UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ORTHO-CLINICAL DIAGNOSTICS, INC.,

Plaintiff,

- against-

MAZUMA CAPITAL CORP,

Defendant.

Civil Action No.: 18-cv-06416-CJS

Oral Argument Requested

PLAINTIFF ORTHO-CLINICAL DIAGNOSTICS, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT MAZUMA CAPTIAL CORP.'S MOTION TO DISMISS

CHIESA SHAHINIAN & GIANTOMASI PC
11 Times Square, 31st Floor
New York, NY 10036
(212) 973-0572
Attorneys for Plaintiff
Ortho-Clinical Diagnostics, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Plaintiff Ortho-Clinical Diagnostics, Inc. ("Ortho" or "Plaintiff"), respectfully submits this Memorandum of Law in Opposition to the Motion to Dismiss filed by the defendant, Mazuma Capital Corp. ("Mazuma" or "Defendant"). For the reasons set forth herein, Mazuma's motion should be denied.

First, Mazuma's motion to dismiss should be denied because venue is proper in this district and a forum selection clause identifying another forum is not a basis for dismissal under Rule 12 of the Federal Rules of Civil Procedure. Specifically, the United State Supreme Court has made clear that if venue is proper under 28 U.S.C. § 1391, a forum selection clause is not a proper basis for a motion to dismiss under Rule 12(b) and attempted enforcement of such a clause should be brought as a motion to transfer. Here, Mazuma has not sought to transfer this case – affirmatively or in the alternative – and for this reason alone the motion should be denied.

Even if this Court were to look at the forum selection clause and *sua sponte* convert Mazuma's motion to dismiss to a motion to transfer (which Second Circuit case law counsels against), the forum selection clause cannot and should not be enforced because it is void as against public policy. New York has a strong public policy against automatic renewal clauses like the one at issue here and New York's General Business Law includes a statute which severely curtails enforcement of such clauses. At the same time, New York courts have recognized that such clauses are unenforceable as unconscionable. As a New York entity with a principal place of business in New York, and with the Property that is the subject of the action in New York, Ortho is entitled to the protection of New York's laws; enforcement of the forum selection clause will eviscerate that right.

Through this action, Ortho seeks a declaratory judgment that (a) Mazuma's Lease Agreements (as defined herein and in the Complaint) are in violation of New York's General

Business Law and are unconscionable, and (b) Ortho has met its obligations under the Lease Agreements such that they do not automatically renew and Ortho is entitled to a return of the Property. Since the filing of this lawsuit, Ortho has learned that Mazuma has a long and tortured history of unconscionable business practices as it relates to its leases, which has generated press coverage and multiple litigations. New York has a strong public policy protecting its citizens from this type of conduct, as exemplified by the statutory provision referenced above. The United States Supreme Court has recognized that forum selection clauses should not be enforced when to do so would be against the forum state's public policy. Here, enforcement of Mazuma's lease would be directly against this policy. Accordingly, for this reason as well, Mazuma's motion should be denied.

STATEMENT OF FACTS

Ortho is an in vitro diagnostics company that manufactures, sells and distributes a variety of products, reagents, and diagnostic equipment used to test for various diseases, conditions and substances in both humans and animals. *See* Complaint ¶ 10 (ECF No. 1), annexed as Exhibit A to the Declaration of Richard P. O'Leary. Ortho is a New York corporation, and operates a large research and development facility in Rochester, New York, which manufactures a variety of products utilized around the world. *Id.* at ¶¶ 4, 10.

On or about June 20, 2016, Ortho entered into a series of agreements to effectuate a sale and leaseback transaction (collectively, the "Lease Agreements") with Mazuma, a privately-owned leasing company that provides equipment financing. *Id.* at ¶¶ 1, 2, 5. The Lease Agreements concern equipment that was assembled, installed and operated at Ortho's plant in Rochester, New York (the "Property"). *Id.* ¶ 12. As part of the transactions, Ortho received $27 million in cash and $9 million held back as a security deposit. *Id.* ¶ 13. The Lease Agreements were for a Base Period of twenty-four months from July 1, 2016 through June 30, 2018 with

payments of $1,507,967.38 per month for a total of $36,191,217.12, along with a security deposit of approximately $9 million which Ortho paid. *Id.* ¶ 49. The Lease Agreements set forth a Total Property Cost of $36,336,563.11. *Id.*

Section 21(k) of the Master Lease Agreement ("Section 21(k)"), one of the documents comprising the Lease Agreements, includes an automatic renewal provision and specifically provides as follows:

> At the end of the Base Period of any Schedule, unless otherwise provided herein, the Schedule shall automatically renew for twelve (12) additional months at the rate specified on the respective Schedule. Provided that Lessee [Ortho] gives written notice to Lessor [Mazuma] by certified mail received by Lessor at least one hundred fifty days prior to the end of the Base Period of any Schedule, Lessee shall be granted the opportunity to negotiate with Lessor concerning one of the following options: (1) purchase the Property for a price to be determined by Lessor and Lessee, or (2) terminate the Schedule and return the Property to Lessor at Lessee's expense to a destination within the continental United States specified by Lessor provided, however, that for option (2) to apply, all accrued but unpaid late charges, interest, taxes, penalties, and any and all other sums due and owing under the Schedule must first be paid in full, the provisions of Sections 8e, 8h and 9c hereof must be specifically complied with, and Lessee must enter into a new Schedule with Lessor to lease Property which replaces the Property listed on the old Schedule. With respect to options (1) and (2), each party shall have the right in its sole discretion to accept or reject any terms of purchase or of any new Schedule, as applicable. In the event Lessor and Lessee have not agreed to either option (1) or (2) prior to the maturity of the Base Period, or if Lessee fails to give written notice via certified mail at least one hundred fifty (150) days prior to the maturity of the Base Period of its intent to negotiate, or if an Event of Default has occurred under any Schedule, then options (1) and (2) shall expire and the Schedule shall automatically renew as provided herein. At the maturity of the initial twelve (12) month renewal period provided above, the Schedule shall continue in effect at the rate specified in the respective Schedule for successive periods of six (6) months, each subject to termination at the maturity of any such successive six-month renewal period by either Lessor or Lessee giving the other party at least thirty (30) days prior written notice of termination. Lessee acknowledges that Lessor has no obligation to

> enter into any agreement as a result of the initiation of discussions concerning options (1) or (2).

Id. ¶ 19.

As noted, subsequent to entering into the Lease Agreements, Ortho made payment in full in cash for all amounts due in monthly rental payments and other payments under the Lease Agreements during the two-year term (*i.e.*, Base Period). *Id.* ¶ 50. On June 30, 2017, Ortho sent written notice to Mazuma informing Mazuma that Ortho was exercising its rights under Section 21(k) of the Master Lease Agreement to negotiate with Mazuma the purchase of the Property set forth in the Lease Agreements. *Id.* ¶ 52.

With the end of the Lease Agreements approaching, on May 23, 2018, Ortho sent Mazuma a letter (i) requesting that Mazuma return the Security Deposit pursuant to Section 11(g) and/or (f) of Lease Schedules 1, 2 and 3 by June 1, 2018; and (ii) offering a purchase price of $2,375,000.00 for the Property. *Id.* ¶ 53. The purchase price was derived as a result of consultation with an outside equipment appraisal professional. *Id.* As permitted under the Lease Agreements, Ortho intended to apply the monthly rental deposit that Ortho had paid to Mazuma pursuant to Section 8 of the respective Lease Schedules as Ortho's final monthly rental payment during the base periods of the Lease Schedules. *Id.*[1] The $2,375,000 offer by Ortho was more than reasonable as it represents an internal rate of return ("IRR") of 10.1%. *See* Certification of John Sanders ("Sanders Cert.") ¶ 4. To put this in context, the current market rate for secured loans like the Lease Agreements is 5.5%. *Id.* ¶ 3

[1] The monthly rental deposit (one month's rent) is different from the Security Deposit (approximately $9 million) and the Lease Agreements specifically permit Ortho to apply it to the last month's rent. Complaint, Exs. B, C, D at p. 1, § 6.

At no point prior to Ortho's May 23, 2018 letter did Mazuma provide written notice to Ortho calling attention to Section 21(k) of the Master Lease Agreement and the automatic renewal of the Lease Schedules under said provision at least one hundred and fifty (150) days prior to the expiration of the base period for the Lease Schedules as required by New York law. *Id.* ¶ 51.

Mazuma rejected Ortho's offer to purchase the Property for $2,375,000.00 and proposed a counteroffer to sell the Property to Ortho for $18,168,281.56 – representing Mazuma's calculation of the maximum purchase amount permitted under the terms of the Lease Agreements. *Id.* ¶ 54. Mazuma stated that it would apply Ortho's Security Deposit towards this full purchase price and Ortho would be required to remit an additional $9,084,140.78 (plus applicable taxes and fees) to Mazuma to purchase the Property. *Id.* Because Ortho had already paid Mazuma a total of $36,191,217.12 under the Lease Agreements, under Mazuma's purchase offer, Mazuma would receive over $18,000,000 in additional financing charges on a two year fully secured agreement. This would amount to an internal rate of return of **56%**. Sanders Cert., ¶ 5. Stated another way, Mazuma was demanding to receive approximately $54,000,000 on a $36,000,000 two year lease back transaction.

In addition, Mazuma asserted the position that if Ortho paid the full purchase amount Mazuma was demanding by the end of the Base Period (*i.e.*, June 30, 2018), then Mazuma would apply the monthly rental deposit that Ortho had paid to Mazuma pursuant to Section 8 of the respective Lease Schedules as Ortho's final monthly rental payment. *Id.* ¶ 55. However, Mazuma also stated the unfounded and commercially unreasonable position that if Ortho did not pay Mazuma the full purchase price it was demanding, (i) the monthly rental deposit would not be applied as the June 1, 2018 payment, (ii) the Lease Schedules would automatically renew for

a twelve month period, and (iii) Ortho would purportedly be in default of the Lease Agreements if it did not pay the next monthly rental payment by June 10, 2018. *Id.* Of course, under Section 21(k), after a twelve month automatic renewal, there would be an additional six month automatic renewal. *Id.* ¶ 9, Ex A ("At the maturity of the initial twelve (12) month renewal period provided above, the Schedule shall continue in effect at the rate specified in the respective Schedule for successive periods of six (6) months . . . ."). Thus, according to Mazuma's unreasonable demand, if Ortho did not accept its purchase price, the Lease Agreements would renew for at least an additional eighteen months, which equates to payment of an additional approximately $24,000,000. This would have Ortho paying Mazuma over $60,000,000 over 42 months for an original $27,000,000 advance – an IRR of over **74%**. Sanders Cert. ¶ 6. It is clear that Mazuma's strategy all along was to attempt to extort an $18,000,000 purchase price (which bears no relation to the value of the collateral) by threatening Ortho with an exorbitant and punitive renewal charge. As discussed further below, this is apparently a strong arm tactic that Mazuma frequently employs.

In response, Ortho advised Mazuma that its position was unreasonable, in violation of New York law and public policy, and that Ortho had met its obligations under the Lease Agreements by electing to negotiate a purchase of the equipment which under the terms of the Lease Agreements ensures such the Lease Schedules would not automatically renew. *Id.* ¶ 56. Specifically, by letter dated May 31, 2018, Ortho advised Mazuma as follows:

> Lessor [Mazuma] failed to comply with applicable New York Law which required Lessor to provide written notice of its intent to re-lease the property and specifically call attention to the renewal provision. See NY Gen. Oblig. §§ 5-901; 5-903. Lessor did not provide Lessee with the requisite statutory notice. Therefore, the renewal provision in the Master Lease Agreement is unenforceable as a matter of law.

See Certification of Adam K. Derman ("Derman Cert."), Ex. A (May 31, 2018 letter). Ortho's letter also pointed out that Mazuma's position was particularly unreasonable because it purports to require payment for the "soft costs" itemized on Schedule 3 of the Lease Agreements. *Id.* Soft costs are not part of the definition of "Property" under the Master Lease Agreement and, in any event, had no independent value at the time of Ortho's purchase option exercise. *Id.* Thereafter, Mazuma continued to refuse to substantively revise its position and showed no willingness to engage in good faith negotiations grounded in the value of the Property to be acquired by Ortho – *i.e.,* Mazuma insisted on an $18,168,281.56 purchase price. Complaint ¶ 57. Specifically, by letter dated June 1, 2018, Mazuma responded to Ortho's May 31, 2018 letter and advised that it would sell the Property to Ortho for nine monthly installments of one million dollars plus the approximately nine million dollar security deposit. *See* Derman Cert., Ex. B (June 1, 2018 letter). This is the same approximately $18 million that it previously demanded and, again, the absolute maximum value allowed under the Lease Agreements and an IRR of over 50%. In the June 1, 2018 letter, Mazuma again reiterated its extortive position that if Ortho did not agree to Mazuma's required purchase price, the Lease Schedules would automatically renew and Ortho would be in default of the Lease Agreements if it did not make a monthly lease payment immediately thereafter. Complaint, ¶ 58. Mazuma also continued to refuse Ortho's demand to return the Security Deposit. *Id.*

Recognizing that it had failed to comply with New York's General Obligations Law, on June 7, 2018, Mazuma delivered a notice to Ortho which is required for all automatic renewal leases. *See* Derman Cert., Ex. C (June 7, 2018 letter). Although Mazuma's June 1, 2018 letter was from its outside counsel, this letter came directly from Mazuma and included in bold block print at the top the following notice:

NOTICE UNDER N.Y. GOB § 5-901 AND § 5-903

Id. Mazuma's notice was untimely; the statute specifically requires that such notice be given in advance of the 150-day deadline set forth in Section 21(k). Mazuma's notice was over 120 days late. If New York law were to be applied, Mazuma should not be able to enforce the automatic renewal provisions in its Lease Agreements for this reason alone.

Later that day, on June 7, 2018, Ortho filed this action against Mazuma seeking, among other forms of relief, a declaratory judgment that the automatic renewal provisions in the Lease Agreements (Section 21(k)) are in violation of New York's General Obligations law, void against public policy and unconscionable and therefore unenforceable as a matter of New York law. Complaint ¶ 2. In the alternative, Ortho seeks a declaratory judgment that it has met its obligations under the Lease Agreements to negotiate in good faith and that the Lease Agreements do not automatically renew. *Id.* ¶ 1.

After Ortho filed its Complaint, on June 12, 2018, Mazuma filed a Complaint against Ortho in Utah seeking a declaratory judgment that it was entitled to keep Ortho's Security Deposit. Subsequently, on June 14, 2018, Mazuma filed an Amended Complaint against Ortho in Utah alleging additional claims, including replevin of the Property that is located in New York. Derman Cert., Ex. D (Amended Complaint). Mazuma never served its Complaint and its Amended Complaint was not served until June 26, 2018. Derman Cert., Ex E (CT Corp., Service of Process Notification). Since filing the Complaint, Ortho has learned that Mazuma is notorious for inducing customers into entering into these automatic renewal leases with false promises that it would be "reasonable" when negotiating the purchase price and has been sued repeatedly for its predatory business practices. *See, e.g.,* Derman Cert, Exs. F (Complaint filed in *Win Enterprises, Inc. v. Mazuma Capital Corp*. (Utah 3rd District Court, Salt Lake County, Case No.

160904120)); G (Amended Complaint filed in *United Container, LLC v. Mazuma Capital Corp.* (U.S. District Court, D. Utah, Case No. 2:10-cv-00723)); H (Desert News articles). An article published on the practice even reported that Mazuma salesman are taught to lie to customers, while being careful not to put in writing their purported assurances of reasonable conduct. *See* Derman Cert., Ex. H. Ortho intends to demonstrate that Mazuma's conduct was similar in this case.

On July 2, 2018, Mazuma filed its Motion to Dismiss, pointing to the forum selection clause contained in the Lease Agreements, which provides that suits to enforce or construe the Lease Agreements or the relationship of the parties should be filed in a Utah court. ECF Dkt. No. 5. For the reasons set forth below, Ortho respectfully requests that this Court deny Mazuma's motion to dismiss and allow Ortho's claims to remain in this venue for resolution.

LEGAL ARGUMENT

I. MAZUMA'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE VENUE IS PROPER IN THIS DISTRICT AND ENFORCEMENT OF A FORUM SELECTION CLAUSE IS NOT A BASIS FOR DISMISSAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(B)

Mazuma's motion to dismiss should be denied because enforcement of a forum selection clause is not a proper basis to dismiss a case where venue is proper under 28 U.S.C. § 1391. Citing outdated case law, Mazuma represents that there is a "split of authority" in the Second Circuit regarding the proper procedure for enforcing a forum selection clause and moves to dismiss the Complaint on the basis of Rule 12(b). *See* Defendant Mazuma Capital Corp's Memorandum of Law in Support of its Motion to Dismiss ("Mazuma's Br.") at 3. In fact, in 2013, the United States Supreme Court held that a determination of whether venue is proper "depends exclusively" on whether the court in which the case was brought satisfies the requirements of federal venue laws. *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist.*

of Tex., 571 U.S. 49, 55 (2013). A forum selection clause "has no bearing" on the question of proper venue; indeed, when venue is appropriate under § 1391, a forum selection clause ***cannot*** render venue "improper" within the meaning of Rule 12(b)(3). *Id.* at 56. Instead, where a complaint was filed properly in a district pursuant to § 1391, but a defendant believes a forum selection clause governs, it must be addressed through a motion to transfer under 28 U.S.C. § 1404(a). *Id.* at 59; *see also Martinez v. Bloomberg LP*, 740 F.3d 211, 216 (2d Cir. 2014) (noting that the Court in *Atlantic Marine* held that forum selection clause cannot be enforced via Rule 12(b)). Mazuma has not filed a motion to transfer, does not seek transfer as an alternative remedy, and makes no mention of 28 U.S.C. § 1404(a) in its notice of motion or memorandum of law.

Pursuant to 28 U.S.C. § 1391(b)(2), an action may be brought in a district in which "a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(b)(2). As set forth in the Complaint, venue is proper in this Court under this provision because Ortho's claims against Mazuma concern equipment that was assembled, installed, and currently operates in this district. Complaint ¶ 8. In fact, Mazuma does not contend that Ortho fails to meet the requirements of § 1391.

Accordingly, because the requirements of § 1391 are satisfied, venue in this district is proper and Mazuma's motion to dismiss should be denied on this basis alone. Mazuma has not moved to transfer pursuant to § 1404(a) – affirmatively or in the alternative – and thus there is no basis for this Court to consider a change of venue. *See Acosta v. Artuz*, 221 F.3d 117, 122 (2d Cir. 2000) (stating that "[g]enerally, courts should not raise sua sponte nonjurisdictional defenses not raised by the parties"); *Sit N' Stay Pet Servs., Inc. v. Hoffman*, No. 17-CV-00116-LJV-JJM, 2017 WL 3845595, at *2 (W.D.N.Y. Apr. 17, 2017) (refusing to "restructure the Motion as being

both a request for dismissal for lack of jurisdiction and a failure to state a claim" where defendants did not move for dismissal under Rule 12(b)(6).

II. THE FORUM SELECTION CLAUSE IS UNENFORCEABLE AS AGAINST PUBLIC POLICY

Were this Court to entertain Mazuma's Motion to Dismiss as a motion to transfer pursuant to § 1404(a), this form of relief is likewise not appropriate because the forum selection clause in the Lease Agreements is not enforceable. Courts refuse to enforce forum selection clauses that are "'unreasonable' under the circumstances," which can be demonstrated on one of the following grounds: (1) the forum selection clause "was the result of fraud or overreaching"; (2) "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) "the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy"; or (4) the forum selection clause contravenes "a strong public policy of the forum state." *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

In arguing that the forum selection clause contained in the Lease Agreements is "reasonable," Mazuma references the first three grounds articulated in *Roby* and *The Bremen*, but conveniently neglects to acknowledge the fourth basis, namely that a forum selection clause is "unreasonable" if it contravenes "a strong public policy of the forum state." Mazuma's Br. at 7-8. Indeed, a court may refuse to enforce a forum selection clause "based ***solely*** on its conflict with a strong public policy of the forum state." *DeBello v. VolumeCocomo Apparel, Inc.*, 720 F. App'x 37, 40 (2d Cir. 2017) (citing *M/S Bremen*, 407 U.S. at 15) (emphasis added). The forum selection clause here, which would prevent Ortho from pursuing its claims in a New York court, should not be enforced on multiple public policy grounds.

A. New York General Obligations Law § 5-901 Embodies A Strong Public Policy Against Automatic Renewal Clauses Such As Section 21(k)

The forum selection clause should not be enforced because New York has a fundamental public policy against enforcing automatic renewal provisions in leases for personal property, such as Section 21(k) of the Master Lease Agreement. Under New York law, an automatic renewal provision in a lease for personal property is enforceable ***only if*** the lessor gives the lessee written notice of the provision within a designated timeframe. Specifically, New York General Obligations Law § 5-901 provides:

> **No provision of a lease of any personal property which states that the term thereof shall be deemed renewed for a specified additional period unless the lessee gives notice to the lessor of his intention to release the property at the expiration of such term, shall be operative unless the lessor, at least fifteen days and not more than thirty days previous to the time specified for the furnishing of such notice to him, shall give to the lessee written notice, served personally or by mail, calling the attention of the lessee to the existence of such provision in the lease**. Nothing herein contained shall be construed to apply to a contract in which the automatic renewal period specified is one month or less.

N.Y. Gen. Oblig. § 5-901 (emphasis added).

As set forth in Ortho's complaint, Mazuma absolutely failed to comply with this statute. Complaint ¶ 51. Section 21(k) required Ortho to provide Mazuma with written notice "at least one hundred fifty days" prior to the expiration of the Lease Agreements in order to terminate the Lease Agreements. Under § 5-901, Mazuma was therefore required to serve Ortho with written notice of the automatic renewal provision "at least fifteen days and not more than thirty days" before the 150-day deadline. It did not. In fact, in a belated attempt to simulate compliance with § 5-901 after Ortho advised of Mazuma's noncompliance with the statute, Mazuma sent notice to Ortho with the heading **"NOTICE UNDER N.Y. GOB § 5-901 AND § 5-903"** on June 7, 2018 ***– a mere three weeks before the Lease Agreements expired and more than five months after***

the time required by the New York statute. This, of course, did not comply with § 5-901's strict notice requirement.

Citing the legislative history of § 5-901, the New York Appellate Division, First Department has noted its "remedial nature" and construed it broadly, explaining that the statute "seeks to protect all businessmen from fast talking sales organizations armed with booby traps which they plant in business contracts involving equipment rentals." *Peerless Towel Supply Co. v. Triton Press, Inc.*, 160 N.Y.S.2d 163, 164-65 (1st Dep't 1957) (quoting New York Legislative Annual 1953, pp. 61-62). In other words, the purpose of the law is to protect New York citizens from this predatory business practice by refusing to enforce automatic renewal provisions unless the lessor follows a precise notice requirement. If the forum selection clause at issue here is enforced, Ortho will be denied the protection of § 5-901 and the statute will be rendered meaningless.

Moreover, New York courts have determined that this statute embodies a significant state public policy. In *Andin International Inc. v. Matrix Funding Corp.*, 194 Misc. 2d 719 (Sup. Ct. N.Y. Cty. 2003), the Court considered an automatic renewal provision nearly identical to Section 21(k) that a Utah-based lessor sought to impose on a New York-based lessee concerning equipment that was used in New York. Recognizing the significant "public policy purpose" of this statute, the Court held that § 5-901 "was enacted specifically to protect New Yorkers from this type of lease provision." *Id.* at 722-23. As a result, the Court disregarded the lease agreement's choice of law provision calling for the application of Utah law and, instead, applied this New York statute. *Id.* at 723. Thus, without question, Mazuma's attempts to enforce this automatic renewal clause are contrary to a strong public policy of New York, the forum state.

Courts in other jurisdictions have refused to enforce forum selection clauses based on the state's strongly held public policy of protecting its citizens, including from oppressive business practices. *See, e.g., Doe 1 v. AOL LLC*, 552 F.3d 1077 (9th Cir. 2009) (finding forum selection clause designating Virginia courts unenforceable as to California resident plaintiffs bringing class action claims under California consumer law based on California's public policy against consumer class action waivers and waivers of consumer rights under the Consumer Legal Remedies Act); *Jones v. GNC Franchising, Inc.*, 211 F.3d 495 (9th Cir. 2000) (finding forum selection clause designating Pennsylvania courts unenforceable because it contravened California's strong public policy against enforcing such clauses in franchise agreements based on statute voiding franchise agreement provisions restricting venue to a forum outside of California); *Black Hills Truck & Trailer, Inc. v. MAC Trailer Mfg., Inc.*, Civ. 13–4113–KES, 2014 WL 12768809 (D.S.D. Apr. 14, 2014) (finding forum selection clause designating Ohio courts unenforceable in vehicle franchise agreement based on South Dakota statute prohibiting such clauses in franchise agreements); *Rodriguez v. Ryder Mem'l Hosp., Inc.*, 964 F. Supp. 2d 208 (D.P.R. 2013) (finding that forum selection clause in medical admissions forms violates Puerto Rico's public policy against such clauses in informed consent forms based on state regulation); *Ins. Prods. Mktg., Inc. v. Indianapolis Life Ins. Co.*, 176 F. Supp. 2d 544 (D.S.C. 2001) (finding a forum selection clause designating Indiana courts unenforceable based on South Carolina statute prohibiting such clauses in any contract).

Likewise, the forum selection clause here, which would prevent Ortho from pursuing its claims in a New York court, including its claim for a declaratory judgment that Section 21(k) is unenforceable pursuant to § 5-901, contravenes New York's strongly held public policy against the enforcement of automatic renewal provisions such as Section 21(k). Compelling Ortho to

litigate its claims in Utah pursuant to the forum selection clause is particularly unjust because Utah has no statute comparable to § 5-901; to the contrary, an automatic renewal provision similar to the one in the agreements at issue in this matter has been upheld in Utah court, albeit under different circumstances. *See Republic Bank v. Ethos Env., Inc.*, No. 1:09 cv 24 BCW, 2011 WL 587772, at * 5 (D. Utah Feb. 9, 2011) (finding no unconscionability or bad faith where the total payoff amount demanded was "relatively close" to the amount plaintiff asserted would be fair). Accordingly, for this reason alone, the forum selection clause should not be enforced and any attempt to transfer on this basis should be denied.

B. New York Public Policy Requires Rejection of Section 21(k) As Unconscionable

In addition to placing severe restrictions on automatic renewal provisions, New York has a fundamental public policy against enforcing unconscionable contract provisions. The contract at issue here, which Mazuma asserts renews for eighteen months if Mazuma refuses to agree to a purchase price, is unconscionable. Moreover, as noted in the *Andin Int'l Inc.* case, New York law considers automatic renewal provisions such as Section 21(k) to be unconscionable.

It is well-established that "[a]n agreement is unenforceable when it is unconscionable." *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 381 (S.D.N.Y. 2002). "Under New York law, a contract is unconscionable when it is so grossly unreasonable or unconscionable in light of the mores and business practices of the time and place as to be unenforceable according to its literal terms." *Eisen v. Venulum Ltd.*, 244 F. Supp. 3d 324, 340 (W.D.N.Y. 2017) (quoting *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 122 (2d Cir. 2010)); *see also Gardella v. Remizov*, 42 N.Y.S.3d 225, 227 (2d Dep't 2016). As the Court stated in Brennan, "a contract is unconscionable where there is 'an absence of meaningful choice on the part of one of the parties together with contract term which are unreasonably favorable to the other party.'" *Brennan*, 198

F. Supp. 2d at 382 (quoting *Gilman v. Chase Manhattan Bank*, 537 N.Y.S.2d 787 (1988)). The doctrine "is not aimed at 'disturbance of allocation of risks because of superior bargaining power' but, instead, at 'the prevention of oppression and unfair surprise.'" *State v. Avco Fin. Serv. of N.Y. Inc.*, 429 N.Y.S.2d 181, 185 (1980) (quoting McKinney's Cons. Laws of N.Y., Book 62 1/2, Uniform Commercial Code, § 2-302, Official Comment 1).

Section 21(k) of the Lease Agreements is unconscionable – both by its terms and in the manner it has been utilized by Mazuma. Specifically, when Ortho endeavored to negotiate the purchase of the Property in good faith, Mazuma refused to reciprocate and, instead, attempted to use the unjust and unreasonable automatic renewal provision of Section 21(k) as a weapon in its negotiations. Specifically, on May 23, 2018, Ortho sent Mazuma a letter offering a purchase price of $2,375,000.00 – a wholly reasonable offer which would provide an IRR of 10.1%. *Id.* ¶ 53; Sanders Cert. ¶ 4. Despite Ortho's attempt to negotiate with Mazuma in good faith pursuant to Section 21(k), Mazuma rejected Ortho's offer and proposed a counteroffer to sell the Property to Ortho for $18,168,281.56 – representing Mazuma's calculation of the maximum purchase amount permitted under the terms of the Lease Agreements and an IRR of 56%. *Id.* ¶ 54; Sanders Cert., ¶ 5. When Ortho pointed out that this was not a negotiation in good faith, Mazuma came back with the same maximum number – this time agreeing to accept half over nine months. Derman Cert., Ex. B. Furthermore, Mazuma included the maximum amount for Schedule 3 despite this lease being for "soft costs" which have no residual value. *Id.* Additionally, Mazuma stated that if Ortho did not pay Mazuma the full purchase price it was demanding, the Lease Schedules would automatically renew for a twelve month period pursuant to Section 21(k) (which would, under the terms of Section 21(k), be followed by an additional automatic six-month renewal). *Id.* ¶ 55. The cost of eighteen months of renewal is

approximately $24,000,000.00. As of the filing of the Complaint, Mazuma had showed no willingness to move off this maximum figure.

In effect, Mazuma is using Section 21(k) to pressure Ortho into accepting an unreasonably exorbitant purchase price based on the threat of even more expensive automatic renewals for eighteen months, which Ortho does not want and for which it has no use. As noted above, Mazuma has a tortured history of engaging in such predatory practices. *See* Derman Cert., Exs F, G, H. New York public policy is clear: A New York business such as Ortho should not be subjected to such unjust and predatory business tactics and, to the extent a forum selection clause would fail to protect the New York business, such a clause should not be enforced. *Andin Int'l Inc.*, 194 Misc. 2d at 722-23. The law allows this Court to recognize this public policy and protect Ortho. It should do so here.

C. The Forum Selection Clause Contravenes the Public Policy of Judicial Economy

Finally, this Court should disregard the forum selection clause as "unreasonable" on the additional ground that compelling Ortho to litigate its claims in Utah pursuant to the clause would contravene the deep-seated public policy of promoting judicial economy. As set forth in the Statement of Facts, after Ortho filed its Complaint in this Court, Mazuma filed a Complaint against Ortho in Utah state court, and then an Amended Complaint, with their full claims, days later. Mazuma's Amended Complaint includes an action for replevin of the Property. Derman Cert., Ex. D. In its "Prayer for Relief", Mazuma seeks "the immediate issuance of a writ of replevin (i) directing defendant Ortho Inc. to deliver, or cause to be delivered, the Property to a location to be designated by Mazuma, or such other locations as agreed by the parties; (ii) directing that the Property be immediately and permanently seized and taken from possession of

defendant Ortho Inc.; and (iii) directing that the Property be delivered to Mazuma or its designated agent." (Amended Complaint at p. 15).

Because the Property is located in New York, however, Mazuma's replevin action must be brought in a New York court. *See, e.g.*, *Orix Credit All. v. Riccio*, No. 94 Civ. 4049 (PKL), 1994 WL 512542, at *3 (S.D.N.Y. Sept. 20, 1994) ("[A] replevin action must be brought in the jurisdiction in which the collateral is located[.]"); *Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co.*, 470 F. Supp. 1308, 1325 & n.14 (N.D.N.Y. 1979) (noting that New York's replevin statute "appears to apply only to the recovery of chattels located in New York State" and citing C.P.L.R. 7102(c)(7), (d)(2), (d)(3)); *see also Prestige Rent-A-Car, Inc. v. Advantage Car Rental & Sales, Inc.*, 656 So.2d 541, 543-44 (Fla. Dist. Ct. App. 1995) ("An action for replevin cannot be successfully maintained unless the property is *within the state* and subject to the jurisdiction of its courts." (emphasis in original)); *Gillen v. Keenan*, C.A. No. N13C-09-250 RRC, 2014 WL 6676139, at *1 (Del. Sup. Ct. Nov. 7, 2014) (finding no *in rem* jurisdiction over replevin action in Delaware when property was located in Pennsylvania despite having personal jurisdiction over defendant because "[a]n action for replevin cannot be successfully maintained unless the property is within the state and is subject to the jurisdiction of the courts").

Although the time to remove and then answer Mazuma's Amended Complaint has not arisen as of the time of this filing, Ortho intends to move to dismiss or to transfer the replevin count on these and other grounds.[2] Since Mazuma's replevin claim will either need to be refiled in this court (or will be transferred here), litigation will proceed in this Court. As such, enforcing

[2] Ortho also intends to move to dismiss or stay the Amended Complaint on the grounds that Ortho's Complaint was the first-filed complaint. *Emp'rs Ins. of Wausau v. Fox Entm't Grp., Inc.*, 522 F.3d 271, 274-75 (2d Cir. 2008) ("As a general rule, where there are two competing lawsuits, the first suit should have priority") (internal quotations omitted).

the forum selection clause in this case would be "an inefficient use of judicial resources as well as an unnecessary waste of the litigants' resources." *Taylor Inv. Corp. v. Weil*, 169 F. Supp. 2d 1046, 1061 (D. Minn. 2001) (declining to enforce forum selection clause and retaining jurisdiction to fully resolve all claims relating to the litigation).

CONCLUSION

For the reasons set forth herein, Mazuma's motion to dismiss should be denied. Venue is proper in this district under § 1391 and Mazuma has not made a motion to transfer. Moreover, enforcement of the forum selection clause would violate New York's public policy against automatic renewal provisions and against unconscionable contract provisions, and would contravene the well-established public policy of judicial economy.

Dated: July 16, 2018

Respectfully submitted,

CHIESA SHAHINIAN & GIANTOMASI PC
Attorneys for Plaintiff
Ortho-Clinical Diagnostics, Inc.

By: */s Adam P. Friedman*
Adam P. Friedman

11 Times Square, 31st Floor
New York, NY 10036
(212) 973-0572