UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DONALD F. JULIANO,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**No. 3:04CV1091(DJS)**
	:	
CECIL SAYDAH COMPANY, LOUISVILLE SAYDAH HOME FASHIONS, HAROLD SCHEIRHOLT, and JOHN JOHN SHAWGER,	:	
	:	
Defendants.	:	

MEMORANDUM OF DECISION AND ORDER

Now pending in this diversity action for damages based upon California employment law is defendants' motion (dkt. # 8) to dismiss this action pursuant to Rules 12(b)(2) and (3) of the Federal Rules of Civil Procedure or, in the alternative, to transfer venue pursuant to 28 U.S.C. §§ 1404(a) and 1406(a). For the reasons that follow, defendant's motion to dismiss (dkt. # 8) is **GRANTED.**

I. BACKGROUND

Plaintiff began working as a sales representative with defendants on or about January 1, 1986 until the termination of this relationship on January 7, 2003. Plaintiff brings this action against defendants seeking unpaid compensation and benefits allegedly due because defendants improperly classified him as an independent contractor rather than an employee.

On February 21, 1994, plaintiff and defendant Cecil Saydah

Company executed an Independent Contractor Agreement. The Independent Contractor Agreement sets forth the following clause:

> The validity, interpretation and performance of this Agreement shall be controlled by and construed under the laws of the State of California, to which jurisdiction and venue [plaintiff] agrees to be bound. Any lawsuit arising from this Agreement or the performance thereof, shall be venued in the Superior or Municipal Court of the County of Los Angeles, State of California.

(Dkt. # 7, Ex. B, § V 2. at 8).

II. DISCUSSION

Defendants contend that the forum selection clause in the Independent Contractor Agreement requires that this action be litigated in the State of California Superior or Municipal Court for the County of Los Angeles, and, therefore, that this action must be dismissed because venue is not proper in the District of Connecticut. "A forum selection clause is enforceable unless it is shown that to enforce it would be 'unreasonable and unjust' or that some invalidity such as fraud or overreaching is attached to it." New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG, 121 F.3d 24, 29 (2d Cir. 1997) (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)); see Evolution Online Systems, Inc. v. Koninklijke PTT Nederland N.V., 145 F.3d 505, 510 n.10 (2d Cir. 1998) (applying M/S Bremen analysis to non-admiralty cases). A forum selection clause is unreasonable under the following circumstances:

(1) if [its] incorporation into the agreement was the

> result of fraud or overreaching . . .; (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the selected forum . . .; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy . . .; or (4) if the clause[] contravene[s] a strong public policy of the forum state. . . .

Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1364 (2d Cir. 1993) (quoting M/S Bremen, 407 U.S. at 18) (citations to M/S Bremen omitted). "The party claiming unreasonableness of a forum selection clause bears a heavy burden; in order to escape the contractual clause, he must show 'that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.'" New Moon Shipping Co., Ltd., 121 F.3d at 32 (quoting M/S Bremen, 407 U.S. at 15).

Plaintiff contends that the insertion of the forum selections clause was the product of fraud or overreaching. In support of his argument, he claims that (1) he received the proposed Independent Contractor Agreement in February of 1994, or eight years after he was working for defendant Cecil Saydah Companies; (2) that there was no cover letter explaining the significance of the proposed Independent Contractor Agreement; (3) that no agent of defendants advised him that he could review the contract with a lawyer; (4) that his supervisors stated that there was no reason for plaintiff to review the contract with a lawyer; (5) that only six of the twelve salespeople were asked to

sign the Independent Contractor Agreement; (6) that he was only permitted to make one change to the proposed Independent Contractor Agreement; (7) that he did not receive any additional compensation in exchange for executing the agreement; and (8) that five days was not a realistic period for review of the proposed Independent Contractor Agreement.

Plaintiff has not set forth a prima facie case of fraud or overreaching. "The legal effect of a forum-selection clause depends in the first instance upon whether its existence was reasonably communicated to the plaintiff." Effron v. Sun Line Cruises, Inc., 67 F.3d 7 (2d Cir. 1995). Plaintiff admits that defendants provided five days for him to review the contract. Further, although he claims that his supervisors advised him that legal advice was not necessary, they did not preclude him from seeking it. Plaintiff relies principally upon the premise that an employee is inherently in a subordinate bargaining position to his or her employer, and cites authority noting this disparity. This premise standing alone, absent any indicia of coercion, is not enough to prove fraud or overreaching. Plaintiff in effect argues the forum selection clauses in an employer and employee relationship should be unenforceable per se, which is a position for which there is no support in this circuit.

Plaintiff also alleges, in conclusory fashion, that he would be unable to pursue his claims in California. Although the court

acknowledges that Connecticut is a more convenient forum for him, plaintiff does not explain how he is unable to pursue his claims in California. He has retained counsel in Connecticut, and presumably would be able to retain counsel in California. Plaintiff has not demonstrated that litigating his claims in the forum mandated by the Independent Contractor Agreement would deprive him of his right to pursue these claims altogether.

III. CONCLUSION

For the above reasons, defendants' motion to dismiss (dkt. # 8) this action is **GRANTED**. This case is **DISMISSED** without prejudice. The Clerk of the Court shall close this file.

So ordered this 28th day of February, 2005.

/s/DJS

DOMINIC J. SQUATRITO
UNITED STATES DISTRICT JUDGE