No. 12-____

IN THE

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

J-CREW MANAGEMENT, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following the Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the majority of federal circuit courts hold that a valid forum-selection clause renders venue "improper" in a forum other than the one designated by contract. In those circuits, forum-selection clauses are routinely enforced through motions to dismiss or transfer venue under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406. The Third, Fifth, and Sixth Circuits, however, follow a contrary rule. This Petition presents the following issues for review:

1. Did the Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), change the standard for enforcement of clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences analysis under 28 U.S.C. § 1404(a)?

2. If so, how should district courts allocate the burdens of proof among parties seeking to enforce or to avoid a forum-selection clause?

PARTIES TO THE PROCEEDING

The following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

The Petitioner below was Atlantic Marine Construction Company, Inc. The Respondent below was J-Crew Management, Inc.

Petitioner is a privately-owned corporation. No corporation owns 10% or more of Petitioner's shares.

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Petitioner Atlantic Marine Construction Company, Inc. ("Atlantic Marine") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion (Pet. 1a), including Judge Haynes' special concurrence (Pet. 14a), is reported: *In re Atlantic Marine Construction Co., Inc.*, 701 F.3d 736 (5th Cir. 2012). The district court's decision that is subject to this Petition is reprinted in the Appendix. (Pet. 26a).

JURISDICTION

The court of appeals entered judgment on November 19, 2012. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

This Petition requires an analysis of two federal venue statutes in Title 28, United States Code:

§ 1404. Change of Venue

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any 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.

§ 1406. Cure or Waiver of Defects.

> (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.
>
> (b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

This Petition also raises an issue under Rule 12(b)(3) of the Federal Rules of Civil Procedure:

> **(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (3) improper venue[.]
>
> A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.

INTRODUCTION

The contractual right to select the forum for a lawsuit in advance of any controversy is important to commerce and the administration of justice. As Justice Kennedy explained:

> enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system.
>
> * * *
>
> The federal judiciary has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions. Courts should announce and encourage rules that support private parties who negotiate such clauses.

Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy J. concurring).

Since 1988, federal circuit courts have struggled to understand the meaning of the Court's majority opinion in *Stewart*. They are divided on the question whether (a) a valid forum-selection clause designating a federal forum renders venue "improper" for purposes of Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a) in a venue other than the one chosen by the parties in their contract, or (b) the forum-selection clause is just a factor to consider in the discretionary, balancing analysis for convenience transfers under 28 U.S.C. § 1404(a). *See* 17 MOORE'S FEDERAL PRACTICE § 111.04 (3d ed. 2012) (discussing the circuit split).

The majority of federal circuit courts (including the Second, Seventh, Eighth, Ninth, and Eleventh Circuits) reads *Stewart* narrowly, and concludes that a valid forum-selection clause designating an alternative federal forum renders venue "improper" in a forum other than the one the parties selected. *See Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970-73 (8th Cir. 2012); *TradeComet LLC.com v. Google, Inc.,* 647 F.3d 472, 478 (2d Cir. 2011)*; Slater v. Energy Servs. Grp. Int'l, Inc.,* 634 F.3d 1326, 1332-33 (11th Cir. 2011)*; Hillis v. Heineman,* 626 F.3d 1014, 1016-17 (9th Cir. 2010)*; Muzumdar v. Wellness Int'l Network, Ltd.,* 438 F.3d 759, 760-62 (7th Cir. 2006).

The Fifth Circuit, however, adopted a minority position (shared with the Third Circuit and Sixth Circuit). (Pet. 5a); *see also Kerobo v. Southwestern Clean Fuels, Corp.*, 285 F.3d 531, 535 (6th Cir. 2002); *Jumara v. State Farm Ins. Co.,* 55 F.3d 873, 877-78 (3d Cir. 1995). The minority position finds an "implicit" holding in *Stewart* that limits review of such forum-selection clauses to a discretionary, balancing test under the convenience transfer rules of 28 U.S.C. § 1404(a). (Pet. 6a).

The standard employed is important. Under the majority view, a forum-selection clause would be enforced under the strict standard adopted in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). That is, a forum-selection clause will be enforced unless the party seeking to avoid the clause shows that it is unreasonable and unjust, or the product of fraud or overreaching. *Id.* at 15. J-Crew did not even attempt to meet the *Bremen* standard to avoid enforcement of the clause in its contract with Atlantic Marine. By following the minority view, the Fifth

Circuit upheld the district court's exercise of discretion and allowed J-Crew to avoid its contractual forum-selection clause based on a convenience analysis. (Pet. 5a).

Also ruling in conflict with other circuits, the Fifth Circuit placed the burden on Atlantic Marine to justify its request to enforce its contract, instead of requiring J-Crew to prove why the contract should not be enforced. (Pet. 9a-10a). If the Fifth Circuit (and minority position) is correct, it literally will be easier for a party to enforce a forum-selection clause requiring disputes to be resolved in the Republic of the Philippines, than to enforce a clause requiring a dispute to be resolved in federal court in Virginia. *See MarineChance Shipping Ltd. v. Sebastian*, 143 F.3d 216, 220-21 (5th Cir. 1998) (Wisdom, J.) (enforcing choice of a Philippine forum).

Fifth Circuit Judge Haynes disagreed with the Fifth Circuit Majority, and correctly recognized that enforcement of forum-selection clauses should not be left to the discretion of district courts:

> We should not leave the enforcement by specific performance of otherwise valid contractual forum selection clauses to the vicissitudes of virtually unfettered judicial discretion. Absent some compelling countervailing factor (something J-Crew does not even argue is present here), forum-selection clauses such as this one should be and should have been enforced by transfer or dismissal.

(Pet. 24a-25a). Judge Haynes found "no practical difference between this district court opinion and that of a district court that was assessing this same case without a forum-selection clause." (Pet. 24a). She

concluded: "Given the state of the law in this area, I encourage the parties to request review of today's decision by the United States Supreme Court . . . " (Pet. 25a).

This Court should grant review in this case to resolve the disagreement over the meaning of *Stewart*.

STATEMENT OF THE CASE

1. The United States Army Corps of Engineers contracted with Atlantic Marine, a Virginia corporation with its principal place of business in Virginia Beach, Virginia (just a few miles away from Norfolk, Virginia), for the construction of a child development center located in Ft. Hood (the "Prime Contract"). Atlantic Marine thereafter entered into a Subcontract Agreement with J-Crew (the "Subcontract") for the provision of construction labor and materials in connection with the Prime Contract. J-Crew claims Atlantic Marine failed to pay it for work performed as a subcontractor.

Subcontract Paragraph 12(b) contains a mandatory forum-selection clause:

> The Subcontractor agrees that all other disputes not included in subparagraph (a) above, shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts.[1]

[1] Subparagraph (a) addresses subcontractor disputes for which the United States Government might be liable. It is not at issue here.

The forum-selection clause is applicable to all of J-Crew's claims against Atlantic Marine.

Ignoring the forum-selection clause, J-Crew filed suit against Atlantic Marine in the Austin Division of the Western District of Texas. Atlantic Marine moved to dismiss J-Crew's complaint under Fed. R. Civ. P. 12(b)(3) & 12(b)(6), and to dismiss or, alternatively, transfer the case to Virginia under 28 U.S.C. §§ 1406 and 1404(a). J-Crew opposed Atlantic Marine's motion, but did *not* challenge the forum-selection clause as being unreasonable and unjust, or that the clause was invalid for reasons such as fraud or overreaching.

The district court denied enforcement of the forum-selection clause. (Pet. 26a-44a). It held that Atlantic Marine could not seek enforcement of the clause under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406. (Pet. 32a-35a). The district court also placed the burden on Atlantic Marine to show whether transfer under 28 U.S.C. § 1404(a) was appropriate. (Pet. 36a). The court concluded: "Atlantic has not carried its burden to demonstrate that transfer of this case to Virginia would be in the interest of justice or increase the convenience of the parties and their witnesses." (Pet. 40a). The district court refused to dismiss the case or transfer it to Virginia.

2. Atlantic Marine filed a Petition for Writ of Mandamus to the United States Court of Appeals for the Fifth Circuit seeking review of the district court's order. The Fifth Circuit recognizes (as have several other circuits) that mandamus is the only vehicle available to obtain appellate review of the denial of a motion seeking to change the venue of a lawsuit. *See, e.g., In re Volkswagen of America, Inc.,* 545 F.3d 304, 309-10, 318-19 (5th Cir. 2008) (en banc); *In re*

National Presto Indus. Inc., 347 F.3d 662, 663 (7th Cir. 2003) (Posner, J.); *see also In re Ricoh Corp.,* 870 F.2d 570, 573 (11th Cir. 1989) (granting mandamus to enforce forum-selection clause on remand from *Stewart*).

3. The Fifth Circuit denied Atlantic Marine's petition, (Pet. 13a), stating "we cannot find that the district court clearly abused its discretion." (Pet. 9a). The Court recognized the circuit split on enforcement of forum-selection clauses:

> [T]he choice between Rule 12(b)(3) and § 1406 on the one hand and § 1404 on the other depends on whether private parties can, through a forum-selection clause, render venue improper in a court in which venue is otherwise proper under § 1391. Federal circuit courts are divided on the issue.

(Pet. 4a). The Fifth Circuit adopted the approach taken by "a minority of the federal appellate courts." (Pet. 5a). Under that approach, "when a forum-selection clause designates a specific federal forum or allows the parties to select the federal courts of a different forum, a motion to transfer under § 1404(a) is the proper procedural mechanism for enforcing the clause." (Pet. 5a).

Based on what it found "implied" and "implicit" in *Stewart*, not on what this Court said explicitly (Pet. 6a), the Fifth Circuit held: "*Stewart* teaches that Congress has by § 1404(a) removed the lateral transfer of cases among federal courts from the control of private contracts." (Pet. 11a). Thus, the Fifth Circuit concluded that a dismissal or transfer under Rule 12(b)(3) and § 1406 was not available. (Pet. 4a-8a, 13a). The Fifth Circuit concluded that the position

endorsed by Judge Haynes and followed by a majority of federal circuit courts would render *Stewart* "a dead letter." (Pet. 6a n.18).

The Fifth Circuit Majority began its review of the § 1404(a) balancing analysis by stating "we cannot conclude that the district court clearly abused its discretion by placing the burden on the movant" to show that a transfer was appropriate. (Pet. 9a). With the burden on Atlantic Marine, the court found that the district court did not abuse its discretion when balancing the relevant factors. (Pet. 9a-13a). The court upheld the denial of the motion to dismiss or transfer.

4. Judge Haynes filed a "special concurrence" in which she expressly disagreed with the Fifth Circuit Majority. Judge Haynes recognized that this Court "has made clear that forum-selection clauses are enforceable," but that the effect of the ruling in this case:

> is to make forum-selection clauses enforceable by specific performance only at the election of the district court, which is free to render a decision that evades practical review, given our substantial limits on mandamus review . . . and the practical unavailability of review on appeal following final judgment.

(Pet. 14a) (internal citations omitted). In response to the Fifth Circuit Majority's concern that private parties should not be able to "transcend federal venue statutes" by contract (Pet. 6a), Judge Haynes emphasized there is nothing novel or unusual about parties selecting among available venues in their contracts. (Pet. 16a-17a). "In so doing, the parties do not transcend federal law, but instead agree that neither will

seek to maintain venue in certain otherwise permissive forums." (Pet. 17a).

Judge Haynes agreed with the majority of federal circuit courts that allow forum-selection clauses to be enforced under Rule 12(b)(3) and § 1406. (Pet. 19a-20a). She wrote:

> A forum-selection clause that was negotiated and agreed to by sophisticated parties and is not challenged based on fraud, unreasonableness, or anything similar should be given effect. . . . Companies, such as Atlantic, that conduct business throughout a broad geographical area rely on forum-selection clauses to ensure that they can anticipate business costs and avoid litigation in a plethora of possible venues. Section 1406 seems to be the cleanest way to do so, treating the venue now "deselected" by the agreement as a "wrong" venue.

(Pet. 23a-24a). Judge Haynes recognized that *Stewart* did not address the issue of whether a forum-selection clause could be enforced under Rule 12(b)(3) and § 1406 "because the claim of 'improper venue' had been waived by the defendant." (Pet. 18a). She also noted that "the actual result of *Stewart* is exactly the opposite of the result reached here" because, on remand in *Stewart*, the Eleventh Circuit granted mandamus relief to enforce the forum-selection clause even under a Section 1404(a) convenience analysis. (Pet. 18a-19a). The Eleventh Circuit explained: "the clear import of [*Stewart*] is that the venue mandated by a choice of forum clause rarely will be outweighed by other 1404(a) factors." *In re Ricoh*, 870 F.2d at 573.

REASONS TO GRANT THE PETITION

The disagreement between the Fifth Circuit Judges is indicative of the larger, well-developed, circuit split on the issue whether a forum-selection clause that designates an alternative federal forum renders venue "improper" in a forum other than the one selected by contract. The Fifth Circuit's decision has deepened the divide, causing increased uncertainty about whether contractual forum-selection clauses will be enforced as written.

For cases filed within the Fifth Circuit (and in other jurisdictions following the minority view), enforcement of a forum-selection clause turns on the forum selected in the contract. Clauses designating an alternative *state* or *foreign* forum render venue "improper" in a federal court, whereas a clause designating an alternative *federal* court forum does not. (Pet. 7a-8a). In the first instance, one can expect routine enforcement of the clause under *Bremen*; in the latter, a Section 1404(a) balancing test with uncertain results. For cases filed in circuits following the majority approach, by contrast, one can expect consistent, routine enforcement of all contractual forum-selection clauses under the *Bremen* standard, so long as the objection to venue is timely raised. Thus, the forum where a case is filed now controls the level of deference given to the parties' contractual choice of forum, with the Third, Fifth, and Sixth Circuits giving much less deference, and much less certainty, to those clauses than is given by other circuits.[2]

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[2] Contracting parties cannot even write around this problem by trying to select a jurisdiction following the majority rule,

By granting this Petition, this Court will have the opportunity to end a long-running disagreement over the federal venue rules that has divided the circuit courts since this Court's decision in *Stewart*.

A. This Court Should Resolve the Well-Developed Circuit Split on Whether a Forum-Selection Clause Renders Venue Improper When It Calls for an Alternative Federal Forum

1. For over 40 years, this Court has recognized that the enforcement of contractual forum-selection clauses presents an issue of national importance that warrants this Court's consideration. Beginning with *Bremen*, the Court established a strong presumption favoring enforcement of forum-selection clauses, and set a high standard for those seeking to avoid their contractually-chosen forum:

> The correct approach would have been to enforce the forum clause specifically unless [the resisting party] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or over-reaching.

407 U.S. at 15. The burden on the party resisting enforcement of the clause requires a "strong showing that it should be set aside." *Id.*

This strong presumption recognizes that forum-selection clauses are often negotiated bargains in contracts. In many instances, parties will make concessions (such as changing pricing terms) in

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because there is no way to know in advance where the party that ignores the forum-selection clause will file suit.

return for receiving a more convenient, more familiar, and/or more certain venue for resolution of contractual disputes. Any claimed "inconvenience" associated with a chosen forum is something parties can take into account when they enter an agreement. *Id.* at 16-17. When the alleged inconvenience of the chosen forum is foreseeable at the time of contracting:

> it should be incumbent on the party seeking to escape his contract to 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. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

Id. at 18. The Court even adheres to this strict enforcement of forum-selection clauses when the contract was not the subject of negotiation. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593 (1991). Contracting parties routinely use and rely upon forum-selection clauses, which "now appear in contracts of every description and, if anything, are being used with greater frequency." 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3803.1 at 50 (3d ed. 2007) (hereinafter "WRIGHT & MILLER").

2. In *Stewart*, this Court addressed (for the first and only time) a forum-selection clause in the context of a motion to transfer venue under 28 U.S.C. § 1404(a). The question presented was whether "the District Court's denial of the § 1404(a) motion constituted an abuse of discretion." *Stewart*, 487 U.S. at 28. As a threshold matter, the Court analyzed "the issue whether a federal court sitting in diversity should apply state or federal law in adjudicating a

motion to transfer a case to a venue provided in a contractual forum-selection clause." *Id.* at 24. The Court found that federal law controlled, meaning that an Alabama statute (which would have invalidated the forum-selection clause) would not control the outcome of the venue analysis. *Id.* at 30-33.

The Court then explained that "[t]he presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus." *Id.* at 29. Although the Court did not give "dispositive" weight to the forum-selection clause in a Section 1404(a) analysis, the Court still found the rules from *Bremen* "instructive" in resolving the dispute. *Id.* at 28 & 31. In his concurrence, Justice Kennedy emphasized that "a valid forum-selection clause is given controlling weight in all but the most exceptional cases." *Id.* at 33.

3. Footnote 8 in *Stewart* is the source of much disagreement in the federal circuit courts. The Court wrote:

> The parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business in the Northern District of Alabama. *See* 28 U.S.C. § 1391(c) (venue proper in judicial district in which corporation is doing business).

Id. at 28 n.8. The majority of federal circuit courts have read this footnote as recognition that the issue whether venue was "improper" was not presented to the Court, and thus not addressed or decided by *Stewart*. *See* 17 MOORE'S FEDERAL PRACTICE § 111.04[4][a][ii] ("this issue technically was not before

the Court and therefore the Court's apparent endorsement of the use of Section 1404(a) arguably was dictum"). A minority of federal circuit courts have read *Stewart* as an implicit recognition that parties cannot, through a forum-selection clause, render a venue "improper" for purposes of Rule 12(b)(3) and 28 U.S.C. § 1406(a).

4. The Second, Seventh, Eighth, Ninth, and Eleventh Circuits follow the majority view, holding that a forum-selection clause calling for a federal court forum may be enforced through a motion to dismiss or transfer based on improper venue. *See Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970-73 (8th Cir. 2012); *TradeComet LLC.com v. Google, Inc.,* 647 F.3d 472, 478 (2d Cir. 2011); *Slater v. Energy Servs. Grp. Int'l, Inc.,* 634 F.3d 1326, 1332-33 (11th Cir. 2011); *Hillis v. Heineman,* 626 F.3d 1014, 1016-17 (9th Cir. 2010); *Muzumdar v. Wellness Int'l Network, Ltd.,* 438 F.3d 759, 760-62 (7th Cir. 2006).

5. In this case, the Fifth Circuit joined the Third and Sixth Circuits in holding that a forum-selection clause allowing for an alternative federal forum did not render venue improper in a forum other than the one chosen by contract, thereby limiting the court's review of venue to a discretionary analysis under § 1404(a). (Pet. 5a); *see also Jumara v. State Farm Ins. Co.,* 55 F.3d 873, 877-78 (3d Cir. 1995); *Kerobo v. Southwestern Clean Fuels, Corp.*, 285 F.3d 531, 535 (6th Cir. 2002).[3]

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[3] The Fourth, Tenth, and D.C. Circuits hold that a Rule 12(b)(3) motion to dismiss for improper venue is an appropriate vehicle to enforce a forum-selection clause, but those courts have not directly addressed that question in the context of a clause designating an alternative federal court venue. *See Sucampo Pharms. v. Astellas Pharma, Inc.*, 471 F.3d 544, 548-

6. Commentators have also struggled to understand the meaning of *Stewart* when read in context with this Court's decisions in *Bremen* and *Carnival Cruise Lines*. For example, in WRIGHT & MILLER, the authors have called *Stewart* an "underappreciated decision," in which the Court limited the applicability of *Bremen* and *Carnival Cruise Lines* to admiralty cases. WRIGHT & MILLER § 3803.1 at 74.[4] Others have gone even further, suggesting that the answer to the "tangled mess" left by the Court's "trio" of forum-selection clauses cases is that *Bremen* was not the watershed case most courts believe it to be—meaning that *Bremen* only applied in admiralty cases

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50 (4th Cir. 2006) (requiring Japanese forum); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992) (requiring English forum); *Commerce Consultants Int'l, Inc. v. Vetrerie Riunite*, 867 F.2d 697, 699-700 (D.C. Cir. 1989) (requiring Italian forum). Recently, however, district courts in the Fourth and Tenth Circuits have followed the majority approach and enforced forum-selection clauses calling for an alternative federal forum using an analysis based on improper venue. *See Smart Choice Constr., Inc. v. Ceco Bldg. Sys.*, 2012 WL 6025784 (W.D. Va. Dec. 3, 2012); *Montoya v. Fin. Fed. Credit, Inc.*, 872 F. Supp.2d 1251 (D.N.M. 2012).

The First Circuit has rejected that conclusion, but holds that a motion to dismiss based on a forum-selection clause should be treated as a Rule 12(b)(6) motion. *See Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009).

The Federal Circuit has not created its own rule on this issue because, as a matter of procedure, the Federal Circuit is bound to follow the decisions of the regional circuit court for the district from which an appeal is taken. *See Powertech Technology, Inc. v. Tessera, Inc.*, 660 F.3d 1301, 1310 (Fed. Cir. 2012) (applying Ninth Circuit rules when determining to enforce forum-selection clause).

[4] Although it did not expressly adopt its reasoning, the Fifth Circuit relied upon WRIGHT & MILLER when rendering its decision. (Pet. 6a).

and did not change the pre-1972 law for diversity and federal question cases. *See* David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 976-77 (2008) (hereinafter "MARCUS").

No federal circuit court has adopted such a constrained view of *Bremen* and such an expansive view of *Stewart*. To the contrary, "[f]ollowing *Bremen*, both state and federal courts adopted its rule of decision, not only in admiralty cases, but in virtually all forum selection settings, and it now clearly represents the weight of authority in the United States." 7 RICHARD A. LORD, WILLISTON ON CONTRACTS § 15.15 at 371 (4th ed. 2010); *see also* 17 MOORE'S FEDERAL PRACTICE § 111.04[4][a][iii] ("*The Bremen*, like *Carnival Cruise*, was an admiralty case, yet the lower courts have routinely imported its standards to a wide variety of non-admiralty cases, including diversity cases.").

Commentators recognize, however, that there is a deep divide over the meaning of the majority opinion in *Stewart*:

> The lower courts have differed as to whether *Stewart*'s apparent endorsement of the use of Section 1404(a) to enforce forum selection clauses was dicta or not, and, therefore, the debate about whether a forum selection clause makes venue improper or not continues.

See 17 MOORE'S FEDERAL PRACTICE § 111.04[4][a][ii] (internal cross-reference omitted). WRIGHT & MILLER explains:

> Not surprisingly, given this confusion surrounding forum-selection clause analysis, many lower

> federal courts have failed to distinguish between the approach taken in *Carnival Cruise* and that taken in *Stewart*.

WRIGHT & MILLER § 3803.1 at 79;[5] *see also* MARCUS at 973 ("Forum selection clause enforcement doctrine in the federal courts has splintered in a number of ways, making a clause enforcement decision in any particular case uncertain and confused.")

Atlantic Marine agrees with the majority of the federal circuit courts that have addressed this issue. The answer to the confusion is that *Stewart* is not a sweeping decision, limiting parties' contractual rights to select in advance the forum for litigation of disputes. Broad changes in doctrine are not made "implicitly" or through an ambiguously-worded footnote.

7. The Fifth Circuit's decision shows that the circuit-split regarding the meaning of *Stewart* is not going to resolve itself. During the last two years, three circuit courts joined the majority approach, but most recently, the Fifth Circuit emphatically joined the minority. Eight circuit courts have now expressly addressed the issue, and respected commentators are supporting a position not expressly adopted by any circuit. This Court should resolve this well-developed split in authorities, thereby providing certainty for parties when entering into contracts and efficiency when entering the courts.

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[5] The authors of WRIGHT & MILLER have called the distinction they draw between admiralty cases and other types of cases "curious." WRIGHT & MILLER § 3803.1 at 79. Nevertheless, they support a narrow reading of *Bremen* and *Carnival Cruise Lines* to draw that distinction. *See id.* at 70.

B. The Fifth Circuit Decision to Treat Enforcement of the Forum-Selection Clause as a Discretionary Issue under Section 1404(a) Is Fundamentally Flawed

On the merits, this Court should adopt the approach followed by the majority of federal circuit courts. The minority view leads to absurd results and encourages forum shopping.

1. A fundamental problem with the Fifth Circuit's view is that it leaves the enforcement of forum-selection clauses to the discretion of the district courts, but only with respect to forum-selection clauses allowing for an alternative *federal* forum. The Fifth Circuit holds: "When the forum-selection clause designates an *arbitral, foreign, or state court* forum, the federal district court is without power to transfer and thus must dismiss the case as long as it determines the forum-selection clause is enforceable." (Pet. 8a) (emphasis added). Accordingly, a dismissal for improper venue under Rule 12(b)(3) and Section 1406 is required. (Pet. 7a). When the forum-selection clause allows for an alternative federal forum, however, the Fifth Circuit holds that the clause does not render venue "improper." (Pet. 6a-8a). Accordingly, the Fifth Circuit's answer to the question whether parties can render venue improper by contract is "maybe, depending on the forum selected in the contract."

The Fifth Circuit's approach suffers from a logical flaw. The existence of a valid forum-selection clause either renders venue improper or it does not. The answer to that question should not depend upon the forum selected by the parties in their agreement. It should not be easier to enforce a forum-selection

clause requiring parties to travel overseas to resolve their dispute, than it is to enforce a clause requiring parties to go to federal court in Norfolk, Virginia.

The Fifth Circuit Majority's only attempt to reconcile its approach (finding that parties can render venue improper by contractually selecting a state or foreign jurisdiction) with its professed concern regarding the ability of private parties to "transcend federal venue statutes that have been duly enacted by Congress" is to claim that this distinction is necessary because federal law does not allow for transfers to state or foreign jurisdictions. (Pet. 6a-8a). The fact that the Fifth Circuit's approach draws a distinction based on a perceived necessity (rather than based on statutory language enacted by Congress) is a strong indicator that there is an error in the analysis elsewhere. That error is in failing to treat all forum-selection clauses the same. A valid forum-selection clause renders an otherwise available federal venue "improper" for those parties who agreed to a different forum. The approach endorsed by Judge Haynes and the majority of federal circuits allows for consistent, logical application in the business world and in court. The contrary, minority view leads to inconsistent, absurd results.

2. The Fifth Circuit's approach also encourages forum shopping. Even when a forum-selection clause is enforced under § 1404(a), the Fifth Circuit's approach alters the choice of law analysis for the case. Ordinarily, a federal court applies the choice of law rules of the forum in which the court sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). When a case is transferred for convenience under § 1404(a), the applicable law transfers with the case. *See Ferens v. John Deere Co.*, 494 U.S.

516, 524-25 (1990). But, when a case is dismissed for improper venue under Rule 12(b)(3) and re-filed in another court, or when a case is transferred for improper venue under § 1406, the law does *not* transfer with the case. *See Wisland v. Admiral Beverage Corp.*, 119 F.3d 733, 735-36 (8th Cir. 1997); *Ellis v. Great Sw. Corp.*, 646 F.2d 1099, 1110 (5th Cir. 1981); *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 992 (11th Cir. 1982); *Martin v. Stokes*, 623 F.2d 469, 473 (6th Cir. 1980). Accordingly, the decision regarding the rules to determine whether a forum-selection clause is enforced also controls the analysis of what law is going to govern when the case finds its proper home. *See Lafferty v. Riel*, 495 F.3d 72, 76 (3d Cir. 2007) ("Distinctions between §§ 1404(a) and 1406(a) have to do with discretion, jurisdiction, and choice of law.").

C. The Fifth Circuit Also Created a Circuit Split on the Burden to Prove that Transfer Is Appropriate under Section 1404(a) When a Forum-Selection Clause Is at Issue

Even if the Court determines that § 1404(a) is the proper vehicle to analyze forum-selection clauses allowing for an alternative federal forum, this case provides an excellent vehicle to provide guidance on the role of a forum-selection clause in the § 1404(a) analysis. The Fifth Circuit's decision creates a circuit split on the burden of proof under § 1404(a) when a valid forum-selection clause is at issue, and it adopts an analysis of that burden that cannot be squared with *Bremen*.

1. In *Stewart*, the Court left the balancing of factors under § 1404(a) to a future day. 487 U.S. at

32. Following *Stewart*, most courts to address the issue hold that a forum-selection clause shifts the burden of proof under the § 1404(a) analysis, requiring a party seeking to avoid a contractually-chosen forum to justify departure from the contract. *See In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995); *see also* 17 MOORE'S FEDERAL PRACTICE § 111.13[1][p][i][B] (3d ed. 2012) ("there should be a presumption in favor of enforcing the forum selection clause that shifts the burden to the plaintiff to come forward with a substantial, reasoned explanation as to why an agreement to litigate in a particular place, as set forth in the forum selection clause, should not be honored under the circumstances."). That approach is consistent with the allocation of the burden in *Bremen*. *See* 407 U.S. at 14-15. It also makes sense because the contractually-chosen forum is presumptively the "convenient" forum for resolution of disputes between the parties to the contract. *See Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989); *see also Moses v. Business Card Express, Inc.,* 929 F.2d 1131, 1139 (6th Cir. 1991) (recognizing that the expense and inconvenience associated with travelling to another forum are "inherent in a forum selection clause").

The Fifth Circuit, however, held the burden of proof does not shift based on a forum-selection clause.[6] (Pet. 9a-10a). The court wrote: "we cannot

[6] The Fifth Circuit's decision has been read by district courts as placing the burden of proof on the party seeking to enforce the contract. *See Vasquez v. El Paso II Enters., LLC*, 2012 WL 6160986, *2 (W.D. Tex. Dec. 11, 2012) (declining to enforce a

conclude that the district court clearly abused its discretion by placing the burden on the movant." (Pet. 9a). The Fifth Circuit found that "no part of the Supreme Court's decision in *Stewart* necessarily requires the burden to be placed on the non-moving party." (Pet. 9a). Although correct that *Stewart* did not address the burden of proof, this Court's earlier decision in *Bremen* unequivocally placed the burden on a party seeking to avoid its contractually-chosen forum. *See* 407 U.S. at 14-15.

The Fifth Circuit further erred by suggesting that the allocation of the burden of proof in a § 1404(a) analysis is a matter of discretion for the district court. (Pet. 9a-10a). The allocation of the burden of proof is a legal question, and not a matter of discretion. *See, e.g., Whitehouse Hotel Ltd. P'ship v. Comm'r of Internal Revenue,* 615 F.3d 321, 332 (5th Cir. 2010); *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008); *Fuji Kogyo Co. Ltd. v. Pacific Bay Int'l*, *Inc.*, 461 F.3d 674, 681 (6th Cir. 2006). The Fifth Circuit offers no explanation as to why a district court should have discretion to deviate from the established burden imposed on a party that seeks to avoid its contractually-chosen forum.

The district court's entire opinion denying transfer was based on findings that Atlantic Marine did not meet its burden of proof. (Pet. 40a). Had the burden been allocated correctly, the district court should have reached the opposite conclusion, and ordered transfer of this case to Virginia even under Section 1404(a).

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forum-selection clause in a case involving the denial of benefits under an ERISA Plan).

2. The Fifth Circuit compounded its error by allowing the district court to consider alleged inconveniences in the Section 1404(a) analysis that were foreseeable at the time of contracting. The Fifth Circuit wrote:

> To remove all matters of inconvenience foreseeable when the parties reached their choice of forum agreement from the required weighing by federal district judges cannot be squared with *Stewart*. The argument is simply a slip past its core holding—institutional concerns cannot be contracted away by private parties.

(Pet. 11a). Contrary to the Fifth Circuit's decision, the "core holding" of *Stewart* was that the determination of whether to transfer a case from one federal court to another is governed by federal law, not state law. *See* 487 U.S. at 28-32. As Justice Kennedy explained, institutional concerns favor enforcement of private contractual venue choices. *Id*. at 33 (Kennedy, J., concurring).

There is nothing in *Stewart* that allows a party to avoid a forum-selection clause based on conveniences that were foreseeable at the time of contracting. To the contrary, *Stewart* explained that the Court's *Bremen* decision was "instructive" in resolving the venue issue. *See* 487 U.S. at 28. In *Bremen*, the Court placed a high hurdle in front of parties seeking to avoid their contract based on inconveniences that were foreseeable at the time of contracting. *See* 407 U.S. at 17-18. By allowing J-Crew to avoid its contractual forum-selection clause based on alleged inconveniences that were foreseeable at the time of contracting, the Fifth Circuit acted in conflict with *Bremen* and its sister circuits when considering the

issue in a Section 1404(a) analysis. *See Heller Fin., Inc.,* 883 F.2d at 1293; *Moses,* 929 F.2d at 1139.

D. Review of This Case Is Needed Now

The issues raised in Atlantic Marine's Petition are recurring issues that impact a tremendous number of civil cases. There is an urgent need for this Court to resolve the circuit split regarding the proper procedures to enforce forum-selection clauses. Over the last two years, the circuit courts have become more divided, thereby adding great uncertainty to the meaning and enforceability of forum-selection clauses.

To relagate enforcement of forum-selection clauses to a discretionary convenience analysis under Section 1404(a), is to invite error and erode the right to contract. "Many federal courts, applying this balancing test, have found that a transfer is not warranted." *See* WRIGHT & MILLER § 3803.1 at 77. In the last six months of 2012 alone, numerous district courts (in Texas, Pennsylvania, Ohio, New Jersey, etc.) have written decisions declining to enforce forum-selection clauses as a matter of discretion.[7] So

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[7] *See, e.g., Veverka v. Royal Caribbean Cruises, Ltd.*, 2012 WL 6204911, at *4-7 (D. N.J. Dec. 11, 2012); *Vasquez*, 2012 WL 6160986, at *2; *Myers v. Jani-King of Phila., Inc.*, 2012 WL 6058146, at *4-6 (E.D. Pa. Dec. 5, 2012); *Austin v. Life Partners, Inc.*, 2012 WL 5334649, at *5 (D. Nev. Oct. 26, 2012); *Estate of Thomas v. Cimsa Ingenieria de Sistemas*, 2012 WL 5335277, at *5 (N.D. Ohio Oct. 26, 2012); *Milliken & Co. v. Reynolds*, 2012 WL 5354399, at *4-9 (D.S.C. Oct. 26, 2012); *Star Techs., LLC v. Gilig LLC*, 2012 WL 5194072, at *1-4 (S.D. W.Va. Oct. 19, 2012); *Clark v. Dale Prop. Servs.*, 2012 WL 4442783, at *3-7 (W.D. Pa. Sept. 25, 2012); *Idacorp., Inc. v. Am. Fiber Sys., Inc.*, 2012 WL 4139925, at *4 (D. Idaho Sept. 19, 2012); *Oak St. Printery v. Fujifilm N. Am. Corp.*, 2012 WL 4086776, at *5-6 (M.D. Pa.

long as this issue is treated as a matter of discretion, district courts will be asked to spend significant time and resources analyzing whether the contract clause should control. There are literally thousands of decisions analyzing this issue, with mixed results.[8]

This Court should resolve the split in authority now and "announce and encourage rules that support private parties who negotiate such clauses." *See Stewart*, 487 U.S. at 33 (Kennedy J. concurring). There are very limited options to seek redress from a discretionary decision declining to enforce a forum-selection clause. For those in circuits following the minority rule, the Fifth Circuit's decision illustrates that those limited options, such as mandamus, are no longer available. Unless action is taken to reverse this authority, the enforcement of forum-selection clauses in many states will be both discretionary, and unreviewable on appeal.

CONCLUSION

Atlantic Marine Construction Company respectfully prays that this Court grant this Petition for Writ of Certiorari, reverse the decision of the United States Court of Appeals for the Fifth Circuit, and enter an order directing that this case be dismissed

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Sept. 17, 2012); *Managed Protected Servs., Inc. v. Credo Petroleum Corp.*, 2012 WL 3264515, at *4 (D. Ariz. Aug. 9, 2012). Of course, this sample is not just limited by time, it is also limited due to the fact that only a small fraction of district court decisions are actually reported to public services such as Westlaw.

[8] *See* MARCUS, at 975 n.4 (identifying 168 decisions on Westlaw in 2006 analyzing this issue, and commenting on the fact that many cases on this topic are likely not reported).

or transferred to the United States District Court for the Eastern District of Virginia, Norfolk Division.

Respectfully submitted,

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January 25, 2013

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed November 19, 2012]

No. 12-50826

In re: ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,

Petitioner

Petition for a Writ of Mandamus to the Western District of Texas, Austin

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Before HIGGINBOTHAM, ELROD, and HAYNES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This case turns on the proper procedural treatment of a forum-selection clause. In April 2009, the United States Corps of Engineers contracted with Atlantic Marine Construction ("Atlantic") for construction of a child development center at Fort Hood, located in the Western District of Texas. In connection with that contract, Atlantic entered into a Subcontract Agreement with J-Crew Management, Inc. ("J-Crew") for provision of construction labor and materials. This Subcontract Agreement included a forum-selection clause, providing that disputes "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern Dis-

trict of Virginia, Norfolk Division." It contained no choice of law provision.

Ignoring the forum-selection clause, J-Crew filed suit against Atlantic in the Austin Division of the Western District of Texas,[1] alleging that Atlantic failed to pay J-Crew for work performed under the Subcontract Agreement. Atlantic moved to dismiss J-Crew's suit under Federal Rule of Civil Procedure 12(b)(3) and 28 U.S.C. § 1406, arguing that the forum-selection clause obligated J-Crew to bring suit in Virginia. Alternatively, Atlantic moved to transfer the case to the Eastern District of Virginia under 28 U.S.C. § 1404(a).

The district court denied the motion to dismiss or transfer the case. It first concluded that when a forum-selection clause designates a specific federal forum or allows the parties to select the federal courts of a different forum, section 1404(a), not Rule 12(b)(3) and § 1406, is the proper procedural mechanism for its enforcement. Applying § 1404(a), the district court denied Atlantic's motion to transfer, finding that Atlantic had not met its burden of showing why the interest of justice or the convenience of the parties and their witnesses weighed in favor of transferring the case to Virginia. Atlantic petitions this Court for a writ of mandamus directing the district court to dismiss the case or transfer it to the United States District Court for the Eastern District of Virginia.

I.

Three requirements must be met before a writ of mandamus may issue. First, the petitioner must have

[1] The district court had diversity jurisdiction. 28 U.S.C. § 1332.

no other adequate means of relief.[2] Second, the petitioner's right to issuance of the writ must be "clear and indisputable."[3] Third, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."[4]

With respect to the second requirement—that the petitioner's right to issuance of the writ must be "clear and indisputable"—this Court has made clear that "we are not to issue a writ to correct a mere abuse of discretion, even though such might be reversible on a normal appeal."[5] Instead, we will only grant mandamus relief when errors "produce a patently erroneous result" and "clearly exceed[] the bounds of judicial discretion."[6]

Atlantic urges that the district court clearly abused its discretion (1) by considering enforcement of the forum-selection clause under § 1404(a), instead of under Rule 12(b)(3) and § 1406, and (2) by committing errors when conducting its analysis under § 1404(a). Because we find the district court did not clearly abuse its discretion in either respect, we deny Atlantic's petition.

II.

Atlantic first argues that the district court clearly abused its discretion by using § 1404(a), instead of Rule 12(b)(3) and § 1406, to enforce the contractual

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[2] *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc).

[3] *Id.* (quoting *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004)).

[4] *Id.* (quoting *Cheney*, 542 U.S. at 380-81).

[5] *Id.* at 310.

[6] *Id.*

forum-selection clause. We begin with a brief explanation of the relevant statutory framework. Section 1391 governs whether venue is proper in a given federal district.[7] Rule 12(b)(3) and § 1406(a) provide for dismissal or transfer of an action that has been brought in an improper venue.[8] By contrast, when the action has been brought in a proper venue, section 1404 provides for transfer of the action within the federal system to another federal venue where the action could have been brought.[9] Thus, the determination of whether § 1406 or § 1404(a) applies turns on whether venue is proper in the court in which the suit was originally filed. If venue is improper in that court, then § 1406 or Rule 12(b)(3) applies. If venue is proper in that court, then § 1404(a) applies. In turn, the choice between Rule 12(b)(3) and § 1406 on the one hand and § 1404 on the other depends on whether private parties can, through a forum-selection clause, render venue improper in a court in which venue is otherwise proper under § 1391.[10] Federal circuit courts are divided on the issue.[11]

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[7] *See* 28 U.S.C. § 1391.

[8] Rule 12(b)(3) provides for a motion to dismiss for improper venue. FED. R. CIV. P. 12(b)(3). Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406.

[9] Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any 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." 28 U.S.C. § 1404(a).

[10] In this case, venue was proper in the Western District of Texas under § 1391 because the parties entered into and per-

The district court below held that when a forum-selection clause designates a specific federal forum or allows the parties to select the federal courts of a different forum, a motion to transfer under § 1404(a) is the proper procedural mechanism for enforcing the clause. In so doing, the district court followed the approach taken by a majority of district courts in this Circuit[12] and a minority of the federal appellate courts.[13] We agree with that approach.

In reaching the conclusion that enforcement of the forum-selection clause under § 1404(a) was proper, we find the Supreme Court's opinion in *Stewart Organization, Inc. v. Ricoh Corp*. instructive.[14] In that case, the plaintiff filed suit in the Northern District of Alabama and the defendant moved to dismiss the case or transfer venue to the Southern District of New York based on a contractual forum-selection clause. The Supreme Court held that when an action is filed in federal court under diversity jurisdiction, federal law, specifically § 1404(a), not state law, gov-

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formed the Subcontract Agreement in that judicial district. *See* 28 U.S.C. § 1391(b)(2).

[11] *Compare TradeComet.com LLC v. Google, Inc*., 647 F.3d 472, 477-78 (2d Cir. 2011), *and Slater v. Energy Servs. Grp. Int'l Inc*., 634 F.3d 1326, 1333 (11th Cir. 2011), *with Kerobo v. Sw. Clean Fuels Corp*., 285 F.3d 531, 535 (6th Cir. 2002), and *Jumara v. State Farm Ins. Co*., 55 F.3d 873, 879 (3d Cir. 1995).

[12] *See, e.g*., *Williamson-Dickie Mfg. Co. v. M/V Heinrich J*, 762 F. Supp. 2d 1023, 1028 (S.D. Tex. 2011); *Se. Consulting Grp., Inc. v. Maximus, Inc.*, 387 F. Supp. 2d 681, 684-85 (S.D. Miss. 2005); *Lafargue v. Union Pac. R.R.*, 154 F. Supp. 2d 1001, 1003-04 (S.D. Tex. 2001); *Brock v. Baskin-Robbins USA Co*., 113 F. Supp. 2d 1078, 1082-82 (E.D. Tex. 2000).

[13] *See Kerobo*, 285 F.3d at 538-39; *Jumara*, 55 F.3d at 879-79.

[14] 487 U.S. 22 (1988).

erns a motion to transfer to another federal court pursuant to a forum-selection clause. In doing so, the Stewart Court "implicitly held that a forum selection clause does not render the venue of an otherwise properly venued claim improper" because "Section 1404(a) is the proper procedural tool for transferring a case only when venue is proper in the chosen district; if venue is improper, Section 1406(a) is used to transfer venue."[15] The *Stewart* Court explained that a forum-selection clause should receive "the consideration for which Congress provided in § 1404(a)."[16] Thus, *Stewart* "strongly implies that Congress' determination of where venue lies cannot be trumped by private contract and that, therefore, a forum selection clause cannot render venue improper in a district if venue is proper in that district under federal law."[17] This result makes sense "because private parties should not have the power to transcend federal venue statutes that have been duly enacted by Congress and render venue improper in a district where it otherwise would be proper under congressional legislation."[18] That Atlantic Marine claims to have exactly this power is understandable. Dismissal under Rule 12(b)(3) or transfer under § 1406 would deny district courts both a role in making the transfer and its capture of Texas law. While Atlantic Marine bargained for a choice of forum, it failed to obtain a choice of law provision.

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[15] 14D CHARLES A. WRIGHT, ET. AL., FEDERAL PRACTICE AND PROCEDURE § 3803.1 (3d ed.).

[16] *Stewart*, 487 U.S. at 31.

[17] WRIGHT, *supra* note 13, at § 3803.1 (3d ed.).

[18] *Id*. However the concurring opinion reads *Stewart*, it is plain that its view would render it a dead letter.

Although Atlantic urges otherwise, our approach is in accord with Fifth Circuit precedent holding that dismissal under Rule 12(b)(3) is the proper approach when a forum-selection clause designates an arbitral, foreign, or state court forum.[19] When a forum-selection clause designates an arbitral, foreign, or state court forum, a district court does not have the option of transferring the case to the designated forum because § 1404(a) and § 1406 only allow for transfer within the federal system. Because dismissal is the only available option for the district court in those cases, dismissal is the proper remedy.[20] By contrast, this Court has implied that dismissal is inappropriate when transfer pursuant to § 1404(a) is available, as is the case when a forum-selection clause designates a federal forum.[21]

Nor is our approach inconsistent with this Court's decision in *Jackson v. West Telemarketing Corp.*

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[19] *See, e.g.*, *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005) (arbitral forum); *Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33 (5th Cir. 1997) (foreign forum); *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112 (5th Cir. 1996) (state court forum).

[20] *See Amplicon*, 77 F.3d at 115.

[21] *Id.* at 113-14 ("Although we would prefer to apply the same *Stewart* balancing in diversity cases to motions to dismiss and motions to transfer, the other federal courts have decided otherwise and continue to apply *Bremen* to motions to dismiss based on a forum selection clause . . . . Still other courts have suggested that a motion to dismiss is not an appropriate means of enforcing a forum selection clause, and that instead the motion should be treated as a motion to transfer. However, these cases, unlike our own, did not involve a forum selection clause that limited the agreed venue to a state court." (internal citations omitted)).

Outbound.[22] *Jackson* does not necessarily rest on a finding that a forum-selection clause renders venue improper in any venue other than that designated—a holding we would not quickly attribute to the panel as it cannot be squared with *Stewart*. Faced with an opaque record, the panel was unable to find footing for concluding more than that venue was improper in the California district court; that conclusion came from the inference that because transfer was under § 1406 and no § 1404 analysis was conducted, venue must have been improper. Why it was improper was of lesser concern and the panel did not say. Because the vitality of venue in California was muddled, we cannot exclude the possibility that venue was improper under § 1391 in the district where originally filed. Reading *Jackson* in conformity with *Stewart* we cannot conclude that *Jackson* determines the outcome in this case.

In short, *Stewart* did not hold that § 1404 is *always* the proper approach when the parties have entered into a contractual forum-selection clause. The choice between § 1404 and § 1406 depends on whether venue was statutorily proper under § 1391 in the forum where the action was initially filed. A forum-selection clause is properly enforced via § 1404(a) as long as venue is statutorily proper in the district where suit was originally filed and as long as the forum-selection clause elects an alternative federal forum. When the forum-selection clause designates an arbitral, foreign, or state court forum, the federal district court is without power to transfer and thus must dismiss the case as long as it determines the forum-selection clause is enforceable.

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[22] 245 F.3d 518 (5th Cir. 2001).

III.

Atlantic next argues that even if the district court correctly chose § 1404(a) as the proper procedural mechanism for enforcing the forum-selection clause, it made several errors in conducting its analysis under § 1404(a) that show a clear abuse of discretion. Specifically, Atlantic alleges that the district court clearly erred (1) by placing the burden of proof under § 1404(a) on Atlantic, the party seeking to enforce the forum-selection clause, to show why transfer to the designated forum should be granted; (2) by considering inconvenience that was foreseeable at the time the parties entered into the Subcontract Agreement; (3) by considering non-existent difficulties in obtaining depositions from non-party witnesses located in Texas; and (4) by not considering the public interests served by enforcement of the forum-selection clause. After reviewing the record and case law with respect to each of these alleged errors, we cannot find that the district court clearly abused its discretion.

A.

First, Atlantic contends that although the movant seeking to transfer under § 1404(a) generally bears the burden of proving the propriety of transfer, when the parties have entered into a contractual forum-selection clause the party seeking to avoid the contractually-chosen forum bears the burden of proving why the contractual choice should not be honored. Given the fact that this Court has never confronted that issue, we cannot conclude that the district court clearly abused its discretion by placing the burden on the movant. Moreover, no part of the Supreme Court's decision in *Stewart* necessarily requires the burden to be placed on the non-moving party. The Supreme Court merely insisted that the forum-

selection clause be "a significant factor that figures centrally in the district court's calculus."[23] Placing the burden on the moving party still allows the court to give the forum-selection clause "the consideration for which Congress has provided in § 1404" because the district court will consider the forum-selection clause in evaluating both the private and public interest factors.[24] Although transfer under § 1404(a) involves consideration of "the convenience of parties and witnesses" and "the interest of justice," that does not mean that in the absence of burden shifting the § 1404(a) approach will disfavor forum-selection clauses or allow litigants to easily circumvent their contractually-chosen forum. Instead, by incorporating the forum-selection clause into the private and public factor analysis, it will be difficult for a party to avoid the contractually-chosen forum. In light of the Supreme Court's language in *Stewart* and the realities of the § 1404(a) analysis, we are not persuaded that the district court clearly mis-allocated the burden under § 1404(a).

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[23] *Stewart*, 487 U.S. at 29.

[24] *Id*. at 31; *see id*. at 29-30 ("A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors. The presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus. In its resolution of the § 1404(a) motion in this case, for example, the District Court will be called on to address such issues as the convenience of a Manhattan forum given the parties' expressed preference for that venue, and the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power. The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences.").

B.

Second, Atlantic argues that the district court gave undue consideration to the foreseeable inconvenience J-Crew would face if the case were transferred to the Eastern District of Virginia. Atlantic urges that because J-Crew entered into a valid forum-selection clause it should have been precluded from arguing that the selected forum is inconvenient if such inconvenience was foreseeable at the time of contracting. *Stewart* teaches that Congress has by § 1404(a) removed the lateral transfer of cases among federal courts from the control of private contracts. While a contracted-for choice of forum remains a significant factor, it is not controlling. To remove all matters of inconvenience foreseeable when the parties reached their choice of forum agreement from the required weighing by federal district judges cannot be squared with *Stewart*. The argument is simply a slip past its core holding—institutional concerns cannot be contracted away by private parties. Finally, we add that our consideration of this late-arriving argument as a variation of the arguments made below is generous. Atlantic failed to argue below that the district court should not consider foreseeable inconvenience and Atlantic points to no controlling authority holding foreseeability is a necessary consideration under § 1404(a).[25] Thus, we conclude that the district court did not "clearly and indisputably" err by failing to consider an argument that was not before it and that was not compelled by precedent.

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[25] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the only case Atlantic cites for this proposition, did not employ a § 1404(a) analysis, so even if foreseeability is an appropriate consideration under the *Bremen* factors, it does not necessarily follow that the same is true in a § 1404(a) analysis.

C.

Third, Atlantic argues that the district court clearly erred in considering non-existent difficulties J-Crew would face in obtaining depositions from non-party witnesses in Texas if the case were transferred to Virginia. Atlantic contends that these alleged difficulties are unfounded because under Rule 45(a)(2)(B) the parties would be able to issue subpoenas to compel witnesses to sit for depositions in Texas.[26] Atlantic's argument misses the point. The district court below was mainly concerned with J-Crew's ability to secure witnesses for trial, not for depositions. And the district court's concerns with respect to J-Crew securing trial testimony were well-founded, notwithstanding Rule 45(a)(2)(B). J-Crew identified seven non-party witnesses that may provide relevant testimony who reside in Texas and any trial subpoenas for witnesses to travel more than 100 miles would be subject to motions to quash under Rule 45(c)(3)(ii).[27] Thus, we are unpersuaded by Atlantic's argument that the district court clearly erred by considering J-Crew's ability to secure testimony for trial in Virginia.

D.

Finally, Atlantic argues that the district court clearly erred in not recognizing the strong public interest favoring enforcement of forum-selection clauses. However, Atlantic failed to raise this argument below. In fact, the only argument Atlantic made with respect to the public's interest in transferring the case to Virginia was that courts in the Eastern

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[26] FED. R. CIV. P. 45(a)(2)(B).

[27] Fed. R. Civ. P. 45(c)(3)(ii); *see In re Volkswagen of Am.*, 545 F.3d at 316.

District of Virginia resolve cases faster than those in the Western District of Texas, a factor considered and rejected by the district court below. Regardless, the argument here is essentially that because the forum-selection clause did not dictate a different outcome it must not have been weighed properly. The district court was plainly conversant with *Stewart*. We cannot conclude that the district court "clearly and indisputably erred" by not giving proper weight to the public interest in ways Atlantic did not even raise before the district court.

IV.

The core of *Stewart* is the directive of Congress that allocation of matters among the federal district courts is not wholly controllable by private contract. Rather the agreement of parties will signify in the district court's allocating decision, tempering the private agreement's reflection of private interests with the public interest attentive to the usual metrics of this case law, such as time to trial and convenience of witnesses. The contention that dismissal may be under § 1406 or Rule 12(b)(3) empties *Stewart* of force and confounds the plain language § 1406. Thus, we DENY Atlantic Marine's Petition for a Writ of Mandamus.

HAYNES, Circuit Judge, specially concurring:

In light of the majority opinion, I cannot credibly contend that the right to the writ is "clear and indisputable" as required for mandamus relief. *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) (en banc). Thus, I concur in the majority opinion's holding.

I. The District Court Erred

I submit, however, that the district court erred in its ruling and approach. I also respectfully diverge from the analysis of the majority opinion. Plainly stated, the Supreme Court has made clear that forum-selection clauses are enforceable. *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 10 (1972); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991) (explaining that forum-selection clauses aid in avoiding confusion among parties regarding the proper forum, limiting litigation expenses, and "conserving judicial resources that otherwise would be devoted to deciding [venue disputes]." (citing *Stewart Org., Inc. v. Ricoh Corp*., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring))). The effect of the district court's ruling, however, is to make forum-selection clauses enforceable by specific performance only at the election of the district court, which is free to render a decision that evades practical review, given our substantial limits on mandamus review, *see In re Volkswagen*, 545 F.3d at 310-11, and the practical unavailability of review on appeal following final judgment. *Id*. at 319 ("[T]he prejudice suffered [from an erroneous transfer decision] cannot be put back in the bottle . . . an appeal will provide no remedy for a patently erroneous failure to transfer venue.").

In *M/S Bremen*, the Supreme Court stated that forum-selection clauses "are prima facie valid," and should generally be enforced "unless [the party challenging enforcement] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id*. at 10, 15. Under this standard, the parties' forum-selection clause, which requires that disputes be brought in a specific state or federal court in Virginia, is enforceable as J-Crew Management, Inc. ("J-Crew") has neither shown nor made any attempt to show any injustice in proceeding in Virginia. J-Crew simply violated its agreement and filed suit against Atlantic in the Western District of Texas.

The district court denied Atlantic's motion to dismiss because it found venue was proper in the Western District of Texas pursuant to 28 U.S.C. § 1391. The court then stated it would consider the parties' forum-selection clause merely as a factor in denying Atlantic's motion to transfer pursuant to § 1404(a), although it gave very short shrift to the forum-selection clause in the ensuing analysis. The majority opinion correctly concludes that a forum-selection clause may be enforced through a motion to transfer based on § 1404(a). *See, e.g*., *Stewart Org., Inc. v. Ricoh Corp*., 487 U.S. 22, 29 (1988). I disagree, however, with the holding that this vehicle for relief is the exclusive means of enforcing a forum-selection clause that contemplates a federal forum when the original federal forum is valid under a permissive venue statute.

II. The Majority Opinion's Analysis is Incorrect

A. Forum-Selection Clauses Do Not "Transcend" Permissive Venue Statutes

The majority opinion reasons that a motion to dismiss or transfer pursuant to § 1406 cannot be granted when a forum-selection clause contemplates another federal forum and the plaintiff's chosen forum is statutorily permissive because doing so would allow private parties to transcend federal venue statutes. However, the statute in question here is permissive, not mandatory.[1] *See* 28 U.S.C. § 1391. Significantly, § 1391 is a general and permissive venue statute that provides "a civil action *may* be brought in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." *See* 28 U.S.C. § 1391(b)(2) (emphasis added). Unlike other statutes that mandate venue in

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[1] Although the statute that purportedly establishes venue in this case is permissive, it is significant to note that this circuit has found that forum-selection clauses may trump even seemingly mandatory venue statutes. For example, Congress provided that any action under the Miller Act, 40 U.S.C. §§ 3131-3134, "*must* be brought . . . in the United States District Court for any district in which the contract was performed and executed . . . ." 40 U.S.C. § 3133 (emphasis added). This circuit has held that this provision in the Miller Act "is not jurisdictional but only a venue provision . . . [which] may be varied by contract unless under the circumstances the agreement is unreasonable." *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979) (citations omitted) (denying a petition for writ of mandamus seeking reversal of a district court's decision to transfer an action to a venue contemplated by a forum-selection clause pursuant to a motion to transfer based on § 1404(a)). The court explained that the seemingly mandatory venue provision "exists for the convenience of the parties. Such a provision is subject to variation by their agreement . . . ." *Id*.

a particular forum, § 1391 does not mandate that venue be laid in a particular district. Accordingly, in the absence of congressional direction otherwise, the parties remain free to consider all permissive venues and to "var[y] by their agreement," 588 F.2d at 95, the number of venues through a forum-selection clause. In so doing, the parties do not transcend federal law, but instead agree that neither will seek to maintain venue in certain otherwise permissive forums.[2]

Here, because J-Crew and Atlantic contracted to limit the scope of permissive federal forums to the Eastern District of Virginia, the Western District of Texas becomes a "wrong venue." The district court should have given effect to the parties' valid forum-selection clause and either dismissed the action for improper venue under 12(b)(3) or transferred it pursuant to § 1406. The parties did not seek to transcend the applicable federal venue statute; instead, each merely agreed that it would not bring suit in any other permissive federal forum apart from the Eastern District of Virginia, a permissive venue. This agreement does not replace or contradict § 1391, but instead only limits the parties' prerogative to avail themselves of the full scope of permissive venues that the statute would otherwise provide.

B. *Stewart* Does Not Require a Contrary Result

The majority opinion's reliance on *Stewart* to support the proposition that federal venue law must

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[2] The Eastern District of Virginia is also a permissive venue under § 1391(a)(1) & (a)(2) because all of the Defendants reside there and it is the place where a substantial part of the alleged events or omissions giving rise to J-Crew's claims occurred.

trump forum-selection clauses that contemplate a federal forum is misplaced. Similar to the forum-selection clause at issue here, *Stewart* involved a forum-selection clause that allowed for suit only in specific state or federal courts. 487 U.S. at 24. *Stewart*'s narrow holding determined that federal law, rather than state law, applies to a party's motion to transfer in a diversity action filed in federal court. *See id*. (describing the question presented as "whether a federal court sitting in diversity should apply state or federal law in *adjudicating a motion to transfer* a case to a venue provided in a contractual forum-selection clause." (emphasis added)). The Court specifically noted that the defendant's motion to dismiss based on § 1406 was not at issue on appeal because the claim of "improper venue" had been waived by the defendant. *See id*. at 28 n.8.

We have recognized the limited scope of *Stewart*, explaining that the case holds "that § 1404(a) is an appropriate vehicle for such a transfer because it allows for an individualized assessment of fairness and convenience, with a forum selection clause being one factor for consideration. *Stewart* does not mandate that whenever a forum selection clause exists any transfer must fall under § 1404(a)." *Jackson v. W. Telemarketing Corp. Outbound*, 245 F.3d 518, 522 (5th Cir. 2001) (emphasis removed). Although limited to the question of whether federal or state law applies in federal venue disputes, *Stewart* itself illustrates that an agreement between private parties can render inappropriate an otherwise appropriate federal forum. On remand from the Supreme Court in that very case, the Eleventh Circuit issued a writ of mandamus ordering the case transferred to the venue specified in the parties' forum-selection clause. *In re Ricoh Corp*., 870 F.2d 570, 571 (11th Cir. 1989). In

enforcing the forum-selection clause, the court noted that the case did not present the "'exceptional' situation in which judicial enforcement of a contractual choice of forum clause would be improper." *Id*. at 574 (citing *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)). Thus, the actual result of *Stewart* is exactly the opposite of the result reached here.

The Supreme Court has not read *Stewart* the same way as the majority opinion. Indeed, following *Stewart*, the Court in *Shute* embraced *M/S Bremen*'s holding and enforced a forum-selection clause by affirming the grant of a motion for summary judgment. *See* 499 U.S. at 591-94. The Court's approval of the use of a summary judgment motion as a vehicle for enforcing the forum-selection clause—which implicitly contemplated a federal forum by allowing for suit in any court in "the State of Florida"—demonstrates that *Stewart* does not render forum-selection clauses enforceable only under the discretion of a district court performing a § 1404(a) analysis. *See id*. at 588-89. Instead, as *Shute* demonstrates, these clauses may also be given effect when a party alleges venue is not proper under a motion to dismiss or a motion for summary judgment. Accordingly, I respectfully submit that the majority opinion takes *Stewart* too far.

C. The Majority Opinion Is Contrary to the Majority of Circuit Courts and Inconsistent with Our Precedent

My view is consonant with that of the majority of circuits which give effect to a forum-selection clause through a motion to dismiss filed pursuant to Rule 12(b)(3) and § 1406. *See, e.g*., *Union Elec. Co. v. Energy Ins. Mut. Ltd*., 689 F.3d 968, 970-73 (8th Cir. 2012) (rejecting the notion that a claim cannot be

dismissed under § 1406 for failure to comply with a forum-selection clause if venue is otherwise appropriate under 28 U.S.C. § 1391); *TradeComet LLC.com v. Google, Inc*., 647 F.3d 472, 478 (2d Cir. 2011) (noting that *Stewart* does not compel consideration of a forum-selection clause under § 1404(a) and holding that "a defendant may seek to enforce a forum selection clause under Rule 12(b)"); *Slater v. Energy Servs. Gr. Int'l, Inc*., 634 F.3d 1326, 1333 (11th Cir. 2011) ("[W]e conclude that § 1404(a) is the proper avenue of relief where a party seeks the transfer of a case to enforce a forum-selection clause, while Rule 12(b)(3) is the proper avenue for a party's request for dismissal based on a forum-selection clause."); *Hillis v. Heineman*, 626 F.3d 1014, 1016 (9th Cir. 2010) (finding that a party's defense for improper venue under Rule 12(b)(3) based on a forum-selection clause was valid and was not waived by the filing of a counterclaim); *Muzumdar v. Wellness Int'l Network, Ltd*., 438 F.3d 759, 760-62 (7th Cir. 2006) ("A challenge to venue based upon a forum selection clause can appropriately be brought as a motion to dismiss the complaint under [Rule] 12(b)(3)."); *Sucampo Pharm., Inc. v. Astellas Pharma, Inc*., 471 F.3d 544, 548-50 (4th Cir. 2006) (holding that a forum-selection clause may be enforced "under Rule 12(b)(3) as a motion to dismiss on the basis of improper venue"); *Riley v. Kingsley Underwriting Agencies, Ltd*., 969 F.2d 953, 954 (10th Cir. 1992) (affirming a district court's dismissal of claims based on a forum-selection clause that contemplated a foreign jurisdiction).[3]

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[3] In contrast to these cases, the Third and Sixth Circuits embrace the majority opinion's approach in this case by concluding that, when venue is otherwise proper in the original forum, § 1404(a) is the only appropriate procedural vehicle to enforce a

Our circuit has not addressed whether a forum-selection clause contemplating a federal forum may be enforced through a motion to dismiss for improper venue. However, as the majority opinion points out, we have found that a Rule 12(b)(3) motion to dismiss for improper venue is an appropriate vehicle for enforcing a forum-selection clause that contemplates state, foreign or arbitral forums. *See Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005) (arbitral forum); *Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33, 37 (5th Cir. 1997) (foreign forum); *Int'l Software Sys., Inc. v. Amplicon, Inc*. 77 F.3d 112, 115 (5th Cir. 1996) (state forum).

Further, we suggested in *Jackson* that a forum-selection clause contemplating a federal forum could be enforced through a motion to transfer for improper venue based on § 1406. *See* 245 F.3d at 522. The choice-of-law analysis in *Jackson* required us to consider whether a federal district court in California transferred a case to a federal district court in Texas based on § 1404(a) or § 1406. We concluded that the

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forum-selection clause that contemplates an alternative federal forum. *See, e.g.*, *Kerobo v. Sw. Clean Fuels Corp*., 285 F.3d 531, 538-39 (6th Cir. 2002); *Jumara v. State Farm Ins. Co*., 55 F.3d 873, 879 (3d Cir. 1995) ("Since venue is proper in the [district] where the action commenced, . . . [t]he District Court should instead have applied the appropriate balancing test under 28 U.S.C. § 1404(a) to determine whether the case should proceed in the [district] or be transferred to the [district where the forum-selection clause contemplates the action should lie]."). More recently, however, the Sixth Circuit suggested that a forum-selection clause contemplating both federal and state forums may be enforced through a motion to dismiss. *See Langley v. Prudential Mortg. Cap. Co*., 546 F.3d 365, 366 (6th Cir. 2008) (remanding to the district court "to entertain a motion to enforce the forum selection clause under [Rule] 12(b)(6) or 28 U.S.C. § 1404(a)").

California court ordered transfer under § 1406 based on a forum-selection clause. *Id*. at 522-23. We specifically noted that "*Stewart* does not mandate that whenever a forum selection clause exists any transfer must fall under § 1404(a)." *Id*. at 522. The majority opinion disregards *Jackson*'s guidance.

D. The Forum-Selection Clause at Issue Should be Given Effect

The effect of the majority opinion is to leave us with the somewhat bizarre situation that forum-selection clauses are enforceable by specific performance where the forum is state, foreign, or arbitral, but enforceable by specific performance only at the mercy of the district court for federal courts. I submit that we should adopt the approach of the majority of our sister circuits and use § 1406 transfers in these situations. Absent a mandatory venue statute, a valid forum-selection clause renders any other forum inappropriate, regardless of whether the forum contemplated by the parties is a state, federal, or foreign venue.

Congress, is of course, free to limit the enforcement of forum-selection clauses if it so chooses, as it has done in the past. For example, after the Supreme Court in *Shute* gave effect to a forum-selection clause in a cruise line's passage contract ticket, Congress initially amended 46 U.S.C. § 30509 to prevent passenger ships from seeking enforcement of forum-selection clauses when plaintiffs raise personal-injury or wrongful-death claims. *See Reynolds-Naughton v. Norwegian Cruise Line Ltd*., 386 F.3d 1, 2 (1st Cir. 2004) (explaining that § 30509 was initially amended to supercede *Shute*'s holding). Interestingly, however, Congress ultimately re-amended the statute to allow for the enforcement of forum-selection clauses in the

context of passage contract tickets. *See id*. at 2-3 (discussing the subsequent amendments to § 30509). Congress continues to look favorably on forum-selection clauses, as reflected in the recent amendment to § 1404(a) allowing for the transfer of cases to venues chosen by agreement that would otherwise not be districts where an action "might have been brought." *See* § 1404(a).[4]

A forum-selection clause that was negotiated and agreed to by sophisticated parties and is not challenged based on fraud, unreasonableness, or anything similar should be given effect. As Atlantic notes, the negotiation of a forum-selection clause involves various economic decisions and often requires a party to make concessions in exchange for

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[4] Specifically, this amendment provides that a transfer can be made to "any district or division to which all parties have consented," regardless of whether the venue would otherwise be proper. *See* § 1404(a); *see also* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 204, 125 Stat. 758, 764; 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §111.12(1)(c) (3d ed. Supp. 2012) (explaining that the amendment superceded the requirement in *Hoffman v. Blaski*, 363 U.S. 335 (1960), that a transferring court could only transfer to a venue with personal jurisdiction and "could not consider the defendant's consent to the transferee venue"). Accordingly, parties may seek transfer under §1404(a) to a venue where the action could have otherwise been brought or that was consented to by the parties through a forum-selection clause. *See* § 1404(a). This amendment does not supercede the majority of federal circuits that allow for forum-selection clauses also to be enforced through Rule 12(b)(3) motions or motions to transfer based on § 1406. Rather, by explicitly providing that § 1404(a) allows for transfer to a venue that would otherwise be invalid but for the parties consent, this amendment demonstrates that Congress recognizes that forum-selection clauses may be enforced even where the chosen venue is not that chosen by federal venue statutes.

the assurance that potential litigation will occur in a predetermined venue. Companies, such as Atlantic, that conduct business throughout a broad geographical area rely on forum-selection clauses to ensure that they can anticipate business costs and avoid litigation in a plethora of possible venues. Section 1406 seems to be the cleanest way to do so, treating the venue now "deselected" by the agreement as a "wrong" venue. This approach does not transcend federal venue statutes, but instead recognizes the ability of parties to "var[y] by their agreement," 588 F.2d at 95, the breadth of the scope of permissive venue statutes through their contractual agreements.

I note, however, that even if the majority opinion is correct that § 1404 is the only appropriate procedural vehicle here, the district court still abused its discretion. While stating that it considered the forum-selection clause as a "factor," the district court in practical terms gave it no weight and conducted a standard § 1404 "convenience" analysis. I can discern no practical difference between this district court opinion and that of a district court that was assessing this same case without a forum-selection clause. Whatever the procedure may be, the substance was wrong.

Absent any claim of fraud or unreasonableness by J-Crew, mere "convenience" should not trump the parties' reasoned contract. Had the district court given the forum-selection clause the deference it deserves, it would have transferred the case under either §1404 or §1406.

E. Conclusion

We should not leave the enforcement by specific performance of otherwise valid contractual forum

selection clauses to the vicissitudes of virtually unfettered judicial discretion. Absent some compelling countervailing factor (something J-Crew does not even argue is present here), forum-selection clauses such as this one should be and should have been enforced by transfer or dismissal.[5] Thus, while the very high standards for mandamus review coupled with the majority opinion's approach compel my concurrence in the judgment, I conclude that the district court erred.

Given the state of the law in this area, I encourage the parties to request review of today's decision by the United States Supreme Court, so it may consider whether this area of the law would benefit from its further guidance.

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[5] That said, nothing in the majority opinion would preclude Atlantic's seeking of some other remedy for the clear breach. As Atlantic discussed during oral argument, J-Crew's disregard for the parties' bargained-for agreement by bringing suit in Texas may result in Atlantic incurring substantial litigation costs that it would have otherwise avoided. On remand, it is free to seek damages for those costs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRCT OF TEXAS
AUSTIN DIVISION

[Filed August 6, 2012]

Cause No. A-12-CV-228-LY

UNITED STATES OF AMERICA, FOR THE USE OF J-CREW MANAGEMENT, INC.,
Plaintiffs,

v.

ATLANTIC MARINE CONSTRUCTION COMPANY, INC., BRUCE W. EXUM, JR., AND LINDA M. EXUM,
Defendants.

ORDER

Before the court in the above-styled cause of action are Defendants' Motion to Dismiss Plaintiff's First Amend Complaint or, Alternatively, Transfer Venue, filed May 23, 2012 (Clerk's Doc. No. 20), Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss Amended Complaint or to Transfer Venue, filed June 6, 2012 (Clerk's Doc. No. 21), and Defendants' Reply Brief in Support of Motion to Dismiss Plaintiff's First Amended Complaint or, Alternatively, Transfer Venue, filed June 13, 2012 (Clerk's Doc. No. 22). Having considered the motion, response, reply, the case file, and relevant law, the court will grant in part and deny in part Defendants' motion.

I. Background

This suit arises from a construction project known as the Ft. Hood Child Development Center No. 1, located at Ft. Hood, in Killeen, Texas. The project is owned by the United States Government, U.S. Army Corps of Engineers. Pursuant to an agreement entered into on or about April 16, 2009, the government contracted with Defendant Atlantic Marine Construction Co., Inc. (Atlantic), a Virginia corporation with its principal place of business in Virginia Beach, Virginia, for the design and construction of the project. Atlantic entered into a subcontract agreement on July 29, 2010, with Plaintiff J-Crew Management, Inc. (J-Crew), to perform certain work required of Atlantic under the prime contract.

J-Crew alleges that it fully performed all of its obligations under the subcontract, and Atlantic failed to pay J-Crew for the labor and materials it furnished Atlantic. J-Crew pleads claims of breach of contract, *quantum meruit*, and unjust enrichment against Atlantic, as well as violations of the Texas Construction Trust Fund Statute & Accounting Act and Texas Prompt Pay Act against Atlantic, Bruce W. Exum, Jr., and Linda M. Exum, President and Vice President of Atlantic, respectively.

Atlantic[1] moves to dismiss J-Crew's Texas statutory claims under Rule 12(b)(6) on the basis that the construction project at issue occurred on federal land no longer part of the state of Texas. *See* FED. R. CIV. P. 12(b)(6). Atlantic also moves the court to dismiss this action on the basis of a forum-selection clause in the subcontract agreement, mandating a Virginia

[1] Because Defendants' interests do not diverge, they will be referred to collectively as "Atlantic."

forum under Rule 12(b)(3) and section 1406 of Title 28 of the United States Code. *See* FED. R. CIV. P. 12(b)(3); 28 U.S.C. § 1406(a). Alternatively, Atlantic requests that the court transfer this suit to the United States District Court for the Eastern District of Virginia, Norfolk Division under section 1404 of Title 28. *See* 28 U.S.C. § 1404(a).

II. Analysis

The subcontract agreement between J-Crew and Atlantic contains a forum-selection clause that states in pertinent part:

> [J-Crew] agrees that all . . . disputes . . . shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts.

Atlantic argues that this clause evidences the parties' contractual choice of a Virginia forum for the resolution of their disputes, and that this court should either dismiss this cause or transfer it to the Eastern District of Virginia. J-Crew argues that the forum-selection clause is no longer a valid part of the Subcontract Agreement because J-Crew exercised its statutory right under section 272.001 of the Texas Business and Commerce Code to void the forum-selection clause when it filed this complaint in Texas federal court. The court first considers whether the forum-selection clause remains a valid part of the parties' contract before turning to the question of whether dismissal or transfer on the basis of such clause is appropriate.

A. Validity and Enforceability of Forum-Selection Clause

Section 272.001 applies "only to a contract that is principally for the construction or repair of an improvement to real property located in this state." TEX. BUS. & COMM. CODE § 272.001(a). If the section applies, a forum-selection clause making any conflict arising under the contract subject to litigation in the courts of another state is "voidable by the party obligated by the contract to perform the construction or repair." *Id*. § 272.001(b). Atlantic argues that this provision from the Texas Business and Commerce Code does not apply to the construction project at issue in this case because the project is located entirely on land ceded to the federal government by Texas.

"Under the Constitution the United States has the power to acquire land from the states for certain specified uses and to exercise exclusive jurisdiction over such lands, which are known as federal enclaves." *Lord v. Local Union No. 2088, Intl Bhd. of Elec. Workers, AFL-CIO*, 646 F.2d 1057, 1059 (5th Cir. 1981) (citing U.S. CONST. art. I, § 8, cl. 17). "The jurisdiction exercised by the United States over federal enclaves is exclusive unless the deed of cession provides to the contrary or unless the cession is not accepted in the manner required by law." *Id*. Texas ceded exclusive jurisdiction over the land comprising Fort Hood to the United States on September 6, 1950. *Adams v. Calvert*, 396 S.W.2d 948, 949 (Tex. 1965). The Department of the Army accepted exclusive jurisdiction over the land, and Texas reserved concurrent jurisdiction over the land only for the purpose of executing civil and criminal process. *Id*.

Although J-Crew concedes for purposes of this motion that Fort Hood is a federal enclave, it argues that Fort Hood is still "located within" Texas for purposes of the Texas Business and Commerce Code's provision concerning construction projects in the state. In support of this argument, J-Crew directs the court to a Texas case in which the court held that inventory shipped from a warehouse in Texas to an Army Depot on a federal enclave geographically contained within Texas was not transported "outside this State" for purposes of a statutory tax exemption. *See Aviall Servs., Inc. v. Tarrant Appraisal Dist.*, 300 S.W.3d 441, 446-47 (Tex. App.—Fort Worth 2009, no pet.).

This court agrees with Atlantic that J-Crew's reliance on *Aviall* is misplaced. In *Aviall*, the court reasoned that the phrase "outside this State" in the tax-exemption provision did not implicate the state's power to exercise jurisdiction or legislation over the property or residents of the federal enclave, because the state was not attempting to assess taxes on property within the enclave. *Id.* at 446. Rather, the state sought to assess the tax solely on inventory located on Aviall's private property—a distribution center in Irving, Texas—located outside the enclave. *Id.*

Similarly, the Sixth Circuit Court of Appeals reasoned that a military reservation was a "geographical part of the city, county and state of which it was at the time of acquisition by the United States" in the context of a state statute requiring a banking corporation to apply to the state commissioner of banking for permission to establish a new branch "within the city in which its principal office is located." *First Hardin Nat'l Bank v. Fort Knox Nat'l Bank*, 361 F.2d 276, 278-79 (6th Cir. 1966). The banking corporation

in that case sought to establish a branch bank at Radcliff, Hardin County, Kentucky—a location outside of the federal enclave at issue. *Id*. at 278. The court held that it was a question of fact for the state comptroller to determine whether the principal office of Fort Knox National Bank, located within the federal enclave, remained geographically part of Hardin County for purposes of the state banking act. *Id*. at 279.

In contrast, section 272.001 of the Texas Business & Commerce Code, if applied to the construction contract in this case, would amount to Texas exercising legislative jurisdiction over property located entirely within the federal enclave. "It is well established that in order for Congress to subject a federal enclave to state jurisdiction, there must be a specific congressional deferral to state authority over federal property." *W. River. Elec. Ass 'n, Inc. v. Black Hills Power & Light Co*., 918 F.2d 713, 719 (8th Cir. 1990); *see also Evans v. Cornman*, 398 U.S. 419, 424 (1970) (statute in question permitted state unemployment-compensation law to be applied to services performed on "land or premises owned, held, or possessed by the United States"); *Howard v. Comm'rs of Sinking Fund of City of Louisville*, 344 U.S. 624, 627-28 (1953) (statute in question specifically permitted state income tax on persons residing or working in "Federal area"). In the absence of any legislative authorization of concurrent state and federal jurisdiction over property within the federal enclave of Fort Hood, this court holds that section 272.001 of the Texas Business & Commerce Code does not apply to the subcontract agreement between J-Crew and Atlantic concerning a construction project contained entirely within the federal enclave. Accordingly, J-Crew did not void the forum-selection clause

contained in the subcontract agreement by filing suit in a Texas forum.

B. Dismissal or Transfer

Having concluded that the forum-selection clause remains a valid part of the parties' contract, the next question is whether and how the forum-selection clause should be enforced. Atlantic seeks an order either dismissing or transferring this case pursuant to Rule 12(b)(3) and section 1406(a) on the basis of improper venue, or transferring the case for convenience pursuant to section 1404(a). Rule 12(b)(3) and section 1406(a) are the procedural vehicles for dismissing or transferring an action that has been brought in an improper forum. *See* FED. R. CIV. P 12(b)(3); 28 U.S.C. 1406(a); *Lim v. Offshore Speciality Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2005). In contrast, where an action has been brought in a forum that is "proper" within the meaning of the federal venue statutes, section 1404(a) serves as the vehicle for transferring the action to a more convenient forum. *See* 28 U.S.C. §1404(a); *see also* 28 U.S.C. § 1391 (governing venue of all civil actions brought in federal district courts).

Federal courts are split on the question of whether a mandatory forum-selection clause renders an otherwise proper venue improper for purposes of section 1406(a), and the Fifth Circuit Court of Appeals has not yet decided this question. *Compare Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 535 (6th Cir. 2002) ("whether a forum-selection clause should be enforced is a matter of contract, not an issue of proper venue") with *Salton, Inc. v. Philips Domestic & Pers. Care B.V.*, 391 F.3d 871, 881 (7th Cir. 2004) ("a forum-selection clause is a substitute for the legal rules governing venue"). However, a survey of the case law

from this circuit illustrates that the type of forum designated in the forum-selection clause is determinative of whether dismissal or transfer is the proper means of giving effect to the parties' contractual choice of venue.

When a forum-selection clause designates a state-court forum, an arbitral forum, or a forum in a foreign country, the proper remedy is dismissal. *See Lim*, 404 F.3d at 902 (arbitral forum); *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33, 37 (5th Cir. 1997) (foreign forum); *Intl Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 113-15 (5th Cir. 1996) (state-court forum). In such cases, the Fifth Circuit has applied the Supreme Court's rule as stated in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), to determine the enforceability of a forum-selection clause. *See Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 441 (5th Cir. 2008). *Bremen* held that federal courts sitting in admiralty generally should enforce forum-selection clauses, absent a showing that to do so "would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Bremen*, 407 U.S. at 15.

By contrast, where a forum-selection clause designates a specific federal forum or allows the parties to select the state or federal courts of a different forum, the majority of district courts in this circuit have held that a motion to transfer under section 1404(a) is the proper approach. *See, e.g., Williamson-Dickie Mfg. Co. v. M/V Heinrich J*, 762 F. Supp. 2d 1023, 1028 (S.D. Tex. 2011) (surveying district-court case law); *Se. Consulting Grp., Inc. v. Maximus, Inc.*, 387 F. Supp. 2d 681, 683-84 (S.D. Miss. 2005) (same). This result finds support in the Supreme Court's

decision in *Stewart Organization, Inc. v. Ricoh Corp*., 487 U.S. 22 (1988).

In *Stewart*, as here, the defendant moved either for dismissal for improper venue under section 1406(a) or transfer under section 1404(a) on the basis of a forum-selection clause. 487 U.S. at 28. The Court held that section 1404(a), as opposed to state law, governed the district court's decision whether to give effect to the parties' forum-selection clause. *Id*. at 32. Implicit in this holding is the finding that venue was proper in the transferor court, despite the fact it was not the forum selected by the parties in their forum-selection clause, as section 1404(a) only concerns transfers of cases originally filed in a "proper venue." *See Tel-Phonic Servs., Inc. v. TBS Intl, Inc*., 975 F .2d 1134, 1141 (5th Cir. 1992). Moreover, the *Stewart* Court noted that the parties agreed that the district court properly denied the motion to dismiss for improper venue under section 1406(a) on the basis that the defendant did business in the plaintiff's chosen venue. 487 U.S. at 28 n.8 (citing 28 U.S.C. § 1391(c) (venue proper in judicial district in which corporation is doing business)).

District courts in this circuit have reasoned that "where jurisdiction is based upon diversity, the forum-selection clause allows suit in another federal court, and venue is proper under 28 U.S.C. § 1391 in the court in which the plaintiff filed suit, the Supreme Court's decision in *Stewart* directs the Court to apply the standard set forth in 28 U.S.C. § 1404(a) taking appropriate consideration of the parties' apparent choice of forum." *E.g*., *Brock v. Baskin-Robbins USA Co*., 113 F. Supp. 2d 1078, 1085 (E.D. Tex. 2000). In such cases, the *Bremen* case's presumption of enforcement of a forum-selection clause

"may prove instructive in resolving the parties' dispute," but the clause is insufficient to justify transfer on its own. *Stewart Org., Inc*., 487 U.S. at 28 (forum-selection clause should receive "neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a)").

In this diversity action, venue is proper in this court because the subcontract that is the subject of this lawsuit was entered into and was to be performed in this judicial district. *See* 28 U.S.C. § 1391(b)(2) (venue proper in judicial district in which substantial part of events or omissions giving rise to claim occurred, or substantial part of property that is subject of action is situated). In light of the fact that the forum-selection clause in this case allows the parties to file suit in a state or federal forum, this court joins the majority of district courts in this circuit in holding that section 1404(a) controls Atlantic's request to give effect to the parties' contractual choice of a Virginia forum.

C. Section 1404(a) Transfer

"[F]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it may have been brought." 28 U.S.C. § 1404(a). The decision to effect transfer under section 1404(a) is committed to the discretion of the district court. *Jarvis Christian Coll. v. Exxon Corp*., 845 F.2d 523, 528 (5th Cir. 1988). In addition to the factors set forth in the statutory text, courts consider a nonexhaustive and nonexclusive list of public and private interest

factors, none of which are of dispositive weight.[2] *See In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) (*Volkswagen I*). The parties' forum-selection clause is only one such factor. *Stewart Org., Inc*., 487 U.S. at 28. Atlantic, as movant, bears the burden of establishing the propriety of transfer. *Williamson-Dickie Mfg. Co*., 762 F. Supp. 2d at 1029.

1. Private-Interest Factors

A balancing of the private-interest factors relevant to this case militates against a transfer to Virginia. With respect to the first private-interest factor, this court is not persuaded that the sources of proof will be more readily accessible in a Virginia forum. This breach-of-contract action concerns the alleged failure of Atlantic to pay for the work of J-Crew under the parties' subcontract agreement. Atlantic argues that key evidence in this case will be Atlantic's accounting records, invoices, and bank statements, as well as records with respect to its evaluation and selection of subcontract proposals, all of which are located in the Eastern District of Virginia. The location of Atlantic's books and records is a factor for this court's consideration in its section 1404(a) analysis. *See In re Horseshoe Entm't*, 337 F .3d 429, 434 (5th Cir. 2003). How-

[2] The private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *Volkswagen I*, 371 F.3d at 203. The public interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law." *Id*.

ever, this court concludes that the inconvenience of transporting such records to this forum is minimal compared to the significant problems that would result from the transfer of this case.

The second and third private-interest factors concern the availability of compulsory process to secure the attendance of witnesses and the cost of attendance for willing witnesses. Both of these factors weigh heavily against transfer. The party moving for transfer, here Atlantic, must "specifically identify the key witnesses and outline their testimony" in order to carry their burden with respect to transfer. *Mid-Continent Cas. Co. v. Petroleum Solutions, Inc.*, 629 F. Supp. 2d 759, 763 n.3 (S.D. Tex. 2009). Atlantic has not identified any witness specifically or explained the testimony they would provide that is relevant to this dispute. Rather, Atlantic generally states that Atlantic's company headquarters is in the Eastern District of Virginia and that Atlantic's project-management team, as well as Defendants Bruce and Linda Exum reside there. This is insufficient to carry Atlantic's burden.

First, Atlantic concedes that the members of its project-management team that work on the construction site do not reside in Virginia. It is fair to assume that these employees have more familiarity with the performance of J-Crew under the subcontract than those performing more administrative management of the project from afar. Moreover, even if Atlantic's only witnesses will be members of its project-management team residing in Virginia, these employees are agents of Atlantic, a defendant in this action. It is the relative convenience to nonparty witnesses, not the parties themselves, that is most significant in a court's consideration of a motion to

transfer. *See id.* at 762 ("The relative convenience to the witnesses is often recognized as the most important factor under § 1404(a)."); *Frederick v. Advanced Fin. Solutions, Inc.*, 558 F. Supp. 2d 699, 704 (E.D. Tex. 2009) ("The availability and convenience of party-witnesses is generally insignificant because a transfer based on this factor would only shift the inconvenience from movant to nonmovant . . . . When nearly all of the nonparty witnesses that will testify concerning disputed issues reside elsewhere, this factor weighs in favor of transferring the case.") (internal citation omitted).

Additionally, J-Crew anticipates that Atlantic's primary defense to its suit will be that the work performed by J-Crew was somehow deficient. The evidence relevant to this fact question will be the Child Development Center itself and testimony by those who worked on or oversaw the project. J-Crew states that it intends to call numerous second-tier contractors and tradesmen as witnesses regarding the quality, timing, installation, and construction of the work under the subcontract agreement. J-Crew identifies seven companies it employed in completing the work, from painters to flooring specialists and woodworkers. All of these companies and their employees reside in Texas, and the majority would be within this court's subpoena power. *See* FED. R. CIV. P. 45(c)(3). However, were this court to transfer this case to Virginia, that court's subpoena power with respect to all of these witnesses for purposes of deposition or trial would be subject to motions to quash. *See id.*; *In re Volkswagen of America, Inc.*, 545 F.3d 304, 316 (5th Cir. 2008) ("*Volkswagen II*).

Finally, when the distance between an existing venue and the proposed venue exceeds 100 miles, as

it does here, *Volkswagen II*'s 100-mile rule applies. *See Volkswagen II*, 545 F.3d at 317. According to the 100-mile rule, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled. *Id*. The inconvenience and expense of traveling from Texas to Virginia for J-Crew's willing witnesses would be significant. In light of Atlantic's failure to identify any nonparty witnesses that would be inconvenienced by this court retaining jurisdiction over this case and the demonstrated inconvenience to J-Crew's witnesses, this factor weighs heavily in favor of transfer.

In summary, the court identifies only two private-interest factors in favor of transfer: the parties' forum-selection clause and the fact that Atlantic's books and records are located in Virginia. Weighing against transfer are the fact that compulsory process will not be available for the majority of J-Crew's witnesses, as well as the significant expense for those willing witnesses. The parties' forum-selection clause is not entitled to dispositive weight. *Stewart Org., Inc*., 487 U.S. at 28. And the court reiterates that the inconvenience of transporting Atlantic's records to this forum is minimal compared to the identified obstacles to securing witnesses for trial that would result from the transfer of this case to Virginia.

2. Public-Interest Factors

Atlantic makes only one argument with respect to the public's interest in transferring this case to Virginia: that the Eastern District of Virginia is a more efficient forum to resolve this dispute. Atlantic cites to the court statistics that the Eastern District of Virginia disposes of civil cases, on average, 2.3 months faster than this court. The court finds this difference to be negligible.

Moreover, the other public-interest factors weigh in favor of denying transfer. A transferee district court under section 1404(a) is obligated to apply the state law that would have applied had there been no change of venue. *See Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (1404(a) change of venue is "but a change of courtrooms"). Texas law governs the parties' contractual dispute in this diversity case. *See Holt v. State Farm Fire & Cas. Co*., 627 F.3d 188, 191 (5th Cir. 2010); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (where jurisdiction is based on diversity, this court applies substantive law of forum state, here Texas). This court presumes that it is much more familiar with Texas contract law than federal courts in Virginia. Finally, despite the fact that the construction project at issue in this case is located in a federal enclave, the project is of far greater significance to the people of this district than residents of Virginia.

In summary, weighing the private- and public-interest factors and considering the arguments presented by the parties regarding transfer, the court finds that Atlantic has not carried its burden to demonstrate that a transfer of this case to Virginia would be in the interest of justice or increase the convenience to the parties and their witnesses. Accordingly, the court will deny the motion to transfer under section 1404(a).

D. Motion to Dismiss Under Rule 12(b)(6)

Having determined that this case will remain in the Western District of Texas, the court's final consideration is whether Atlantic is entitled to a dismissal of J-Crew' s Texas statutory claims under Rule 12(b)(6). J-Crew alleges that Atlantic violated the Texas Construction Trust Fund Act and the Texas

Prompt Pay Act in failing to compensate J-Crew for the work it performed under the parties' subcontract agreement. *See* TEX. PROP. CODE § 162.001(a); TEX. GOV'T CODE § 2251.022. The Texas Construction Trust Fund Act creates a cause of action for misapplication of "trust funds," which are defined as "construction payments . . . made to a contractor . . . under a construction contract for the improvement of specific real property in this state." TEX. PROP. CODE § 162.001(a) (emphasis added). The Texas Prompt Pay Act states that "[a] vendor who receives a payment *from a governmental entity* shall pay a subcontractor the appropriate share of the payment not later than the 10th day after the date the vendor receives the payment." TEX. GOV. CODE § 2251.022(a) (emphasis added). Atlantic argues that J-Crew has failed to plead a cause of action under either Texas statute, because the construction project is located in a federal enclave, not in the state of Texas, and the owner of the project at issue is the United States Government, not a Texas governmental entity.

Rule 12(b)(6) allows for dismissal of an action "for failure to state a claim upon which relief can be granted." Although a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, in order to avoid dismissal, the plaintiffs factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). A plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. The Supreme Court expounded on the *Twombly* standard, explaining that a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face.

Ashcroft v. Iqbal, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. In evaluating a motion to dismiss, the court must construe the complaint liberally and accept all of the plaintiff's factual allegations in the complaint as true. *See In re Katrina Canal Breaches Litig*., 495 F.3d 191, 205 (5th Cir. 2009).

For the same reasons this court concludes that J-Crew does not have a statutory right under Texas law to void the forum-selection clause by filing suit in this court, the court also finds that J-Crew's claim under the Texas Construction Trust Fund Act fails as a matter of law. The construction project at issue in this case is located in a federal enclave, though geographically situated within the state of Texas, outside of its legislative jurisdiction. Accordingly, the parties' subcontract agreement was not a construction contract for the "improvement of specific real property in this state," and Texas lacks legislative jurisdiction over the U.S. Government's construction contracts that were performed on land located entirely within a federal enclave. *See W. River. Elec. Ass'n, Inc*., 918 F.2d at 719 ("It is well established that in order for Congress to subject a federal enclave to state jurisdiction, there must be a specific congressional deferral to state authority over federal property.").

With respect to the Texas Prompt Pay Act claim, this court also agrees with Atlantic that the United States Government, U.S. Army Corps of Engineers, rather than a Texas governmental entity, is responsible for payment to the Government's "vendor"—

Atlantic—under the prime construction contract. *See* TEX. GOV. CODE § 2251.022. Accordingly, Atlantic was not subject to the Prompt Pay Act's time limitations on its payments to its subcontractor, J-Crew.

Therefore, the court will grant Atlantic's motion to dismiss these two claims. Because these are the only claims J-Crew pleads against Defendants Bruce W. Exum, Jr., and Linda M. Exum, the court's dismissal of these claims leaves Atlantic as the only remaining defendant in this suit.

III. Conclusion

Having considered Atlantic's motion, the response and reply, as well as the case file and the applicable law to this cause, the court holds that J-Crew did not void the forum-selection clause by filing suit in this court. However, this court will deny Atlantic's motion to dismiss for improper venue because this court is of the opinion that section 1404(a), not section 1406(a) and Rule 12(b)(3), is the proper mechanism for enforcement of the parties' contractual choice of forum. Under the analysis dictated by section 1404(a), this court will deny the motion to transfer and retain jurisdiction over this case. Finally, the court will dismiss J-Crew's Texas statutory claims for failure to state a claim on the basis that neither the Texas Construction Trust Fund Act nor Texas Prompt Pay Act govern Atlantic's alleged misconduct in this case. J-Crew may proceed with its common-law claims of breach of contract. *quantum meruit*, and unjust enrichment against Atlantic.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiff's First Amend Complaint or, Alternatively, Transfer Venue (Clerk's Doc. No. 20) is GRANTED IN PART. J-Crew's Texas

statutory claims under the Texas Construction Trust Fund Act and Texas Prompt Pay Act are hereby DISMISSED. In all other respects the motion is DENIED.

SIGNED this 6th day of August, 2012.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES DISTTRICT JUDGE