir.] 1992), whether the signor lacked authority to commit the alleged principal, Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 ([3rd Cir.] 2000); Sphere Drake Ins. Ltd. v. All American Ins. Co., 256 F.3d 587 ([7th Cir.] 2001), and whether the signor lacked the

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[8] While the Supreme Court's statement that "[a]n agreement to arbitrate . . . is, in effect, a specialized kind of forum-selection clause" could be read to mean that precedent about forum selection clauses also applies to arbitration clauses, the inverse need not be true. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

> mental capacity to assent, Spahr v. Secco, 330 F.3d 1266 ([10th Cir.] 2003).

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). The Supreme Court, making clear that it did not matter whether a contract was void or voidable, held that a challenge to the validity of the contract must be resolved by an arbitrator. Id. at 446, 449, 126 S.Ct. 1204. The challenge at issue was that "a contract containing an arbitration provision [was] void for illegality." Id. at 442, 126 S.Ct. 1204. To the extent that arbitration precedents apply to the present case, then, they do not favor Vitol—quite the contrary, they imply that the forum selection clauses are enforceable even if PREPA argues that the contracts are void.

III. Conclusion

The district court correctly decided that the forum selection clauses were enforceable. Therefore, the unanimity requirement could not be met here, and remand was proper.[9]

Affirmed.

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[9] We have considered Vitol's remaining arguments, and deem them to be without merit, at least insofar as they apply to the remand issue before us.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

Autoridad de Energia Electrica de Puerto Rico,

Plaintiff

v.

Vitol Inc., Vitol S.A.; et al.,

Defendants

Case No. 09-cv-02242-SJM
Opinion No. 2016 DNH 057

O R D E R

This suit was filed in 2009 by the Autoridad de Energia Electrica de Puerto Rico ("PREPA") in the Commonwealth Court of First Instance, San Juan Part ("Commonwealth court"), against Vitol Inc. and Vitol S.A. seeking, inter alia, a declaratory judgment that certain oil supply contracts it had entered with Vitol Inc. were rescinded by operation of local law. Defendants removed the case to federal court, invoking this court's diversity subject matter jurisdiction, and asserted counterclaims against PREPA. In 2012, PREPA filed a second complaint in the Commonwealth's court against Vitol Inc. and Vitol S.A., d/b/a Vitol S.A., Inc., alleging similar causes of action regarding four additional oil supply contracts. Defendants removed that case to federal court as well, again invoking the court's diversity subject matter jurisdiction. Subsequently, the two actions were consolidated.

The procedural history of the case is long and complicated. Since removal of the action in December 2009, PREPA has repeatedly moved for remand of the case to the Commonwealth's court based on forum selection clauses in the fuel supply contracts. The history of the case appears to have been further complicated by extensive motion practice between the parties, as well as PREPA's March 2015 motion to disqualify and/or for recusal of the judge previously assigned to the case.

The case was reassigned in October of 2015, thereby mooting PREPA's motion to disqualify and/or recuse. Having reviewed the existing docket, it appears that several motions are pending, including a third motion to remand filed by PREPA, three fully briefed motions for summary judgment, as well as two motions for reconsideration of orders on motions in limine, and a motion for reconsideration of the court's September 30, 2014, order.

Because it appears from the record that the court has not definitively resolved a critical issue, i.e. the applicability of the forum selection clauses,[1] and because the forum selection clauses determine

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[1] To the extent defendants suggest that the issue was largely resolved in earlier rulings (except as to whether PREPA could prove its allegations that Vitol Inc. is the alter ego of Vitol S.A.) it does not appear so, and, in any event, the law of the case doctrine would not apply even if the issue had been finally resolved. See, e.g., Ellis v. U.S., 313 F.3d 636, 648 (1st Cir. 2002) (court may revisit earlier ruling to avoid "manifest injustice"). The relationship between the defendants is not critical to a determination of the applicability of the forum selection clauses to this case.

whether the case should remain before this court, that is an appropriate place to begin.

BACKGROUND

PREPA, a Puerto Rico public corporation, filed suit in November 2009 against Vitol Inc., Vitol S.A., Carlos Benitez, Inc. ("Benitez, Inc."), and Fidelity & Deposit Company of Maryland ("Fidelity"),[2] claiming that two oil supply contracts it held with Vitol Inc. were "void" or were automatically rescinded pursuant to Puerto Rico Act 458.

Puerto Rico Act 458 provides that public corporations, like PREPA, may not award bids or contracts to a juridical person[3] who has pled guilty to, or been convicted of, any crime constituting fraud, embezzlement or misappropriation of public funds. See 3 LRPA § 928. Act 458 further prohibits juridical persons who have pled guilty to, or been convicted of, such crimes from participating in the bidding process for a contract with a public corporation, and from executing contracts with a public corporation for 20 years after the date of conviction. See id. The Act further provides that conviction "shall entail . . . the automatic rescission of all contracts in effect on said date between the person convicted or found guilty and any agency or

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[2] Benitez, Inc., and Fidelity subscribed Vitol Inc.'s performance bond required under the contracts.

[3] "Juridical person" is defined by the statute to include "corporations, professional corporations, civil and mercantile partnerships, special partnerships, cooperatives and any entity defined as such in any applicable law, including those that constitute, for these purposes, the alter ego of the juridical person or subsidiaries thereof." 3 L.P.R.A. § 928a.

instrumentality of the Commonwealth government, [or] public corporation." 3 LRPA § 928c.

In November of 2007, Vitol S.A. pled guilty to grand larceny fraud in a New York state court. PREPA makes several assertions regarding that conviction, all of which arise from PREPA's contention that Vitol S.A. is an "alter ego" or "partner" of Vitol Inc., as described in Act 458.

First, PREPA says that, pursuant to 3 LPRA § 928c, the contracts in effect between Vitol Inc. and PREPA on the date of Vitol S.A.'s conviction were automatically rescinded, and that any contract executed after Vitol S.A.'s conviction is "null and void ab initio" (document no. 160, p. 12) because Vitol Inc. could no longer legally participate in the public bidding/contract process.

PREPA also contends that, because the contracts at issue required Vitol Inc. to represent that it was not prohibited from contracting with Puerto Rico public authorities, and to submit a sworn statement, attesting to whether it had pled guilty to, or been convicted of such crimes, Vitol Inc. was contractually required to inform PREPA of Vitol S.A.'s conviction. (Document no. 113, p. 18-19.) Therefore, says PREPA, Vitol Inc.'s omission violated both Act 458 and the contracts. PREPA's 2009 complaint seeks declaratory relief, damages "caused by deceit in the contracting process," and damages for breach of contract. (Document no. 1-3.)

PREPA's subsequent complaint, filed in 2012 against Vitol Inc. and Vitol S.A. d/b/a Vitol S.A., Inc., seeks similar relief with regard to four additional oil supply contracts—three between Vitol Inc. and PREPA, and one between PREPA and Vitol S.A.,

Inc.[4] The contracts at issue in the 2009 and 2012 actions contain choice of law and venue clauses.

First Motion to Remand

Following defendants' removal of the case in December 2009, PREPA timely filed a motion to remand, arguing: (1) complete diversity between the parties was lacking because defendant Benitez, Inc., was a citizen of the Commonwealth of Puerto Rico; and (2) Vitol Inc. could not remove the case, or consent to removal, because the forum selection clause in the contracts between Vitol Inc. and PREPA was mandatory and enforceable. Defendants countered that PREPA had improperly or fraudulently included Benitez, Inc., as a non-diverse party to defeat diversity jurisdiction. Defendants further argued that enforcement of the forum selection clause would be unreasonable, because Vitol S.A. was not a signatory party to the relevant contracts.

The motion was referred to a magistrate judge, who found that defendants had not established that PREPA included Benitez, Inc., as a defendant to defeat diversity, and that the forum selection clause was mandatory and subject to enforcement. (Document no. 25, p. 19.) She recommended that the action be remanded to state court. Both parties objected.[5]

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[4] Vitol S.A., Inc., subsequently assigned its contract with PREPA (contract 902-01-05) to Vitol Inc. PREPA argues that the assignment was without PREPA's consent, but the validity of that assignment does not impact the court's analysis.

[5] Defendants objected to the magistrate judge's conclusions. (Document no. 26.) PREPA, on the other hand, requested that the magistrate judge's report and

The court issued an order on September 3, 2010, agreeing with the magistrate judge that the forum selection clause was mandatory, but indicated the court's "strong doubts as to the inclusion" of Benitez, Inc., and Fidelity as parties to the case. (Document no. 30, p. 11.) Then, focusing on whether it would be unreasonable to hold non-signatory Vitol S.A. to the contract's forum selection clause, the court noted: "the relationship [between] Vitol Inc. and Vitol S.A. . . . should be determined not by mere allegations but by proof, particularly as to alter ego allegations." (Id. at p. 18.) The court then denied PREPA's motion to remand without prejudice, allowing the parties 90 days to perform discovery, and authorizing PREPA to file an amended motion to remand "making reference to specific facts relating to the remand request." (Id. at 19.)

Second Motion to Remand

As instructed, in December of 2010, PREPA filed a second motion to remand (document no. 39). Additional facts and exhibits pertaining to the relationship between Vitol Inc. and Vitol S.A., were included, but the same arguments made in its first motion to remand were largely reiterated: (1) that

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recommendation be amended to state: (1) "Vitol S.A., even though a non-signatory party, is subject to enforcement of or bound by the mandatory selection clauses in the contracts between PREPA and Vitol Inc.;" (2) "Vitol S.A., as a non-signatory party, but as an entity closely related to the contractual relationships at issue in the case . . . can be bound by the mandatory forum selection clauses in the contracts at issue;" and (3) "since Vitol Inc. waived its right to removal, Vitol Inc. cannot consent to removal by Vitol S.A. and therefore Vitol S.A. cannot meet the unanimity requirement for removal." (Document no. 27, pp. 2-3.)

PREPA's joinder of Benitez, Inc., was proper, and, therefore, complete diversity of citizenship did not exist; and (2) the forum selection clause in the contracts made the Commonwealth courts of Puerto Rico "the only courts with competent and exclusive jurisdiction over disputes" between Vitol Inc. and PREPA regarding the contracts. (Document no. 39, p. 11.) PREPA further argued that the court's attention to the relationship between Vitol Inc. and Vitol S.A., (for purposes of ruling on PREPA's motion to remand) was misplaced because "it is immaterial whether Vitol S.A. is so related to Vitol Inc. so as to make Vitol S.A. bound by the forum selection clauses in the contracts in controversy [,] because Vitol Inc. cannot consent to removal by Vitol S.A. and therefore Vitol S.A. cannot meet the unanimity requirement for removal." (Id. at 19.)

The court determined that PREPA's motion should be treated as a motion for reconsideration, since PREPA "[did] not present any new evidence or arguments that have not been presented before the Court's issuance of its Opinion and Order of September 3, 2010." (Document no. 55, p. 12.) Characterizing PREPA's motion as "merely a rehash of its prior arguments," (id.) the court determined that Fidelity and Benitez, Inc., should be disregarded for diversity purposes, as they were improperly joined because "there is no cause of action under the [performance bonds] against Benitez, et al." (Id. at 14.)

The court then turned to the forum selection clause. PREPA's unanimity argument was not addressed. Instead, the analysis focused on whether it would be unjust and unreasonable to apply the mandatory forum selection clause to a non-signatory

party (Vitol S.A.) when PREPA had not sufficiently proved that Vitol S.A. was an alter ego of Vitol Inc. The court did not issue a final ruling on the applicability of the forum selection clause, however, stating: "[t]he issue as to whether [Vitol Inc.] may or may not consent to the removal will be determined after the Court issues a final ruling on the forum selection clause, which will be made after the parties have an opportunity to present evidence at trial." (Id. at 21.)

PREPA filed a motion for reconsideration. (Document no. 57.) By order dated September 10, 2012, the court denied the motion, stating: "until PREPA shows to the Court that [Vitol Inc.] and [Vitol S.A.] are one and the same legal entity, [Vitol S.A.] is not obligated by the forum selection clause to litigate in state court." (Document no. 90, p. 3-4; see also p. 29 ("Until PREPA proves to the Court that [Vitol Inc.] is an alter ego of [Vitol S.A.], PREPA's arguments, both substantive and procedural as to the choice of forum clause in its contracts . . . cannot be accepted by the court.").)

PREPA subsequently filed a motion requesting leave to file an interlocutory appeal, as well as a motion to dismiss defendants' counterclaims based on the forum selection clause. Both motions were denied. (Document no. 124).

Motion to Remand 2012 Action

As mentioned above, in December of 2012, PREPA filed a second action in the Commonwealth court, which defendants also promptly removed. PREPA again sought remand, based on the forum selection clauses in the contracts. The motion was denied "at this stage of the proceedings," on grounds

that the court needed to first determine the "alter ego issue." (Case No. 12-cv-02062; Docket no. 13.)

ANALYSIS

The relevant legal principles are rather straightforward. The federal removal statute is strictly construed. Danca v. Private Health Care Systems, Inc., 185 F.3d 1, 4 (1st Cir. 1999). "If there is any doubt as to the right of removal, federal jurisdiction should be rejected and the case resolved in favor of remand." Tremblay v. Philip Morris, Inc., 231 F. Supp. 2d 411, 414 (D.N.H. 2002). When the propriety of a removal petition is questioned, "the removing party bears the burden of showing that removal is proper." Universal Ins. Co., Inc. v. Warrantech Corp., 392 F. Supp. 2d 205, 208 (D.P.R. 2005). "That burden is particularly heavy when the party seeks to avoid a forum selection clause through use of removal." Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA, 779 F.3d 214, 218 (3d Cir. 2015) (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)).

"Federal courts have long enforced forum selection clauses as a matter of federal common law."[6] Lambert v. Kysar, 983 F.2d 1110, 1116 (1st Cir. 1993). "The enforcement of valid forum-selection

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[6] "[B]ecause there is no conflict between federal common law and Puerto Rico law regarding the enforceability of forum-selection clauses," the court will apply federal common law. Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 16-17 (1st Cir. 2009) (quotations omitted). See also D.I.P.R. Mfg., Inc. v. Perry Ellis Intl., Inc., 472 F. Supp. 2d 151, 154 (D.P.R. 2007) ("[G]iven the similarity between federal law and Puerto Rico law concerning enforcement of forum selection clauses, the First Circuit has applied federal common law when interpreting them in a diversity context.").

clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 581 (2013) (internal quotations omitted). The Court of Appeals for the First Circuit has stated that a forum selection clause is "prima facie valid" and should not be set aside, "absent a strong showing by the resisting party that the clause is 'unreasonable under the circumstances,'." Claudio-De Leon v. Sistema Universitario Ana G. Mendez, 775 F.3d 41, 48 (1st Cir. 2014) (quoting M/S Bremen, 407 U.S. at 15).

A. Validity and Application of the Forum Selection Clause

1. Permissive or Mandatory

"Under federal law, the threshold question in interpreting a forum selection clause is whether the clause at issue is permissive or mandatory." Claudio-De Leon, 775 F.3d at 46. Here, both the magistrate judge and district judge properly found that the forum selection clauses at issue are mandatory. The court sees no reason to revisit that determination.

2. Coverage Question

The next topic of inquiry is the "coverage question"—whether the clauses encompass the claims in this suit. Huffington v. T.C. Group, LLC, 637 F.3d 18, 21 (1st Cir. 2011). Such a determination is "clause-specific," "so 'it is the language of the forum selection clause itself that determines which claims fall within its scope.'" Claudio-De Leon, 775 F.3d at 47 (quoting Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 19 (1st

Cir. 2009). "So the scope question turns, as often is so with contracts, on plain language, attributed purpose, available precedent and any background policy considerations that may bear." Huffington, 637 F.3d at 21.[7]

The court, it seems, previously concluded that the forum selection clause in the contracts do cover the claims at issue here. (See Document no. 30, p. 8 ("The court then agrees that the [choice] of forum is enforceable unless pursuant to the cases of M/S/ Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) and Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385, 386 (1st Cir. 2001)[,] there exists an 'unreasonable and/or unjust' reason.'".) The plain language of the clauses encompass the claims.

The Choice of Law and Venue provision in each of the contracts is nearly identical and reads:

> The Contract shall be governed by, and construed in accordance with the laws of the Commonwealth of Puerto Rico. Also, the contracting parties expressly agree that only the state courts of Puerto Rico will be the courts of competent and exclusive jurisdiction to decide over the judicial controversies that the appearing parties may have among them regarding the terms and conditions of this Contract.

(Document no. 325, Exh. 1.) Defendants make two points in support of their position that the clause does not cover the dispute. First, they argue that

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[7] Neither party argues that Puerto Rico law requires a different analysis.

the clause is inapplicable because "this case is fundamentally not about [Vitol Inc.'s] performance under the terms and conditions of the contracts." (Document no. 333, pp. 3-4.) But, the plain language of the clause does not limit its scope to coverage of controversies relating to performance under the terms and conditions of the agreement. Instead, the clause is broadly written, applying to "judicial controversies" between the parties "regarding the terms and conditions" of the contracts (emphasis supplied).

Second, defendants argue that the "actual controversy" between the parties is over the statutory eligibility of Vitol Inc. and PREPA to contract, and "[t]his statutory claim is the substantive core of [the] two consolidated lawsuits." (Document no. 325, p. 11, 12.) According to defendants, PREPA has asserted, at most, one claim that falls with the scope of the forum selection clause, but the majority of PREPA's claims are "not claims regarding the terms and conditions of the contracts; they are claims for statutory violations seeking statutory forfeiture remedies." (Id. at 17, 12; see also Document no. 333, p. 3-4 ("This case is . . . about PREPA's statutory claims seeking statutory remedies for a statutory reporting violation.").)

The plaintiff in Huffington v. T.C. Group, LLC, 637 F.3d 18, made a similar argument. In Huffington, the forum selection clause named Delaware courts as the exclusive forum for "any action, suit or proceeding with respect to" the contract. Id. at 20. Huffington argued that his claims did not fall within the clause because he "advance[d] no contract claim and his stated statutory and common-law tort claims rest on

alleged misrepresentations that occurred before he signed the agreement." Id. at 21. Our circuit court disagreed. Noting that the language of the clause "easily invite[d] a broader application," the court concluded that "a suit is 'with respect to' the agreement if the suit is related to that agreement—at least if the relationship seems pertinent in the particular context." Id. at 22. The court of appeals then went on to note:

> So, too, courts describe the phrase "with respect to" as synonymous with the phrases "with reference to," "relating to," "in connection with," and "associated with," and they have held such phrases to be broader in scope than the term "arising out of," to be broader than the concept of a causal connection, and to mean simply "connected by reason of an established or discoverable relation."

Id. (citations omitted). The court concluded that, because "[e]ach cause of action Huffington asserted has as a prerequisite the loss that flowed from the agreement," Huffington's claims "related to" the agreement and fell within the scope of the clause. Id. at 22-23.

Huffington is particularly instructive here because the court of appeals equated the phrase "with respect to" (the language at issue in that case) to the phrase "with reference or regard to something" (the language at issue in this case). Id. at 22. And, as in Huffington, PREPA's claims all arise out of the parties' contractual relationship. Indeed, PREPA would have no claims against Vitol

Inc. were it not for the contracts that include the forum selection clauses.

The clauses at issue here apply to controversies among the parties not simply "regarding the contracts," but regarding the "terms and conditions" of the contracts. While that language might be seen as narrowing the scope of the forum selection clause, it supports PREPA's argument that the clause applies. That is because the majority of the contracts contain either: (1) a clause requiring Vitol Inc. to effectively represent that it had not violated Act 458; or (2) as part of the contractual terms and conditions, a representation by Vitol Inc. (or Vitol S.A., Inc.) that it was not prohibited from contracting with PREPA. (See, e.g., Document no. 39-23, pp. 28-29; Document no. 39-21, p. 28; Document no. 39-22, pp. 27-28; Document no. 39-24, pp. 25-26; Document no. 39-25, pp. 25-26; Document no. 39-26, pp. 16, 25-26.) Indeed, most of the contracts at issue contain both clauses.

In light of those express contractual provisions, it cannot reasonably be argued that PREPA's claims do not "relate to" the contract's terms and conditions. See Bagg v. HighBeam Research, Inc., 862 F. Supp. 2d 41, 45 (D. Mass. 2012) ("courts have held that tort and statutory claims may 'relate to' a contract and fall within the scope of a forum selection clause, even if the complaint contains no explicit contract claims.") (Collecting authority.) The court concludes that the clauses encompass the claims in the action.

3. Enforceability

Having determined that the clauses are mandatory and cover PREPA's claims, the "final step in evaluating the clause involves asking 'whether

there is some reason the presumption of enforceability should not apply.'" Claudio-De Leon, 775 F.3d at 48 (quoting Rafael Rodriguez Barril, 619 F.3d at 93).

> A forum selection clause is "prima facie valid" and absent a "strong showing" by the resisting party that the clause is "'unreasonable' under the circumstances" it should not be set aside. There are four grounds for finding such a clause unreasonable, and thus unenforceable:
>
> (1) the clause was the product of "fraud or overreaching";
>
> (2) "enforcement would be unreasonable and unjust";
>
> (3) proceedings "in the contractual forum will be so gravely difficult and inconvenient that [the party challenging the clause] will for all practical purposes be deprived of his day in court"; or
>
> (4) "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."

Claudio-De Leon, 775 F.3d at 48-49 (quoting Rafael Rodriguez Barril, 619 F.3d at 93 (quoting Bremen, 407 U.S. at 15, 18)) (alterations in original).

Defendants argue that enforcement would be unreasonable and unjust because PREPA has taken "manifestly inconsistent positions" by arguing that the contracts have no legal effect while

simultaneously attempting to enforce the contractual forum selection clause. (Document no. 325, p. 22.) While imaginative, defendants cite no persuasive authority in support of that position, and the court is not persuaded.

Along these lines, defendants also argue that PREPA should be judicially and equitably estopped from enforcing the clauses. Judicial estoppel requires that (1) a party adopt a position clearly inconsistent with a prior position; and (2) the party have succeeded in persuading a court to accept that party's prior position. Guay v. Burack, 677 F.3d 10, 16 (1st Cir. 2012). Defendants point to no evidence that PREPA has "successfully maintained" its position that the contracts have no legal effect. Defendants' judicial estoppel argument lacks merit.

Defendants' equitable estoppel argument is equally unavailing—as succinctly put by the court in Marra v. Papandreou, 59 F. Supp. 2d 65, 70 (D.C.C. 1999):

> This argument "puts the cart before the horse." For this argument to succeed, the court would have to hold that the defendants unlawfully revoked the consortium's license. That would require the court to reach the merits of the plaintiffs' claims. The court cannot reach the merits of those claims, however, until and unless it finds that the forum-selection clause does not apply.

See also Contacare, USA, Inc. v. Laboratoires Contapharm, No. CIV-85-794E, 1986 WL 3504, *2 (W.D.N.Y. Mar. 20, 1986) ("This Court finds no merit

to the plaintiffs' argument that [defendant] should be precluded from invoking provisions of the contract before this Court because [defendant] has allegedly repudiated the contract. The plaintiffs' action against [defendant] arises under the contract. The mere fact that [defendant] in its defense alleges that it properly terminated the contract with Trans-Canada does not preclude [defendant] from looking to the contract for all purposes in this action. [Defendant] is therefore not estopped from invoking any venue provisions found to exist in the contract.").

In sum, defendants have not met their burden of establishing that enforcement of the forum selection clause would be "unreasonable under the circumstances." Claudio-De Leon, 775 F.3d at 48 (quotation omitted). Accordingly, the court finds that the mandatory forum selections clauses are enforceable against Vitol Inc.

B. 28 USC § 1446's Unanimity Requirement

Under the provisions of 28 U.S.C. § 1441, a defendant in a state court action may remove the case to federal court if the plaintiff could have originally filed the case in federal court. Esposito v. Home Depot U.S.A., Inc., 590 F.3d 72, 75 (1st Cir. 2009). "Where the action involves multiple defendants, however, the right of removal is subject to the so-called 'unanimity requirement.'" Id. (citing Chicago, Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 247–48 (1900)).[8]

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[8] In 2011, 28 U.S.C. § 1446 was amended to codify the unanimity requirement. See Federal Court Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758; see also 28 U.S.C. § 1446(b)(2)(A) ("When a civil action is

> The requirement of unanimity serves the interests of plaintiffs, defendants and the judiciary. Plaintiffs are advantaged, because, were the right to removal an independent rather than joint right, defendants could split the litigation, forcing a plaintiff to pursue its case in two separate forums. See Sansone v. Morton Mach. Works, Inc., 188 F. Supp. 2d 182, 184 (D.R.I. 2002) (citing Getty Oil Corp., Div. of Texaco, Inc. v. Ins. Co. of N. Am., 841 F.2d 1254, 1262 n. 11 (5th Cir. 1988)). Defendants also stand to benefit from the requirement, as it precludes one defendant from imposing his choice of forum on a co-defendant. Id. (citation omitted). And the unanimity requirement prevents the needless duplication of litigation, thereby preserving court resources and eliminating the unattractive prospect of inconsistent state and federal adjudications. Spillers v. Tillman, 959 F. Supp. 364, 369 (S.D. Miss. 1997).

Esposito, 590 F.3d at 75. Accordingly, "subject to a few exceptions not applicable here, all defendants

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removed solely under [28 U.S.C. § 1441(a)], all defendants who have been properly joined and served must join in or consent to the removal of the action."). Prior to the 2011 amendments, the unanimity requirement was "derived from 28 U.S.C. § 1446, which sets forth the procedure for removing a state action to federal court." Esposito, 590 F. 3d at 75 (citing Loftis v. UPS, 342 F.3d 509, 516 (6th Cir. 2003)).

must consent to remove the case for removal to be effected." Id. (citations omitted).

1. Waiver of Right to Consent to Removal

PREPA argues that the forum selection clause vitiates Vitol Inc.'s ability to consent to removal of this action. According to PREPA, because Vitol Inc. cannot consent to removal, the unanimity rule is violated and the case must be remanded. In response, defendants argue that, even if Vitol Inc. waived its right to remove, Vitol Inc. did not waive its right to consent to removal by a co-defendant. In support of the drawn distinction, defendants rely upon the Congress's 2011 amendments to 28 U.S.C. § 1446(b)(2)(C). Those amendments allow an earlier-served defendant to consent to removal by a later-served defendant even if the earlier-served defendant had not effected removal within 30 days and thereby waived its own right to remove. Defendants argue that, by this amendment, Congress, "adopted [the] underlying principle that a defendant's waiver of its right to remove does not automatically waive the right to consent to removal." (Document no. 325, p. 19.).

As previously noted, "[g]enerally, a forum selection clause mandating that disputes be resolved in state court operates as a waiver of the parties' removal rights under § 1441." Skydive Factory, Inc. v. Skydive Orange, Inc., No. 12-CV-307-SM, 2013 WL 954449, at *1 (D.N.H. Mar. 12, 2013) (collecting authority); see also GKD-USA, Inc. v. Coast Mach. Movers, No. CIV. A. WMN-15-1380, 2015 WL 5092523, at *3 (D. Md. Aug. 27, 2015) ("Courts have consistently held that, where a party has signed an agreement with a mandatory forum selection clause

requiring the parties to litigate disputes exclusively in a particular state court, that party has waived the right to remove an action from that court.") (collecting authority). And, "[j]ust as the intent to establish a waiver of the right to removal may be inferred from the language of a forum selection clause, so, too, can the language of a forum-selection clause establish a waiver of the right to consent to some other defendant's removal." Medtronic, Inc. v. Endologix, 530 F. Supp. 2d 1054, 1058 (D. Minn. 2008) (emphases in original) (quotation omitted).

It may well be that, in some circumstances, a defendant's waiver of its right to remove might not also waive its right to consent to another's removal. But, such a distinction makes little sense in these circumstances, given the plain language of the forum selection clauses. Vitol Inc. and PREPA have both agreed that the Commonwealth courts of Puerto Rico have "exclusive jurisdiction" to "decide over ... judicial controversies" between the parties. The clause conveys the "parties' agreement that exclusive jurisdiction over contractual disputes lies in the state court." Skydive Factory, Inc. v. Skydive Orange, Inc., 2013 WL 954449, at *1. If Vitol Inc. were deemed to have retained the right to consent to removal by another defendant, the Commonwealth courts of Puerto Rico would not have "exclusive jurisdiction" over the judicial controversies arising from the relevant contracts. The forum selection clauses would be rendered ineffective. Indeed, "[m]andatory forum selection clauses would lose much of their utility if a party . . . could contract for a venue for any dispute to be exclusively in a state court but, when a dispute arose, could avoid that clause by removing or consenting to remove the

dispute from the state venue to federal court." Push Pedal Pull, Inc. v. Casperson, 971 F. Supp. 2d 918, 928 (D.S.D. 2013).

The reasoning in Medtronic, Inc. v. Endologix, 530 F. Supp. 2d 1054, is both instructive and persuasive. In Medtronic, the court addressed a nearly identical argument to the one defendants make here[9] in the context of a forum selection clause that required disputes to be "exclusively decided by a state court in the State of Minnesota." Id. at 1056. After noting that the "clear intent behind the forum-selection clauses is that matters arising out of the . . . agreements are to be litigated only in a Minnesota state court," the court stated: "the only way for a state court to actually decide—that is, render a decision—in a dispute arising out of the agreements is for [defendants] to remain in state court once they have been sued there; they cannot consent to some other party removing the case, or else the state court will not be afforded the opportunity to render a decision." Id. at 1058. The court therefore concluded that "the forum-selection clauses waived not only [defendants'] right to remove, but also their right to consent to . . .

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[9] While the Medtronic decision pre-dated the 2011 amendments, defendants there relied upon Marano Enters. of Kan. v. Z-Teca Rests., L.P., 254 F.3d 753 (8th Cir. 2001), where the Court of Appeals for the Eighth Circuit adopted the position later incorporated in the 2011 amendment: "even when a first-served defendant does not effect removal within 30 days, and hence waives its right to removal, a later-served defendant can nevertheless remove within 30 days of being served, as long as all of the defendants to the action consent to that removal." Medtronic, 530 F. Supp. 2d at 1058.

removal," and therefore "the rule of unanimity cannot be satisfied." Id.[10]

So it is in this case. Because the forum selection clauses waived Vitol Inc.'s ability to consent to a co-defendant's removal, defendants cannot satisfy the unanimity requirement, and the case must be remanded. See Graham Construction Servs., Inc. v. Adventure Divers, Inc., No. 11-03414 (MJD/AJB), 2012 WL 1365729, at *5 (D. Minn. Mar. 27, 2012) ("Where one party is forbidden from giving consent to removal by a forum selection clause, removal is improper."); see also Push Pedal Pull, Inc. v. Casperson, 971 F. Supp. 2d at 928 ("If one defendant in a multi-defendant action contractually waives his right to removal, that defendant has waived his ability to consent to a co-defendants' removal; the defendants then cannot satisfy the unanimity requirement, and the case is subject to remand."); Cattleman's Choice Loomix, LLC v. Heim, No. 11-CV-00446-WYD-CBS, 2011 WL 1884720, at *3 (D. Colo. May 18, 2011) (adopting reasoning of cases holding "in multi-defendant cases, where some of the defendants are prevented by a contractual waiver from agreeing to removal, defendants cannot meet the unanimity requirement and the case must be remanded."); Weener Plastics, Inc. v. HNH Packaging, LLC, No. 5:08-CV-496-D, 2009 WL 2591291, at *1 (E.D.N.C. Aug. 19, 2009) (adopting

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[10] The court is not persuaded by defendants' efforts to distinguish Medtronic on the basis that those forum selection clauses also provided that the signatory would not take action to upset the plaintiff's choice of forum. This provision did not weigh heavily into the Medtronic court's analysis; indeed, the court indicated that these provisions merely "bolstered" its conclusion. Id. at 1058

magistrate court's recommendation that "concluded that the forum-selection clause in the Payment Agreement [between the parties] waived HNH's right to remove and thereby prevented HNH from lawfully removing the action."); First Lowndes Bank v. KMC Grp., No. CIV.A. 2:08CV906-WHA, 2009 WL 174972, at *2 (M.D. Ala. Jan. 26, 2009) ("If some defendants are prevented by a contractual waiver from agreeing to removal, the defendants cannot meet the unanimity requirement, and the case must be remanded.").

2. Waiver of Unanimity Argument

Defendants contend that PREPA waived its lack of unanimity argument by failing to raise it within thirty days of removal. Defendants rely on circuit precedent holding that a "defect in the removal process resulting from a failure of unanimity is not considered to be a jurisdictional defect, and unless a party moves to remand based on this defect, the defect is waived and the action may proceed in federal court." Esposito v. Home Depot, U.S.A., Inc., 590 F.3d at 75.

In its initial motion to remand, which was timely filed within 30 days of removal, PREPA unambiguously argued: "pursuant to 28 U.S.C. § 1446(a), all defendants must consent to the removal. Vitol Inc. may not request and may not consent to removal of the State Case because it waived its statutory right to removal in the contracts subject to the State Case." (Document no. 9, p. 5.) (emphasis added). No more was necessary. PREPA adequately raised the unanimity argument in its initial motion to remand, and nothing in the record suggests either a forfeiture or waiver. See Weener

Plastics, Inc., 2009 WL 2591291 at *2 (construing plaintiffs' argument that forum selection clause was mandatory and prevented removal "to include the argument that the forum-selection clause precluded [defendant] from consenting to removal"); see also Cattleman's Choice Loomix, LLC, 2011 WL 1884720, at *4 (finding that plaintiff had not waived unanimity argument where plaintiff's initial motion for remand was timely filed and referenced forum selection clause, because court did "not view Plaintiff's discussion of the applicability of the rule of unanimity as a wholly new argument, but rather a continuation of the arguments raised in Plaintiff's initial motion to remand.").

Even if PREPA had waived its unanimity argument, however, remand would still be required. PREPA seeks to enforce a mandatory contractual forum selection clause. When a defendant has removed a case in violation of a forum selection clause, remand is the appropriate and effective remedy for that wrong. "[Vitol Inc.] is stuck with [its] bargain." PGT Trucking, Inc. v. Lyman Consulting, LLC, 500 Fed. Appx. 202, 204 (3d Cir. 2012). "[E]nforcement of a waiver of the right to remove is a proper ground for remand." Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1219 (3d Cir. 1991); see also Snapper, Inc. v. Redan, 171 F.3d 1249, 1253 (11th Cir. 1999 ("determination that the [forum selection] clause does not permit further adjudication in that particular federal forum does not render the removal 'defective' in any ordinary sense of the word; it merely means that the federal court has held the parties to the terms of their

agreement, as with any other contractual adjudication.").[11]

Finally, the court addresses PREPA's request for attorneys' fees pursuant to 28 U.S.C. 1447(c), as well as its request that the court "clarify" the relationship between Vitol S.A. and Vitol S.A., Inc. Both requests are denied. While the court has concluded that remand is appropriate, defendants' removal of the case was not objectively unreasonable, as required by Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005), and an award of fees is unwarranted. As for PREPA's request for "clarification," PREPA is free to raise that request with the state court in Puerto Rico.

CONCLUSION

For the foregoing reasons, as well as those set forth in plaintiffs' memoranda, PREPA's third motion to remand (document no. 322) is granted. The case is remanded to the Commonwealth of P.R. Court of First Instance, San Juan Part for further proceedings.

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[11] The court is aware that this case is long-in-tooth, and that remand at this stage is not the norm. At no point, however, has PREPA sat on its hands with respect to raising the enforceability of the forum selection clauses. Indeed, PREPA has raised the issue at nearly every opportunity. (See Document nos. 9, 39, 57, 91, 95, 116.) Given that diligence, and the existence of mandatory, enforceable forum selection clauses, refusing to enforce the clauses now would be manifestly unjust to PREPA. The defendants very well knew the risks of opposing remand on such doubtful legal grounds, and any prejudice to them is self-inflicted.

SO ORDERED.

s/ Steven J. McAuliffe
Steven J. McAuliffe
United States District Judge

March 15, 2016

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 16-1438

AUTORIDAD DE ENERGIA ELECTRICA DE PUERTO RICO

Plaintiff - Appellee

v.

VITOL S.A.; VITOL, INC.

Defendants - Appellants

FIDELITY AND DEPOSIT CO. OF MARYLAND; FULANO DE TAL; FIADORAS A, B AND C; ASEGURADORAS X, Y AND Z; CARLOS M. BENITEZ, INC.

Defendants

No. 16-1447

AUTORIDAD DE ENERGIA ELECTRICA DE PUERTO RICO

Plaintiff - Appellee

v.

VITOL S.A.; VITOL, INC.

Defendants - Appellants

Before

Howard, Chief Judge
Torruella, Lynch, Thompson
Kayatta and Barron, Circuit Judges

ORDER OF COURT

Entered: October 2, 2017.

In light of appellee PREPA's PROMESA Title III case and the parties' responses to this court's August 9, 2017 order, the petition for panel rehearing and rehearing en banc is stayed insofar as it concerns appellants' counterclaim against PREPA in Appeal No. 16-1438. In all other respects, the petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:
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Eduardo A. Vera-Ramirez
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Michael Craig Kelso
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28 U.S.C. § 1447

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

P.R. Laws Ann. tit. 3, § 928

§ 928. Prohibition of bid or contract

It is hereby provided that a head of a government agency or instrumentality, public corporation or municipality, or of the Legislative or Judicial Branches shall not award any bids or contract whatsoever for services or for the sale or delivery of goods to a natural or juridical person who has been convicted or plead guilty in a federal or state forum, in any other jurisdiction of the United States, or in any other country, for the commission of those crimes that constitute fraud, embezzlement or misappropriation of public funds listed in § 928b of this title.

P.R. Laws Ann. tit. 3, § 928a

§ 928a. Definitions

For the purposes of this chapter, the term "service" means any nonprofessional services likely to be contracted or subcontracted by the state, including, but without being limited to, construction services, reconstruction works, remodeling and maintenance of works or physical facilities. It shall likewise be understood that "goods" constitute any real or personal property. A "natural person" is any person defined as such in any applicable law, including the Civil Code of Puerto Rico, and includes, but shall not be limited to the chairperson, vice chairperson, director, executive director or any member of a Board of Officials or Board of Directors, or the person who performs equivalent functions. The term "juridical person" includes corporations, professional corporations, civil and mercantile partnerships, special partnerships, cooperatives and any entity defined as such in any applicable law, including those that constitute, for these purposes, the alter ego of the juridical person or subsidiaries thereof.

P.R. Laws Ann. tit. 3, § 928b

§ 928b. Crimes

The crimes for whose conviction the prohibition set forth in this chapter shall apply, are the following:

(1) Aggravated misappropriation, in all its modalities.

(2) Extortion.

(3) Construction fraud.

(4) Fraud in the execution of construction works.

(5) Fraud in the delivery of goods.

(6) Undue intervention in the processes of awarding bids or in government operations.

(7) Bribery, in all its modalities.

(8) Aggravated bribery.

(9) Offer to bribe.

(10) Undue influence.

(11) Crimes against public funds.

(12) Preparation of forged documents.

(13) Presentation of forged documents.

(14) Forgery of documents.

(15) Possession and transfer of forged documents.

For the purposes of the federal jurisdiction, that of the states and territories of the United States, or of any other country, the prohibition set forth in this chapter shall apply in cases of convictions for crimes whose constitutive elements are equivalent to those of the above stated crimes.

P.R. Laws Ann. tit. 3, § 928c

§ 928c. Penalties; rescission of contract

The conviction or guilt for any of the crimes listed in § 928b of this title shall entail, in addition to any other penalty, the automatic rescission of all contracts in effect on said date between the person convicted or found guilty and any agency or instrumentality of the Commonwealth government, public corporation, municipality, the Legislative Branch or the Judicial Branch of Puerto Rico. In addition to the rescission of the contract, the Government shall have the right to demand the reimbursement of payments made with regard to the contract or contracts directly affected by the commission of the crime.

P.R. Laws Ann. tit. 3, § 928d

§ 928d. Duration of prohibition

The prohibition for contracting, subcontracting or awarding a bid, contained in this chapter shall have a duration of twenty (20) years, as of the date of the corresponding conviction in cases of felonies, and a duration of eight (8) years in cases of misdemeanors.

P.R. Laws Ann. tit. 3, § 928e

§ 928e. Requirement of contract clause

Upon the effectiveness of this act, all contracts entered into by any government agency or instrumentality, public corporation, municipality, the Legislative Branch or the Judicial Branch of Puerto Rico shall include a penal clause or clauses that expressly set forth the provisions contained § 928c of this title. In the event that due to omission or inadvertence, the inclusion of said clause or clauses in the contract in which they should have been included is omitted, the same shall be deemed to have been included in said contract for all legal purposes.

P.R. Laws Ann. tit. 3, § 928f

§ 928f. Notification

The Court of First Instance shall notify the Secretary of Justice of any conviction that falls within the crimes listed in § 928b of this title. The Secretary of Justice shall establish and keep a register of all natural and juridical persons who have been convicted or plead guilty of said crimes.

Furthermore, any natural or juridical person who wishes to participate in the award of bids or in any granting of contracts with any government agency or instrumentality, public corporation or municipality for the rendering of services or the sale or delivery of goods shall submit a statement sworn before a notary public stating if he/she has been convicted or has plead guilty of the commission of any of the crimes listed under § 928b of this title, or if he/she is under investigation in any legislative, judicial or administrative procedure, whether in Puerto Rico, the United States or any other country, in order to participate in the awarding or granting of any bids or contract, respectively. If the information were affirmative, the crimes for which he/she was found guilty or entered a guilty plea shall be stated therein.

P.R. Laws Ann. tit. 3, § 928g

§ 928g. Remedies

The remedies granted to the Commonwealth of Puerto Rico in this chapter are in addition to those established in the Civil Code of Puerto Rico, specifically to causes of action for general fraud, fraud in the negotiation of a contract, fraud in the compliance of the obligations of the contract and the law, fault in contrahendo, false or unlawful purpose, turpis causa, fault or negligence. All actions contemplated in the code of laws in effect and those added by this chapter shall be deemed to be cumulative, and may be alleged in the alternative.

P.R. Laws Ann. tit. 3, § 928h

§ 928h. Effect

The provisions of this chapter shall not apply retroactively nor shall they interfere with contracts in effect, and shall not prevent the Commonwealth of Puerto Rico from exercising each and every one of the civil and criminal actions in effect prior to the approval of this act with respect to contracts entered into prior to the effective date of this act.

P.R. Laws Ann. tit. 31, § 3517

§ 3517. Restoration of objects of contract—Illicit consideration not crime or misdemeanor

If the fact of which the illicit consideration consists does not constitute either a crime or misdemeanor, the following rules shall be observed:

(1) When both parties are guilty, neither of them can recover what he may have given by virtue of the contract, nor claim the fulfilment of what the other party may have offered.

(2) When only one of the contracting parties is guilty, he cannot recover what he may have given by virtue of the contract, nor demand the fulfilment of what may have been offered him. The other party, who has had nothing to do with the illicit consideration, may reclaim what he may have given without being obliged to fulfill what he has offered.