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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Yvonne Becker,

Plaintiff,

vs.

Wells Fargo & Co.; Employee Benefit Review Committee; Human Resources Committee of the Board of Directors of Wells Fargo & Co.; Ronald L. Sargent; Wayne M. Hewett; Donald M. James; Maria R. Morris; Wells Fargo Bank, National; and Galliard Capital Management,

Defendants.

CASE NO. 4:20-CV-01803-JST

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

Hearing Date:	July 15, 2020
Time:	2:00 p.m.
Judge:	Hon. Jon S. Tigar
Courtroom:	6, 2nd Floor
Complaint Filed:	March 13, 2020

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PRELIMINARY STATEMENT

Plaintiff Yvonne Becker's ("Becker's") Opposition Brief falls far short of meeting her "heavy burden of proof" to "clearly show" why the Wells Fargo & Company 401(k) Plan's (the "Plan's") forum selection clause should not be enforced. *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 15, 17 (1972). The various arguments she advances all have been rejected by numerous authorities. Her alternative effort to resist transfer based on the traditional Section 1404(a) factors fares no better because the traditional factors do not even apply where there is a forum selection clause and Becker does not dispute that the public interest factors that do apply all favor transfer.

Even under a traditional Section 1404(a) analysis, Becker has made no case for litigating this action here. The only factor weighing in her favor is her choice of forum. But, as explained in Defendants' Moving Brief (Dkt. No. 41), a plaintiff's choice of forum merits little deference in a putative class like this one. As a practical matter, Becker's participation as a class representative is unlikely to ever require her to leave her home state unless the case actually proceeds to trial. Becker's effort to steer some of the remaining Section 1404(a) factors in her favor backfires. She mischaracterizes this suit as an action between herself and her former employer in California, when in fact her claims are directed at the conduct of Plan fiduciaries that took place primarily in Minnesota where the Plan is administered. The relevant witnesses are the Plan fiduciaries and support personnel, most of whom are in Minnesota, and the Plan documents likewise are housed there. None of the relevant witnesses are in California. Thus, even were there no forum selection clause, Minnesota would clearly be the more relevant forum to litigate this case.

In anticipation of Defendants' Motion to Transfer Venue being granted, Becker requests a stay of the case while she pursues an appeal. Although such an appeal would be fruitless, Defendants agree that a stay of proceedings is warranted until this threshold issue is fully resolved.

ARGUMENT

I. BECKER PROVIDES NO REASON WHY THIS ACTION SHOULD NOT BE TRANSFERRED TO THE DISTRICT OF MINNESOTA PURSUANT TO THE PLAN'S FORUM SELECTION CLAUSE AND SECTION 1404(a).

Becker does not dispute that the overwhelming weight of authority favors the transfer of venue in ERISA lawsuits where, as here: (1) venue is proper in the transferee district; and (2) the Plan has a forum selection clause that, on its face, applies to the action in question. Instead, Becker contends that forum selection clauses in ERISA plans are *per se* invalid, and that the Plan's forum selection clause should not be enforced as to her or as to all of the Defendants. All of these arguments have been repeatedly rejected by the Sixth and Seventh Circuits, courts in this District, and/or other courts around the country, and Becker offers no reason for concluding otherwise here.

Insofar as Becker relies on the traditional Section 1404(a) factors, her argument is misplaced because these factors do not apply where, as here, there is a valid forum selection clause and the public interest factors that apply instead favor transfer. Even with respect to the Section 1404(a) factors, moreover, she fails to provide any plausible basis for disputing that they also clearly militate in favor of litigating this action in the District of Minnesota.

A. The Plan's Forum Selection Clause Is Valid And Enforceable.

Becker challenges the Plan's forum selection clause on various grounds, each of which repeatedly has been rejected for good and valid reasons, as discussed below.

1. The Plan's Forum Selection Clause Is Valid Even If Not Signed By Becker.

Becker first contends, without elaboration, that she "had no opportunity to bargain over or sign off on the forum selection clause." (Dkt. No. 47 at 12.) Becker's scant attention to this argument is understandable given that the Supreme Court has flatly rejected it as a ground for refusing to enforce a forum selection clause, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–95 (1991) (enforcing a forum selection clause in a non-negotiated cruise ship ticket), and other courts have rejected the same argument when raised as a challenge to a forum selection clause in an ERISA plan. *See Smith v. AEGON Cos. Pension Plan*, 769 F.3d 922, 930 (6th Cir. 2014) (enforcing venue selection clause added seven years after participant's retirement because ERISA plans can be amended for any reason at any time); *Coleman v. Brozen*, No. 19-cv-705, 2020 WL 2200220, at *3 (E.D. Tex. May 6, 2020)

(rejecting argument that non-negotiated ERISA plan forum selection clause was unfair because the plan sponsor is "free to amend or modify the Plan at any time, and it was not obligated to seek Plaintiffs' assent, negotiate with Plaintiffs, or furnish Plaintiffs consideration for the same"); *Rapp v. Henkel of Am.*, No. 18-cv-1128, 2018 WL 6307904, at *3 (C.D. Cal. Oct. 3, 2018) (concluding that plaintiffs' status as third-party beneficiaries of an ERISA plan who did not negotiate the forum-selection provision does not preclude its enforcement); *Feather v. SSM Health Care*, 216 F. Supp. 3d 934, 941–42 (S.D. Ill. 2016) (upholding forum selection clause unilaterally added to pension plans); *Laasko v. Xerox Corp.*, 566 F. Supp. 2d 1018, 1024 (C.D. Cal. 2008) (enforcing forum selection clause even though plaintiff was not given notice of the clause); *Rogal v. Skilstaf, Inc.*, 446 F. Supp. 2d 334, 338 n.3 (E.D. Pa. 2006) (enforcing forum selection clause and noting that ERISA plans are not bilateral written contracts that require execution by all parties as a prerequisite to becoming effective); *Angel Jet Servs., L.L.C. v. Red Dot Bldg. Sys.' Emp. Benefit Plan*, No. 09-cv-2123, 2010 WL 481420 at *2 (D. Ariz. Feb. 8, 2010) (rejecting claim that unilateral addition of forum selection clause in ERISA plan prohibits its enforcement); *see also Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 512 (9th Cir. 2019) (explaining that an ERISA "plan participant agrees to be bound by a provision in the plan document when he participates in the plan while the provision is in effect").

Becker's reliance on *Dumont v. PepsiCo, Inc.*, 192 F. Supp. 3d 209 (D. Me. 2016) is misplaced. In *Dumont*, the forum selection clause was added to the plan over 30 years *after* the plan participant joined the plan. *Id.* at 214. Here, the Plan's forum selection clause was added to the Plan nearly ten years *before* Becker joined the Plan. (Dkt. No. 41-1 at ¶¶ 7, 18.) In any event, as discussed above, all courts that have subsequently considered the issue have rejected *Dumont's* reasoning regardless of when the forum selection clause was added to the plan.

2. The Declaration Of Trust For Collective Investments Does Not Control Or Conflict With The Plan's Forum Selection Clause.

Becker erroneously argues (in footnote 9) that the Plan's forum selection clause should not be enforced because it conflicts with the Wells Fargo Bank, N.A. Collective Investment Trust Funds for Employee Benefit Trusts Declaration of Trust ("Declaration of Trust") applicable to certain collective investment trusts ("CITs"). To begin with, the Declaration of Trust is irrelevant. This is not an action

against the CITs; rather, it is an action against the Plan fiduciaries challenging their decision to invest in certain CITs, mutual funds, and a stable value fund. (*See, e.g.*, Dkt. No. 1 ¶ 2) ("This suit is about corporate self-dealing at the expense of the retirement savings of company employees" related to the Plan fiduciaries' selections "when choosing the investment options for the Plan menu."). In any event, there is no conflict between the Plan and the Declaration of Trust. The Declaration of Trust does not itself have a forum selection clause (Dkt. No. 47 at 8 n.9), and silence in the Declaration of Trust as to the appropriate venue for litigation does not create a conflict with the Plan's forum selection clause. *See, e.g.*, *Lee v. Kaiser Found. Health Plan Long Term Disability Plan*, 812 F. Supp. 2d 1027, 1035 (N.D. Cal. 2011) (ruling that silence in "different plan documents" does not create a conflict with the main ERISA plan document), *aff'd in relevant part*, 563 F. App'x 530 (9th Cir. 2014); *Gonzales v. Unum Life Ins. Co. of Am.*, 861 F. Supp. 2d 1099, 1109 n.5 (S.D. Cal. 2012) ("silence in one document does not create a conflict with language in another plan document").

3. The Plan's Forum Selection Clause Does Not Conflict With ERISA's Venue Provision.

Having failed to identify a valid a reason for challenging the application of the Plan's forum selection clause to this action, Becker mounts a broad attack on the validity of forum selection clauses in ERISA plans generally. Her arguments, each of which is addressed below, find support only in two dissenting opinions, the views of the U.S. Department of Labor as expressed in a handful of amici briefs, and/or two out-of-circuit, nonbinding district court opinions. They all have been repeatedly rejected by the Sixth and Seven Circuits and numerous district courts, including this District.

First, Becker contends that forum selection clauses in ERISA plans should not be enforced because they: (1) conflict with ERISA's venue provision; and (2) contravene ERISA's purpose to provide "ready access to the Federal courts." (Dkt. No. 47 at 6–10.) She is wrong on both counts. Because ERISA's venue provision provides that suit "*may* be brought" in one of three districts, ERISA § 502(e), 29 U.S.C. § 1132(e), and ERISA nowhere precludes the parties from narrowing venue, courts have routinely construed the provision to permit parties to "contractually narrow[] the options to one of the venues listed in the statute." *In re Mathias*, 867 F.3d 727, 732 (7th Cir. 2017); *Smith*, 769 F.3d at 931–33 (holding that "ERISA's venue provision is permissive" and explaining that a

majority of courts have held that "if Congress had wanted to prevent private parties from waiving ERISA's venue provision, Congress could have specifically prohibited such action"); *Rapp*, 2018 WL 6307904, at *4 ("ERISA provides for multiple appropriate venues, and courts have found that '[n]othing in the statutory language bars those negotiating ERISA plans from narrowing that menu of options to one venue in particular.'") (quoting *Rodriguez v. PepsiCo Long Term Disability Plan*, 716 F. Supp. 2d 855, 861 (N.D. Cal. 2010); *Price v. PBG Hourly Pension Plan*, No. 12-cv-15028, 2013 WL 1563573, at *2 (E.D. Mich. Apr. 15, 2013) ("The *may* of § 1132(e)(2) does not mean *cannot*. Congress provided that an action may be brought in several venues. Congress did not provide that private parties cannot narrow the options to one of these venues."); *Rodriguez*, 716 F. Supp. 2d at 861 (N.D. Cal. 2010) ("Congress could have—but has not—expressly barred parties from agreeing to restrict ERISA's venue provisions" and "in light of the strong presumption favoring enforcement of forum selection clauses, Congress would have had to speak far more clearly if it meant to prohibit them entirely in the ERISA context."); *Williams v. CIGNA Corp.*, No. 10-cv-155, 2010 WL 5147257, at *4 (W.D. Ky. Dec. 13, 2010) (concluding that Congress did not "intend to usurp the right of private parties to predetermine the situs of anticipated litigation under ERISA" because ERISA's venue selection provision is permissive); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.").

Becker's argument that forum selection clauses contravene ERISA's purpose by limiting "ready access to the Federal courts" (Dkt. No. 47 at 6) is equally misplaced. As the Sixth Circuit explained, a forum selection clause does not "inhibit[] ready access to federal courts when it provides for venue in a federal court." *Smith*, 769 F.3d at 931. In fact, all but two courts have concluded that there are strong public policies that support enforcement of forum selection clauses in ERISA plans, including: (1) encouraging uniformity in the decisions interpreting the plan, which furthers ERISA's goal of a uniform administrative scheme; and (2) promoting ERISA's goal of providing low-cost administration of employee benefit plans by ensuring plans are not subject to varying pronouncements

of federal district courts around the country. *See In re Mathias*, 867 F.3d at 732–33; *Smith*, 769 F.3d at 931–33; *Rodriguez*, 716 F. Supp. 2d at 861.

Contrary to Becker's assertion (Dkt. No. 47 at 13–14), the Ninth Circuit's decision in *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019) enforcing mandatory arbitration clauses in ERISA plans—which operate as a specialized forum selection clause—is consistent with this rationale. *See Smith*, 769 F.3d at 932 ("We have previously upheld the validity of mandatory arbitration clauses in ERISA plans, which are, 'in effect, a specialized kind of forum-selection clause.' It is illogical to say that, under ERISA, a plan may preclude venue in federal court entirely, but a plan may not channel venue to one particular federal court") (internal citations omitted); *Turner v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 14-cv-1244, 2015 WL 225495 at *14 (N.D. Ala. Jan. 16, 2015) ("[I]t simply makes little sense to view the enforcement schemes of ERISA and similar federal statutes as manifesting a public policy that permits a plaintiff to waive her right to proceed in the first instance in *any judicial forum at all, state or federal*, but precludes a waiver of the decidedly more limited right to select a *specific* federal judicial forum for that same proceeding); *cf. Dumont*, 192 F. Supp. 3d at 222 (acknowledging the "logical appeal" to enforcing forum selection clauses given that district courts have enforced arbitration clauses in ERISA plans, but noting that at that time no circuit court had enforced an ERISA arbitration provision).

Second, Becker purports to rely on decisions addressing forum selection clauses in claims having nothing to do with ERISA. (Dkt. No. 47 at 7–8, 11–12.) These cases are legally and factually inapposite and, in some cases, have been effectively overruled. For example, in *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263, 266 (1949), the Supreme Court declined to enforce a forum selection clause in a Federal Employers Liability Act ("FELA") case. Because FELA's special venue provision contains *mandatory* language voiding any attempt to modify the available venue, courts have found that it "is not only inapplicable to ERISA's permissive [venue] language but undermines [the] argument" against enforcing forum selection clauses in ERISA cases. *Mroch v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 14-cv-4087, 2014 WL 7005003, at *3 n.1 (N.D. Ill. Dec. 10, 2014). Other courts have observed that *Boyd*, which was decided more than seventy years ago, was "decided in an era of marked judicial suspicion of contractual forum selection," which is inconsistent with current

Supreme Court jurisprudence that contractual choice of forum is controlling "except in unusual cases." *In re Mathias*, 867 F.3d at 733 (rejecting *Boyd* as "an obscure decision of the Supreme Court" that "sheds no light on the proper interpretation of ERISA's venue provision"); *see Clause v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 15-cv-388, 2016 WL 213008, at *4 (D. Ariz. Jan. 19, 2016) (same); *Turner*, 2015 WL 225495, at *8–14 (same); *see also* 7 Williston on Contracts § 15:15 (4th ed.) ("During the past several decades, the rules governing the validity of various 'forum selection' clauses have been relaxed considerably."). *Varsic v. United States District Court for the Central District of California*, 607 F.2d 245 (9th Cir. 1979), as Becker concedes, did not even involve a forum selection clause and it is thus irrelevant. In *Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115, 1122 (9th Cir. 2011), the Court declined to compel arbitration pursuant to a foreign arbitration clause in a shipment contract because the plaintiff did not consent to such arbitration as was required by the applicable federal statute.

Third, Becker purports to rely on California Labor Code § 925 as a state public policy against enforcing the Plan's forum selection clause (Dkt. No. 47 at 12–13). Section 925 provides that, effective January 1, 2017 and thereafter, "[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" require adjudication of a case outside of California. (Emphasis added.) Even putting aside the fact that this case is governed exclusively by ERISA, which preempts state law pursuant to ERISA § 514, 29 U.S.C. § 1144, the California state law has no application to Becker because she ceased her employment four years before the law went into effect. *See, e.g.*, *Scales v. Badger Daylighting Corp.*, No. 17-cv-222, 2017 WL 2379933, at *5 (E.D. Cal. June 1, 2017) (enforcing forum selection clause and holding that Section 925 did not apply because plaintiff's employment was terminated before the enactment of Section 925). Moreover, the law has no relevance because participation in the Plan is not a condition of employment. The Plan is a voluntary tax deferred savings vehicle that employees can join at any time during their employment, can choose to discontinue participating in at any time, and can choose to continue to participate in following the termination of their employment with the Plan sponsor. (Dkt. No. 41-1 at ¶¶ 4–5, 18.) For the same reason, the cases Becker cites (Dkt. No. 47 at 13) are irrelevant as they invalidated forum selection clauses in employment agreements that

employees were required to sign as a condition for commencing employment or promotion. *See also Yates v. Norsk Titanium US, Inc.*, No. 17-cv-1089, 2017 WL 8232188, at *3 (C.D. Cal. Sept. 20, 2017) (rejecting plaintiff's argument that Section 925 was dispositive because singular reliance on state public policy does not carry the day).

Fourth, contrary to Becker's assertions (Dkt. No. 47 at 10), there are only two district courts that have declined to enforce forum selection clauses in ERISA plans, while numerous courts have enforced them. Two of the four cases cited by Becker, *Harris v. BP Corp. North America Inc.*, No. 15-cv-10299, 2016 WL 8193539 (N.D. Ill. July 08, 2016); *Coleman v. Supervalu, Inc. Short Term Disability Program*, 920 F. Supp. 2d 901 (N.D. Ill. 2013), are no longer good law in light of the Seventh Circuit's subsequent decision in *In re Mathias*, 867 F.3d at 734–35. The other two cases, *Dumont*, 192 F. Supp. 3d 209 and *Nicolas v. MCI Health & Welfare Plan No. 501*, 453 F. Supp. 2d 972 (E.D. Tex. 2006), have been criticized severely by the Sixth and Seventh Circuits and district courts in (and outside) the Ninth Circuit as "outliers" and inconsistent with Ninth Circuit precedent. *See, e.g.*, *Rodriguez*, 716 F. Supp. 2d at 861 (refusing to follow *Nicolas*); *Marin v. Xerox Corp.*, 935 F. Supp. 2d 943, 946 (N.D. Cal. 2013) (same); *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 436 (S.D.N.Y. 2007) (same); *Rapp*, 2018 WL 6307904, at *4 (refusing to follow *Dumont*); *Shah v. Wellmark Blue Cross Blue Shield*, No. 16-cv-2397, 2017 WL 1186341, at *2 (D.N.J. Mar. 30, 2017) (same).

Lastly, Becker's reliance on the DOL's amicus briefs filed in other actions that advocated for a *per se* rule invalidating forum selection clauses in ERISA plans (Dkt. No. 47 at 8–9) fares no better. The DOL's views were rejected in all of those actions, and Becker offers no reason why they should be accepted here. *See In re Mathias*, 867 F.3d at 732–34 (rejecting the DOL's position that forum selection clauses violate ERISA), *cert. denied*, 136 S. Ct. 791 (2018); *Smith*, 769 F.3d at 929 (concluding that "[t]he level of deference to be afforded the Secretary's interpretation does not determine the outcome of this case because, even were we to give the Secretary's interpretation

heightened deference . . . ERISA and our precedent do not support adopting the Secretary's position"), *cert. denied*, 138 S. Ct. 756 (2016).[1]

4. The Plan's Forum Selection Clause Applies To All Parties.

Becker argues that, even if the Plan's forum selection clause is valid, this Court should refuse to enforce it because the Plan is a contract between Becker and Wells Fargo and none of the other Defendants are signatories to the agreement. (Dkt. No. 47 at 14–15.) But, as the Ninth Circuit has made clear, where "the alleged conduct of the non-parties is so closely related to the contractual relationship" "a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses." *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988) (citation omitted); *see Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 456 (9th Cir. 2007) (enforcing forum selection clause to sister corporations of a signatory defendant); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-2752, 2017 WL 3727318 (N.D. Cal. Aug. 30, 2017) (enforcing forum selection clause against Yahoo! Inc., which was not a signatory to the contracts at issue, because it had a close relationship with the contracting entities); *Ultratech, Inc. v. Ensure NanoTech (Beijing), Inc.*, 108 F. Supp. 3d 816, 822–23 (N.D. Cal. 2015) (enforcing forum selection clause against corporate officer who was not signatory to contract) (collecting cases); *Randhawa v. Skylux Inc.*, No. 09-cv-2304, 2009 WL 5183953, at *11 (E.D. Cal. Dec. 21, 2009) (enforcing forum selection clause against non-signatory unaffiliated corporations because plaintiff alleged a "close relationship" with the contracting defendant). This Court has similarly recognized that there are circumstances in which a contractual forum selection clause can be enforced against a non-party to the contract. *See Bronstein v. U.S. Customs & Border Prot.*, No. 15-cv-2399, 2016 WL 861102, at *5 n.4 (N.D. Cal. Mar. 7, 2016) (Tigar, J.).[2]

[1] The law review article cited by Becker (Dkt. No. 47 at n.6) acknowledged that "[t]he two federal courts of appeals and a large majority of the district courts that have considered this issue sided with enforcement." (Dkt. No. 47-1 at 6.)

[2] Contrary to Becker's contention (Dkt. No. 47 at 14–15), it is of no moment that that this Court declined to enforce the forum selection clause in *Bronstein*. In *Bronstein*, the Court reached its decision based on the "unusual" circumstances of the case and, in particular, that there were federal claims against the United States and state law claims against a private company. 2016 WL 861102, at *5–6.

It is thus no surprise that courts have enforced forum selection clauses in ERISA plans where suit was commenced by a plan participant against parties in addition to the plan sponsor, including many of the same entities named as Defendants in this action. *Gipson v. Wells Fargo & Co.*, 563 F. Supp. 2d 149, 151, 159 (D.D.C. 2008) (enforcing the Plan's forum selection clause in a case against Wells Fargo Bank, National Association and the Employee Benefit Review Committee);[3] *see, e.g.*, *Marin v. Xerox Corp.*, 935 F. Supp. 2d 943, 947 (N.D. Cal. 2013) (enforcing ERISA plan forum selection clause in a case against a third-party claims processing company); *Feather v. SSM Health Care*, 216 F. Supp. 3d 934, 940 (S.D. Ill. 2016) (enforcing ERISA plan forum selection clause in a case against third party plan fiduciaries); *Laasko v. Xerox Corp.*, 566 F. Supp. 2d at 1023 (enforcing ERISA plan forum selection clause in a case against third party plan fiduciaries and individual plan administrator); *see also Dorman*, 934 F.3d at 1107 (enforcing arbitration provision in ERISA plan against affiliated bank and record-keeper and the plan's individual fiduciaries); *Cooper v. Ruane Cunniff & Goldfarb Inc.*, No. 16-cv-1900, 2017 WL 3524682, at *5–7 (S.D.N.Y. Aug. 15, 2017) (enforcing arbitration provision as to the ERISA plan's unaffiliated investment manager).

This case is no different. Here, Becker alleges that all Defendants are either affiliated entities or employees of Wells Fargo (Dkt. No. 1 at ¶¶ 21–30, 43–58) and "are all fiduciaries of the Wells Fargo Plan" (*id.* at ¶ 2). Furthermore, all of Becker's claims against all Defendants plainly involve the Plan and the Plan fiduciaries' decisions concerning certain investment options available in the Plan. (*Id.* at ¶¶ 2, 184, 193, 219.)

B. The Traditional Section 1404(a) Factors Clearly Favor Transfer Of This Action To The District Of Minnesota.

Becker nowhere disputes that where, as here, a valid, enforceable forum selection clause exists, the traditional Section 1404(a) analysis is replaced with consideration of five specific public interest factors. (Dkt. No. 41 at 8.) She also does not dispute that because public interest factors will "rarely defeat" a transfer to the contractually chosen forum, "the practical result is that forum-selection

[3] Whether or not *Gipson* considered every argument raised by Becker here does not, as Becker contends (Dkt. No. 47 at 14), make *Gipson* any less persuasive as to the enforceability of the Plan's forum selection clause.

clauses should control except in unusual cases." *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 571 U.S. 49, 64 (2013). As discussed in Defendants' Moving Brief (Dkt. No. 41 at 11–12), the public interest factors clearly favor transfer of this action to the District of Minnesota.

Even if the traditional Section 1404(a) factors were applicable, they would not militate against transfer to the District of Minnesota. A review of each factor demonstrates that Becker has not offered any reason to conclude that the action should remain in California.

Contrary to Becker's assertion (Dkt. No. 47 at 17), the fact that she worked for Wells Fargo in California is not relevant to where the relevant agreements were negotiated and executed (first factor) because "negotiations or agreements related to her employment" in California have no bearing on her claims that the Plan fiduciaries allegedly breached their fiduciary duties under ERISA in connection with certain Plan investment options. As discussed (Dkt. No. 41 at 4–6), all Plan administration took place in Minnesota. (Dkt. No. 41 at 13; Dkt. No. 41-1 ¶¶ 9–17.)

Becker concedes that the state most familiar with the governing law (second factor) is "mostly neutral" (Dkt. No. 47 at 17). She contends nevertheless that a California court is best suited to interpret the Declaration of Trust. But, as discussed, this is not a case against the CITs and is thus not about the Declaration of Trust or California law. Rather, this is a case arising under ERISA against the Plan fiduciaries concerning their decisions to make certain investment options available in the Plan, including CITs, mutual funds, and a stable value fund.

Becker argues her choice of forum (third factor) should be afforded great deference. (Dkt. No. 47 at 18–19.) But she fails to distinguish the cases holding that choice of forum is accorded little or no deference in class action lawsuits which, like this one, is brought on behalf of thousands of class members located throughout the United States. *See, e.g.*, *Peters v. Wells Fargo Bank, N.A.*, No. 17-cv-4367, 2018 WL 398238, at *2 (N.D. Cal. Jan. 12, 2018) (Tigar, J.) ("When an individual brings a derivative suit or represents a class . . . the named plaintiff's choice of forum is given less weight.") (citation omitted). Becker's reliance on *Reyes v. Bakery & Confectionery Union & Industry International Pension Fund*, No. 14-cv-5596, 2015 WL 1738269 (N.D. Cal. Apr. 9, 2015) (Tigar, J.) is misplaced because in that case, unlike here, the other factors did not clearly establish the transferee forum as more convenient.

Becker also argues that "the respective parties' contacts with the forum," and "the contacts relating to the plaintiff's cause of action in the chosen forum" (fourth and fifth factors) favor litigating this action in California. But the fact that Becker resides in California and that Wells Fargo is headquartered in California (Dkt. No. 47 at 18) is irrelevant. As discussed, this is a case against the Plan fiduciaries concerning their decisions to make certain investment options available in Plan, all of which occurred in Minnesota. (Dkt. No. 41-1 at ¶¶ 9–17.) *See Gipson*, 563 F. Supp. 2d at 159 (concluding that "notwithstanding the forum selection clause, the District of Minnesota is still the most appropriate venue because the Plan is administered in Minnesota, the events and activities that give rise to the alleged fiduciary breach took place in Minnesota, the majority of the relevant witnesses will be situated in Minnesota, and a significant proportion of Plan participants reside in Minnesota").

Becker argues that the differences in the costs of litigation in the two forums (sixth factor) weigh against transfer because not every potential document or witness resides in Minnesota. (Dkt. No. 47 at 19–20.) But she has not identified *any* relevant witness or documents that are in California. *See Italian Colors Rest. v. Am. Express Co.*, No. 03-cv-3719, 2003 WL 22682482, at *5 (N.D. Cal. Nov. 10, 2003) (weighing this factor "heavily in favor" of transfer where a majority of documentary and testamentary evidence resided in the transferee district and where plaintiff would contribute "comparatively little documentary evidence" to the action); *Int'l Union, United Mine Workers of Am. v. CONSOL Energy, Inc.*, No. 16-cv-12506, 2020 WL 3001670, at *20 (S.D. W. Va. June 4, 2020) (granting motion to transfer and weighing Section 1404(a) factors in favor of defendants in part because it was "likely that many of the relevant Plan officials" resided in or near the desired transferee forum).

Becker concedes that availability of compulsory process to compel attendance of unwilling non-party witnesses (seventh factor) is neutral. (Dkt. No. 47 at 20.)

Becker offers nothing new about the "the ease of access to sources of proof" (eighth factor). For reasons explained in connection with the fourth and factors, this factor strongly favors transfer to the District of Minnesota.

In short, the convenience of the parties and witnesses, and the interest of justice, clearly support transferring this matter to the District of Minnesota.

II. DEFENDANTS DO NOT OPPOSE BECKER'S REQUEST THAT THIS ACTION BE STAYED BEFORE THE TRANSFER OF VENUE IS IMPLEMENTED.

Becker requests that if this Court grants Defendants' Motion to Transfer Venue that this action be stayed to allow her to seek appellate review. Although Defendants question whether Becker would have any reasoned basis to seek appellate review, Defendants agree that moving forward with this case before the forum is established would result in "procedural inefficiencies" (Dkt. No. 47 at 22). *See Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1361 (C.D. Cal. 1997) (granting motion to stay pending motion to transfer because "there are no guarantees that an order by this Court would not later be vacated and this Court's investment of time and resources would not have been in vain" given that transferee judges "have been known" to vacate or modify previous rulings of the transferor judge).[4]

CONCLUSION

For the reasons stated herein and those stated in Defendants' Moving Brief, this Court should enforce the Plan's forum selection clause and transfer this matter to the United States District Court for the District of Minnesota. Alternatively, the Court should transfer this matter to the United States District Court for the District of Minnesota based on 28 U.S.C. § 1404(a)'s traditional factors.

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Respectfully submitted,

By: */s/ Russell Hirschhorn*

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[4] Contrary to Becker's contention (Dkt. No. 47 at 23), there is no "substantial ground for difference of opinion" on the enforceability of the Plan's forum selection clause and thus no basis for interlocutory appeal under 28 U.S.C. § 1292(b). As discussed, the overwhelming majority of courts have upheld forum selection clauses in ERISA plans.

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