APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEPUY SYNTHES SALES, INC., a Massachusetts corporation; JONATHAN L. WABER, an individual, Plaintiffs-Appellees, v. HOWMEDICA OSTEONICS CORP., Defendant-Appellant, and STRYKER CORPORATION, a Michigan corporation, Defendant.	No. 21-55126 D.C. No. 5:18-cv-01557-FMO-KK Central District of California, Riverside ORDER

Before: LINN,[*] BYBEE, and BENNETT, Circuit Judges.

Judge Bennett has voted to deny the petition for

[*] The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

rehearing en banc, and Judges Linn and Bybee so recommend. **Dkt. No. 33**. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEPUY SYNTHES SALES, INC., a Massachusetts corporation; JONATHAN L. WABER, an individual, *Plaintiffs-Appellees*, v. HOWMEDICA OSTEONICS CORP., *Defendant-Appellant*, and STRYKER CORPORATION, a Michigan corporation, *Defendant*.	No. 21-55126 D.C. No. 5:18-cv-01557-FMO-KK OPINION

Appeal from the United States District Court
for the Central District of California
Fernando M. Olguin, District Judge, Presiding

Argued and Submitted November 18, 2021
Pasadena, California

Filed March 14, 2022

Before: Richard Linn,[*] Jay S. Bybee, and

[*] The Honorable Richard Linn, United States Circuit Judge for the

Mark J. Bennett,
Circuit Judges.

Opinion by Judge Linn

SUMMARY[**]

Forum-Selection Clause / Transfer

The panel affirmed the district court's order denying transfer under 28 U.S.C. § 1404(a); and affirmed the grant of partial summary judgment to DePuy Synthes Sales, Inc. and Jonathan Waber because the district court did not err in holding the forum-selection, non-compete and nonsolicitation clauses in an employment contract void under California law.

Waber was hired by Howmedica Osteonics Corp., and signed an employment contract with Howmedica's parent company, Stryker Corporation. The contract included a restrictive one-year non-compete clause and forum-selection and choice-of-law clauses requiring adjudication of contract disputes in New Jersey. Waber left Stryker to work at DePuy, a Howmedica competitor.

The panel first addressed the threshold jurisdictional issue. Howmedica was not a party to the case when Stryker's motion to dismiss or transfer was decided. The panel held that as the actual employer that participated in the proceedings to enforce its parent corporation's forum-selection clause, Howmedica had a right to appeal the

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U.S. Court of Appeals for the Federal Circuit, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

adverse decision of the district court on that issue. Moreover, Howmedica properly became a party to this litigation in the district court case, albeit after the district court denied the motion to transfer. The panel concluded there was jurisdiction to hear Howmedica's appeal under 28 U.S.C. § 1201.

The panel considered whether federal or state law governed the validity of a forum-selection clause. The panel held that the state law applicable here, Cal. Labor Code § 925(b), which grants employees the option to void a forum-selection clause under a limited set of circumstances, determined the question of whether Waber's contract contained a valid forum-selection clause. Section 925 as applied by the district court here is not a rule of state law that removed all discretion from a federal court on questions of venue. Rather, the provisions in § 925 circumscribing the kinds of employment agreements permitted and allowing parties unrepresented by counsel to void a forum-selection cause under certain circumstances relate to the terms of the agreement between the parties and, at least to that extent, are contrary to or within the scope of 28 U.S.C. § 1404(a). Waber's voiding of the forum-selection clause in his employment contract under § 925(b) excised the forum-selection clause from the agreement as presented to the district court. The panel held that § 1404(a) and *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), did not broadly preempt all state laws controlling how parties may agree to or void a forum-selection clause.

Having found that Waber satisfied all the prerequisites of § 925 and effectively voided the forum-selection clause under § 925(b), the district court turned to the traditional § 1404 factors under *M/S Bremen v.*

Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972), and held they favored denial of transfer. The panel held there was no error in applying the California choice-of-law rules here where there was no valid forum-selection clause. The panel rejected Howmedica's challenges. There was no error in the district court's consideration of § 925 as part of its transfer analysis. Howmedica was incorrect when it asserted that *Bremen* was inapplicable to adjudication of § 1404(a) motions because *Stewart* limited *Bremen* to the context of *forum non conveniens* rather than transfer. Finally, the district court did not abuse its discretion in finding that the forum-selection clause was void and unenforceable and that the modified *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 571 U.S. 49, 62 n.5 (2013), analysis was thus inapplicable. The panel found no reason to question or overturn the district court's analysis or its denial of Howmedica's motion to transfer.

The panel held that Howmedica presented no persuasive reason to overturn the district court's ruling of partial summary judgment in favor of DePuy and Waber that the forum-selection, non-compete and non-solicitation clauses were void under California law.

COUNSEL

Robert J. Carty, Jr. (argued), Nichols Brar Weitzner & Thomas, LLP, Houston, Texas; Michael D. Wexler, Seyfarth Shaw, LLP, Chicago, Illinois; Robert B. Milligan, Seyfarth Shaw, LLP, Los Angeles, California; John P. Phillips, Seyfarth Shaw, LLP, Houston, Texas; for Defendant-Appellant.

Anthony B. Haller (argued), Blank Rome, LLP,

Philadelphia, Pennsylvania; Leigh Ann Buziak, Blank Rome, LLP, Philadelphia, Pennsylvania; Jeffrey Rosenfeld, Blank Rome, LLP, Los Angeles, California; for Plaintiffs-Appellees.

OPINION

LINN, Circuit Judge:

Howmedica Osteonics Corp. ("HOC") appeals from the denial by the United States District Court for the Central District of California of HOC's motion to transfer this case to the District of New Jersey based on a forum-selection clause in an employment contract between Jonathan L. Waber ("Waber"), a California resident, and HOC's parent company, Stryker Corporation ("Stryker"). HOC also appeals from the district court's ruling that the forum-selection, non-compete and non-solicitation clauses in Waber's contract were void under California law and from the district court's consequent grant of partial summary judgment in favor of DePuy Synthes Sales, Inc. ("DePuy") and Waber. Because the district court did not abuse its discretion in denying transfer under 28 U.S.C. § 1404(a), we affirm the denial of HOC's transfer motion. Because the district court did not err in holding the forum-selection, noncompete and non-solicitation clauses void under California law, we affirm the grant of partial summary judgment.

I

A

In September 2017, Waber was hired by HOC as a Joint Replacement Sales Associate for the Palm Springs and Palm Desert areas and signed an employment

contract nominally with HOC's parent, Stryker. That contract included a restrictive one-year non-compete clause and forum-selection and choice-of-law clauses requiring adjudication of contract disputes in New Jersey.[1]

On July 1, 2018, Waber left Stryker to work at DePuy, an HOC competitor, serving the same region he previously serviced for Stryker in apparent violation of the non-compete clause. On July 17, 2018, Stryker threatened enforcement of the non-compete clause and soon thereafter sent Waber a cease-and-desist letter that threatened legal action. On July 23, 2018, Waber sent Stryker a notice stating that he was exercising his right to void the forum-selection and choice-of-law clauses under California Labor Code § 925. That statute forecloses certain contracts with California employees and renders such agreements "voidable by the employee" under specified conditions. The key provisions read:

> (a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:

[1] The key provision, § 8.2, reads:

> "8.2 Governing Law and Venue. Although I may work for Stryker in various locations, I agree and consent that this Agreement shall be interpreted and enforced as a contract of [New Jersey] … and shall be interpreted and enforced in accordance with the internal laws of that state without regard to its conflict of law rules. In such circumstance, *I agree and consent that any and all litigation between Stryker and me relating to this Agreement will take place exclusively* [in New Jersey] …." (emphasis added).

> (1) Require the employee to adjudicate outside of California a claim arising in California.
>
> (2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.
>
> (b) Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute.
>
> . . .
>
> (e) This section shall not apply to a contract with an employee who is in fact individually represented by legal counsel in negotiating the terms of an agreement to designate either the venue or forum in which a controversy arising from the employment contract may be adjudicated or the choice of law to be applied.

Cal. Lab. Code § 925 (emphasis added).

B

Having purported to void the forum-selection and choice-of-law clauses, DePuy and Waber, through shared counsel, filed a preemptive declaratory judgment action in the United States District Court for the Central District of California, seeking a ruling that the forum-selection

and choice-of-law clauses were void under § 925, that California law governs the dispute, that the non-compete clause was void as a violation of California Business and Professions Code § 16600,[2] and that DePuy was not subject to a tortious interference claim. In response, Stryker, seeking to enforce the forum-selection clause, filed a motion to dismiss under 28 U.S.C. § 1406 or to transfer to the United States District Court for the District of New Jersey under § 1404(a).

In addressing Stryker's motion, the district court, guided by *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 12-13 (1972) ("Bremen") and *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 571 U.S. 49, 62 n.5 (2013), began by considering whether there was a contractually valid forum-selection clause in Waber's contract. To answer that question, the district court turned to California state law, specifically § 925. Because Waber satisfied all the prerequisites in § 925, the district court concluded that the forum-selection clause "shall not be enforced" under state law. Having found the forum-selection clause unenforceable, the district court applied the factors normally considered by courts in deciding transfer motions under § 1404(a) and found both the

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[2] California Business & Professions Code § 16600 reads:

> Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.

California courts have said that "section 16600 prohibits employee noncompetition agreements unless the agreement falls within a statutory exception." *Edwards v. Arthur Andersen LLP,* 189 P.3d 285, 288 (Cal. 2006). There is no dispute on appeal that no statutory exception applies.

private factors—including the Plaintiff's choice of forum and the convenience to the parties—and the public factors—including familiarity with governing law and California's local interest manifest in its strong public policy against enforcing out-of-state forum-selection clauses as reflected in § 925—to weigh against transfer. The district court therefore denied Stryker's motion.

Thereafter, DePuy added HOC as a defendant and amended the complaint, repeating the allegations of invalidity of the forum-selection, choice-of-law, and noncompete clauses, deleting the request for relief from the tortious interference claim, and requesting injunctive relief and attorney fees. The district court followed much of the same reasoning it relied on in its denial of HOC's motion to transfer or dismiss and held that § 925 rendered the forum-selection and choice-of-law clauses "void and unenforceable." Applying California law, the district court granted partial summary judgment in favor of DePuy and Waber, holding that § 925 and § 16600 rendered the forum-selection, non-compete and non-solicitation clauses in Waber's contract void and unenforceable. The only issue of material fact left undecided was whether Stryker and HOC were joint employers.

The parties then filed a joint stipulation that dismissed Stryker with prejudice as the wrong party, agreeing that this would not prejudice HOC's and Stryker's rights to appeal. That resolved the final fact issue. The district court thereafter entered final judgment in favor of DePuy and Waber. HOC appealed both the order denying transfer and the judgment.

II

A

We first address the threshold question of our jurisdiction over this appeal. DePuy notes that HOC was not a party to the case on February 5, 2019, when Stryker's Motion to Dismiss or Transfer was decided and that based on the stipulation entered into by the parties, Stryker has since been dismissed from the case. While DePuy "takes no position for or against jurisdiction here" pursuant to the parties' stipulation, we are obligated to consider our own jurisdiction independently of the parties' stipulation. *See Bank of N.Y. Mellon v. Watt*, 867 F.3d 1155, 1157 (9th Cir. 2017).

It is uncontested that HOC participated in the litigation and filed its notice of appearance with an explanation that HOC was "improperly named as Stryker Corporation" and that HOC was the true party in interest. As HOC explained, and DePuy has not contested, "HOC is a wholly-owned subsidiary of Defendant Stryker Corporation. Because HOC employed Waber at the time of his resignation, it is the correct party to this action." HOC further explained that although the employment contract at the heart of the dispute is between Waber and "Stryker Corporation," the contract defines "Stryker Corporation" to include "subsidiaries, divisions, and affiliates," and HOC is such a subsidiary. As the actual employer that participated in the proceedings to enforce its parent corporation's forum-selection clause, HOC has a right to appeal the adverse decision of the district court on that issue. *See also Devlin v. Scardelletti,* 536 U.S. 1, 7 (2002) (considering the rights of non-named class members, noting that "[w]e have never, however, restricted the right to appeal to named parties to the

litigation."); *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 1999) (allowing appeal by individual investor based on participation in the district court, pro se participation, and formal objections to determinations).

Moreover, HOC properly became a party to this litigation in the district court case, albeit after the district court denied the motion to transfer. We are aware of no authority requiring a party to join the litigation prior to a decision on a motion in order to appeal the final ruling on the issue addressed by that motion. And even if HOC's official joinder into the case after the district court's February 5, 2019 decision were deemed to preclude its appeal of that decision, HOC was a party at the time of the district court's partial summary judgment decision, which also addressed the transfer issue.

For these reasons, we have jurisdiction to hear HOC's appeal under 28 U.S.C. § 1291.

B

We review the district court's denial of transfer under 28 U.S.C. § 1404(a) for an abuse of discretion.[3] *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). "A district court abuses its discretion if it does not apply the correct law…." *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000).

We review legal issues, including statutory interpretation, de novo. *Wash. Pub. Utils. Grp. v. U.S. Dist. Ct. for W. Dist. of Wash.*, 843 F.2d 319, 324 (9th Cir. 1987). We review factual findings for clear error. *Husain*

[3] HOC does not separately challenge the district court's denial of dismissal under § 1406.

v. Olympic Airways, 316 F.3d 829, 835 (9th Cir. 2002). We review the district court's grant of summary judgment de novo. *Oswalt v. Resolute Indus.*, 642 F.2d 856, 859 (9th Cir. 2011).

III

A

HOC challenges the district court's denial of its motion to transfer, arguing that the district court failed to follow *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), should have found the forum-selection clause enforceable under federal law, should have applied the analysis required by *Atlantic Marine*, and should have transferred the case to the District of New Jersey. HOC frames the majority opinion in *Stewart* as a wholesale rejection of Justice Scalia's position in his dissent that state law governs the validity of a forum-selection clause, holding instead that § 1404(a) preempts any state law—like § 925—that would render a previously agreed-to forum-selection clause void or unenforceable. HOC thus contends that the district court abused its discretion by applying § 925 to invalidate the forum-selection clause and deny its motion to transfer. HOC does not contest that Waber's employment agreement is governed by state contract formation law, but argues that only general contract law, rather than any state law directed specifically to forum-selection clauses, can render such a clause invalid and avoid the modified *Atlantic Marine* analysis.

DePuy and Waber argue that in reason and result *Stewart* should not be read as broadly as HOC contends. They contend that *Stewart* does not occupy the entire landscape of state contract law related to the validity and

enforcement of forum-selection provisions and dealt with a narrower issue—whether a district court's categorical denial of a § 1404(a) motion to transfer based on Alabama law was an abuse of discretion. According to Depuy and Waber, § 925 operates at the level of how agreements are made and voided, before the venue question addressed by § 1404(a). Depuy and Waber argue that *Bremen*, *Stewart*, and *Atlantic Marine* assumed the presence of a valid forum-selection clause, rather than addressing how forum-selection clauses are made or voided. DePuy and Waber consider HOC's contention that *Stewart* preempted all consideration of state law on questions of party agreement and validity of the forum-selection clause to be unsupported and unsustainable.

DePuy and Waber assert that while the *enforceability* of a forum-selection clause in a federal court is a well-established matter of federal law in this Circuit following *Bremen*, *see Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 914-15 (9th Cir. 2019); *Jones*, 211 F.3d at 497; *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988), the validity of such a clause—like any other contract clause—is a threshold issue governed by state law. DePuy and Waber argue that while this court has not spoken to whether state or federal law applies to the validity of a forum-selection clause, at least two district courts in this circuit have applied § 925 to determine the validity of a forum-selection clause in deciding transfer motions under §1404(a). *See Pierman v. Stryker Corp.*, No. 3:19-cv-00679-BEN-MDD, 2020 WL 406679, at *3-4 (S.D. Cal. January 24, 2020); *Friedman v. Glob. Payments, Inc.*, No. CV 18-3038 FMO, 2019 WL 1718690, at *3 (C.D. Cal. February 5, 2019). DePuy and Waber also assert that

applying state law to determine the validity of a forum-selection clause is consistent with federal courts' treatment of the validity of arbitration agreements. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter … courts generally … should apply ordinary state-law principles that govern the formation of contracts."). DePuy and Waber further argue that Waber's voiding of the forum-selection clause under § 925 effectively excised the forum-selection clause from the contract and fully justified the district court's refusal to apply the modified *Atlantic Marine* analysis and denial of HOC's motion to transfer.

B

For decades, courts in the United States frowned upon forum-selection clauses. That all changed when the Supreme Court in an admiralty case applied the common law doctrine of *forum non conveniens* and held that forum-selection clauses are presumptively valid and should be enforced unless "enforcement would be unreasonable and unjust, or … the clause [is] invalid for such reasons as fraud or overreaching." *Bremen*, 407 U.S. at 15. Several years after *Bremen*, the Supreme Court in *Stewart* once again addressed the force of a forum-selection clause, this time deciding what law governs transfer motions in a federal court sitting in diversity.

In *Stewart*, the plaintiff, alleging breach of contract, brought suit in the United States District Court for the Northern District of Alabama notwithstanding the presence of a forum-selection clause electing a New York court for any dispute arising out of the contract. *Stewart*, 487 U.S. at 24. The defendant responded by moving to transfer to New York under § 1404(a) or to dismiss under

§ 1406 pursuant to the forum-selection clause. *Id.* The district court denied transfer, applying an Alabama policy described in an Alabama Supreme Court decision:

> [C]ontractual agreements by which it is sought to limit particular causes of action which may arise in the future to a specific place, are held invalid.

See Redwing Carriers, Inc. v. Foster, 382 So.2d 554, 556 (Ala. 1980) (quoting 6 A.L.R.2d § 4, p. 306 (1957)). The Court explained that § 1404(a) represented Congress' mandated standard for venue transfer analysis, one that required a "flexible and individualized" analysis of multiple factors including the presence of the forum-selection clause. *Stewart*, 487 U.S. at 29-31. The Supreme Court made it a point to note that Alabama's policy, unlike the flexible and individualized approach required under federal law, was a "categorical policy disfavoring forum-selection clauses"—a rule of decision setting the weight a court was required to assign to a forum-selection clause. *Id.* at 30-31. Because § 1404(a) already controls the standard by which a federal court must analyze transfer, the Alabama policy had to give way to federal supremacy. *Id.* at 30 (explaining that a federal court considering a transfer motion must "integrate the factor of the forum-selection clause into its weighing of considerations as prescribed by Congress" in § 1404(a) rather than apply "Alabama's categorical policy disfavoring forum-selection clauses); *id.* (holding that a federal court cannot honor a state law that "refuse[s] to enforce forum-selection clauses providing for out-of-state venues as a matter of state public policy."); *id.* at 31 ("The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive

consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a).”). In other words, Alabama law could not set the weight a federal court must give to an extant forum-selection clause because § 1404(a) already requires consideration of an extant forum-selection clause in the transfer analysis.

Following *Stewart*, the Supreme Court once again had an opportunity to address venue and transfer issues in *Atlantic Marine*. In that case, the Supreme Court noted that while a determination under § 1404(a) ordinarily requires consideration and balancing of several recognized private and public interest factors, the existence of a forum-selection clause in a contract alters the usual transfer analysis and calls for the consideration of modified public and private interest factors. *Atl. Marine*, 571 U.S. at 62-63. Specifically, the Supreme Court held that in the presence of a valid forum-selection clause, courts should give plaintiffs choice of forum “no weight,” should deem the parties’ private interest factors “to weigh entirely in favor of the preselected forum,” and should apply the choice-of-law rules of the preselected forum. *Id.* at 63-65. This is referred to as the modified *Atlantic Marine* analysis. The court noted that its application of the modified *Atlantic Marine* analysis “presupposes a contractually valid forum-selection clause.” *Id.* at 62 n.5.

C

While concerns over the enforceability of a forum-selection clause and the law governing venue have thus been resolved, the question remains as to whether federal or state law governs the validity of a forum-selection

clause.[4] A number of district courts, including several in this circuit, have ruled that state law governs the *validity* of a forum-selection clause just like any other contract clause.[5] We hold that the state law applicable here, § 925(b), which grants employees the option to void a forum-selection clause under a limited set of circumstances, determines the threshold question of whether Waber's contract contains a valid forum-

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[4] Our sister circuits have recognized that the Supreme Court did not answer whether state or federal law governs the validity of a forum-selection clause. *Barnett v. DynCorp Int'l, LLC,* 831 F.3d 296, 301 (5th Cir. 2016) *("Atlantic Marine* thus did not answer under what law forum-selection clauses should be deemed invalid-an issue that has long divided courts." (citations omitted)); *In re Union Elec. Co.,* 787 F.3d 903, 906-07 (8th Cir. 2015) (noting that *Atlantic Marine* "assumed the existence of a valid forum-selection clause … thereby providing no direct holding as to when such clauses should be deemed invalid"); *Lambert v. Kysar*, 983 F.2d 1110, 1116 n. 10 (1st Cir. 1993) ("The Supreme Court has yet to provide a definitive resolution of the *Erie* issue, which has divided the commentators and split the circuits." (citation omitted)).

[5] *Pierman,* 2020 WL 406679, at *4 n.4 ("[T]hese matters [of forum-selection clause validity] are fundamentally state law concerns which must be respected by federal courts sitting in diversity under the *Erie* doctrine."); *Glob. Power Supply, LLC v. Acoustical Sheetmetal Inc.,* No. CV 18-3719-R, 2018 WL 3414056, at *2 (C.D. Cal. July 9, 2018) ("Although federal law governs the interpretation and enforcement of forum selection clauses, state law governs contract formation and the interpretation of an agreement's terms.") (quoting *Worldwide Subsidy Grp., LLC v. Fed'n Int'l De Football Ass'n*, No. 14-00013 MMM, 2014 WL 12631652, at *14 (C.D. Cal. June 9, 2014)); *Whipple Indus., Inc. v. Opcon AB*, No. CV-F-05-0902 REC SMS, 2005 WL 2175871, at *1 n.2 (E.D. Cal. Sept. 7, 2005) ("[T]he issue of the existence of [a] forum selection clause . . . is decided according to state contract law."); *Kellerman v. Inter Island Launch*, No. 2:14-cv-01878-RAJ, 2015 WL 6620604, at *3 (W.D. Wash. Oct. 30, 2015) ("To determine the enforceability of a forum selection clause, a federal court must ask whether a contract existed under state law.").

selection clause.[6]

Section 925 includes three problems relevant here. First, § 925(a) prohibits employers from requiring California employees to agree to litigate disputes outside California and to give up the protection of California laws. Second, § 925(b) protects a California employee who is not represented by counsel from being bound by such a provision and gives them the right to declare that provision void. Third, § 925(e) specifies that the first two provisions do not apply to any California employee who is represented by counsel when signing the agreement. Such an employee is free to negotiate whatever forum-selection clause they want. Unlike the Alabama policy at issue in *Stewart*, § 925 as applied by the district court here is not a rule of state law that would remove all discretion from a federal court on questions of venue. Rather, the provisions in § 925 circumscribing the kinds of employment agreements permitted and allowing parties unrepresented by counsel to void a forum-selection clause under certain circumstances relate to the terms of the agreement between the parties and, at least to that extent, are not contrary to or within the scope of § 1404(a). As discussed, *infra*, Waber voided the forum-selection clause in his employment contract under § 925(b). Waber's voiding of that provision excised the forum-selection clause from the agreement as presented to the district court.

HOC argues that § 1404(a), as interpreted by *Stewart*, preempts § 925 and renders Waber's voiding of the forum-

[6] We need not decide whether state law would govern validity of a forum-selection clause that had not been voided and is before the district court for consideration in the transfer analysis.

selection clause ineffective. But nothing in § 1404(a) relates to questions of contract formation or a party's unilateral withdrawal of consent to a provision, and nothing in *Bremen*, *Stewart*, *Atlantic Marine* or any other Supreme Court decision creates a federal rule of contract law that preempts a state law like § 925 from addressing the upstream question of whether the contract sought to be enforced includes a viable forum-selection clause. HOC overreads the *Stewart* majority decision as preempting all state laws relating to forum-selection clauses. That is not what the Supreme Court did.

The Supreme Court in *Stewart* did not adopt a sweeping rule of preemption of all state laws relating to forum-selection including issues of contract formation and voidability between the parties. Instead, the Court simply held that, on matters of venue in federal court, § 1404(a) governed and took primacy over any state law purporting to set a categorical rule within the scope of § 1404(a). The Supreme Court recognized that the question before it was to assess the effect of the Alabama law on an existing and presumptively valid forum-selection clause. *Stewart*, 487 U.S. at 29 ("[T]he first question for consideration should have been whether § 1404(a) itself controls respondent's request *to give effect* to the parties' *contractual choice of venue* and transfer this case to a Manhattan court" (emphases added)); *id.* at 32 ("We hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to *give effect to the parties 'forum-selection clause* and transfer this case to a court in Manhattan." (emphasis added)); *see also Atl. Marine*, 571 U.S. at 58 (explaining *Stewart's* holding similarly).

HOC argues that its position on preemption is supported by *Stewart's* statement that its determination

under § 1404(a) renders it "unnecessary to address the contours of state law." *See Stewart*, 487 U.S. at 30 n.9. This quote does not support HOC's sweeping contention. This footnote addressed the question of enforcement of a forum-selection clause in the transfer analysis itself and explained that Alabama's policy against enforcement need not be considered in light of the Court's determination that the analytical standard for transfer in the federal court is § 1404(a).

HOC next argues that *Stewart*'s footnote 10 stands for the broad proposition that any state law voiding a forum-selection clause that "makes the applicability of a federal statute depend on the content of state law" is necessarily preempted. *See id.* at 31 n.10. Again, HOC's argument cannot be sustained. In this footnote, the majority rejected the dissent's position that "if the forum-selection clause would be *unenforceable* under state law, then the clause cannot be accorded any weight by a federal court." *Id.* The point the majority was making was simply that any state law that would prohibit the multi-factor analysis required by § 1404(a) must give way to the federal law. *Id.* ("[A] State cannot pre-empt a district court's *consideration* of a forum-selection clause … by holding the clause automatically void." (emphasis added)).

Finally, HOC broadly contends that, under *Stewart*, once the parties agree to a forum-selection clause, that agreement is locked in by § 1404(a). Again, nothing in *Stewart* supports such an expansive view. The majority in *Stewart* repeatedly presumed the validity of the forum-selection clause and nowhere addressed the effect of any state law like § 925 that permits a party to unilaterally void a forum-selection clause agreed to without the

assistance of counsel.

For the foregoing reasons, we hold that §1404(a) and *Stewart* do not broadly preempt all state laws controlling how parties may agree to or void a forum-selection clause.

D

Here, the district court found that Waber satisfied all the prerequisites of § 925 and effectively voided the forum-selection clause under § 925(b). Having found that the forum-selection clause was void, the district court turned to the traditional § 1404 factors under *Bremen.* It found that the "plaintiff's choice of forum weighs heavily against transfer," as does the convenience of the parties. It also found that the familiarity of the forum with California laws slightly favors denial of transfer. The district court additionally found that § 925 represented California's strong public policy in adjudicating this action in California and "preventing contractual circumvention of its labor laws." (quoting *Karl v. Zimmer Biomet Holdings, Inc.*, No. C 18-04176 WHA, 2018 WL 5809428, at *7 (N.D. Cal. Nov. 6, 2018)).

HOC argues that the district court erred by applying California's choice-of-law rules because *Atlantic Marine* requires applying the choice-of-law rules of the forum selected by the parties. *See Atl. Marine,* 571 U.S. at 64-65. The parties' chosen choice-of-law rules, like the remainder of the modified *Atlantic Marine* analysis, are applied only in the presence of a valid forum-selection clause. *See id.* at 62 n.5. We see no error in applying the California choice-of-law rules here. *Id.* at 65 ("A federal court sitting in diversity ordinarily must follow the choice-

of-law rules of the State in which it sits.").[7]

HOC argues that the district court, by declining to enforce the forum-selection clause, abused its discretion for three reasons. First, HOC argues that state law is irrelevant to the determination of enforcement of a forum-selection clause under § 1404. As noted, *supra*, HOC is incorrect that *Stewart* prohibits a federal court from considering the state public policy in deciding a § 1404(a) motion. The majority in *Stewart* only prohibited categorically "focusing on a single concern or a subset of the factors identified in § 1404(a)," like the Alabama law required. 487 U.S. at 31. That § 1404(a), rather than state law, controls the enforcement inquiry does not imply that state law is necessarily irrelevant as one of the multiple factors to consider under § 1404(a). Indeed, the statutory text requires consideration of "the interest of justice," which, in this circuit, includes "the relevant public policy of the forum state." *Jones*, 211 F.3d at 499 & n.21. *See also Sun v. Adv. China Healthcare, Inc.*, 901 F.3d 1081, 1088-90 (9th Cir. 2018) (considering, after *Atlantic Marine*, whether enforcement of a forum-selection clause "would contravene a strong public policy of the forum" in determining what constitutes an "exceptional reason" or "extraordinary circumstances" sufficient to avoid enforcement of the forum-selection clause) (quoting *Bremen*, 407 U.S. at 15). Consistent with *Stewart*, "the public policy of the forum state is not dispositive in a § 1404(a) determination, but, rather, it is another factor that should be weighed in the court's § 1404(a) 'interest of justice' analysis." *Jones*, 211 F.3d at 499 n.21. The district

[7] HOC does not argue that New Jersey choice-of-law rules should apply except via application of the modified *Atlantic Marine* analysis.

court here did not rely exclusively on California's public policy to deny transfer, but correctly analyzed it as one of the multiple § 1404(a) factors. We discern no error in the district court's consideration of § 925 as part of its transfer analysis.

Second, HOC argues that *Bremen* is inapplicable to adjudication of § 1404(a) motions because *Stewart* limited *Bremen* to the context of *forum non conveniens* rather than transfer. *See Stewart*, 487 U.S. at 28-29 (noting that the first question the district court and circuit court should have asked was "whether § 1404(a) itself controls respondent's request to give effect to the parties' contractual choice of venue" rather than asking "whether the forum selection clause in this case is unenforceable under the standards set forth in *Bremen*."). HOC is incorrect. When the Supreme Court rejected the Eleventh Circuit's framing of the question as enforceability under *Bremen*, it did so to focus on the preliminary question of whether § 1404(a) or the categorical Alabama analysis applied in the first place. The Supreme Court in *Atlantic Marine* made clear that "courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum," applying the same balancing of interests standard for both § 1404(a) and *forum non conveniens*. *Atl. Marine*, 571 U.S. at 61.

Third, HOC argues that even if *Bremen* applies, the district court abused its discretion by denying transfer because § 925 represents an even weaker public policy than the policy embodied in the Alabama law in *Stewart*. HOC contends that the district court should have applied the modified *Atlantic Marine* factors. DePuy and Waber

respond that the *Bremen* analysis "controls the enforcement of forum clauses in diversity cases," *Manetti-Farrow*, 858 F.2d at 513, and that this court has repeatedly held forum-selection clauses unenforceable as violating forum state public policy, *see, e.g., Doe 1 v. AOL LLC*, 552 F.3d 1077, 1084 (9th Cir. 2009) (per curiam); *Jones,* 211 F.3d at 497-98. DePuy and Waber argue that the district court did not abuse its discretion in finding that the forum-selection clause was void and unenforceable and that the modified *Atlantic Marine* analysis is thus inapplicable. We agree with DePuy and Waber.

In *Atlantic Marine,* the Court explained the procedure for addressing § 1404(a) motions in the absence of a forum-selection clause: "In the typical case not involving a forum-selection clause, a district court considering a § 1404(a) motion (or a *forum non conveniens* motion) must evaluate both the convenience of the parties and various public-interest considerations." 571 U.S at 62-63; *see Gemini*, 931 F.3d at 914-15 (recognizing that "*Bremen* continues to provide the law for determining the validity and enforceability of a forum-selection clause"). The district court here considered these factors in its analysis. HOC does not argue that the balance of private or public factors separate from the enforcement of the forum-selection clause required the district court to grant the transfer motion, and we see no reason to question or overturn the district court's analysis or its denial of HOC's motion to transfer.

IV

HOC also appeals from the district court's ruling on summary judgment in favor of DePuy and Waber that the forum-selection, non-compete and non-solicitation clauses

were void. The district court, in ruling on the cross-motions for summary judgment, found that the forum-selection clause satisfied all the prerequisites for voidability under § 925 and was properly voided by Waber. It also found the forum-selection and non-compete clauses unenforceable as contrary to California public policy as expressed in § 925 and § 16000. Beyond the argument we have already rejected that *Stewart* preempts consideration of § 925, HOC presents no persuasive reason for us to overturn the district court's ruling of partial summary judgment.

V

In conclusion, because the district court did not abuse its discretion in denying transfer under 28 U.S.C. § 1404(a), we affirm the denial of HOC's transfer motion. Furthermore, because the district court did not err in holding the forum-selection, non-compete and non-solicitation clauses void under California law, we affirm the grant of partial summary judgment and the entry of judgment in favor of DePuy and Waber.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEPUY SYNTHES SALES, INC., et al., Plaintiffs, v. STRYKER CORPORATION, et al., Defendants.	Case No. ED CV 18-1557 FMO (KKx) **ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT**

Having reviewed and considered the briefing filed with respect to the Cross-Motions for Summary Judgment (Dkt. 117, "Joint Motion") filed by plaintiffs DePuy Synthes Sales, Inc. ("DePuy Synthes") and Jonathan L. Waber ("Waber) (collectively, "plaintiffs"), and defendants Stryker Corporation ("Stryker") and Howmedica Osteonics Corporation ("HOC") (collectively, "defendants"), the court finds that oral argument is not necessary to resolve the motions, see Fed. R. Civ. P. 78(b); Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

BACKGROUND

Waber is a California citizen residing in Palm Springs, California. (Dkt. 117-2, Joint Statement of Uncontroverted Facts [] ("SUF") P1; Dkt. 117-3, Plaintiffs' Evidentiary Appendix [] ("Plf. Evid. Appx.") Exh. 1, Declaration of Jonathan L. Waber ("Waber Decl.") at ¶ 1). HOC employed Waber as a Joint Replacement Sales Associate ("Sales Associate") from

October 2, 2017 to July 1, 2018.[1] (Dkt. 117-2, SUF D15; Dkt. 121, Defendants' Evidentiary Appendix ("Def. Evid. Appx.") Exh. H, Declaration of Michael Schultz [] ("Schultz Decl.") at ¶ 14) ("On October 2, 2017, Waber was hired by HOC as a sales associate[.]"); (Dkt. 117-3, Plf. Evid. Appx. Exh. 1, Waber Decl. at ¶ 6) ("In June 2018, DePuy Synthes offered me a position as a Sales Consultant. I accepted the position. I started working for DePuy Synthes on July 2, 2018."). As a condition of his employment, Waber signed an agreement which contained non-compete and non-solicitation clauses. (See Dkt. 117-2, SUF P10 & P11; Dkt. 117-3, Plf. Evid. Appx. Exh. 8, September 7, 2017 Offer Letter ("This offer is contingent … upon your execution of Stryker's Confidentiality, Intellectual Property, Non-Competition and Non-Solicitation Agreement."); Dkt. 117-3, Plf. Evid. Appx. Exh. 9, Stryker Corporation Confidentiality, Intellectual Property, Non-Competition and Non-Solicitation Agreement for U.S. Employees ("Stryker Agreement") §§ 6.2 & 6.3).

Section 6.2 of the Stryker Agreement, entitled "Non-Solicitation of Customers and Supplier[,]" provides:

> I agree that during my employment with Stryker and during the Restricted Period, I will not, in any capacity, directly or indirectly, personally or through another person, (i) solicit, contact or sell any

[1] The parties dispute whether HOC and Stryker jointly employed Waber. (Dkt. 117-1, Joint Memorandum of Points and Authorities Regarding Cross-Motions for Summary Judgment ("Joint Br.") at 54-60). Because the parties appear to agree that, at a minimum, HOC employed Waber, the court will refer to HOC as Waber's employer for purposes of this Order.

> Conflicting Product or Service to a Stryker Customer; (ii) [] solicit, contact or sell any product or service to a Stryker Customer that competes with or is similar to any Stryker product or service; (iii) divert, entice or otherwise take away from Stryker the business or patronage of any Stryker Customer; or (iv) solicit or induce any vendor, supplier or Stryker Customer to terminate or reduce its relationship with Stryker.

(Dkt. 117-3, Plf. Evid. Appx. Exh. 9, Stryker Agreement § 6.2). The Stryker Agreement defines the "Restricted Period" as "the twelve-month period following termination of [ ] employment with Stryker, regardless of the reason for termination." (Id. § 2.8). Section 6.3 of the Stryker Agreement, entitled "Non-Compete[,]" provides in relevant part:

> During my employment with Stryker and during the Restricted Period, I will not work (as an employee, consultant, contractor, agent, or otherwise) for, or render services directly or indirectly to, any Conflicting Organization in which the services I may provide could enhance the use or marketability of a Conflicting Product or Service by application of Confidential Information which I have had access to during my employment.

(Id. § 6.3). A "Conflicting Organization" is defined as "any person or organization which is engaged in or about to become engaged in research on, consulting regarding, or development, production, marketing, or selling of a

Conflicting Product or Service." (Id. § 2.4). A "Conflicting Product or Service" is "any product, process, technology, machine, invention or service of any person or organization other than Stryker … which is similar to, resembles, competes with or is intended to resemble or compete with "one of Stryker's products. (Id. § 2.3). The parties do not dispute that DePuy Synthes is a Conflicting Organization, as defined in the Stryker Agreement. (See, generally, Dkt. 117-1, Joint Br.).

In addition to the non-solicitation and non-compete clauses, the Stryker Agreement includes a section entitled, "Governing Law and Venue[,]" which states that the "Agreement shall be interpreted and enforced as a contract of the applicable state listed on Attachment B as of the date of [the employee's] termination[.]" (Id. § 8.2). The section further provides that "all litigation between Stryker and [the employee] relating to this Agreement will take place exclusively in the state listed in Attachment B, and [the employee] consent[s] to the jurisdiction of the federal and/or state courts of the state listed on Attachment B." (Id.). New Jersey is the state listed in Attachment B. (Id., Attachment B).

HOC, a wholly owned subsidiary of Stryker Corporation, develops, manufactures, and sells orthopaedic implants, instruments, and other products and services. (Dkt. 117-2, SUF D2; Dkt. 121, Def. Evid. Appx. Exh. H, Schultz Decl. at ¶¶ 1 & 5). As a Sales Associate, Waber was responsible for selling and promoting HOC products to orthopaedic surgeons, and providing technical support for those products. (Id. at ¶ 16). Waber's "territory" was Palm Springs, California. (Id. at ¶ 12). During the course of his employment, Waber became familiar with HOC's customer's preferences and

developed relationships with them. (Id. at ¶ 16).

In June 2018, DePuy Synthes offered Waber a sales consultant position, which he accepted. (Dkt. 117-2, SUF P27); (Dkt. 117-3, Plf. Evid. Appx. Exh. 1, Waber Decl. at ¶ 6). On June 8, 2018, Waber executed a pre-hire protocol with DePuy Synthes. (See Dkt. 117-2, SUF D29; Dkt. 123, Exh. M, DePuy Synthes Pre-Hire Protocol). The Pre-Hire Protocol indicated that DePuy Synthes "wish[ed] to establish a strict protocol in order to ensure that [Waber complied] fully with the reasonable restrictions contained in agreements [he] may have with [his] employer, Stryker Corporation[.]" (Dkt. 123, Exh. M, DePuy Synthes Pre-Hire Protocol). The Pre-Hire Protocol stated that Waber would not "disclose, use, disseminate, identify by topic or subject, lecture upon or publish Stryker Confidential Information[.]" (Id.). The Pre-Hire Protocol further provided that "[f]or a period of twelve (12) months following the termination of [Waber's] employment with Stryker, [he] will not use any trade secret or confidential information of Stryker to solicit any accounts … for which [he] had responsibility during the last twenty-four (24) months of [his] employment with Stryker[.]" (Id.).

On June 25, 2018, Waber gave HOC notice that he was resigning from HOC employment, and his last day would be July 1, 2018. (Dkt. 117-2, SUF D31; Dkt. 121, Def. Evid. Appx. Exh. H, Schultz Decl. at ¶ 23). Waber began working for DePuy Synthes on July 2, 2018, with responsibility for accounts in Palm Springs. (Dkt. 117-2, SUF P29; Dkt. 117-3, Plf. Evid. Appx. Exh. 1, Waber Decl. at ¶¶ 6-7).

On July 15, 2018, Waber's former manager sent him a text message advising him to "respect [his] non compete" and that "[Waber] cannot do any work for

Synthes at any of [his] accounts for a year." (Dkt. 117-2, SUF P30; Dkt. 117-3, Plf. Evid. Appx. Exh. 12, Text Message from M. Schultz to J. Waber). Two days later, Stryker sent Waber a cease and desist letter, (Dkt. 117-2, SUF P32; Dkt. 117-3, Plf. Evid. Appx. Exh. 13, Cease and Desist Letter), informing him that it planned to enforce the Non-Compete clause against him. (Dkt. 117-3, Plf. Evid. Appx. Exh. 13, Cease and Desist Letter) ("Stryker is prepared to take whatever steps are necessary to protect its rights. Should you refuse to provide the written assurances outlined above, or should Stryker receive information that you continue to cover cases in violation of the Non-Compete Agreement, Stryker may initiate immediate legal action against you and DePuy Synthes, seeking all available legal and equitable remedies to compensate Stryker for its damages and to compel you to comply with the Non-Compete Agreement.").

On July 23, 2018, Waber sent a letter to Stryker voiding various provisions of the Stryker Agreement pursuant to California Labor Code § 925(b), (Dkt. 117-2, SUF P41; Dkt. 117-3, Plf. Evid. Appx. Exh. 24, July 23, 2018 Letter from Waber to Stryker) ("This letter is intended to provide you notice that I am voiding Sections 6.2, 6.3, 8.2 (including Attachment B), and 8.3 of the agreement."), and plaintiffs filed the instant action. (See Dkt. 1, Complaint). In the operative First Amended Complaint ("FAC"), plaintiffs seek declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, et seq., and assert violations of California Labor Code § 925 and California Business and Professions Code §§ 17200, et seq. (See Dkt. 79, FAC at ¶¶ 35-55). Plaintiffs allege that, contrary to California law, Stryker seeks to

enforce a non-compete clause in a contract Waber signed as a condition of his prior employment with Stryker. (Id. at ¶¶ 1 & 7-11). Plaintiffs seek to "prevent and enjoin Defendants from enforcing the void provisions of the Stryker Non-Compete, and to award Mr. Waber damages for the harm he has suffered as a result of Defendants' conduct[.]" (Id. at ¶ 11).

LEGAL STANDARD

Rule 56(a) of the Federal Rules of Civil Procedure authorizes the granting of summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The standard for granting a motion for summary judgment is essentially the same as for granting a directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). Judgment must be entered "if, under the governing law, there can be but one reasonable conclusion as to the verdict." Id.

The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). If the moving party fails to carry its initial burden of production, "the nonmoving party has no obligation to produce anything." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102-03 (9th Cir. 2000). However, "[w]here the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." In re Oracle Corp. Sec. Litig., 627 F.3d 376,387 (9th Cir. 2010); see Celotex, 477 U.S. at 325,

106 S.Ct. at 2554 (clarifying that "the burden on the moving party may be discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case.").

If the moving party has sustained its burden, the burden then shifts to the nonmovant to identify specific facts, drawn from materials in the file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. Celotex, 477 U.S. at 324, 106 S.Ct. at 2553; Anderson, 477 U.S. at 256, 106 S.Ct. at 2514 (A party opposing a properly supported motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial.").[2] A factual dispute is material only if it affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth. SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S.Ct. at 2552; see also Anderson, 477 U.S. at 252, 106 S.Ct. at 2512 (parties bear the same substantive burden of proof as would apply at a trial on the merits).

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[2] "In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Issues' and (b) controverted by declaration or other written evidence filed in opposition to the motion." Local Rule 56-3.

In determining whether a triable issue of material fact exists, the evidence must be considered in the light most favorable to the nonmoving party. Barlow v. Ground, 943 F .2d 1132, 1134 (9th Cir. 1991). However, summary judgment cannot be avoided by relying solely on "conclusory allegations [in] an affidavit." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188 (1990); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986) (more than a "metaphysical doubt" is required to establish a genuine issue of material fact). "The mere existence of a scintilla of evidence in support of the plaintiff's position" is insufficient to survive summary judgment; "there must be evidence on which the [fact finder] could reasonably find for the plaintiff." Anderson, 477 U.S. at 252, 106 S.Ct. at 2512. Moreover, it is not the court's task "to scour the record in search of a genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996) (internal quotation marks omitted). Rather, the nonmoving party must "identify with reasonable particularity the evidence that precludes summary judgment." Id. (internal quotation marks omitted).

DISCUSSION

Plaintiffs seek a declaration that §§ 8.2, 6.2, and 6.3 of the Stryker Agreement are void and unenforceable under California law. (See Dkt. 79, FAC at pp. 13-14). Plaintiffs also ask for a "determination that Defendants' statements to Mr. Waber that they intend to enforce the 'Non-Compete' and 'Non-Solicitation of Customers and Supplier' provisions of the [Agreement] … constitute[] unlawful and unfair business practices and therefor[e] violate[] California Business & Professions Code section

17200 et seq." (Id. at p. 14). Finally, plaintiffs seek injunctive relief, restitution, attorney's fees, and costs. (Id.). Defendants seek to enforce § 8.2 of the Stryker Agreement, which provides that this suit be litigated in New Jersey according to New Jersey law. (Dkt. 117-1, Joint Br. at 3). Defendants also request judgment in their favor as to all of plaintiffs' other claims. (See id. at 3-5).

I. STANDING.

Defendants argue that plaintiffs "lack standing to pursue their claims for declaratory and injunctive relief" because: (1) "no actual, present, or [justiciable] controversy exists[;]" (2) plaintiffs' claims regarding §§ 6.2 and 6.3 of the Stryker Agreement are moot; and (3) plaintiffs "suffered no injury or harm to support their Declaratory Judgment Act or Section 17200 claims." (Dkt. 117-1, Joint Br. at 44-45).

A. Declaratory Relief.

1. **The Case or Controversy Requirement.**

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. "The 'actual controversy' requirement of the Act is the same as the 'case or controversy' requirement of Article III of the United States Constitution." Societe de Conditionnement en Aluminium v. Hunter Eng'g Co., 655 F.2d 938, 942 (9th Cir. 1981); see Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office, 689 F.3d 1303, 1317-18 (Fed. Cir. 2012), aff'd in part, rev'd in part on other grounds sub

nom., Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S.Ct. 2107 (2013) ("The phrase 'a case of actual controversy' in the Act refers to the types of 'cases' and 'controversies' that are justiciable under Article III of the U.S. Constitution."). Under the case or controversy requirement, a plaintiff's claim must be "'definite and concrete, touching the legal relations of parties having adverse legal interests'; and … 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127, 127 S.Ct. 764, 771 (2007) (citing Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240-41, 57 S.Ct. 461,464 (1937)); West v. Sec'y of Dep't of Transp., 206 F.3d 920, 924 (9th Cir. 2000).

Whether a declaratory judgment claim satisfies the case or controversy requirement is not a bright-line test. See MedImmune, 549 U.S. at 127, 127 S.Ct. at 771 ("Aetna and the cases following it do not draw the brightest of lines between those declaratory-judgment actions that satisfy the case-or-controversy requirement and those that do not."); Maryland Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270,273, 61 S.Ct. 510,512 (1941) ("The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy."). A plaintiff must allege facts that "under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant

the issuance of a declaratory judgment." MedImmune, 549 U.S. at 127, 127 S.Ct. at 771 (internal quotation marks omitted); Shell Gulf of Mexico Inc. v. Ctr. for Biological Diversity, Inc., 771 F.3d 632, 635 (9th Cir. 2014) (same); Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1339 (Fed. Cir. 2008) ("[A] case or controversy must be based on a real and immediate injury or threat of future injury that is caused by the defendants — an objective standard that cannot be met by a purely subjective or speculative fear of future harm.") (emphasis in original).

Here, the parties dispute the validity and enforceability of various provisions of the Stryker Agreement. The core issue is whether Waber breached the Stryker Agreement by working for DePuy Synthes. (See, e.g., Dkt. 117-1, Joint Br. at 1) ("This is an action by Plaintiffs … to protect against the efforts of Defendants… to enforce [the employment] contract[.]"). The parties clearly have adverse legal interests: plaintiffs want Waber to work at DePuy Synthes, (see Dkt. 117-2, SUF P27); (Dkt. 117-3, Plf. Evid. Appx. Exh. 1, Waber Decl. at ¶ 6), while defendants, as shown by their text messages and cease-and-desist letter, claim that Waber's work for DePuy Synthes breaches the Stryker Agreement. (Dkt. 117-2, SUF P30; Dkt. 117-3, Plf. Evid. Appx. Exh. 12, Text Message from M. Schultz to J. Waber; Dkt. 117-2, SUF P32; Dkt. 117-3, Plf. Evid. Appx. Exh. 13, Cease and Desist Letter). The text messages from Waber's former manager and the cease-and-desist letter also demonstrate immediacy in the sense that defendants appeared ready to enforce the Stryker Agreement in court. (See Dkt. 117-3, Plf. Evid. Appx. Exh. 13, Cease and Desist Letter) ("Stryker is prepared to take whatever steps are necessary to protect its rights. Should you refuse to

provide the written assurances outlined above, or should Stryker receive information that you continue to cover cases in violation of the Non-Compete Agreement, Stryker may initiate immediate legal action against you and DePuy Synthes, seeking all available legal and equitable remedies to compensate Stryker for its damages and to compel you to comply with the Non-Compete Agreement."). Thus, the court concludes that a live case or controversy is present here. See, e.g., Healy v. Qognify, Inc., 2019 WL 1242843, *3 (C.D. Cal. 2019) ("Here, a live case and controversy exists because [plaintiff] maintains that after he was terminated, [defendant] interfered with his ability to contract by threatening legal action to enforce a non-compete provision contained the employment contract he signed with [defendant].").

Contrary to defendants' argument, (see Dkt. 117-1, Joint Br. at 44), the litigation privilege does not preclude the court from looking to the cease-and-desist letter as part of its standing analysis. The litigation privilege protects parties from being held liable in tort for statements and communications made during and, in some instances, prior to litigation. See Flatley v. Mauro, 39 Cal.4th 299, 322 (2006) ("To accomplish these objectives, the [litigation] privilege is an absolute privilege, and its bars all tort causes of action except a claim of malicious prosecution.") (internal quotation marks omitted); Edwards v. Centex Real Estate Corp., 53 Cal.App.4th 15, 29 (1997) ("In other words, the litigation privilege is intended to encourage parties to feel free to exercise their fundamental right of resort to the courts for assistance in the resolution of their disputes, without being chilled from exercising this right by the fear that

they may subsequently be sued in a derivative tort action arising out of something said or done in the context of the litigation."). Determining whether plaintiffs have standing does not equate to holding defendants liable in tort on the basis of the cease-and-desist letter; accordingly, the litigation privilege is inapplicable.

2. The Court's Discretion.

"Once the court finds that an actual case or controversy exists, the court must decide whether to exercise its jurisdiction" to entertain a plaintiff's request for declaratory relief. See Healy. 2019 WL 1242843, at *3. The decision whether to grant relief under the Declaratory Judgment Act is discretionary. See Gov't Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1223 (9th Cir. 1998) (en banc) ("If the suit passes constitutional and statutory muster, the district court must also be satisfied that entertaining the action is appropriate. The determination is discretionary, for the Declaratory Judgment Act is deliberately case in terms of permissive, rather than mandatory, authority.") (internal quotation marks omitted). In general, federal courts have a "virtually unflagging obligation … to exercise the jurisdiction given them." Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246 (1976). But in the context of the Declaratory Judgment Act, "the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." Wilton v. Seven Falls Co., 515 U.S. 277, 288, 115 S.Ct. 2137, 2143 (1995). However, because the exercise of jurisdiction is mandatory with respect to most claims, "when other claims are joined with an action for declaratory relief …, the district court should not, as a

general rule, remand or decline to entertain the claims for declaratory relief." Dizol, 133 F.3d at 1225 (citation omitted). Further, "[i]f a federal court is required to determine major issues of state law because of the existence of non-discretionary claims, the declaratory action should be retained to avoid piecemeal litigation." Id. at 1225-26.

In determining whether to issue a declaratory judgment, the Supreme Court's decision in Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 495, 62 S.Ct. 1173, 1176 (1942), "remain[s] the philosophic touchstone for the district court." Dizol, 133 F.3d at 1225. The court takes into account the following considerations: (1) avoiding "needless determination of state law issues"; (2) discouraging "forum shopping"; and (3) avoiding "duplicative litigation." Id. District courts have "broad discretion" when deciding whether to exercise their remedial power, "as long as [the decision] furthers the Declaratory Judgment Act's purpose of enhancing judicial economy and cooperative federalism[.]" R.R. St. & Co., Inc. v. Transp. Ins. Co., 656 F.3d 966, 975 (9th Cir. 2011) (internal quotation marks omitted).

Here, the court is persuaded that it should exercise its discretion and consider plaintiffs' request for declaratory relief. First, entertaining plaintiffs' request for declaratory relief avoids piecemeal litigation. Plaintiffs bring other causes of action in addition to their request for declaratory relief; were the court to decline to consider plaintiffs' request for declaratory relief, it would still need to rule on plaintiffs' claim for injunctive relief. (See Dkt. 79, FAC at ,r 50; p. 14); Dizol, 133 F.3d at 1225 ("Indeed, when other claims are joined with an action for declaratory relief (e.g., bad faith, breach of contract,

breach of fiduciary duty, rescission, or claims for other monetary relief), the district court should not, as a general rule, remand or decline to entertain the claim for declaratory relief."). Second, unlike other cases where courts have exercised their discretion to decline to hear requests for declaratory relief, there is no parallel case pending in another court, state or federal. See, e.g., Knapp v. DePuy Synthes Sales Inc., 983 F.Supp.2d 1171, 1177 (E.D. Cal. 2013) ("Specifically, whether or not the agreement is enforceable is also an issue that must be resolved in the Pennsylvania litigation."); Harrison v. Synthes USA Sales, LLC, 2013 WL 1007662, *2 (E.D. Cal. 2013) ("Review of the operative complaints in the respective federal and state lawsuits reveals that retaining jurisdiction would require decision on purely state law issues that are essentially the same as those pending in the Pennsylvania lawsuit."). Therefore, hearing plaintiffs' request for declaratory relief would not result in "duplicative litigation."

B. Mootness.

Defendants contend that plaintiffs' "claims regarding the restrictive covenants in §§ 6.2 and 6.3 of the Stryker Agreement are moot because those covenants expired last year." (Dkt. 117-1, Joint Br. at 45). According to defendants, because the "covenants are limited to a 'Restricted Period' of 12 months following Waber's termination of employment with HOC[,]" plaintiffs' claims regarding the enforceability of these provisions "became moot on July 1, 2019." (Id.).

Plaintiffs ask the court to declare §§ 6.2 and 6.3 of the Stryker Agreement void under California law and to prohibit defendants from enforcing those sections of the Stryker Agreement. (Dkt. 79, FAC at pp. 13-14).

Plaintiffs thus seek declaratory and injunctive relief to preempt a potential breach of contract lawsuit initiated by defendants. (See id.). Even though the period during which §§ 6.2 and 6.3 required Waber to refrain from competition with defendants has expired, this does not render plaintiffs' request for declaratory or injunctive relief moot. The statute of limitations for a breach of contract claim in New Jersey is six years, N.J.S.A. 2A:14-1, and in California it is four years. Cal. Code Civ. Proc. § 337. Neither statute of limitations has run, and defendants could still file a breach of contract claim against plaintiffs in either forum.

C. Plaintiffs' Injury.

Finally, defendants contend that plaintiffs "suffered no injury or harm to support their Declaratory Judgment Act or Section 17200 claims." (Dkt. 117-1, Joint Br. at 45). Defendants claim "there is no evidence that Defendants improperly impaired Plaintiffs' ability to service any customer accounts." (Id.). As for the Declaratory Judgment Act claim, defendants' threats to initiate litigation are sufficient to establish injury. Indeed, the Declaratory Judgment Act "created a new procedural mechanism for removing the threat of impending litigation[.]" Shell Gulf of Mexico, Inc., 771 F.3d at 635.

Plaintiffs have not, however, sufficiently established standing to bring their UCL claim. "[S]tanding [under the UCL] is limited to any person who has suffered injury in fact and has lost money or property as a result of unfair competition[.]" Kwikset Corp. v. Super. Ct. Of Orange Cty., 51 Cal.4th 310, 320-21 (2011) (internal quotation marks omitted). To establish standing under the UCL, a party must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e.,

economic injury, and (2) show that the economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." Id. at 322 (emphasis omitted). In explaining why they have standing, plaintiffs argue only that they "have operated under the threat of [defendants'] enforcement of the … Non-Compete and have incurred substantial harm and attorney's fees as a result of [defendants'] maintenance of this threat." (Dkt. 117-1, Joint Br. at 47). Plaintiffs' conclusory assertion that they have "incurred substantial harm" is insufficient to establish standing under the UCL.[3] See Kwikset Corp., 51 Cal.4th at 322.

II. CALIFORNIA LABOR CODE § 925.

Defendants move for summary judgment "on the grounds that the venue and choice of law provision in Waber's Agreement is enforceable based on the Supreme Court precedent in Stewart Org., Inc. V. Ricoh Corp., 487 U.S. 22 (1988) and Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas, 571 U.S. 49 (2013)." (Dkt. 117-1, Joint Br. at 18-19). The court previously issued an order denying defendant's Motion to Dismiss, or in the Alternative, to Transfer ("Motion to Transfer"). (See Dkt. 63, Court's Order of February 5, 2019). The court concluded that the forum selection clause at issue falls within California Labor Code "Section 925's orbit and

[3] Plaintiffs also claim the attorney's fees incurred, presumably in bringing this lawsuit, are sufficient to establish UCL standing. (Dkt. 117-1, Joint Br. at 47). Attorney's fees accrued in bringing a UCL action are insufficient to establish standing. See Cordon v. Wachovia Mortgage, a Div. Of Wells Fargo Bank, N.A., 776 F.Supp.2d 1029, 1039 (N.D. Cal. 2011). Indeed, "[u]nder Plaintiff's reasoning, a private plaintiff bringing a UCL claim automatically would have standing merely by filing suit." Id.

contravenes California's strong public policy against litigating labor disputes out-of-state"; accordingly, the court declined to enforce the forum selection clause. (See id. at 2-5). The court also conducted a transfer analysis, pursuant to the factors set forth in 28 U.S.C. § 1404(a), and concluded that those factors did not warrant transfer. (See id. at 5-7). On summary judgment, defendants again argue that the court should enforce the forum selection clause and transfer this case to New Jersey. (Dkt. 117-1, Joint Br. at 17-18, 27-35). Defendants' arguments on summary judgment closely track the arguments they made in their Motion to Transfer. (Compare id. with Dkt. 35, Motion to Transfer at 7-20). Given the absence of new arguments, the court sees no reason to depart from the reasoning and outcome articulated in its previous order.

Plaintiffs ask the court to declare that § 8.2 of the Stryker Agreement, the forum selection and choice of law clause, is void pursuant to California Labor Code § 925 and that any claim arising out of the Stryker Agreement must be adjudicated in California under California law. (Dkt. 79, FAC at p. 13). Section 925 provides that "[a]n employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would … (1) [r]equire the employee to adjudicate outside of California a claim arising in California [or] (2) [d]eprive the employee of the substantive protection of California law with respect to a controversy arising in California." Cal. Lab. Code. § 925(a). It further provides that "[a]ny provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall

govern[.]" Id. § 925(b). Section 925 does not apply if the employee is represented by counsel "in negotiating the terms of an agreement to designate either the venue or forum" nor to any agreement entered into prior to January 1, 2017. Id. § 925(e)-(f).

Section 8.2 of the Stryker Agreement expressly requires Waber to adjudicate disputes with defendants in New Jersey under New Jersey law. (See Dkt. 117-3, Plf. Evid. Appx. Exh. 9, Stryker Agreement § 8.2). Waber, who signed the Stryker Agreement on September 8, 2017, (id.), was not represented by counsel in connection with executing the Stryker Agreement. (Dkt. 117-3, Plf. Evid. Appx. Exh. 1, Waber Decl. at ¶ 4). On July 23, 2018, Waber sent a letter to Stryker's in-house counsel voiding § 8.2 of the Stryker Agreement, pursuant to California Labor Code § 925(b). (Dkt. 117-2, SUF P41; Dkt. 117-3, Plf. Evid. Appx. Exh. 24, July 23, 2018 Letter from Waber to Stryker). Waber has met all the requirements set out in the text of § 925; therefore, the court finds that § 8.2 is void and unenforceable.

III. CALIFORNIA BUSINESS & PROFESSIONS CODE § 16600.

Plaintiffs next ask the court to declare that "Defendants are not entitled to any relief, equitable or legal, to enforce" §§ 6.2 and 6.3 of the Stryker Agreement, the non-solicitation and non-compete clauses, respectively. (Dkt. 79, FAC at p. 14). In other words, "Plaintiffs move for summary judgment on their Count I on grounds that Sections 6.2 and 6.3 of Waber's Agreement are unenforceable under California law." (Dkt. 117-1, Joint Br. at 35). Plaintiffs contend that California Business & Professions Code § 16600 renders §§ 6.2 and 6.3 of the Stryker Agreement unenforceable.

(Id.).

Section 16600 of the California Business & Professions Code reads: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." "In the years since its original enactment . . . , [California] courts have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility." Edwards v. Arthur Andersen LLP, 44 Cal.4th 937, 946 (2008). "[S]ection 16600 prohibits employee noncom petition agreements unless the agreement falls within a statutory exception[.]" Id. at 942. The relevant statutory exceptions include: "noncompetition agreements in the sale or dissolution of corporations (§ 16601), partnerships ([] § 16602), and limited liability corporations (§ 16602.5)." Id. at 946.

In Edwards, plaintiff signed an employment agreement with defendant "which prohibited him from working for or soliciting certain [of defendant's] clients for limited periods following his termination." 44 Cal.4th at 946. The California Supreme Court "conclude[d] that [defendant's] noncompetition agreement was invalid" and ran afoul of § 16600 because it "restricted [plaintiff] from performing work for [defendant's] clients and therefore restricted his ability to practice his accounting profession." Id. at 942.

Here, § 6.2 of the Stryker Agreement prohibited Waber from soliciting or selling a competitor's product to any of defendants' customers, or enticing or taking away defendants' customers, vendors, or suppliers. (Dkt. 117-3, Plf. Evid. Appx. Exh. 9, Stryker Agreement § 6.2). These restrictions were in effect during Waber's

employment and for the 12-month period following the end of his employment with defendants. (Id. § 2.8). As noted earlier, Waber was a salesperson for defendants servicing orthopaedic surgeons and other medical professionals in Palm Springs, California. (Dkt. 117-2, SUF D2; Dkt. 121, Def. Evid. Appx. Exh. H, Schultz Decl. at ¶¶ 12 & 16). Section 6.2 of the Stryker Agreement would prevent Waber from conducting the activities of a salesperson in the field in which he has experience — orthopaedic surgery and related medical fields. (Dkt. 117-3, Plf. Evid. Appx. Exh. 9, Stryker Agreement § 6.2). Based on the language of § 16600 and the Edwards decision, the court finds that § 6.2 of the Stryker Agreement violates California Business & Professions Code § 16600.

Section 6.3 of the Stryker Agreement prohibited Waber from working for any "Conflicting Organization" for 12 months after the end of his employment. (Dkt. 117-3, Plf. Evid. Appx. Exh. 9, Stryker Agreement § 6.3). In other words, § 6.3 of the Stryker Agreement prohibited Waber from working for a competitor of defendants. (See id.). "Under the general rule in California, covenants not to compete are unenforceable[.]" Fillpoint, LLC v. Maas, 208 Cal.App.4th 1170, 1173 (2012). More specifically, "Business and Professions Code 16600 has consistently been interpreted as invalidating any employment agreement that unreasonably interferes with an employee's ability to compete with an employer after his or her employment ends." Techno Lite, Inc. v. Emcod, LLC, 44 Cal.App.5th 462, 471 (2020) (emphasis in original) (internal quotation marks omitted); Muggill v. Reuben H. Donnelly Corp., 62 Cal.2d 239, 242 (1965) (Section 16600 "invalidates provisions in employment contracts

prohibiting an employee from working for a competitor after completion of his employment or imposing a penalty if he does so[.]"). Thus, § 6.3 is unenforceable to the extent it prohibited Waber from competing with defendants after the end of his employment with defendants.

Defendants contend that § 16600 does not invalidate §§ 6.2 and 6.3 of the Stryker Agreement because of the "trade secrets exception." (Dkt. 117-1, Joint Br. at 38). The court disagrees. Some California courts have concluded that "[a]ntisolicitation covenants are void as unlawful business restraints except where their enforcement is necessary to protect trade secrets." Thompson v. Impaxx, Inc., 113 Cal.App.4th 1425, 1429 (2003) (internal quotation marks omitted). However, this "trade secret exception," if it still exists, see Dowell v. Biosense Webster, Inc., 179 Cal.App.4th 564, 577 (2009) ("[W]e doubt the continued viability of the common law trade secret exception[.]"), is narrow. See id. In order for a non-compete or non-solicitation clause to fall within the trade secret exception, the clause must be "narrowly tailored or carefully limited to the protection of trade secrets[.]" Id.

In Dowell, the California Court of Appeal evaluated non-compete and non-solicitation clauses similar to those at issue here. See 179 Cal.App.4th at 578. The court rejected the company's request to find the clauses enforceable on the basis of the trade secret exception, concluding that both clauses were so broad that they could not be considered "narrowly tailored to protect trade secrets and confidential information." Id. at 578 ("Given such an inclusive and broad list of confidential information, it seems nearly impossible that employees like [plaintiffs], who worked directly with customers,

would not have possession of such information."). Similarly, in D'Sa v. Playhut, Inc., 85 Cal.App.4th 927 (2000), the California Court of Appeal found that the trade secrets exception did not render a noncompete clause valid. See id. at 934-35. The D'Sa court supported its conclusion by pointing out that the purpose of the non-compete clause at issue did not appear to be the protection of trade secrets, but rather to prevent employees from competing with the company, particularly given the one-year limitation the clause placed on the employee's activities. Id. at 935.

Here, the non-solicitation and non-compete clauses applicable to Waber lasted only one year following the termination of Waber's employment. (Dkt. 117-3, Plf. Evid. Appx. Exh. 9, Stryker Agreement §§ 2.8, 6.2 & 6.3). Notably, the clauses in the Stryker Agreement are set forth under the bold and underline heading "NON-SOLICITATION AND NON-COMPETE," reinforcing the notion that the purpose of these clauses was not to protect trade secrets, but to prevent employees like Waber from competing with defendants. (Id. at §§ 6.1-6.6). Further, if the purpose of the clauses at issue had been to protect trade secrets, defendants should not have placed a time limitation on those clauses. See D'Sa, 85 Cal.App.4th at 935 ("[W]e do not perceive the intended purpose of the instant covenant not to compete to be the protection of [the company's] property, trade secrets, or other proprietary information since … the covenant not to compete only places a one-year limitation on plaintiff's activities whereas these other provisions are not so limited."). Finally, the Stryker Agreement contains another clause whose sole function is to prohibit Waber from disclosing defendants' Confidential Information,

which is defined to include trade secrets. (Dkt. 117-3, Plf. Evid. Appx. Exh. 9, Stryker Agreement § 5.1). In short, §§ 6.2 and 6.2 of the Stryker Agreement are void under Business & Professions Code § 16600.

IV. UNCLEAN HANDS.

A party seeking equitable relief "must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim." Kendall-Jackson Winery, Ltd. v. Superior Court, 76 Cal.App.4th 970, 978 (1999). "The decision whether to apply the unclean hands defense is a matter within the trial court's discretion." Farahani v. San Diego Community College Dist., 175 Cal.App.4th 1486, 1495 (2009). "The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue." Kendall-Jackson, 76 Cal.App.4th at 979. "Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice." Id.

Defendants argue that "Waber's breach of his nondisclosure and return of property obligations in his Agreement render his hands unclean." (Dkt. 117-1, Joint Br. at 40). Defendants assert that Waber retained certain business information after his employment with defendants ended, and that such information "would be valuable to competitors." (Id. at 41). Defendants' assertions are unpersuasive.

Putting aside that defendants put forth no evidence that Waber used any of the alleged business information, (see, generally, Dkt. 117-1, Joint Br. at 41-43; Dkt. 131, Defendants' Supplemental Memorandum of Points and Authorities Regarding the Parties' Cross-Motions for Summary Judgment at 8), the core issue in this case is

whether certain provisions in the Stryker Agreement violate California law, not whether Waber misused defendants' business information. In other words, defendants' unsupported allegation of alleged misconduct is insufficiently related to the issues in this case.

Defendants also argue that DePuy Synthes' hands are unclean because their Pre-Employment Protocol required Waber "to strictly abide by his Agreement with Defendants." (Dkt. 117-1, Joint Br. at 41). But the June 8, 2018, Pre-Employment Protocol between Waber and DePuy Synthes does not require Waber to follow all the conditions in the Stryker Agreement with defendants. (See Dkt. 123, Sealed Exhs., Exh. M, June 8, 2018 Pre-Employment Protocol). As relevant here, the Pre-Employment Protocol forbids Waber from: (1) using defendants' confidential information; (2) soliciting defendants' current employees for a period of 12 months following the end of Waber's employment with defendants; and (3) using defendants' trade secrets to solicit defendants' customers. (See id. at ¶¶ 7-9). These requirements are narrower in scope than the non-solicitation and non-compete clauses in the Stryker Agreement that are at issue in this case. (See Dkt. 117-3, Plf. Evid. Appx. Exh. 9, Stryker Agreement §§ 6.2 & 6.3). Given the difference between the requirements of the Pre-Employment Protocol and the Stryker Agreement, the court concludes that these issues are insufficiently related to support the application of the defense of unclean hands.

V. WHETHER HOC AND STRYKER ARE JOINTLY LIABLE FOR PLAINTIFFS' CLAIMS.

Based on the parties' submissions, there appear to be triable issues of fact as to whether Stryker ratified the

Stryker Agreement and whether it has the authority to enforce the Stryker Agreement. If a jury were to conclude that Stryker is bound by the Stryker Agreement, it could then find that Stryker had an employment relationship with Waber pursuant to the Stryker Agreement and Stryker can thus be held liable under the California Labor Code. In addition, the parties should, in preparing for trial, be cognizant of what is the principal test of an employment relationship under California law and the meaning of "employer" under the California Labor Code. See Martinez v. Combs, 49 Cal.4th 35, 64 (2010) (setting forth three legal formulations of what it means to "employ" someone: "[1] to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or [3] to engage, thereby creating a common law employment relationship").[4]

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. Plaintiffs' Cross-Motion for Summary Judgment **(Document No. 117)** are **granted in part** and **denied in part.** Plaintiffs' claim for relief under California Business & Professions Code § 17200 is **dismissed.** Plaintiffs' request for summary judgment as to joint employment is **denied without prejudice.** The motion is **granted** in all other respects.

2. Defendants' Cross-Motion for Summary

[4] "Although *Martinez* involved a claim for violation of California Labor Code § 1194, other courts have applied *Martinez's* holding and the 'employer' tests it articulated to claims alleging violation of other Labor Code provisions[.]" Bullard v. Wastequip Manufacturing Company LLC, 2015 WL 12766467, *16 n. 89 (C.D. Cal. 2015).

Judgment **(Document No. 117)** is **denied.**

Dated this 29th day of September, 2020.

/s/
Fernando M. Olguin
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**ED CV 18-1557 FMO (KKx)**	Date	**February 5, 2019**
Title	**Depuy Synthes Sales Inc., et al. v. Stryker Corporation**		

Present: The Honorable	Fernando M. Olguin, United States District Judge	
Vanessa Figueroa	None	None
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorney Present for Plaintiff(s):	Attorney Present for Defendant(s):
None Present	None Present

Proceedings: (In Chambers) Order Re: Pending Motion [34]

The court has reviewed and considered all the briefing filed with respect to defendant Stryker Corporation's ("defendant" or "Stryker") Motion to Dismiss or, in the Alternative, to Transfer (Dkt. 34, "Motion") and concludes that oral argument is not necessary to resolve the Motion. See Fed. R. Civ. P. 78; Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001).

BACKGROUND

Plaintiffs DePuy Synthes Sales, Inc. ("DePuy Synthes") and Jonathan L. Waber ("Waber") (collectively, "plaintiffs") filed the instant action, seeking

declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, et seq., and alleging violations of California Labor Code § 925, California Business and Professions Code §§ 17200, et seq. intentional interference with contractual relations, and intentional interference with prospective economic advantage. (See Dkt. 1, Complaint at ¶¶ 33-75). Plaintiffs allege that, contrary to California law, Stryker seeks to enforce a non-compete clause in a contract Waber signed as a condition of his prior employment with Stryker. (Id. at ¶¶ 1 & 7-11). Plaintiffs seek to "prevent and enjoin Stryker from enforcing the void provisions of the Stryker Non-Compete, and to award Mr. Waber damages for the harm he has suffered as a result of Stryker's conduct[.]" (Id. at ¶ 11).

Waber is an individual domiciled in Palm Springs, California, who previously worked for Stryker in California and currently works for Depuy Synthes in California. (See Dkt. 1, Complaint at ¶ 12). DePuy Synthes is a Massachusetts corporation, (see id. at ¶ 13), and Stryker is a Michigan corporation with its principal place of business in Kalamazoo, Michigan. (See id. at ¶ 14).

In the instant Motion, defendant seeks to dismiss the case or transfer venue to the District of New Jersey under 28 U.S.C. § 1404(a) ("§ 1404"), on the ground that litigation surrounding Waber's employment and non-compete is governed by a forum selection clause. (See Dkt. 35, Memorandum in Support of Defendant's Motion ("Memo") at 1). Defendant contends that plaintiff improperly sued Stryker and that Howmedica Osteonics Corporation ("HOC"), a New Jersey corporation and wholly-owned subsidiary of Stryker, is the proper party

because it employed Waber at the time of his resignation. (See id. at 1 n. 1). According to defendant, in connection with Waber's employment by HOC, he executed an agreement that required him not to solicit HOC customers, or compete with HOC, for one year after the termination of his employment with HOC, and provided that any litigation arising out of the agreement shall be conducted in New Jersey. (See id. at 4).

DISCUSSION

Section 1404(a) provides that "[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district court or division where it might have been brought[.]" 28 U.S.C. § 1404(a). Section 1404(a) "does not concern the issue whether and where an action may be properly litigated. It relates solely to the question where, among two or more proper forums, the matter should be litigated to best serve the interests of judicial economy and convenience of the parties."[1] Williams v. WinCo Foods, LLC, 2013 WL 211246, *2 (E.D. Cal. 2013) (internal quotation marks omitted).

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[1] Under the circumstances, the court does not need to decide the issue of venue because even if venue in the Central District of California is improper, the court may transfer this action to a district where it might have been brought. See 28 U.S.C. §§ 1404(a), 1406(a); see, e.g., Multistate Legal Studies, Inc. v. Marino, 1996 WL 786124, *10 (C.D. Cal. 1996) ("Upon thoughtful consideration of U.S.C. § 1404(a) and related case law, the Court finds that U.S.C. § 1404(a) may be utilized in this case, even though the Court has not made the threshold determination as to whether venue is proper in the Central District of California as to Marino and Grufferman."); Microsoft Corp. v. Hagen, 2010 WL 11527312, *1 (E.D. Cal. 2010) ("The court need not determine whether there is personal jurisdiction or proper venue in the Eastern District of California.").

The court weighs multiple factors to determine whether a transfer of venue serves the convenience of the parties and witnesses and promotes the interests of justice. See Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir.), cert. denied, 531 U.S. 928 (2000); Lopez v. Chertoff, 2007 WL 2113494, *2 (N.D. Cal. 2007). "The presence of a forum-selection clause, however, changes the analysis." Karl v. Zimmer Biomet Holdings, Inc., 2018 WL 5809428, *1 (N.D. Cal. 2018). A forum-selection clause should be enforced unless the party challenging enforcement of the provision can show it is unreasonable. See M/S Bremen v. Zapata Off-shore Co., 407 U.S. 1, 10, 92 S.Ct. 1907, 1913 (1972). However, "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." Id. at 15, 92 S.Ct. at 1916.

I. FORUM SELECTION CLAUSE.

"Given the weight accorded to forum selection clauses in a 28 U.S.C. § 1404(a) transfer analysis," the court first examines the enforceability of the forum selection clause. See Rowsby v. Gulf Stream Coach, Inc., 2009 WL 1154130, *2 (C.D. Cal. 2009). Forum selection clauses are "prima facie valid unless enforcement is unreasonable." Id. (internal quotations omitted) (citing Bremen, 407 U.S. at 10, 92 S.Ct. at 1913). "[T]he party seeking to avoid a forum selection clause bears a 'heavy burden' to establish a ground upon which we will conclude the clause is unenforceable." Doe 1 v. AOL LLC, 552 F.3d 1077, 1083 (9th Cir. 2009). A forum selection clause may be found to be unenforceable if one of the following conditions is satisfied: "(1) if the inclusion of the clause in the agreement was the product of fraud or overreaching; (2)

if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and (3) if enforcement would contravene a strong public policy of the forum in which suit is brought." Holland Am. Line Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 457 (9th Cir. 2007) (internal quotation marks omitted).

Here, Waber's agreement with defendant, which he signed on September 8, 2017, contains the following forum selection clause: "[A]ll litigation between Stryker and [Waber] relating to this Agreement will take place exclusively in the state listed on Attachment B[.]" (Dkt. 45, Buziak Decl., Exh. A, "Agreement" at § 8.2). It also states that "this Agreement shall be interpreted and enforced as a contract of the applicable state listed on Attachment B[.]" (Id.). Attachment B indicates that either New Jersey or Michigan law should be applied, depending upon the entity that employed Waber at the time of his termination. (See id., Attachment B).

Plaintiffs argue that the forum selection clause is unenforceable because it contravenes California's "strong public policy" set forth in California Labor Code § 925 ("§ 925") of litigating labor disputes that arise in California within the state. (See Dkt. 43, Plaintiff's Opposition to Defendant's [] Motion [] ("Opp.") at 16-17). Defendant responds that § 925 does not apply because "[28 U.S.C.] § 1404 leaves no room for the operation of state laws which purport to void forum selection clauses or otherwise render them ineffective." (Dkt. 49, Defendant's Reply in Support of its [] Motion [] ("Reply") at 8). Defendant's argument is unpersuasive.

First, before embarking on the § 1404 analysis, the court must determine whether there is a "contractually

valid forum-selection clause." Atl. Marine Constr. Co., Inc. v. the U.S. Dist. Ct. for W. Dist. of Texas, 571 U.S. 49, 62 n. 5, 134 S.Ct. 568, 581 n. 5 (2013) ("Atlantic Marine"); see Moretti v. Hertz Corp., 2014 WL 1410432, *2 (N.D. Cal. 2014) (noting that before engaging in analysis of forum selection clause pursuant to Atlantic Marine, a "[c]ourt must first determine whether a valid forum-selection clause exists within the subject contract"); Trendsettah USA v. Swisher Int'l Inc., 2015 WL 12697653, *2 (C.D. Cal. 2015) ("Before the court may consider the impact of any forum selection clause on plaintiffs choice of forum and the motion to transfer, it must first determine whether a contract exists and, if so, whether it contains the forum selection clause at issue.") (internal quotation marks omitted); Kedkad v. Microsoft Corp., Inc., 2013 WL 4734022, *3 (N.D. Cal. 2013) ("Before the Court can apply federal law to the interpretation and enforcement of a forum selection clause, however, it must, as a threshold issue, determine whether a forum selection clause exists."). In other words, "[t]o determine the enforceability of a forum selection clause, a federal court must [first] ask whether a contract existed under state law."[2] Kellerman v. Inter Island Launch, 2015 WL 6620604, *3 (W.D. Wash. 2015); Glob. Power Supply, LLC v. Acoustical Sheetmetal Inc., 2018 WL 3414056, *2 (C.D. Cal. 2018) ("Although federal

[2] The court notes that the cases cited by defendant in support of its Motion make precisely this point. See, e.g., Whipple Indus., Inc. v. Opco AB, 2005 WL 2175871, at *1 n. 2 (E.D. Cal. Sept. 7, 2005) ("[T]he issue of the existence of [a] forum selection clause" is "decided according to state contract law."); Guest Assocs., Inc. v. Cyclone Aviation Prods., Ltd., 30 F.Supp.3d 1278, 1282 (N.D. Ala. 2014) ("[T]he validity of a forum-selection clause must first be determined under general contract law[.]").

law governs the interpretation and enforcement of forum selection clauses, state law governs contract formation and the interpretation of an agreement's terms.") (internal quotation marks omitted); Karl, 2018 WL 5809428, at *1-*7 (ascertaining existence of valid forum selection clause before conducting § 1404 analysis).

Section 925 provides that "[a]n employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following: (1) [r]equire the employee to adjudicate outside of California a claim arising in California [or] (2) [d]eprive the employee of the substantive protection of California law with respect to a controversy arising in California." Cal. Lab. Code § 925(a). "Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute." § 925(b). Section 925 further provides that it "shall apply to a contract entered into, modified, or extended on or after January 1, 2017." § 925(f).

Here, there is no dispute that Waber is a California citizen who primarily lives and works in California; that he signed the Agreement as a condition of his employment with defendant in California after the effective date of the statute; and that he was not represented by counsel. (See Dkt. 1, Complaint at ¶¶ 7 & 21; Dkt. 38-1, Declaration of Joshua D. Salinas in Support of Defendant's [] Motion [] ("Salinas Decl."), Exhibit ("Exh.") A, July 23, 2018 Letter from Anthony B. Haller to Emily Seiber (referring to "the provisions in the September 2017 Agreement"); Dkt. 43, Opp. at 12 (describing how circumstances meet § 925

requirements)). Accordingly, § 925 applies.

The forum selection clause at issue violates both prongs of § 925(a) by: (1) requiring labor disputes that arise within California to be adjudicated in another state, and (2) imposing another state's law on California employees. See Cal. Labor Code § 925; (Dkt. 45, Buziak Decl., Exh. A, Agreement at § 8.2 & Attachment B). In other words, the clause violates "California's strong public policy against enforcing forum-selection clauses in employment agreements."[3] Karl, 2018 WL 5809428, at *3; cf. Jones, 211 F.3d at 498 ("[Bremen] teaches that a strong public policy may be declared by statute.") (citing M/S Bremen, 407 U.S. at 15, 92 S.Ct. at 1916) (internal quotation marks omitted).

In addition, since defendant submitted its briefing asserting that it "is aware of no federal court voiding a mandatory forum selection clause pursuant to § 925 and refusing to transfer pursuant to 28 U.S.C. § 1404[,]" (Dkt. 35, Memo at 17), a court in this Circuit has done just that, in a case very similar to the instant matter. In Karl, 2018 WL 5809428, out-of-state companies and corporations that had previously employed plaintiff, a California citizen, as a California-based sales representative, sought to enforce a forum selection clause through a motion to

[3] "In an analogous context, [the Ninth Circuit] made unenforceable a forum-selection clause due to California's strong public policy as expressed in an analogous statute[.]" Karl, 2018 WL 5809428, at *2 (citing Jones, 211 F.3d at 498) (concluding that, "[b]y voiding any clause in a franchise agreement limiting venue to a non-California forum for claims arising under or relating to a franchise located in the state … [California Business and Professions Code] § 20040.5 expresses a strong public policy of the State of California to protect California franchisees from the expense, inconvenience, and possible prejudice of litigating in a non-California venue").

transfer or dismiss. See id. at *1-*2. There, as here, the forum selection clause was part of an employment contract that had been "entered into, modified, or extended on or after January 1, 2017[.]" Cal. Labor Code § 925(f); see Karl, 2018 WL 5809428, at *3-*4 (finding that "[t]he modification condition required by Section 925 is met"). After finding that § 925 "expresses a strong public policy to protect employees from litigating labor disputes outside of their home state[,]" thereby rendering the forum selection clause void, id. at *2, the court exercised its broad discretion to deny the defendants' § 1404 transfer motion. See id. at *1-*7.

In sum, given that the agreement at issue "falls within Section 925's orbit and contravenes California's strong public policy against litigating labor disputes out-of-state[,]" "[the] forum-selection clause [in that contract] is unreasonable … and shall not be enforced. Nor shall the choice of law provision, for the same reasons." Karl, 2018 WL 5809428, at *4.

II. CONVENIENCE AND FAIRNESS FACTORS.

"Because the forum-selection clause has been found to be unenforceable, this order considers the factors of § 1404(a) to decide defendant['s] motion to transfer[,]" Karl, 2018 WL 5809428, at *5, rather than engaging in the modified Atlantic Marine analysis advocated by defendant. (See Dkt. 35, Memo at 9-10).

To determine whether to exercise their "broad discretion" to transfer venue under § 1404, Amini Innovation Corp. v. JS Imports, Inc., 497 F.Supp.2d 1093, 1108 (C.D. Cal. 2007), district courts weigh various factors of "convenience and fairness." Jones, 211 F.3d at 498. While there is no definitive list, courts typically look to

some or all of the following factors to determine whether transfer to the alternative forum is proper: (1) the plaintiff's choice of forum; (2) the convenience of the parties; (3) the convenience of the witnesses; (4) the ease of access to the evidence; (5) the familiarity of each forum with the applicable law; (6) the feasibility of consolidation of other claims; (7) any local interest in the controversy; (8) the relative court congestion in each forum; and (9) the availability of compulsory process. See Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir.1986); Atlantic Marine, 571 U.S. at 62 n. 6, 134 S.Ct. at 581 n. 6 (describing "[f]actors relating to the parties' private interests" and "[p]ublic-interest factors" for a court to consider in determining whether to transfer an action); Jones, 211 F.3d at 498-99 (same).

The court first considers plaintiff's choice of forum, which is "generally accorded" "great weight[.]" Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987), cert. denied, 485 U.S. 993 (1988). However, the weight granted to "plaintiff's chosen venue is substantially reduced where [it] … lacks a significant connection to the activities alleged in the complaint." Williams v. Bowman, 157 F.Supp.2d 1103, 1106 (N.D. Cal. 2001) (internal quotation marks omitted).

Defendant contends that due to the forum selection clause, plaintiff's choice of forum "bears no weight" in the analysis here. (Dkt. 35, Memo at 10) (capitalization omitted). However, given the court's finding that the there is no valid forum selection clause, see supra at § I, this argument is without merit. Here, as in Karl,

> Defendant['s] corporate headquarters may be [outside of California] but, defendant[] hired [a] California citizen[] as [a] sales representative[]

> and implemented policies that allegedly violate California labor laws. That defendant[] [is] headquartered [outside of California] does not negate the local impact of [its] decisions when they are implemented elsewhere. Moreover, as pled in plaintiff[s'] complaint, the operative facts of this action occurred within California which has a strong interest in adjudicating labor disputes within the forum. Plaintiff has established significant contacts between the chosen forum and the allegations of his complaint.

2018 WL 5809428, at *5 (internal citations and quotation marks omitted); see Schultz v. Hyatt Vacation Mktg. Corp., 2011 WL 768735, *5 (N.D. Cal. 2011) (similar). In short, plaintiff's choice of forum weighs heavily against transfer.

The court next considers the convenience of the parties. Given that defendant employed Waber in California, (see Dkt. 1, Complaint at ¶¶ 10, 12, 16-18, 27), defendant cannot—and makes no attempt to—make any credible argument that it would be inconvenienced by having to litigate in California. (See, generally, Dkt. 35, Memo; Dkt. 49, Reply). Plaintiffs, on the other hand, are a Massachusetts corporation and a California citizen. (See Dkt. 1, Complaint at ¶¶ 12-13). They would be inconvenienced by having to travel to New Jersey, the district to which defendant seeks transfer. (See Dkt. 43, Opp. at 13). Thus, this factor weighs heavily against transfer.

As for the convenience of non-party witnesses, ease of access to evidence, and docket congestion, neither party addresses these factors, (see, generally, Dkt. 35, Memo; Dkt. 43, Opp.; Dkt. 49, Reply), so the court finds them to

be neutral.

The next factor, familiarity with governing law, weighs slightly against transfer. In addition to one federal claim, this case involves several state law claims. (See Dkt. 1, Complaint). Given the court's finding that the choice of law provision of the contract is unenforceable under § 925, the state law claims for intentional interference with contractual relations and intentional interference with prospective economic advantage—in addition to the claims under § 925 and California Business and Professions Code §§ 17200, et seq.—will be governed by California law. See Cal. Labor Code § 925(b) ("[I]f a provision is rendered void at the request of the employee, … California law shall govern the dispute."); (Dkt. 1, Complaint at ¶¶ 43-75). While this district and the District of New Jersey are equally familiar with federal law, "this district is more familiar with the state laws underlying the California … claims. But since other federal courts are fully capable of applying California law, this factor weighs only slightly against transfer." Karl, 2018 WL 5809428, at *6.

Finally, the court considers the local interest in the controversy. Here, "California's strong public policy as discussed in the above forum-selection analysis … shows that the local interest in adjudicating this action is great. Section 925 expresses California's interest in preventing contractual circumvention of its labor law—tipping the scales against transfer." Karl, 2018 WL 5809428, at *7 (denying motion to transfer under § 1404 after finding forum selection clause unenforceable under § 925 and that plaintiff's choice of forum, parties' convenience, familiarity with governing law, and local interest in controversy weighed against transfer).

In sum, even assuming, arguendo, that this case could have been brought in New Jersey, consideration of the § 1404(a) convenience factors weighs against transfer. Plaintiffs filed the instant action in this District, and their choice is afforded great weight. Three of the § 1404(a) factors—convenience of the parties, governing law, and local interest in the controversy—weigh against transfer, and none of the others favor transfer. Given that the balance of factors weighs against transfer, the court finds that defendant has not met its burden to make a "strong showing of inconvenience to warrant upsetting the plaintiff[s'] choice of forum." Decker, 805 F.2d at 843.

CONCLUSION

This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

Based on the foregoing, IT IS ORDERED THAT:

1. Defendant's Motion to Dismiss, or in the Alternative, Transfer **(Document No. 34)** is **denied.**

2. Defendant shall file an answer to the Complaint no later than **February 12, 2019.**

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APPENDIX E

STRYKER CORPORATION CONFIDENTIALITY, INTELLECTUAL PROPERTY, NON-COMPETITION AND NON-SOLICITATION AGREEMENT FOR U.S. EMPLOYEES

In addition to other good and valuable consideration, I am expressly being given employment, continued employment, a relationship with Stryker Corporation (including its subsidiaries, divisions and affiliates, as well as any of their respective successors and assigns referred to collectively as "Stryker"), certain monies, bonuses, compensation increases, benefits, training, promotion, equity grants and/or trade secrets and confidential information of Stryker and its customers, suppliers, vendors or affiliates to which I would not have access but for my relationship with Stryker in exchange for my agreeing to the terms of this Agreement. In consideration of the foregoing, I agree as follows:

INTRODUCTION AND ACKNOWLEDGEMENTS

1.1 **Acknowledgment.** I acknowledge and agree that the business in which Stryker is engaged is extremely competitive and that during my employment with Stryker I have received and will receive and have access to materials and information regarding Stryker's technologies, know-how, products, services, customers and sales that are proprietary and confidential to Stryker and for which Stryker has spent and will continue to spend substantial time and monies developing and providing training. I recognize that these materials and information are an important and valuable asset to Stryker and that

Stryker has a legitimate interest in protecting the confidential and proprietary nature of these materials, information, technologies, products and services. Stryker has provided and will be providing me with Confidential Information during my employment and the opportunity to contribute to the creation of Confidential Information, which will assist both Stryker and me in competing effectively. Stryker also has dedicated its time and resources developing and maintaining relationships with existing and potential customers, clients, referral sources, agents, distributors, employees and vendors. During my employment with Stryker, I understand that Stryker expects me to continue to develop and maintain these relationships on its behalf. I recognize that these relationships are an important and valuable asset to Stryker and that Stryker has a legitimate interest in protecting these relationships.

1.2 **Purpose of Agreement.** For the reasons identified herein, this Confidentiality, Intellectual Property, Non-Competition and Non-Solicitation Agreement for U.S. Employees (the **"Agreement"**) is designed to protect the legitimate interests of all of the various businesses that comprise Stryker Corporation.

1.3 **Terms of Agreement and Modifications.** This Agreement, including the items in Attachment A ("State Law Modifications") shall remain in effect during my employment with Stryker even if my position or job location changes or I transfer from one Stryker company to another. For purposes of this Agreement, the terms of this Agreement will be interpreted according to the applicable state law as set forth on Attachment B ("Governing Law and Jurisdiction").

DEFINITIONS

As used in this Agreement:

2.1 The **"Company"** or **"Stryker"** means collectively, Stryker Corporation, including its subsidiaries, divisions, and affiliates and their respective successors, assigns, purchasers and acquirers, to which I may be transferred or by which I may be employed in the future, wherever located.

2.2 **"Confidential Information"** means know-how, trade secrets, and technical, business and financial information and any other non-public information in any way learned by me, disclosed to me or developed by me during my employment with Stryker, including, but not limited to (a) prices, renewal dates and other detailed terms of customer or supplier contracts and proposals; (b) information concerning Stryker's customers, clients, referral sources and vendors, and potential customers, clients, referral sources and vendors, including, but not limited to, names of these entities or their employees or representatives, preferences, needs or requirements, purchasing or sales histories, or other customer or client-specific information; (c) supplier and distributor lists; (d) pricing policies, methods of delivering services and products, and marketing and sales plans or strategies; (e) products, product know-how, product technology and product development strategies and plans; (f) employees, personnel or payroll records or information; (g) forecasts, budgets and other non-public financial information; (h) acquisitions, divestitures, expansion plans, management policies and other business strategies; (i) inventions, research, development, manufacturing, purchasing, finance processes, technologies, machines, computer software, computer hardware, automated

systems, methods, engineering, marketing, merchandising, and selling; and (j) information belonging to third parties which has been disclosed to Stryker in confidence. Confidential Information shall not include information that is or becomes part of the public domain, such that it is readily available to the public, through no fault of mine.

2.3 **"Conflicting Product or Service"** means any product, process, technology, machine, invention or service of any person or organization other than Stryker in existence or under development which is similar to, resembles, competes with or is intended to resemble or compete with a product, process, technology, machine, invention or service upon which I have worked or about which I was knowledgeable during the last twenty-four (24) months of my employment with Stryker. For clarity, if I worked in a service position (e.g., ProCare) during the last twenty-four (24) months of my employment, Conflicting Product or Service includes any product, process, technology, machine, invention or service of any person or organization other than Stryker in existence or under development which is similar to, resembles, competes with or is intended to resemble or compete with a product, process, technology, machine, invention or service used in any procedure in which I provided service or support on behalf of Stryker.

2.4 **"Conflicting Organization"** means any person or organization which is engaged in or about to become engaged in research on, consulting regarding, or development, production, marketing, or selling of a Conflicting Product or Service. For clarity, if I worked in a service position (e.g., ProCare) during the last twenty-four (24) months of my employment, Conflicting

Organization includes the customer(s) for whom I provided service during the last twenty-four (24) months of my employment.

2.5 **"Copyrightable Works"** means all works of authorship, fixed in any tangible medium of expression now known or later developed, that I prepare within the scope of my employment with Stryker, including, but not limited to, writings, reports, graphics, computer programs, user interfaces, drawings, designs, documentation and publications.

2.6 "**Employer"** means any entity of Stryker that employs me or any other entity included within the definition of "Stryker" to which I may be transferred or by which I may be employed in the future.

2.7 "**Intellectual Property"** means all inventions, patents, patent applications, designs, discoveries, innovations, ideas, know-how, trade secrets, methods, specifications, procedures, and/or improvements, whether patentable or not, Copyrightable Works, trademarks, mask works, certifications, or invention disclosures.

2.8 "**Restricted Period"** means the twelve-month period following termination of my employment with Stryker, regardless of the reason for termination.

2.9 "**Stryker Customer"** means any of the current or prospective accounts, customers, doctors, hospitals, group purchasing organizations, integrated delivery networks or clients, with whom I have had direct or material contact during the last twenty-four (24) months of my employment with Stryker or about whom I learned Confidential Information during my employment with Stryker, including, but not limited to: (a) any customer

that purchased Stryker products or services, (b) any prospect that received or requested a proposal to purchase Stryker products or services, (c) any affiliate of any such customer or prospect, or (d) any of the individual customer or prospect contacts that I established, serviced, sold to, attended training or seminars with or learned confidential information about. For clarity, I agree that Stryker Customers also includes all customers of the branch or division to which I am assigned and with which I have had direct or material contact, serviced, trained, learned Confidential Information about or participated in customer development activities.

PERFORMANCE FOR STRYKER

3.1 **Loyalty and Best Efforts.** During my employment with Stryker, I will devote my best efforts, attention and energies to the performance of my duties as an employee of Stryker.

3.2 **Conflicts of Interest.** I agree to abide by the provisions of Stryker Corporation's Code of Conduct, including, but not limited to, the provisions regarding Conflicts of Interest. As such, during the term of my employment with Stryker, I will not engage in any activity or have any outside interest that might deprive Stryker of my loyalty, interfere with the satisfactory performance of my duties, or be harmful or detrimental to Stryker or be engaged in any other occupation, professional or business activity that conflicts with my obligations to Stryker or provide any services that competes with Stryker. I understand that I am required to immediately notify the executive in charge of my division or the CEO of any potential conflict of interest involving me.

3.3. **Sale of Stryker Property.** I will not sell, give away

or trade for my own benefit or for or on behalf of any person or entity other than Stryker, any items that are the property of Stryker. Stryker property includes, but is not limited to, samples, inventory, customer trade-ins (which includes trade-ins of Stryker and non-Stryker Products), training materials, promotional materials, handbooks, correspondence files, business card files, customer and prospect lists, price lists, product lists, software manuals, technical data, forecasts, budgets, notes, customer information, employee information, employee names, phone lists, organizational charts, product information and/or Confidential Information acquired by me in the course of my employment by Stryker. The requirements of this Section 3.3 apply to Stryker Property even if the property is obsolete or has been fully amortized, depreciated or expensed by Stryker.

INVENTIONS

4.1 **Disclosure of Developments.** I agree that during and subsequent to my employment with Stryker, I will promptly disclose and furnish complete information to Stryker relating to all inventions, improvements, modifications, discoveries, methods, and developments, whether patentable or not, made or conceived by my or under my direction during my employment whether or not made or conceived during normal working hours or on the premises of Stryker.

4.2 **Intellectual Property is Stryker Property.**

(a) I agree to assign and hereby assign to Stryker all title, interests and rights including intellectual property rights worldwide in and to any and all Intellectual Property (including, as defined above, patents and patent applications)

made, conceived, developed, reduced to practice, or authored by me alone or with others during the course of my employment which are within the scope of Stryker's actual or anticipated business.

(b) My agreement to assign Intellectual Property rights, as set forth above, shall not apply to any Intellectual Property that was conceived and developed without the use of Stryker's equipment, supplies, facilities, and trade secret information and which was developed entirely on my own time, unless (a) the Intellectual Property relates (i) directly to the business of Stryker, or (ii) to Stryker's actual or anticipated research or development, or (b) the Intellectual Property results from any work performed by me for Stryker.

(c) I agree, however, that Stryker shall have a nonexclusive, fully paid license to use for all purposes any Intellectual Property within the scope of Stryker's actual or anticipated business but not assigned to Stryker under Paragraph 4.2(b), unless such a license is prohibited by statute or by a court of last resort and competent jurisdiction.

4.3 **Copyrightable Works.** I recognize that all Copyrightable Works shall to the fullest extent permissible be considered "works made for hire" in the United States as defined in the U.S. Copyright Laws and in any other country adhering to the "works made for hire" or similar notion. All such Copyrightable Works shall from the time of creation be owned solely and exclusively by Stryker throughout the world. If any Copyrightable Work or portion thereof shall not be legally

qualified as a work made for hire in the United States or elsewhere, or shall subsequently be held to not be a work made for hire, I agree to assign and do hereby assign to Stryker all of my right, title and interest to the Copyrightable Works and all registered and applied for copyrights therein. I hereby waive any moral rights which I may hold in any Copyrightable Works or other Intellectual Property, as an author worldwide.

4.4 **Employee Cooperation.** When requested to do so by Stryker, either during or subsequent to my employment with Stryker, I will (a) execute all documents requested by Stryker for the vesting in Stryker of the entire right, title and interest in and to the Intellectual Property and Confidential Information, and all patent, copyright, trademark, or other applications filed and issuing on the Intellectual Property; (b) execute all documents requested by Stryker for filing and obtaining of patents, trademarks, or copyrights; and (c) provide assistance that Stryker reasonably requires to protect its right, title and interest in the Intellectual Property and Confidential Information, including, but not limited to, providing declarations and testifying in administrative and legal proceedings with regarding to Intellectual Property and Confidential Information. Whenever requested to do so by Stryker, I shall execute any applications, assignments or other instruments which Stryker shall consider necessary to apply for and obtain Letters Patent, trademark and/or copyright registrations in the United States or any foreign country, or to otherwise protect Stryker's interests. These obligations shall continue beyond the termination of my employment with Stryker with respect to Intellectual Property conceived, authored or made by me during my period of

employment, and shall be binding upon my executors, administrators or other legal representatives.

4.5 **Prior Intellectual Property.** I have attached to this Agreement as Attachment C ("List of Prior Intellectual Property") a complete list of what I represent to be all Intellectual Property made, conceived or first reduced to practice by me, alone or jointly with others, prior to my employment with Stryker ("Prior Intellectual Property"). If no such Prior Intellectual Property List is attached to this Agreement, I represent that I have no such Prior Intellectual Property at the time of this Agreement. If in the course of my employment with Stryker I incorporate into a Stryker product, process, or machine any Prior Intellectual Property, then I hereby grant, and agree to grant, Stryker a nonexclusive, royalty-free, irrevocable, perpetual, worldwide license to make, modify, use, and sell such Prior Intellectual Property as part of or in connection with such product, process, or machine.

CONFIDENTIAL INFORMATION AND PROPERTY

5.1 **Non-disclosure of Confidential Information.** I recognize that Confidential Information is of great value to Stryker, that Stryker has legitimate business interests in protecting its Confidential Information, and that the disclosure to anyone not authorized to receive such information, including any entity that competes with Stryker, will cause immediate irreparable injury to Stryker. Unless I first secure Stryker's written consent, I will not disclose, use, disseminate, identify by topic or subject, lecture upon or publish Confidential Information. I understand and agree that my obligations not to disclose, use, disseminate, identify by subject or topic, lecture upon or publish Confidential Information shall

continue after the termination of my employment for any reason.

5.2 **Return of Information and Materials.** Upon termination of my employment with Stryker for any reason whatsoever, or at any time requested by Stryker, I will immediately return to Stryker any and all Confidential Information and any and all information and material relating to Stryker's business, products, personnel, suppliers or customers, whether or not such material is deemed to be confidential or proprietary. Thereafter, any continued possession will be deemed to be unauthorized. I shall not retain any copies of correspondence, memoranda, reports, notebooks, drawings, photographs, or other documents in any form whatsoever (including information contained in computer memory or on any computer disk) relating in any way to the affairs of Stryker and which were entrusted to me or obtained by me at any time during my employment with Stryker.

5.3 **Return of Stryker Property.** Upon termination of my employment with Stryker for any reason whatsoever, or at any time requested by Stryker, I will return to Stryker any and all property in my possession which belongs to Stryker, including the following: all keys and security and credit cards; all equipment, products, samples, inventory, tools, computers, software, cell phones and other electronic devices; all customer files, account files, price lists, product information, training manuals, promotional materials and handbooks; and all other documents relating to Stryker's business, products, personnel, suppliers and customers.

NON-SOLICITATION AND NON-COMPETE

6.1 **Employee Acknowledgement.** I recognize that Stryker's relations with Stryker Customers represent an important business asset that results from Stryker's significant investment of its time and resources. I further acknowledge that my position with Stryker exposes me to Confidential Information and more generally to a segment of business with respect to which I may have had no prior exposure before joining Stryker. I further recognize that by virtue of my employment by Stryker, I have gained relationships with Stryker's Customers, and because of such relationships, I will cause Stryker great loss, damage, and immediate irreparable harm, if I should for myself or on behalf of any other person, entity, firm or corporation, sell, offer for sale, or solicit or assist in the sale of a Conflicting Product or Service as stated in this Agreement.

6.2 **Non-Solicitation of Customers and Supplier.** I agree that during my employment with Stryker and during the Restricted Period, I will not, in any capacity, directly or indirectly, personally or through another person, (i) solicit, contact or sell any Conflicting Product or Service to a Stryker Customer; (ii)) solicit, contact or sell any product or service to a Stryker Customer that competes with or is similar to any Stryker product or service; (iii) divert, entice or otherwise take away from Stryker the business or patronage of any Stryker Customer; or (iv) solicit or induce any vendor, supplier or Stryker Customer to terminate or reduce its relationship with Stryker.

6.3 **Non-Compete.**

(a) During my employment with Stryker and

during the Restricted Period, I will not work (as an employee, consultant, contractor, agent, or otherwise) for, or render services directly or indirectly to, any Conflicting Organization in which the services I may provide could enhance the use or marketability of a Conflicting Product or Service by application of Confidential Information which I have had access to during my employment. This provision shall not bar me from accepting employment with a Conflicting Organization whose business is diversified and which is, as to that part of its business in which I accept employment, not a Conflicting Organization. If I accept employment with a Conflicting Organization, I will provide Stryker written assurances satisfactory to Stryker that indicate that I will not render services directly or indirectly, during the Restricted Period, in connection with any Conflicting Product or Service. I understand that Stryker may also require written assurances from the Conflicting Organization. I also agree that during my employment with Stryker and during the Restricted Period, I will not render services to any organization or person in a position similar in responsibilities to any position I held with Stryker during the twenty-four (24) months prior to the termination of my employment with Stryker for any reason or in which I could use Confidential Information to the detriment of Stryker.

(b) If I hold a research and development position with Stryker, I agree that during my employment with Stryker and during the

Restricted Period I shall not hold a position with a competitor in which I will research or develop any product or service similar to products or services of Stryker for which for which I had research or development responsibilities during the twenty-four (24)-month period prior to the termination of my employment with Stryker or about which I learned Confidential Information.

(c) Notwithstanding Section 6.3(a) hereof, if at the time of the termination of my employment, my responsibilities include: sales or service, case coverage, servicing products or assisting with sales or service, case coverage or servicing product within a geographic area, territory, branch or assigned customer accounts, then the post-employment restrictions set forth in Section 6.3(a) hereof shall include and be limited to (i) the geographic area, territory, branch and assigned customer accounts that, directly or indirectly, was covered either by me or by employees, distributors, agents or representatives who reported to me at any time during such twenty-four (24) month period preceding the termination of my employment; and/or (ii) any geographic area, territory, branch and assigned customer accounts to which I provided services, covered cases, made proposals, made sales or serviced products whether directly or indirectly, at any time during such twenty-four (24) month period preceding the termination of my employment.

(d) During the Restricted Period, Section 6.3 shall apply if, during the last twenty-four months of employment, I worked in a sales or service role

(e.g., ProCare, field service) or in a role that Stryker classified as salaried or exempt.

6.4 **Non-Solicitation of Employees.** I agree that during my employment with Stryker and during the Restricted Period, I will not, directly or indirectly, solicit, induce or influence, or attempt to solicit, induce or influence, any person engaged as an employee, independent contractor or agent of Stryker to terminate his, her or its employment and/or business relationship with Stryker or do any act which may result in the impairment of the relationship between Stryker and its employees, independent contractors or agents.

6.5 **Employee Obligation to Notify Stryker of Work for New Employer.** To enable Stryker to monitor my compliance with the obligations imposed by this Agreement, I agree to notify Stryker in writing before I commence employment with a new employer of the identity of my new employer (if any) and of my job title and responsibilities, and will continue to so inform Stryker, in writing, any time I accept or change employment during the Restricted Period. I shall provide this notice to the Human Resource lead for the division or location I last worked for Stryker. I agree Stryker is also permitted to contact any new or prospective employer regarding my obligations owed to Stryker.

6.6 **Modification of Non-Compete and Non-Solicitation Provisions.** The provisions of this Agreement shall be severable and if any provision of this Agreement is found by any court to be unenforceable, in whole or in part, the remainder of this Agreement shall nevertheless be enforceable and binding on the parties. I also agree that a court or arbitrator may modify any invalid, overbroad or unenforceable term of this

Agreement so that such term, as modified, is valid and enforceable under applicable law and is authorized to extend the length of this Agreement for any period of time in which I am in breach of this Agreement or as necessary to protect the legitimate business interests of Company.

REPRESENTATIONS; ACKNOWLEDGEMENTS

7.1 **Code of Conduct.** I acknowledge receipt of Stryker Corporation's Code of Conduct and confirm that I have read and understand the Code of Conduct. I further agree to abide by and support the policies set forth in the Code of Conduct and understand that compliance with the Code of Conduct, as it may be amended by Stryker from time to time, is a condition of my continued employment.

7.2 **No Violation of Agreements with Prior Employers.** I have not signed any non-competition or other agreement that I have not disclosed to Stryker that prohibits me from being employed by Stryker or assigning works and ideas to Stryker **("Non-Compete Agreement")**. I agree that I will not disclose to Stryker or use for Stryker's benefit any information that to my knowledge is proprietary or confidential to any of my prior employers, without proper consent from the prior employer. If I have signed a Non-Compete Agreement with a prior employer, I have provided a copy of that agreement to Stryker's Human Resources Department under separate cover.

7.3 **Medicare, Medicaid Participation; Fraud and Abuse.** I (a) have not been excluded or debarred from participation in any Federal or State Health Care Program (including Medicare, Medicaid, or CHAMPUS) or other state or federal governmental program, and

(b) have not committed any acts which are cause for exclusion or debarment from participation in any such program. In addition, no entity in which I serve as a managing employee or officer, or currently have a direct or indirect ownership or control interest (c) has been excluded or debarred from participation in any Federal or State Health Care Program (including Medicare, Medicaid, or CHAMPUS), or (d) has committed any acts which are cause for exclusion or debarment from participation in any such program.

7.4 **At-Will Employment.** I understand that this Agreement does not obligate me to remain employed by Stryker nor does it confer upon me the right to continued employment by Stryker. Stryker and I each have the right to terminate the employment relationship at any time, for any or no reason, with or without notice and with or without cause.

7.5 **Provisions are Reasonable.** I acknowledge and agree that it is reasonable and necessary for the protection of the goodwill and continued business of Stryker that I abide by the covenants and agreements contained in this Agreement during and following my employment with Stryker and that Stryker will suffer irreparable injury, loss, harm and damage if I engage in conduct prohibited in this Agreement. My experience and abilities are such that compliance with this Agreement will not cause any undue hardship or unreasonable restriction on my ability to earn a livelihood and that the restrictions on my activities during and after employment do not prevent me from using skills in any business or activity that is not in competition with Stryker.

7.6 **Duty of Loyalty.** Nothing herein shall limit or reduce my common law duties to Stryker, including but

not limited to my duty of loyalty.

MISCELLANEOUS

8.1 **Remedies.** I recognize that any breach by me of Sections 4, 5 or 6 of this Agreement will cause Stryker irreparable harm that cannot be compensated adequately by an award of monetary damages. Consequently, I agree: (a) that Stryker is entitled to specific performance and injunctive relief in addition to money damages at law without the posting of a bond if I breach or threaten to breach this Agreement; (b) that a court or arbitrator shall extend the Restriction Periods in this Agreement for any period of time in which I am in breach or as required to protect Stryker's legitimate business interests; and (c) that Stryker will be entitled to recover from me its reasonable attorneys' fees and costs for any action that it successfully brings for my breach or threatened breach of this Agreement. All remedies for enforcement of this Agreement shall be cumulative and not exclusive.

8.2 **Governing Law and Venue.** Although I may work for Stryker in various locations, I agree and consent that this Agreement shall be interpreted and enforced as a contract of the applicable state listed on Attachment B as of my date of termination and shall be interpreted and enforced in accordance with the internal laws of that state without regard to its conflict of law rules. In such circumstance, I agree and consent that any and all litigation between Stryker and me relating to this Agreement will take place exclusively in the state listed on Attachment B, and I consent to the jurisdiction of the federal and/or state courts in the state listed on Attachment B. I consent to personal jurisdiction and venue in both such Courts and to service of process by United States Mail or express courier service in any such

action.

8.3 **Validity of Provisions.** I expressly agree that the provisions contained herein are fair and reasonable limitations as to time, geographical area and scope of activity, and such restrictions do not impose a greater restraint than is necessary to protect the goodwill and other business interests of Stryker. To the extent any portion of this Agreement, or any portion of any provision of this Agreement is held to be invalid or unenforceable, it shall be construed by limiting and reducing it so as to contain the maximum restrictions permitted by applicable law. All remaining provisions of this Agreement, and/or portions thereof, shall remain in full force and effect. I have been provided an adequate amount of time to seek legal counsel before executing this Agreement.

8.4 **Waiver.** I acknowledge that the failure of Stryker to insist upon strict compliance of this Agreement shall not be deemed a waiver of any of its rights.

8.5 **Transfer or Renewal of Employment.** This Agreement will be deemed to continue during any periods of renewal of my employment, including, but not limited to, periods of employment following promotions or transfers, or during any subsequent re-employment by Stryker.

8.6 **Binding Effect and Assignability.** I may not assign any of my obligations under this Agreement. I acknowledge that my obligations will continue beyond the termination of my employment and are binding upon my assigns, executors, administrators, and other legal representatives. I hereby consent and agree to assignment by Stryker of this Agreement and all rights and obligations hereunder, including, but not limited to,

an assignment in connection with any merger, sale, transfer or acquisition consummated by Stryker or any of its subsidiaries, affiliates or divisions, or relating to all or part of its assets or the assets of its subsidiaries, affiliates or divisions.

8.7 **Independence of Obligations.** Each of my obligations to be performed under this Agreement shall be interpreted independent of (i) any other provisions of this Agreement, and (ii) any other obligation Stryker may have toward me. The existence of any claims I have or may have against Stryker, whether based on this Agreement or otherwise, shall not be a defense to the enforcement of any my obligations under this Agreement.

8.8 **Trial by Court.** I agree that in any legal action relating to this Agreement and/or my obligations under this Agreement, I waive my right to a trial by jury.

8.9 **Notice.** Any notice or other communication required or permitted to be given hereunder shall be in writing and shall be mailed by pre-paid certified mail, return receipt requested, or by Federal Express or other similar overnight delivery service providing proof of delivery, to Stryker at your division's headquarters to the attention of your division's HR leader, and to me at my last known address. All notices shall be effective on the date sent in accordance with this provision.

8.10 **Interpretation.** I acknowledge that the terms of this Agreement will not be interpreted or construed in favor of me on the basis that Stryker was the drafter of this Agreement. This Agreement shall be construed as a whole and in accordance with its fair meaning.

8.11 **Entire Agreement.** This document, including its three attachments [Attachment A "State Law

Modifications," Attachment B "Governing Law and Jurisdiction," and Attachment C "List of Prior Intellectual Property"] contains the entire agreement of the parties related to the matters addressed in this Agreement. This Agreement may not be modified orally but only by a written agreement, signed by me and the Vice President of Human Resources for Stryker Corporation. This Agreement supersedes any and all prior agreements between the parties with respect to the matters addressed in this Agreement.

8.12 **Prior Agreements.** Except as may be stated herein, I agree and acknowledge that this Agreement supersedes prior agreements between me and Stryker with respect to the subject matter addressed in this Agreement.

BY SIGNING BELOW, I ACKNOWLEDGE THAT I HAVE READ THE AGREEMENT AND ITS ATTACHMENTS AND UNDERSTAND AND AGREE TO EACH OF THEIR PROVISIONS.

/s/
EMPLOYEE'S SIGNATURE

Jonathan L. Waber
PRINT NAME

DATE: 09/08/2017

ATTACHMENT A

State Law Modifications

The purpose of this Attachment A to the Agreement is to modify certain terms of this Agreement as described herein. For purposes of this Agreement, the Employee is employed in only one state at any given time.

WHILE THE EMPLOYEE IS EMPLOYED IN LOUISIANA

The following is added to Sections 6.2 and 6.3 of the Agreement and replaces Attachment B:

During the Restricted Period, this covenant shall apply in the following parishes: _____

ATTACHMENT B

Governing Law and Jurisdiction

In accordance with Sections 1.3 and 8.2, the terms of this Agreement shall be governed by the state law and venued exclusively according to the chart below which shall be based on the Stryker entity that employs me at the time of my termination. I consent to the venue, and exclusive personal and subject matter jurisdiction according to the chart below. If employed by the entity listed below, the exclusive applicable governing law and exclusive venue and jurisdiction shall be:

Employer	Applicable Law, Venue and Jurisdiction
Howmedica Osteonics Corp.	New Jersey
Stryker Corporation	Michigan
Stryker Sales Corporation	Michigan
Stryker Performance Solutions, LLC	New Jersey
Stryker Communications, Inc.	Michigan

ATTACHMENT C

List of Prior Intellectual Property