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EMI APRIL MUSIC INC. and
EMI BLACKWOOD MUSIC INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PLEASE GIMME MY PUBLISHING, INC., a New York corporation; WEST BRANDS, LLC, a Delaware limited liability corporation; KANYE WEST, an individual; and YE WORLD PUBLISHING, INC., a Delaware corporation, also doing business as YE WORLD MUSIC,

Plaintiffs,

v.

EMI APRIL MUSIC INC., a Connecticut corporation; EMI BLACKWOOD MUSIC INC., a Connecticut corporation; and DOES 1-10,

Defendants.

No. 2:19-cv-01527-MRW

DEFENDANTS' NOTICE OF MOTION AND MOTION TO TRANSFER FOR CONVENIENCE UNDER 28 U.S.C. § 1404(a), OR, IN THE ALTERNATIVE, TO DISMISS UNDER FED. R. CIV. P. 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: April 10, 2019
Time: 9:30 a.m.

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on April 10, 2019 at 9:30 a.m., or as soon thereafter as this matter may be heard, in Courtroom No. 550 of the United States District Court for the Central District of California, located at the Roybal Federal Building, 255 East Temple Street, Los Angeles, California 90012, Defendants EMI April Music Inc. and EMI Blackwood Music Inc. (collectively, "EMI"), by and through their undersigned attorneys, will and hereby do move under 28 U.S.C. § 1404(a) for an order transferring this action to the United States District Court for the Southern District of New York for the convenience of the parties and witnesses, or, in the alternative, move under Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing this action.

The grounds for EMI's motion are that the operative agreement, as modified and/or extended, between Plaintiffs Please Gimme My Publishing, Inc.; West Brands, LLC; Kanye West; and Ye World Publishing, Inc. (collectively, "West"), on the one hand, and EMI, on the other hand, under which West's purported claims arise and to which the claims relate, contains an exclusive New York forum selection clause that mandates that the claims be heard only by the federal or state courts located in New York County, New York.

EMI bases this motion on this notice of motion, the accompanying memorandum of points and authorities, the concurrently filed Declaration of Maura K. Gierl and all exhibits thereto, the concurrently filed proposed order, all other pleadings and papers on file in this action, and such argument or evidence that the Court may consider at or before the hearing on this motion. Pursuant to Local Rule 7-2, EMI makes this motion following a telephonic conference of counsel on February 28, 2019. During the conference, counsel for the parties thoroughly discussed the substance of the arguments set forth herein, as well as potential resolution of the disagreements, in an attempt to eliminate the need for this motion.

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The parties were unable to reach an agreement, necessitating this motion.

Dated: March 8, 2019

MANATT, PHELPS & PHILLIPS, LLP

By: /s/ Robert A. Jacobs
Robert A. Jacobs
Maura K. Gierl
Molly K. Wyler

Attorneys for Defendants
EMI APRIL MUSIC INC. and EMI BLACKWOOD MUSIC INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

West's lawsuit is a baseless attempt to walk away from unfulfilled contractual obligations and deprive EMI of rights for which EMI already has paid him tens of millions of dollars in advance payments alone.[1] In 2003, West and EMI entered into an extensively-negotiated co-publishing agreement, which they subsequently modified and/or extended. Despite the fact that some of the top law firms in the music industry represented West in his negotiations with EMI, and repeatedly secured substantial payments and other concessions for his benefit, West now seeks to renege on his commitments, and deprive EMI of the benefits of its bargain with him. West, thus, filed a complaint in California state court seeking (i) a declaration that he should not be bound by his agreements with EMI, and should be able to take back all copyrights and other rights in and to the musical compositions he delivered to EMI under the agreements; and (ii) to disgorge the profits that EMI earned as co-owners and administrators of the musical compositions. Putting aside the myriad substantive deficiencies in West's claims, which EMI will address at a later date, West's filing of this lawsuit in California is a flagrant breach of the ***exclusive*** New York forum selection clause in his agreements with EMI (the "New York Forum Selection Clause"), to which he knowingly and voluntarily bound himself, and later ratified and confirmed on seven different occasions. West's lawsuit is the epitome of impermissible forum shopping. This Court should transfer it to the United States District Court for the Southern District of New York (the "SDNY"), or dismiss it without prejudice to allow West to refile it in New York.

[1] "West" collectively refers to plaintiffs Kanye West; Please Gimme My Publishing, Inc. ("PG"); West Brands, LLC; and Ye World Publishing, Inc. ("Ye World"). Although not the subject of this motion to transfer or dismiss, Defendants EMI April Music Inc. ("EMI April") and EMI Blackwood Music Inc. ("EMI Blackwood") (collectively, "EMI") do not waive their right to challenge PG's and Ye World's standing in this lawsuit.

First, West cannot meet his burden – as he must – to demonstrate that transfer to New York, the exclusive forum for which the parties bargained, is unwarranted. The New York Forum Selection Clause ***mandates*** that West's purported claims be adjudicated only by the courts located in New York County, New York. West does not mention the New York Forum Selection Clause in his complaint, let alone allege that it is the product of fraud or other wrongdoing (because it is not). West has no conceivable good faith justification for setting aside his bargained for agreement to limit his judicial recourse to the courts located in New York County, New York. West's decision to file suit in California not only flies in the face of the New York Forum Selection Clause, but it also is quintessential gamesmanship intended to secure benefits under California law to which he is not entitled, and that are not available under New York law, which West also agreed would govern his relationship with EMI. The New York Forum Selection Clause is all but determinative of the issue, but, even if it is not (and it is), New York's myriad connections to West's agreements with EMI conclusively demonstrate that this Court should transfer this matter to the SDNY.

Second, a transfer of this action to the SDNY will promote the interests of justice. Specifically, as confirmed by the multiple close connections between the agreements at issue and New York, the action is "at home" there. Further, notwithstanding West's allegations to the contrary, New York law governs his purported claims, and courts in that state should be permitted to adjudicate them under its laws. Finally, West can pursue his claims just as easily in New York as he can in California. For these reasons, which are discussed in more detail below, this Court should enforce the New York Forum Selection Clause, and transfer this action to the SDNY, or, in the alternative, dismiss it without prejudice to allow West to refile it in New York.

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II. FACTUAL BACKGROUND

In the Complaint ("Complaint" or "Cplt."), West alleges that he entered into a co-publishing agreement with EMI as of October 1, 2003 (the "2003 Agreement") under which EMI acquired a 50 percent share of the copyrights in certain musical compositions written or co-written by Kanye West (the "Compositions") for a finite period of time.[2] (Cplt. ¶ 22; Gierl Decl. ¶ 2, Exh. A at ¶ 8.01) West also granted EMI the right to administer and exploit the Compositions during that period for West's and EMI's mutual benefit. (Gierl Decl. ¶ 2, Exh. A at ¶ 8.02) In exchange, EMI paid West certain advances, and rendered accountings and payments to him for royalties derived from the exploitation of the Compositions. (Gierl Decl. ¶ 2, Exh. A at ¶ 10) Following the 2003 Agreement, the parties entered into multiple agreements modifying and/or extending the 2003 Agreement (each a "Modification" and, collectively, the "Modifications"), including in 2004, 2005, 2006, 2009, 2011, 2012, and 2014. (*See* Cplt. ¶¶ 36, 37, 47, 51, 58, 66; Gierl Decl. ¶¶ 3-9, Exhs. B-H) Each of the Modifications incorporates, ratifies, and confirms the 2003 Agreement and any preceding modifications. (Gierl Decl. ¶ 3, Exh. B at ¶ 3; *id*. at ¶ 4, Exh. C at ¶ 6; *id*. at ¶ 5, Exh. D at ¶ 11; *id*. at ¶ 6, Exh. E at ¶ 9; *id*. at ¶ 7, Exh. F at ¶ 10; *id*. at ¶ 8, Exh. G at ¶ 5; *id*. at ¶ 9, Exh. H at ¶ 11)

The 2003 Agreement and its Modifications (collectively, the "Agreements") were the subject of detailed and thorough negotiations. (*See* Gierl Decl. ¶ 2, Exh. A at ¶ 24.01) At each turn, seasoned and reputable music industry lawyers represented West. (*See* Gierl Decl. ¶ 2, Exh. A at 1, ¶ 24.01; *see generally* Gierl Decl. ¶¶ 3-9, Exhs. B-H) Ultimately, those negotiations resulted in the Agreements, each of which accurately reflects the parties' bargained-for rights and obligations. (*See* Gierl Decl. ¶¶ 2-9, Exhs. A-H) As is relevant here, the 2003

[2] EMI annexed the original state court Complaint to Exhibit A to EMI's Notice of Removal filed with this Court. (Dkt. 1-1)

Agreement includes the New York Forum Selection Clause, an ***exclusive*** forum selection clause, which states the following in pertinent part:

> ANY CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY SHALL BE INSTITUTED AND MAINTAINED EXCLUSIVELY IN ANY FEDERAL OR STATE COURT LOCATED WITHIN THE COUNTY OF NEW YORK IN THE STATE OF NEW YORK.

(Gierl Decl. ¶ 2, Exh. A at ¶ 21.01 (emphasis in original)) The provision continues, "You irrevocably submit to the personal jurisdiction of [any federal or state court located within the County of New York in the State of New York], and agree not to assert, by way of motion" the defenses of personal jurisdiction, inconvenient forum, improper venue or transfer, or unenforceability. (*Id.* (emphasis removed)) The 2003 Agreement also includes the following New York choice of law clause (the "New York Choice Of Law Clause"):

> THIS AGREEMENT SHALL BE DEEMED ENTERED INTO IN THE STATE OF NEW YORK AND THE VALIDITY, INTERPRETATION AND LEGAL EFFECT OF THIS AGREEMENT SHALL BE GOVERNED BY THE INTERNAL LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS ENTERED INTO AND PERFORMED ENTIRELY WITHIN THE STATE OF NEW YORK, WITH RESPECT TO THE DETERMINATION OF ANY CLAIM, DISPUTE OR DISAGREEMENT WHICH MAY ARISE OUT OF THE INTERPRETATION, PERFORMANCE OR BREACH OF THIS AGREEMENT OR WHICH IN ANY OTHER RESPECT RELATES TO THIS AGREEMENT.

(*Id.* at ¶ 21.01 (emphasis in original)) West agreed to the New York Forum Selection Clause and the New York Choice Of Law Clause – and all other provisions – of the 2003 Agreement when he signed it, and again when he signed the seven Modifications that expressly ratified and confirmed the 2003 Agreement. (Gierl Decl. ¶¶ 2-9, Exhs. A-H)

The Agreements have a strong connection to the State of New York for several reasons apart from the New York Forum Selection Clause and the New

York Choice Of Law Clause. *First*, except for the 2011 Modification, in connection with which West used California counsel, the Agreements were fully negotiated in the State of New York by West's counsel and EMI. (Gierl Decl. ¶ 2, Exh. A at 1; *id*. at ¶ 3, Exh. B at 1; *id*. at ¶ 4, Exh. C at 1; *id*. at ¶ 5, Exh. D at 1; *id*. at ¶ 6, Exh. E at 1; *id*. at ¶ 7, Exh. F at 1; *id*. at ¶ 8, Exh. G at 1; *id*. at ¶ 9, Exh. H at 1) *Second*, EMI April and EMI Blackwood both have their principal places of business in the State of New York. (Gierl Decl. ¶ 2, Exh. A at 1; *id*. at ¶ 3, Exh. B at 1; *id*. at ¶ 4, Exh. C at 1; *id*. at ¶ 5, Exh. D at 1; *id*. at ¶ 6, Exh. E at 1; *id*. at ¶ 7, Exh. F at 1; *id*. at ¶ 8, Exh. G at 1; *id*. at ¶ 9, Exh. H at 1) *Third*, West executed and had notarized the Agreements in the State of New York, except the 2011 Modification, which he signed and had notarized in the State of Massachusetts. (Gierl Decl. ¶¶ 2-9, Exhs. A-H) *Fourth*, the Agreements make clear that (i) the performance of West's obligations "will be deemed to have taken place in the State of New York, . . . regardless of where [West] reside[s] or where [West] created or acquired any or all [of the musical compositions due under the Agreements]" (Gierl Decl. ¶ 2, Exh. A at ¶¶ 2.01, 2.02); (ii) West must deliver to EMI in the State of New York all of the elements required for him to satisfy his contractual obligations (Gierl Decl. ¶ 2, Exh. A at ¶ 1.06); (iii) except for the 2011 Modification and the 2012 Modification, which specify a Colorado address, all of the Agreements provide for West to receive all payments and notices under the Agreements in the State of New York (Gierl Decl. ¶ 2, Exh. A at ¶ 18; *id*. at ¶ 3, Exh. B at ¶ 3; *id*. at ¶ 4, Exh. C at ¶ 6; *id*. at ¶ 5, Exh. D at ¶ 11; *id*. at ¶ 6, Exh. E at ¶ 9; *id*. at ¶ 7, Exh. F at ¶ 9; *id*. at ¶ 8, Exh. G at ¶ 4; *id*. at ¶ 9, Exh. H at ¶ 10); (iv) any audits of EMI's books and records that West undertakes must take place in the State of New York (Gierl Decl. ¶ 2, Exh. A at ¶ 12.03(a)(iv));[3] and (v) the opening and closing times of EMI's offices in the State of New York determine the expiration of time periods specified in the Agreements (Gierl Decl. ¶ 2, Exh. A at ¶ 23.11).

[3] These offices have since been moved to Nashville, Tennessee.

Notwithstanding the foregoing, West sued EMI in California state court, seeking a declaration that (i) the 2003 Agreement and the Modifications are unenforceable, and have been for the last eight and a half years; and (ii) EMI's bargained-for copyright ownership and other rights in the Compositions should immediately revert to West. (Cplt. ¶¶ 1, 71) West also seeks restitution and disgorgement of EMI's profits from exploitations of the Compositions undertaken by EMI in accordance with the terms of the Agreements. (*Id.* ¶¶ 75-78) West bases these claims entirely on allegations relating to, and the copyright interests in the Compositions that EMI acquired under, the Agreements. Nevertheless, by filing this action in California, ***West intentionally defied the valid and exclusive New York Forum Selection Clause that governs the Agreements***.

III. LEGAL STANDARD

"[T]he appropriate way to enforce a forum-selection clause . . . is through the doctrine of *forum non conveniens*." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 60 (2013) ("*Atlantic Marine*" or "*Atl. Marine*"). When a defendant wishes to enforce a forum selection clause pointing to a different federal jurisdiction than where the case is pending, it may do so by bringing a motion to transfer pursuant to 28 U.S.C. § 1404(a) ("Section 1404(a)"). *Id.* (Section 1404(a) is the codification of *forum non conveniens*). When the forum selection clause at issue points to a state or foreign forum, the defendant may seek transfer or dismissal under the "residual doctrine of *forum non conveniens*". *Id.* at 61. Regardless of whether the defendant challenges the forum pursuant to Section 1404 or the common law doctrine of *forum non conveniens*, "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." *Id.*

Although the analysis is the same, "[u]nlike a [Section] 1404(a) motion, a successful motion under *forum non conveniens* requires dismissal of the case." *Id.* at 66 n.8. Courts outside the Ninth Circuit have determined that Rule 12(b)(6) of

the Federal Rules of Civil Procedure (the "Federal Rules") is an appropriate mechanism by which to seek dismissal based on the violation of a forum selection clause.[4] *See Podesta v. Hanzel*, 684 F. App'x 213, 215-16 (3d Cir. 2017) ("a Rule 12(b)(6) dismissal is . . . an acceptable means of enforcing . . . a [forum selection] clause when, as here, the clause allows for suit in either a state or federal forum"); *Claudio-de Leon v. Sistema Universitario Ana G. Mendez*, 774 F.3d 41, 46 (1st Cir. 2014) ("absent a clear statement from the Supreme Court to the contrary, the use of Rule 12(b)(6) to evaluate forum selection clauses is still permissible in this Circuit, and we will not decline to review or enforce a valid forum selection clause simply because a defendant brought a motion under 12(b)(6) as opposed to under § 1404 or *forum non conveniens*"); *Consultants Grp. Commercial Funding Corp. v. Inteva Prods.*, Case No. 17-cv-1114, 2017 WL 7833776, at *1 (C.D. Cal. Aug. 28, 2017) (discussing out-of-circuit cases permitting use of Rule 12(b)(6) to enforce forum selection clauses, and noting that "the Supreme Court has not addressed the issue and there generally appears to be no binding authority in the Ninth Circuit that has dealt with it").

IV. ARGUMENT

A. This Action Should Be Transferred To The SDNY Pursuant To Section 1404(a).

This action should be transferred to the SDNY because West is bound by, but has wholly disregarded, the exclusive New York Forum Selection Clause that he agreed would govern the Agreements.

Section 1404(a) permits a court to transfer a civil action "to any other district or division where it might have been brought or to any district or division to which all parties have consented", where doing so would convenience the parties and

[4] *Atlantic Marine* specifies that Section 1404(a) is *an* appropriate "mechanism for enforcement of forum-selection clauses that point to a particular federal district", but declined to consider whether a defendant also can use Rule 12(b)(6) to enforce a forum selection clause. 571 U.S. at 61.

witnesses and would be "in the interest of justice". 28 U.S.C. § 1404(a).[5] The provision specifically allows a court to transfer a case to any district to which the parties have agreed through a valid forum selection clause. *Atl. Marine*, 571 U.S. at 59. Where no forum selection clause is involved, a district court considering a Section 1404(a) motion typically "must evaluate both the convenience of the parties and various public-interest considerations." *Id.* at 62.

However, "[t]he calculus changes . . . when the parties' contract contains a valid forum-selection clause, which 'represents the parties' agreement as to the most proper forum.'" *Id.* at 63 (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)). This is because "[t]he enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." *Atl. Marine*, 571 U.S. at 63; *see also Berkowitz v. Christie's Inc.*, Case No. CV 15-1318, 2015 WL 12670409, at *1 (C.D. Cal. June 4, 2015) (same). For that reason, "***a proper application of [Section] 1404(a) requires that a forum-selection clause be given controlling weight in all but the most exceptional cases***." *Atl. Marine*, 571 U.S. at 59-60 (emphasis added & internal quotations omitted). Accordingly, "a valid forum-selection clause requires courts to adjust their usual § 1404(a) analysis in three ways." *Id.* at 63.

First, "the plaintiff's choice of forum merits no weight", and, "as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted". *Id.* *Second*, the court should not consider the parties' private interests or the convenience of the parties, because "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient". *Id.* at 64. *Third*, "when a party bound by a forum-selection

[5] Section 1404(a) "does not condition transfer on the initial forum's being 'wrong.'" *Atl. Marine*, 571 U.S. at 59.

clause flouts its contractual obligation and files suit in a different forum, a [Section] 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public-interest considerations." *Id.* The application of this adjusted Section 1404(a) framework conclusively demonstrates that this Court's transfer of this action to the SDNY will serve the interests of justice because West cannot meet his burden of establishing why the Court should not do so, even after considering various public interest factors.

1. West Cannot Meet His Burden Of Establishing That This Court Should Not Transfer The Case To The SDNY.

Because West defied the parties' valid New York Forum Selection Clause when he filed suit in California, he bears the heavy "burden of showing why the court should not transfer the case to the forum to which the parties agreed." *Id.* at 64. This he cannot do.

"[P]laintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations)". *Id.* at 63. However, "when a plaintiff agrees by contract to bring suit only in a specified forum – presumably in exchange for other binding promises by the defendant – the plaintiff has effectively" made its forum selection before the dispute arises. *Id.* "Only that initial choice deserves deference". *Id.* at 64. The parties' other private interests, including interests relating to their or their witnesses' convenience, are irrelevant.[6] *Id.* As a result, the court "must deem the private-interest factors to weigh entirely in favor of the preselected forum". *Id.*

[6] As the *Atlantic Marine* decision confirms, "'[w]hatever 'inconvenience' [the parties] would suffer by being forced to litigate in the contractual forum as [they] agreed to do was clearly foreseeable at the time of contracting.'" 571 U.S. at 64 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17-18 (1972)) (alteration in original).

Here, West cannot carry his burden of demonstrating why his original New York forum selection should be disturbed, or why the Court should not transfer this action according to that selection. It is undisputed that the parties agreed that any claims relating to the 2003 Agreement or its Modifications "***shall*** be instituted and maintained ***exclusively*** in any federal or state court located within the county of New York in the State of New York", and then ratified and confirmed that selection in all of the Modifications. (*See* Gierl Decl. ¶ 2, Exh. A at ¶ 21.01 (emphasis added)) West does not allege in the Complaint – and nor can he – that the New York Forum Selection Clause was procured by fraud or any other wrongdoing. Indeed, as discussed above, West, represented by seasoned and reputable music industry lawyers at all times, knowingly and voluntarily agreed to the New York Forum Selection Clause when he entered into the 2003 Agreement, and did so again on seven different occasions when he entered into the Modifications. Thus, the forum selection in the Agreements – and only this forum selection – deserves deference, and any effort by West to escape it is futile.

Although the New York Forum Selection Clause, on its own, demonstrates that West cannot satisfy his burden, the negotiations leading up to and the execution of the Agreements, and multiple other provisions in the Agreements themselves, also make this clear. As discussed on pages 4 through 5 above, in addition to the fact that EMI April and EMI Blackwood both have their principal places of business in the State of New York, the Agreements make clear that (i) the performance of West's obligations "will be deemed to have taken place in the State of New York, . . . regardless of where [West] reside[s] or where [West] created or acquired any or all [of the musical compositions due under the Agreements]"; (ii) West must deliver to EMI in the State of New York all of the elements required for him to satisfy his contractual obligations; (iii) except for the 2011 Modification, in connection with which West used California counsel, the Agreements were fully negotiated in the State of New York; (iv) except for the 2011 Modification, which

West signed and had notarized in the State of Massachusetts, West signed and had notarized all of the Agreements in the State of New York; (v) except for the 2011 Modification and the 2012 Modification, which specify a Colorado address, the Agreements provide for West to receive all payments and notices under the Agreements in the State of New York; (vi) any audits of EMI's books and records that West undertakes must take place in the State of New York; and (vi) the opening and closing times of EMI's offices in the State of New York determine the expiration of time periods specified in the Agreements. (Gierl Decl. ¶¶ 2-9, Exhs. A-H). Each of these facts demonstrates that this Court should transfer this action to the SDNY.

Regardless, as a result of the foregoing, the Court need not consider any private-interest factors in deciding this Motion. To the contrary, other than the New York Forum Selection Clause itself, the Court only may consider public-interest factors in deciding this motion.

2. The Public Interest Factors All Weigh In Favor Of Transfer.

As discussed above, because West flouted the valid New York Forum Selection Clause, all private-interest factors weigh in favor of transfer, and the Court "may consider arguments about public-interest factors only". *Atl. Marine*, 571 U.S. at 64; *see also Perez v. CRST Int'l*, Case No. CV 17-1081, 2018 WL 921984, at *6 (C.D. Cal. Feb. 14, 2018) (where case involves valid forum selection clause, the Court "may only consider the public-interest factors enumerated in [Section 1404(a)]"). When deciding a Section 1404(a) motion, courts generally consider the following public-interest factors: "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981) (internal quotations omitted). ***"[T]hose factors will rarely defeat a transfer motion, [and] the practical result is that forum-selection clauses should control***

except in unusual cases." *Atl. Marine*, 571 U.S. at 64 (emphasis added). Not only is this case far from unusual, but also each of the public interest factors favors transfer. The Court, therefore, should enforce the New York Forum Selection Clause, and transfer this matter to the SDNY.

First, because court congestion is similar in the Central District of California and the SDNY, the first public-interest factor weighs in favor transfer. According to Federal Judicial Caseload Statistics 2018 Table C-5, the median time from filing to disposition in a civil case is 5 months in the Central District of California, and 6.7 months in the SDNY. (Gierl Decl. ¶ 10, Exh. I at 1, 4) A difference of just one and half months hardly demonstrates a significant difference in court congestion between the two venues. *See Seely v. Cumberland Packing Corp.*, Case No. 10-CV-2019, 2010 WL 5300923, at *7-8 (N.D. Cal. Dec. 20, 2010) (transferring action notwithstanding "slightly increased congestion" in transferee forum where there was an eight-month difference between time of filing to disposition between forums). The medium time from filing to trial in a civil case is 20.5 months in the Central District of California, and 31.8 months in the SDNY. (Gierl Decl. ¶ 10, Exh. I at 1, 4) As above, this 11-month difference is not the sort of unusual circumstance that would justify setting the parties' bargained-for forum selection clause aside. *See Harland Clarke Holdings Corp. v. Milken*, 997 F. Supp. 2d 561, 587, 590 (W.D. Tex. 2014) (transferring action and concluding that 12-month difference in time to trial was not an "extraordinary circumstance" warranting a different result). As a result, Plaintiffs will face no significant administrative difficulties in accessing justice in New York. This is especially true here because EMI already has commenced its own lawsuit against West in the SDNY with which this action, assuming this Court transfers it, can and should be consolidated for all purposes. (*See EMI April Music Inc. v. Kanye West*, S.D.N.Y. Case No. 19-cv-2127)

Second, the local interest in having localized controversies decided at home is best served if the Court transfers the action to the SDNY. As set forth on pages 10 through 11 above, the New York Choice Of Law Clause and multiple other provisions in the Agreements, along with the place of their negotiation, signing, and performance, demonstrate that the New York courts have a significant interest in adjudicating the claims in this action. *See Ministers & Missionaries Benefit Bd. v. Snow*, 45 N.E.3d 917, 920-24 (N.Y. Ct. App. 2015) (discussing New York's strong interest in giving effect to New York choice of law clauses, including as a means of encouraging "parties to choose the New York justice system to govern their contractual disputes") ("*Ministers*"). And while this litigation will affect West in California, it will equally impact EMI in New York. "Simply put, [Plaintiffs'] interest in having this dispute settled in California does not make this an 'exceptional case' that defeats application of a valid forum selection clause." *See Rowen v. Soundview Commc'ns, Inc.*, Case No. 14-cv-5530, 2015 WL 899294, at *7 (N.D. Cal. Mar. 2, 2015).

Third, the interest in having the trial of a diversity case in a forum that is at home with the law is best served if this action is transferred to New York. As set forth above, because Plaintiffs disregarded the forum selection clause by filing suit in California, a Section 1404(a) "transfer of venue will not carry with it the original venue's choice-of-law rules". *Atl. Marine*, 571 U.S. at 65. As a result, although traditional transfer cases "require[e] that the state law applicable in the original court also apply in the transferee court", this is *not* the case when, like here, the transfer motion is premised on a valid forum selection provision. *Id.* In fact, to allow a plaintiff to "fasten its choice of substantive law" to the original, unbargained-for venue would be to encourage gamesmanship and forum shopping. *See id.* Thus, New York's choice-of-law rules govern this action. Because of this, New York courts are most "at home" with New York law, heavily weighting this factor in favor of transfer.

The New York Choice Of Law Clause in the 2003 Agreement, which West ratified and confirmed on seven different occasions, lends further support to this conclusion. (Gierl Decl. ¶ 2, Exh. A at ¶ 21.01) Consistent with the federal transfer rules, "New York courts should not engage in any conflicts [of law] analysis where the parties include a choice-of-law provision in their contract". *Ministers*, 45 N.E.3d at 923 ("logic dictates that, by including a choice-of-law provision in their contracts, the parties intended for only New York substantive law to apply"). "To do otherwise . . . would contravene the primary purpose of including a choice-of-law provision in a contract." *Id.* at 922. This approach also is consistent with "the basic tenets of contract interpretation", *id.*, and other fundamental New York law principles. *See, e.g.*, N.Y. Gen. Oblig. L. §§ 5-1401 & 5-1402. New York law, therefore, governs this action.

For all of these reasons, this Court should enforce the parties' bargained-for New York Forum Selection Clause, and transfer this matter to the SDNY.

B. Alternatively, This Action Should Be Dismissed Because It Runs Afoul Of The New York Forum Selection Clause.

As set forth above, West willfully violated the New York Forum Selection Clause when he filed suit in California state court. Accordingly, this Court should transfer this matter to the SDNY, as required by the parties' mutual choice when entering into the Agreements. For these same reasons, the Court should dismiss the action without prejudice to West's ability to refile in the SDNY.

Atlantic Marine specifically left open the question of whether a party may seek dismissal pursuant to Rule 12(b)(6) of the Federal Rules based on the opposing party's violation of an enforceable forum selection clause. 571 U.S. at 61. Such a remedy is particularly appropriate when, like here, the forum selection clause also points to state or foreign forums as permissible venues for suit. *See id.* at 66, n.8. Because the Ninth Circuit has not addressed this issue, this Court may consider as persuasive authority other circuits' treatment of Rule 12(b)(6) motions

in this context. Both the First Circuit and Third Circuit permit dismissal under Rule 12(b)(6) when a party files suit in a forum different from that which they agreed to in a forum selection clause. *See Claudio-de Leon*, 774 F.3d at 46 (Rule 12(b)(6) is a permissible mechanism by which to enforce forum selection clause); *Podesta*, 684 F. App'x at 215-16 (Rule 12(b)(6) is an acceptable means of enforcing . . . a [forum selection] clause). Accordingly, for the same reasons discussed on pages 7 through 14 above, the Court should enforce the New York Forum Selection Clause and dismiss this action without prejudice to allow West to refile it in New York.

V. CONCLUSION

For all of the reasons set forth herein, the Court should transfer this action to the SDNY pursuant to 28 U.S.C. § 1404(a), or, in the alternative, dismiss it pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure without prejudice to allow West to refile it in New York.

Dated: March 8, 2019

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