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**United States District Court  
Central District of California**

LAWRENCE BRITVAN; HWE  
CALIFORNIA, INC.,

Plaintiffs,

v.

CANTOR FITZGERALD, L.P.;  
CANTOR COMMERCIAL REAL  
ESTATE SPONSOR, L.P.; CANTOR  
COMMERCIAL REAL ESTATE  
COMPANY, L.P.; and DOES 1-10,  
inclusive,

Defendants.

Case No. 2:16-cv-04075-ODW (JPRx)

**ORDER GRANTING  
DEFENDANTS’ MOTION TO  
TRANSFER [12]**

**I. INTRODUCTION**

Plaintiffs Lawrence Britvan and his current employer HWE California, Inc. (HWE) filed this action for declaratory relief against Britvan’s former employer, Defendant Cantor Commercial Real Estate Sponsor, L.P. (“CCRES”)<sup>1</sup> and other

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<sup>1</sup> For the purposes of this Motion, CCRES will be considered Britvan’s former employer, although CCRES is a non-operating Delaware corporation, with no office or place of business, and was not the operating entity for whom Britvan worked. (Lawrence Britvan Declaration (“Britvan Decl.”) ¶ 1.) Instead, Britvan worked for CCRE, a subsidiary of CFLP, and received his pay checks from yet another Cantor entity, Cantor Fitzgerald Securities. (*Id.*)

1 related entities, Defendants Cantor Fitzgerald, L.P. (“CFLP”) and Cantor Commercial  
 2 Real Estate Company (“CCREC”) (collectively, Defendants). (Complaint (“Compl.”),  
 3 ECF No. 1-1.) CCRES now moves to transfer the matter to the Southern District of  
 4 New York pursuant to 28 U.S.C. § 1404. (Mot. to Transfer (“Mot.”), ECF No. 12.)  
 5 Based on a valid arbitration forum selection clause and in the interest of justice, the  
 6 Court **GRANTS** CCRES’s Motion to Transfer.<sup>2</sup>

## 7 **II. BACKGROUND**

8 This declaratory judgment action arises from a New York employment contract  
 9 between Britvan, a highly paid executive and lawyer, and his former New York-based  
 10 employer, CCRES. For five years, Britvan was a resident of New York, working for  
 11 CCRES in New York City under a September 8, 2010 Employment Agreement that:  
 12 1) was negotiated in New York by New York lawyers, 2) was signed in New York, 3)  
 13 is governed by New York law, and 4) contains an arbitration provision that requires  
 14 “any disputes, differences or controversies under [the] Agreement” to be adjudicated  
 15 by a panel of arbitrators sitting in New York City. (Declaration of Lori Pennay  
 16 (“Pennay Decl.”) ¶¶ 6–13; Pennay Decl. Ex. A (“Employment Agreement” §§ 8, 10).)

17 Britvan resigned from his employment with CCRES on September 30, 2015.  
 18 (Pennay Decl. ¶ 30.) Immediately thereafter, CCRES sent to Britvan’s New York  
 19 apartment non-compete payments, as provided for in the contract, which now total  
 20 \$375,000. (*Id.*)

21 Britvan moved to California to take a job with HWE (an alleged competitor of  
 22 CCRES) beginning on May 6, 2016. (Declaration of Lawrence Britvan (“Britvan  
 23 Decl.”) ¶ 5.) On May 9, 2016, Britvan and HWE filed the subject declaratory  
 24 judgment action in Los Angeles County Superior Court to strip from the employment  
 25 agreement its covenant not to compete, its covenant not to solicit, and its mandatory  
 26 arbitration provision. (Compl. ¶¶ 44–58.)

27  
 28 <sup>2</sup> After carefully considering the papers filed in support of and in opposition to the Motion, the Court  
 deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

1 The Complaint names as defendants CCRES, as well as two non-parties to the  
2 Employment Agreement, CFLP and CCRE. (*Id.* ¶¶ 10–15.) Plaintiff HWE is also not  
3 a party to the Employment Agreement.

4 On May 11, 2016, Plaintiffs filed in Los Angeles County Superior Court an *Ex*  
5 *Parte* Application for Temporary Restraining Order and Order to Show Cause Re:  
6 Preliminary Injunction, which sought to temporarily enjoin the Defendants from  
7 enforcing the provisions that Plaintiffs sought to invalidate. (Declaration of David A.  
8 Paul “Paul Decl.” ¶ 8.) The court denied Plaintiffs’ request for a TRO and scheduled  
9 a hearing on their Motion for Preliminary Injunction. (*Id.* ¶ 9.)

10 On May 20, 2016, CCRES filed a special proceeding in New York Supreme  
11 Court, seeking an order, *inter alia*, a) declaring that New York law applies to the  
12 Employment Agreement and that the arbitration clause of the Employment Agreement  
13 is valid and binding on Britvan; b) compelling arbitration of any disputes arising  
14 under the Employment Agreement; and c) enjoining prosecution of the Declaratory  
15 Judgment Action. (*Id.* ¶ 10, Ex. 2)

16 That same day, after receiving argument from CCRES and Britvan (who  
17 appeared through counsel and did not contest the court’s jurisdiction), the court  
18 granted CCRES a temporary restraining order which enjoined prosecution of the  
19 Declaratory Judgment Action pending a further hearing on CCRES’s application.  
20 (*Id.* ¶ 11, Ex. 3.) In a court-supervised mediation on June 6, 2016, Plaintiffs state  
21 that Judge Joan Kenney verbally indicated to the parties her intent to issue an order  
22 requiring that Britvan arbitrate all claims raised in the Declaratory Judgment  
23 Action before a panel in New York. (*Id.*) The parties have fully briefed the New  
24 York Action, and await the court’s decision and order. (*Id.*)

25 On June 8, 2016, prior to the preliminary injunction hearing in the  
26 Declaratory Judgment Action, CCRES (with the consent of CFLP and CCRE)  
27 timely removed the case to this Court on the grounds that there is complete  
28 diversity between Britvan and CCRES. (Notice of removal (“NOR”), ECF No. 1.)

1 On June 20, 2016, CCRES filed a demand for arbitration with the American  
2 Arbitration Association.

3 CCRES now moves to transfer the Declaratory Judgment Action to the  
4 Southern District of New York. The Motion is before the Court for consideration.

### 5 III. LEGAL STANDARD

6 Pursuant to 28 U.S.C. § 1404(a), a district court may transfer an action to any  
7 district or division “where the action might have originally been brought” in order to  
8 promote the convenience of the parties and witnesses and the interests of justice. A  
9 district court must make two findings: 1) the transferee court is one where the action  
10 “might have been brought,” and 2) the parties’ and witnesses’ conveniences, as well  
11 as the interests of justice, favor transfer. *Metz v. U.S. Life Ins. Co.*, 674 F. Supp. 2d  
12 1141, 1145 (C.D. Cal. 2009); *see also Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414  
13 (9th Cir. 1985). This provision under 28 U.S.C. § 1404(a) “gives a district court  
14 broad discretion to transfer a case to another district where venue is also proper.”  
15 *Amini Innovation Corp. v. JS Imports, Inc.*, 497 F. Supp. 2d 1093, 1108 (C.D. Cal.  
16 2007) (footnote omitted); *see also Commodity Futures Trading Comm’n v. Savage*,  
17 611 F.2d 270, 279 (9th Cir. 1979) (“Weighing of the factors for and against transfer  
18 involves subtle considerations and is best left to the discretion of the trial judge.”).

19 When a case concerns an enforcement of a forum selection clause, section  
20 1404(a) provides a mechanism for its enforcement and “a proper application of §  
21 1404(a) requires that a forum-selection clause be given controlling weight in all but  
22 the most exceptional cases.” *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for*  
23 *W. Dist. Of Tex.*, 134 S.Ct. 568, 579 (2013) (internal quotation omitted). Plaintiff  
24 bears the burden of showing these exceptional circumstances that make transfer  
25 inappropriate. *Id.* at 581. Plaintiff must show either that the forum selection clause is  
26 not valid or that the public interest factors recognized under section 1404(a) make  
27 transfer inappropriate. *Id.* at 579, 582; *see also Bayol v. Zipcar, Inc.*, No. 14-cv-  
28 02483-TEH, 2014 WL 4793935, at \*1 (N.D. Cal. Sept. 25, 2014).

#### IV. DISCUSSION

1  
2 As a threshold issue, Plaintiffs' argue that the arbitration forum selection clause  
3 in the Employment Agreement is invalid and unenforceable. (Pl.s' Opposition  
4 ("Opp'n") 8, ECF No. 22.) As such, Plaintiffs contend that CCRES carries a heavy  
5 burden in transferring the action to the Southern District of New York based on the  
6 traditional forum non conveniens analysis. (*Id.*) The Court disagrees.

7 Judicial policy strongly favors forum selection clauses. *See E. & J. Gallo*  
8 *Winery v. Andina Licores S.A.*, 446 F.3d 984, 992 (9th Cir. 2006).<sup>3</sup> As such, a forum  
9 selection clause is *prima facie* valid and "should be given controlling weight in all but  
10 the most exceptional cases." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988)  
11 (Kennedy, J., concurring). It is only under these "extraordinary circumstances  
12 unrelated to the convenience of the parties" that a transfer motion being used to  
13 enforce a forum selection clause should be denied. *Atl. Marine Const. Co. v. U.S.*  
14 *Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 581 (2013).

15 As explained by the Supreme Court in *Bremen*, there are three reasons  
16 enforcement of a forum-selection clause would be unreasonable: 1) if the inclusion of  
17 the clause in the agreement was the product of fraud or overreaching; 2) if the party  
18 wishing to repudiate the clause would effectively be deprived of his day in court were  
19 the clause enforced; and 3) if enforcement would contravene a strong public policy of  
20 the forum in which suit is brought. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1,  
21 16 (1972). As the party challenging the clause, Plaintiffs have the "heavy burden of  
22 proof" to "clearly show that enforcement would be unreasonable or unjust." *Murphy*  
23 *v. Schneider National Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2003).

24  
25 \_\_\_\_\_  
26 <sup>3</sup> An arbitration clause is "in effect, a specialized kind of forum-selection clause." *Scherk v.*  
27 *Alberto-Culver Co.*, 417 U.S. 506 (1974); *Palmco Corp. v. JSC Techsnabexport*, 448 F. Supp. 2d  
28 1194 (C.D. Cal. 2006) (dismissing on ground of forum non conveniens due to existence of clause  
requiring arbitration in Sweden); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995)  
(courts treat "a forum selection clause . . . as a manifestation of the parties' preferences as to a  
convenient forum").

1           A. *Valid Forum Selection Clause*

2           Here, Plaintiffs argue that the arbitration forum selection clause in the  
3 Employment Agreement is invalid and unenforceable for the following reasons: 1) it  
4 contravenes California public policy; 2) it is substantively and procedurally  
5 unconscionable; 3) it cannot apply to HWE, a non-party to the Employment  
6 Agreement; and 4) CCRES cannot legally be a party to arbitration in the agreed upon  
7 arbitral forum. (Opp'n 9–16.)

8           1. *Contravenes Public Policy*

9           Here, Plaintiffs argue that the arbitration forum selection clause is invalid  
10 because it violates California's public policy against covenants not to compete under  
11 Business and Professions Code section 16600. (*Id.* 15.) Plaintiffs note that the  
12 transferee forum, unlike California, allows covenants not to compete. (*Id.* 16.)  
13 California district courts have found this argument to be unpersuasive. *See e.g.*,  
14 *Marcotte v. Micros Sys., Inc.*, No. C 14–01372 LB, 2014 WL 4477349, at \*8 (N.D.  
15 Cal. Sept. 11, 2014) (“[A] party challenging enforcement of a forum selection clause  
16 may not base its challenge on choice of law analysis.”); *Rowen v. Soundview*  
17 *Commc'ns, Inc.*, No. 14-CV-05530-WHO, 2015 WL 899294, at \*5 (N.D. Cal. Mar. 2,  
18 2015); *Universal Operations Risk Mgmt., LLC v. Global Rescue LLC*, No. C 11–5969  
19 SBA, 2012 WL 2792444, at \*4 (N.D. Cal. July 9, 2012). The problem with  
20 Plaintiffs' argument is that it does not challenge the reasonableness of the forum  
21 selection clause itself, “only the reasonableness of its effect.” *Hartstein v. Rembrandt*  
22 *IP Solutions, LLC*, No. 12–2270 SC, 2012 WL 3075084, at \*6 (N.D. Cal. July 30,  
23 2012). The argument, if accepted, forces the court to “make a determination of the  
24 potential outcome of the litigation on the merits in the transferee forum and whether  
25 that outcome would conflict” with California policies. *Id.* It asks for an overly  
26 complex analysis of “detailed speculation[.]” *Id.*

27           As noted above, a number of courts have followed this reasoning and rejected  
28 the argument that the enforcement of a forum selection clause would contravene

1 California’s strong public policy against covenants not to compete. The Court finds  
2 this line of authority to be persuasive.

3 *2. Unconscionable*

4 Next, Plaintiffs contend that the arbitration clause is invalid because it is both  
5 procedurally and substantively unconscionable under California law. (Opp’n 11.)

6 In California, a contract must be both procedurally and substantively  
7 unconscionable to be rendered invalid. *Chavarria v. Ralphs Grocery Co.*, 733 F.3d  
8 916, 922 (9th Cir. 2013). The procedural component focuses on oppression, and  
9 surprise due to unequal bargaining power. *Armendariz v. Fdn. Health Psychcare*  
10 *Servs., Inc.*, 24 Cal. 4th 83, 114, 99 (2000). The substantive element focuses on  
11 “overly harsh” or “one-sided” results. *Id.* This element “has to do with the effects of  
12 the contractual terms and whether they are unreasonable.” *Marin Storage & Trucking,*  
13 *Inc. v. Benco Contracting and Eng’g, Inc.*, 89 Cal. App. 4th 1042, 1053 (2001).

14 Plaintiffs argue that the clause is procedurally unconscionable because it  
15 contains boiler plate terms and was presented in a take-it or leave-it manner. (*Id.* 12.)  
16 The Court disagrees. This contract was negotiated between sophisticated parties  
17 represented by counsel without evidence of surprise or coercion. (Pennay Decl. ¶¶  
18 8,14.); *see A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982) (“[A]  
19 businessman usually has a more difficult time establishing procedural  
20 unconscionability in the sense of either ‘unfair surprise’ or ‘unequal bargaining  
21 power.’”). Indeed, there is evidence that over the course of three months, Britvan, a  
22 lawyer himself, and his counsel negotiated “the description of title and  
23 responsibilities, the employment term, assignment, bonuses, indemnification policy,  
24 termination and notice, and the non-compete and non-solicitation provisions.” (*Id.* ¶  
25 11.) During such negotiations, neither Britvan nor his counsel objected to the  
26 arbitration clause in Section 8 of the Employment Agreement or to the choice of law  
27 clause in Section 10 of the Employment Agreement. (*Id.* ¶¶ 12, 13.) As such, the  
28

1 Court finds that Plaintiffs have failed to demonstrate that the arbitration clause is  
2 procedurally unconscionable.

3 While both procedural and substantive unconscionability must be present, and  
4 the Court has already found procedural unconscionability lacking, the Court will  
5 briefly address Plaintiffs' arguments with respect to substantive unconscionability.  
6 Plaintiffs argue that the clause is substantively unconscionable because New York is  
7 Defendants' principal place of business and because the clause lacks mutuality.  
8 (Opp'n 14.)

9 To start, Defendants' selection of New York as a venue is neither unfair nor  
10 oppressive, because at the time the contract was entered into, both Britvan and  
11 Defendants were based in New York, and the terms of which were carried out in New  
12 York.

13 Next, Plaintiffs argue that under the arbitration clause, Defendants—and only  
14 Defendants—have the ability to select an alternative forum in order to address any  
15 breach of the agreement. (*Id.*) Section 8 of the Employment Agreement provides,  
16 “Any disputes, differences or controversies arising under this Agreement shall be  
17 settled and finally determined by arbitration before a panel of three arbitrators in New  
18 York . . . .” Section 7 of the Employment Agreement states, “notwithstanding Section  
19 8,” in the event of a breach or a threatened breach by an employee under this  
20 Agreement, the company “shall be entitled to specific performance of the Agreement  
21 or such equitable and injunctive relief.”

22 Defendants argue that the arbitration clause does not lack mutuality because  
23 nothing in the agreement precludes Britvan from seeking the same provisional relief  
24 afforded Defendants. (Reply 9.)

25 Here, the potential lack of mutuality, although seemingly one-sided, is not  
26 unconscionable. In *Chin*, the court found that an arbitration clause's injunctive  
27 remedy exception was not unconscionable although it only benefitted one party under  
28 other provisions in the contract. “The injunctive remedy exception allows ‘a party’ to



1 go to court for ‘injunctive or other provisional relief.’ It does not provide ‘a choice of  
2 forums [solely] for the claims of the stronger party.’” *Htay Htay Chin v. Advanced*  
3 *Fresh Concepts Franchise Corp.*, 194 Cal. App. 4th 704, 712 (2011) (quoting  
4 *Armendariz*, 24 Cal. 4th 83, 114, 99 (2000)). Based on the injunctive relief exception,  
5 the Court here finds that the potential lack of mutuality in the clause is mitigated by  
6 the weak showing of procedural unconscionability. Because the crucial oppressive  
7 element is lacking, the Court finds substantive unconscionability lacking with respect  
8 to the arbitration provision.

### 9 3. *HWE is a Non-Party*

10 While HWE may not be a party to the arbitration agreement, it cannot escape  
11 transfer under the traditional § 1404 forum non conveniens analysis, as discussed  
12 below.

### 13 4. *FINRA*

14 Plaintiffs contend that because CCRES admitted that it is not subject to the  
15 jurisdiction of the agreed upon arbitral forum, the arbitration forum selection clause is  
16 unenforceable. (Opp’n 9.) Section 8 of the Employment Agreement provides that any  
17 arbitration is to be conducted pursuant to the Financial Industry Regulatory Authority  
18 (“FINRA”). However, Defendants attempted to file an arbitration with another  
19 organization, the American Arbitration Association (“AAA”), because as Defendants  
20 stated, “CCRES is not subject to FINRA’s jurisdiction.” (*Id.* 9–10.)

21 First, contrary to Plaintiff’s arguments, Defendants state that CCRES’s filing  
22 with AAA does not render the arbitration provision invalid or unenforceable. (Reply  
23 2.) Second, Defendants state that CCRES is not subject to FINRA’s jurisdiction only  
24 because it is a non-member, but that it can voluntarily submit to FINRA’s jurisdiction  
25 at any time. (*Id.* 3.)

26 In California state court, it is true that where an arbitration provision provides  
27 that the arbitration will be conducted pursuant to a certain organization’s rules (AAA,  
28 NASD, etc.), then the arbitration must be conducted by that organization. *See*

1 *Martinez v. Master Prot. Corp.*, 118 Cal. App. 4<sup>th</sup> 107, 120 (2004) (holding that “[t]he  
2 arbitration agreement’s requirement for resolution of the present dispute “in  
3 accordance with” pertinent AAA procedures means that the arbitration must take  
4 place before that designated agency, that is, in an AAA forum”). However, here, even  
5 if FINRA were unable to adjudicate this dispute, that would not invalidate the  
6 arbitration agreement. Section 5 of the Federal Arbitration Act, which both parties  
7 agree applies here, explicitly empowers district courts to “designate and appoint an  
8 arbitrator or arbitrators” where “for any other reason there shall be a lapse in the  
9 naming of the arbitrator.” 9 U.S.C. § 5; *see Reddam v. KPMG LLP*, 457 F.3d 1054,  
10 1056 (9<sup>th</sup> Cir. 2006). As such, if CCRES does not voluntarily submit to FINRA’s  
11 jurisdiction, the district court can appoint another arbitrator.

12 *B. Transfer under Section 1404*

13 Under a traditional § 1404 transfer analysis, the court must look to the  
14 “convenience of the parties and witnesses” and the “interest of justice” to see whether  
15 a case should be transferred to “a district or division where it might have been brought  
16 or to any district or division to which all parties have consented.” Fed. R. Civ. P. §  
17 1404(a). However, the “presence of a valid forum-selection clause requires district  
18 courts to adjust their usual § 1404(a) analysis in three ways.” *Atl. Marine Const. Co.*,  
19 134 S. Ct. at 581. First, the plaintiff’s choice of forum is given no weight, and  
20 instead, the party trying to exclude the forum selection clause “bears the burden of  
21 establishing that transfer to the forum for which the parties bargained is unwarranted.”  
22 *Id.* Second, a forum-selection clause in a contract waives the right of the parties to  
23 challenge the preselected forum as inconvenient, thus limiting the court’s  
24 consideration to the public interest factors at stake. *Id.* at 582. Such factors include  
25 “the administrative difficulties flowing from court congestion; the local interest in  
26 having localized controversies decided at home; [and] the interest in having the trial of  
27 a diversity case in a forum that is at home with the law.” *Id.* at 581 (citing *Piper*  
28 *Aircraft Co. v. Reyno*, 454 U.S. 235, 241(1981)). Third, a forum selection clause does

1 not allow the law of the original forum to transfer with the matter; instead, the law of  
2 the preselected forum will apply. *Id.* at 582.

3 This analysis favors transfer to the Southern District of New York under  
4 § 1404. First, the case could have been brought in the South District of New York  
5 because there is proper personal jurisdiction, subject matter jurisdiction, and venue.  
6 Here, Plaintiffs seek a declaratory judgment interpreting provisions of a contract that  
7 was negotiated in New York, signed in New York, governed by New York law, and  
8 performed in New York. CCRES, CCRE, and CFLP all have a principal place of  
9 business in New York. (Compl. ¶¶ 12–14.) Britvan lived and worked under the terms  
10 of the contract in New York for five years. (Pennay Decl. ¶ 21.) It is beyond dispute  
11 that the overwhelming center of gravity in this case is New York and that the case  
12 could have originally been brought there.

13 Second, when considering the public interest factors, transfer to the Southern  
14 District of New York promotes the interests of justice. All Defendants reside in New  
15 York, the contract at issue is a New York agreement governed by New York law,  
16 requiring arbitration in New York City. This controversy is in every meaningful way  
17 a local New York dispute that outweighs any interest California may have. The  
18 Southern District of New York is also a more appropriate venue because of its greater  
19 familiarity with New York law, which governs the Employment Agreement. As a  
20 court that routinely applies New York law to the terms of employment contracts, the  
21 Southern District of New York is best suited to rule on this matter.

22 With regard to HWE, the private interest factors used in the Ninth Circuit in  
23 assessing a motion to transfer under § 1404(a) also weigh in favor of transferring the  
24 case to the Southern District of New York: the location of the witnesses and relevant  
25 evidence, California’s lack of case-specific contacts, the applicable substantive law,  
26 and the locus of purported agreements.

27 Given these circumstances, transfer to the Southern District of New York is  
28 appropriate.

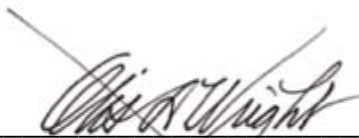
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**V. CONCLUSION**

For the reasons discussed above, the Court **GRANTS** Defendants’ Motion to Transfer. (ECF No. 12.) The Clerk of the Court shall hereby **TRANSFER** this case to the Southern District of New York for further proceedings. As such, the Court **DENIES** as **MOOT** all pending Motions in this case (ECF Nos. 9, 17, 21).

**IT IS SO ORDERED.**

July 18, 2016



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**OTIS D. WRIGHT, II**  
**UNITED STATES DISTRICT JUDGE**