COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

TOTAL QUALITY LOGISTICS, LLC	:	
Plaintiff	:	**CASE NO. 2017 CVH 00261**
vs.	:	**Judge McBride**
LEI TRANSPORTATION, INC., ET AL.	:	**DECISION/ENTRY**
Defendants	:	

Lindhorst & Dreidame Co., LPA, Barry F. Fagel, counsel for the plaintiff Total Quality Logistics, LLC, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202

Moore & Yaklevich, John A. Yaklevich, counsel for the defendants LEI Transportation, Inc. and Justin Moritz, 100 East Main Street, Columbus, Ohio 43215

This cause is before the court for consideration of motion to quash service of process and/or dismiss for lack of personal jurisdiction which was filed by the defendant Justin Moritz on March 22, 2017.

TQL filed a complaint in this case against Moritz and her current employer, LEI Transportation, Inc., on March 2, 2017. The complaint includes multiple causes of action. Pertaining to Moritz, TQL has alleged claims of breach of contract, breach of fiduciary duty, and misappropriation of trade secrets.

With respect to Moritz's pending motion to quash service of process and/or dismiss for lack of personal jurisdiction, TQL filed a response in opposition to the motion on March 30, 2017. The court then held an evidentiary hearing on the motion on April 7, 2017. Following the hearing, the court permitted both parties to submit memoranda in support of their respective positions on the motion, which each did on April 14th. Upon receipt of the memoranda from counsel, the court took the issues raised by the motion under advisement.

Upon consideration of Moritz's motion to quash service of process and/or dismiss for lack of personal jurisdiction, the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

STANDARD OF REVIEW

"In order to render a valid judgment, a court must have personal jurisdiction over the defendant."[1] If the court has not acquired personal jurisdiction over the defendant, then the judgment is void.[2]

Civ.R. 12(B) provides, in pertinent part:

> "Every defense, law or fact, to a claim of relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following

[1] *Nix v. Lytle*, 12th Dist. Butler No. CA2012-06-119, 2013-Ohio-331, ¶ 11, citing *Maryhew v. Yova*, 11 Ohio St.3d 154, 156 (1984). *See EnQuip Technologies Group, Inc. v. Tycon Technologies, S.R.L.*, 2d Dist. Greene Nos. 2009 CA 42, 2009 CA 47, 2010-Ohio-28, ¶ 57, citing *Maryhew*, 11 Ohio St.3d at 156 (holding same).
[2] *Nix*, 2013-Ohio-331 at ¶ 11, citing *Beachler v. Beachler*, 12th Dist. Preble No. CA2006-03-007, 2007-Ohio-1220, ¶ 13.

> defenses may at the option of the pleader be made by motion: * * * (2) lack of jurisdiction over the person."[3]

The defense of lack of personal jurisdiction "usually must be raised either in the defendant's answer or in a motion filed prior to the filing of the answer."[4] When an objection based on personal jurisdiction is made, "the plaintiff has the burden of establishing that the court has jurisdiction."[5]

The court may resolve the issue of whether personal jurisdiction exists by "hear[ing] the matter on affidavits, depositions, or interrogatories, or it may hold a hearing on the issue and receive oral testimony."[6] If the trial court holds an evidentiary hearing, instead of deciding based on the complaint and record alone, the plaintiff is required to demonstrate personal jurisdiction by a preponderance of the evidence.[7]

However, when parties have agreed to a forum selection clause, thereby waiving potential personal jurisdiction objections to other forums, the forum selection clause will be enforced unless the party that opposes the forum selection clause can show it should be invalidated.[8] The factors courts consider when determining whether to

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[3] Civ.R. 12(B)(2).
[4] *Beachler*, 2007-Ohio-1220 at ¶ 17, citing *Franklin v. Franklin*, 5 Ohio App.3d 74, 75-76 (7th Dist. 1981).
[5] *Beachler*, 2007-Ohio-1220 at ¶ 14. *See Simmons v. Budde*, 38 N.E.3d 960, 2015-Ohio-3780, ¶ 7 (10th Dist.), citing *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 785, ¶ 27 ("Upon a defendant's motion to dismiss, the plaintiff bears the burden of establishing that the trial court has personal jurisdiction over the defendant.").
[6] *Beachler*, 2007-Ohio-1220 at ¶ 15, citing *Jurko v. Jobs Europe Agency*, 43 Ohio App.2d 79, 85 (8th Dist. 1975).
[7] *Dahlhausen v. Aldred*, 187 Ohio App.3d 536, 2010-Ohio-2172, 932 N.E.2d 949, ¶ 21 (12th Dist.) *See American Office Services, Inc. v. Sircal Contracting, Inc.*, 8th Dist. Cuyahoga No. 82977, 2003-Ohio-6042, ¶ 7, citing *Giachetti v. Holmes*, 14 Ohio App.3d 306, 307, 471 N.E.2d 165 (8th Dist. 1984) (explaining that "a decision made following an evidentiary hearing requires proof by a preponderance of the evidence.").
[8] *Zilbert v. Proficio Mtge. Ventures, L.L.C.*, 8th Dist. Cuyahoga No. 100299, 2014-Ohio-1838, ¶ 20, citing *Conway v. Huntington Natl. Bank*, 10th Dist. Franklin No. 11AP-1105, 2013-Ohio-1201. *See Four Seasons Enterprises v. Tommel Financial Services, Inc.*, 8th Dist. Cuyahoga No. 77248, 2000 WL 1679456, *1 (Nov. 9, 2000), quoting *Interamerican Trade Corporation v.*

invalidate forum selection clauses in employment contracts are examined in the legal analysis section below.

FACTS OF THE CASE

The present case stems from a dispute between an employer, Total Quality Logistics, LLC (hereinafter referred to as "TQL"), with its former employee Justin Moritz and her new employer, the defendant LEI Transportation, Inc. In this section of the decision, the court has included facts pertinent to the issue of whether this court has personal jurisdiction over Moritz.

Moritz is a Georgia resident.[9] TQL is an Ohio limited liability company headquartered in Ohio.

Moritz avers in her affidavit that she received an offer of employment from TQL on or before November 27, 2015 to work as a broker of freight sales in TQL's Atlanta, Georgia office.[10] Moritz avers that she accepted the offer, although she did not indicate when, and "promptly afterwards" gave her prior employer notice that she was resigning.[11] An exhibit submitted by TQL showing Moritz's employment history with TQL indicates that she accepted the offer on November 30, 2015.[12]

Marc Bostwick, a risk manager at TQL, testified on behalf of TQL that prospective employees are informed that they will have to sign a non-competition,

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Companhia Fabricadora de Pecas, 973 F.2d 487, 489 (6th Cir. 1992) (explaining that, in a motion to dismiss where a party challenges a forum selection clause, "[i]t is clear, however, that the burden of proof is on the party challenging the clause * * *").

[9] J. Moritz Aff., ¶ 8.

[10] *Id.*, ¶¶ 3,9.

[11] Id., ¶ 4.

[12] Pls. Ex. B.

confidentiality, and non-solicitation agreement at multiple junctures before the employee is hired. He testified that TQL's practice is to notify employees of this agreement in their interviews with TQL and then again afterwards at the time TQL makes an offer of employment, via phone or email. Bostwick could not speak to whether Moritz specifically was informed during her interview or at the time of TQL's offer to her of a non-competition agreement that she would be required to sign.

On December 4, 2015, Moritz received an email from a TQL representative titled "TQL First Day Information."[13] The body of the email directs as follows:

> "* * * Before coming onboard, please visit our Welcome Website to review a couple important employment forms and do some insider reading about TQL. *Hint:* Don't miss 'Your First Day' in the top-right corner. On this page, you'll find various forms and benefits information, including our Non-Compete/Non-Disclosure and Arbitration Agreement you are required to sign on your first day. * * *"[14]

Additionally, Moritz avers that on or about December 7, 2015, which was the day she started her employment, TQL informed her that she was required to sign a non-competition, confidentiality, and non-solicitation agreement ("the Agreement").[15] The Agreement lists TQL's address as 4289 Ivy Pointe Blvd, Cincinnati, Ohio 45245.[16] The Agreement included a forum selection clause that provides as follows:

> "11. Governing Law and Jurisdiction. This Agreement shall be interpreted and enforced under the laws of the State of Ohio, without giving effect to any conflict of law provision which would result in the application of any other than Ohio law, and any action, suit or proceeding with respect to or arising out of this Agreement shall be brought exclusively in either the Court of Common Pleas, Clermont County, Ohio

[13] Pls. Ex. B.
[14] (Emphasis original.) Pls. Ex. B.
[15] J. Moritz Aff., ¶ 5.
[16] Pls. Ex. A, pg. 1.

> or in the United States District Court in the jurisdiction where the office of the Employee is located."[17]

Moritz signed the Agreement in Georgia on December 7, 2015.[18] David Acree, the general manager of TQL's Georgia office, also signed the Agreement on the same date.[19] Moritz claims that she signed the Agreement, in part, because she had already resigned from her previous employment, and she "did not believe" that she could negotiate or amend the terms of the Agreement.[20] She was told that she was required to sign the Agreement as a condition of working for TQL.[21] Moritz did not indicate which provisions in the Agreement she found objectionable and would not have agreed to had she believed she could negotiate the contract.

Moritz has never been to Clermont County, Ohio, or anywhere in Ohio for a business purpose.[22] She also avers that she "never solicited or conducted any business in Ohio," nor has she derived substantial revenue from goods used or services rendered in Ohio.[23] Moritz does not have any real, personal, or intangible assets in Ohio.[24]

Bostwick testified that Moritz did have six prospective customers located in Ohio while she worked for TQL. In order to maintain these six customers, and to keep other TQL employees from having these customers assigned to them, Ms. Moritz was required to keep in contact with the prospective customers via email and/or phone. The calls that Moritz received from customers were routed through Cincinnati, Ohio, and she

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[17] Pls. Ex. A, pg. 7.
[18] J. Moritz Aff., ¶ 6; Pls. Ex. A, pg. 9.
[19] Pls. Ex. A, pg. 9.
[20] J. Moritz Aff., ¶ 7.
[21] *Id.*, ¶ 7.
[22] *Id.*, ¶¶ 10-11.
[23] *Id.*, ¶ 14.
[24] *Id.*, ¶ 13.

had a 513 area code, which is the area code for Cincinnati, Ohio. Bostwick was not sure whether Moritz watched any TQL training videos or live training sessions broadcast online, but if she had those would have been filmed from Ohio. Moritz's paychecks were paid through Fifth Third Bank, located in Cincinnati, Ohio.

Moritz maintains that, as a Georgia resident, she cannot afford to travel to Ohio to defend this lawsuit, nor can she afford to pay the travel and other related expenses of any witnesses who may be needed to testify on her behalf in this case.[25]

LEGAL ANALYSIS

In Ohio, to determine whether a trial court has personal jurisdiction over a nonresident defendant, the trial court must determine "(1) whether the long-arm statute and the applicable rule of civil procedure confer jurisdiction and, if so, (2) whether the exercise of jurisdiction would deprive the nonresident defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution."[26]

However, "the requirement that a court have personal jurisdiction over a party is a waivable right and there are a variety of legal arrangements whereby litigants may consent to the personal jurisdiction of a particular court system."[27] One such way a

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[25] J. Moritz Aff., ¶¶ 20-21.

[26] *Kauffman Racing Equip., L.L.C.*, 2010-Ohio-2551 at ¶ 28, citing *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.*, 68 Ohio St.3d 181, 183-184, 624 N.E.2d 1048 (1994). *See Clark v. Connor*, 82 Ohio St.3d 309, 312, 695 N.E.2d 751 (1998), citing *U.S. Sprint Communications Co. Ltd. Partnership*, 68 Ohio St.3d at 183-184 (holding same).

[27] *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, 860 N.E.2d 741, ¶ 6, quoting *Kennecorp Mtgs. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.*, 66 Ohio St.3d 173, 175, 610 N.E.2d 987 (1993). *See IntraSee v. Ludwig*, 9th Dist. Lorain Nos. 10CA009916, 11CA010024, 2012-Ohio-2684, ¶ 7, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

party can waive personal jurisdiction objections is by agreeing to submit to a jurisdiction through the use of a forum selection clause.[28] Such clauses are "'presumptively valid' and have generally been enforced."[29] Once a court finds that a forum selection clause controls, that finding "obviates the need to review the trial court's minimum-contacts analysis as a party may waive the due-process requirements of jurisdiction."[30]

Historically, forum selection clauses were not favored in common law until the United States Supreme Court acknowledged in *MIS Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 Led.2d 513 (1972), that the increase in multi-jurisdictional business transactions and current commercial realities should permit forum selection clauses to control jurisdiction, absent a "strong showing" that they should be set aside.[31] Thereafter, in *Kennecorp Mortgage Brokers, Inc. v. Country Club Convalescent Hospital, Inc.*, 66 Ohio St.3d 173, 610 N.E.2d 987 (1993), the Ohio Supreme Court had to determine whether commercial parties could waive personal jurisdiction by agreeing to a forum selection clause. In *Kennecorp*, the Court found that "[a]bsent fraud or overreaching, a forum selection clause contained in a commercial

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[28] *Salehpour v. Just A Buck Licensing, Inc.*, 12th Dist. Warren No. CA2013-03-028, 2013-Ohio-4436, ¶ 10, citing *Natl. City Commercial Capital Corp. v. All About Limousines Corp.*, 12th Dist. Butler No. CA 2005-08-226, 2009-Ohio-1159, ¶ 7. *See Zilbert*, 2014-Ohio-1838 at ¶ 19, citing *Natl. City Commercial Capital Corp.*, 2009-Ohio-1159 at ¶ 7 ("Parties to a contract may agree to submit to jurisdiction of a particular court through the use of a forum-selection clause."); *InstraSee*, 2013-Ohio-2684 at ¶ 7 ("One way litigants may consent to personal jurisdiction of a particular court system is through a valid forum selection clause.").

[29] *Zilbert*, 2014-Ohio-1838 at ¶ 20, citing *Conway*, 2013-Ohio-1201.

[30] *Info. Leasing Corp. v. Jaskot*, 151 Ohio App.3d 546, 2003-Ohio-566, 784 N.E.2d 1192, ¶ 22 (1st Dist.). *See Contech Const. Products, Inc. v. Blumenstein*, S.D. Ohio No. 1:11cv878, 2012 WL 2871425, *6 (July 12, 2012), citing *Original Peter Pan v. CWC Sports Grp., Inc.*, 194 Ohio App.3d 50, 53-54, 954 N.E.2d 1220 (8th Dist. 2011) (noting, in a case involving an employment contract, that "Ohio courts do not engage in a due process analysis to resolve the question of personal jurisdiction when the defendant is a party to a contract containing a valid forum-selection clause.").

[31] *Info. Leasing Corp.*, 2003-Ohio-566 at ¶ 10, citing *MIS Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 Led.2d 513 (1972). *See Four Seasons Enterprises*, 2000 WL 1679456 at * 2.

contract between business entities is valid and enforceable, unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust."[32] The Court concluded that forum selection clauses "are *prima facie* valid in the commercial context."[33]

Moritz has argued that forum selection clauses cannot apply in cases involving noncommercial contracts, such as an employment contract between a company and an individual. She posits that, because she is not a business entity, TQL must still show that this court has personal jurisdiction over her in accordance with the Ohio long arm statute and due process.[34]

Upon evaluating post-*Kennecorp* Ohio case law and cases from the Northern and Southern Districts of Ohio, the court concludes that a party to a noncommercial contract can waive personal jurisdiction objections by assenting to a forum selection clause.[35] However, while forum selection clauses can apply outside the commercial context, they "should be distinguished between commercial and non-commercial parties."[36]

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[32] *Kennecorp Mtge. Brokers, Inc.*, 66 Ohio St.3d 173 at the syllabus.
[33] Id. at 175.
[34] Defs. Mem., pg. 2.
[35] The Twelfth District Court of Appeals has not directly ruled upon whether a former employee can waive personal jurisdiction through a forum selection clause in an employment contract, such as a non-competition agreement. Of note, however, the Twelfth District Court of Appeals in *Morgan v. Rambly*, 12th Dist. Warren No. CA2007-12-147, 2008-Ohio-6194, dealt with this issue tangentially. There, a defendant was involved in an employment agreement-based dispute and argued that the trial court did not have jurisdiction because the employment contract named a different venue through a forum selection clause. The court acknowledged that the forum selection clause established the proper venue for the dispute, but because he had not timely challenged the venue, the defendant waived his objection and could not enforce the forum selection clause. This case is notable only in that the court did not opine that a forum selection clause in an employment contract would be unenforceable.
[36] *See Preferred Capital, Inc.*, 2007-Ohio-257 at ¶ 8.

The Eighth District Court of Appeals has found that a forum selection clause in an employment contract may be enforceable, and in doing so has examined additional factors to determine enforceability.[37] On this issue, the court has opined that "under the laws of the state of Ohio, in the absence of fraud or overreaching, forum-selection clauses are valid and enforceable if they are reasonable and just."[38] The Eighth District Court of Appeals examines three factors to determine whether a forum selection clause in a noncommercial contract should be enforced. The clause is enforceable unless: "(i) it is the result of fraud or overreaching; (ii) enforcement would violate strong public policy of the forum; or (iii) enforcement would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable."[39]

The Ninth District Court of Appeals likewise found that a forum selection clause may be enforced in the context of an employment agreement in *IntraSee v. Ludwig*, 9th Dist. Lorain Nos. 10CA009916, 11CA010024, 2012-Ohio-2684. The court acknowledged that the law regarding forum selection clauses in employment contracts is not as settled as in cases involving commercial contracts.[40] However, upon reviewing pertinent case law, including federal case law, the court resolved that "we cannot conclude that forum selection clauses in employment contracts are never

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[37] *See Century Business Servs., Inc. v. Barton*, 197 Ohio App.3d 352, 2011-Ohio-5817, 967 N.E.2d 782 (8th Dist.), ¶¶ 55-56 (finding that a trial court properly exercised personal jurisdiction over a defendant where he signed an employment agreement containing a forum selection clause); *Zilbert*, 2014-Ohio-1838 at ¶ 20, citing *Conway*, 2013-Ohio-1201 (applying additional factors to determine validity of forum selection clause in an employment contract).
[38] *Century Business Servs., Inc.*, 2011-Ohio-5817 at ¶ 56.
[39] *Zilbert*, 2014-Ohio-1838 at ¶ 20, citing *Conway*, 2013-Ohio-1201.
[40] *InstraSee*, 2013-Ohio-2684 at ¶ 8.

enforceable."[41] In so holding, the court adopted the same three-part test as used by the Eighth District Court of Appeals as set forth above.[42]

The First District Court of Appeals has observed that a forum selection clause in an employment contract may be enforced, but as it is not a commercial contract, the court is required to examine other factors to determine validity.[43] As such, a forum selection clause will not be enforced where it is the product of fraud or overreaching, or where its enforcement would be unreasonable or unjust.[44]

Beyond Ohio state courts, both the Southern and Northern Districts of Ohio also have enforced forum selection clauses in employment contracts.[45] Notably, the Sixth Circuit Court of Appeals has observed that "Ohio and federal law treat forum selection clauses similarly."[46] In a case involving an employment contract with a forum selection clause, the Southern District of Ohio observed that forum selection clauses are presumptively valid and will be enforced unless the party challenging the enforcement shows "(1) that enforcement was the result of fraud or overreaching; (2) that

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[41] Id.
[42] Id., citing *Buckeye Check Cashing of Arizona, Inc. v. Lang*, S.D. Ohio No. 2:06-CV-792, 2007 WL 641824 (Feb. 23, 2007).
[43] *Deaconess Homecare, Inc. v. Waters*, 1st Dist. Hamilton No. C-00-277, 1999 WL 1488974, *1 (Dec. 8, 1999). *See Buckeye Check Cashing of Arizona, Inc.*, 2007 WL 641824 at *4, citing *Deaconness Homecare, Inc.*, 1999 WL 1488974 at *1 (explaining that, because that case dealt with an employment contract, which is noncommercial, the court had to consider additional factors to determine the validity of the forum selection clause).
[44] *Deaconess Homecare, Inc.*, 1999 WL 1488974 at *1, citing *MIS Breman*, 407 U.S. at 15.
[45] *FirstMerit Corp. v. Craves*, N.D. Ohio No. 1:14-CV-02203, 2015 WL 151318, *3 (Jan. 12, 2015) (enforcing a forum selection clause that named the forum as Summit County Ohio Court of Common Pleas or the Northern District of Ohio); *Veteran Payment Systems, LLC v. Gossage*, N.D. Ohio No. 5:14CV981, 2015 WL 545764, *6 (Feb. 10, 2015) (finding a forum selection clause electing state or federal courts in Alliance County, Ohio enforceable, although the defendant-employee was a resident of North Carolina); *Contech Const. Products, Inc.*, 2012 WL 2871425 at * 8 (enforcing a forum selection clause naming Butler County Ohio or federal district court in Cincinnati, Ohio as the forum, where the defendant-employee was a California resident).
[46] *Buckeye Check Cashing of Arizona, Inc.*, 2007 WL 641824 at *2, citing *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 721 (6th Cir. 2006).

enforcement would violate the strong public policy of the forum state; and (3) that enforcement would result in litigation in a jurisdiction so unreasonable, difficult and inconvenient that the challenger would for all practical purposes be deprived of his day in court."[47]

Having observed that multiple Ohio districts, as well as Ohio federal courts, enforce forum selection clauses in employment contracts after weighing several validity factors, the court adopts the same approach in the case at bar. Accordingly, the court will examine: (1) whether the forum selection clause is the result of fraud or overreaching; (2) whether enforcement of the clause would violate strong public policy of the forum; and (3) whether enforcement would, in the particular circumstances of this case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable.

As mentioned, the first factor considered is whether there was fraud or overreaching. Fraud or overreaching that would invalidate a forum selection clause "must relate directly to the negotiation or acceptance of the forum selection clause itself, not just to the contract generally."[48] Indeed, it "is settled law that unless there is a showing that the alleged fraud or misrepresentation induced the party opposing the forum selection clause to agree to inclusion of the clause in the contract, a general claim of fraud or misrepresentation as to the entire contract does not affect the validity

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[47] *Buckeye Check Cashing of Arizona, Inc.*, 2007 WL 641824 at *5, *Barrett v. Picker Int'l, Inc.*, 68 Ohio App.3d 820, 824, 589 N.E.2d 1372 (8th Dist. 1990).

[48] *Salehpour*, 2013-Ohio-4436 at ¶ 14, quoting *Bohl v. Hauke*, 180 Ohio App.3d 526, 906 N.E.2d 450, 2009-Ohio-150, ¶ 9 (4th Dist.). *See Four Seasons Enterprises*, 2000 WL 1679456 at * 2 (explaining that "in order to invalidate the forum selection clause, the fraud alleged must relate directly to the negotiation or acceptance of the forum selection clause itself, and not just to the contract generally.")

of the forum selection clause."[49] "Unequal bargaining power of the parties or lack of ability to negotiate over the [forum selection] clause cannot, in itself, support a finding of overreaching."[50] Even so, "overreaching may be found if the disparity in bargaining power was used to take unfair advantage of the employee."[51]

The court in *IntraSee v. Ludwig*, cited above, found no evidence of overreaching when an employer chose Ohio as its selected forum.[52] The employer in *IntraSee* had decentralized operations, but its principal place of business and most central location was in Ohio, where it processed its payroll.[53] Therefore, the court reasoned that the employer had not overreached in selecting Ohio as its forum using a forum selection clause.[54]

As in *IntraSee*, in the case at bar TQL is headquartered in Ohio, although it does have multiple offices, and its payroll is processed in Ohio. Moritz posits that TQL overreached because she had to sign the Agreement as a condition of her employment, and she was not notified until after she resigned from her prior employment of this condition. Although Moritz avers that she "did not believe that [she] could negotiate or amend the terms of that agreement,"[55] she did not actually try to amend her contract by asking to renegotiate the forum selection clause. The mere fact that Moritz did not believe that her contract was negotiable is not evidence of fraud or overreaching.

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[49] *Four Seasons Enterprises*, 2000 WL 1679456 at *2, citing *Moses v. Business Card Express*, 929 F.2d 1131, 1138 (6th Cir. 1991).
[50] *IntraSee*, 2012-Ohio-2684 at ¶ 11, citing *Buckeye Check Cashing of Arizona*, 2007 WL 641824 at *5.
[51] *Id.*, citing *Buckeye Check Cashing of Arizona*, 2007 WL 641824 at *5.
[52] *IntraSee*, 2012-Ohio-2684 at ¶ 13.
[53] Id.
[54] *IntraSee*, 2012-Ohio-2684 at ¶ 14.
[55] J. Moritz Aff., ¶ 7.

Furthermore, the record is unclear as to when Moritz gave notice to her prior employer of her resignation and whether that notice preceded TQL's notice to Moritz that she would have to sign the Agreement, which contained the forum selection clause. Moritz avers that she accepted an offer from TQL, although she did not indicate when, and "promptly afterwards" gave her prior employer notice that she was resigning.[56] TQL's Exhibit B suggests that Moritz accepted TQL's offer on or about November 30th.[57]

Bostwick testified that it is TQL's practice to notify employees of the non-competition agreement in their interviews with TQL, and then again afterwards at the time TQL makes an offer of employment, via phone or email. However, because Bostwick could not speak to whether Moritz specifically was informed of the Agreement in her interview or at the time of TQL's offer to her, the court will not presume that Moritz received notice at those junctures. However, it is clear that the email TQL sent to Moritz on December 4th contained a link that Moritz could have used to review the terms of the Agreement, and TQL notified Moritz in the email that she would be required to sign the Agreement as a condition of employment.

Neither the email nor Moritz's affidavit testimony illuminate when she gave notice to her prior employer of her resignation. All that can be reasonably inferred from her affidavit is that her notice to her employer was prompt. Because there are only a few days separating the day when Moritz accepted TQL's offer, November 30th, and when TQL emailed Moritz with a link to the Agreement, December 4th, the court cannot conclude that Moritz resigned from her prior employment before TQL notified her of the

[56] J. Moritz Aff., ¶ 4.
[57] Pls. Ex. B, pg. 1.

terms of the Agreement, which contained the forum selection clause. In other words, the evidence does not indicate that Moritz gave notice to her prior employer of her resignation before receiving TQL's notice of the forum selection clause. Upon reviewing all of the evidence in this case, the court finds that the forum selection clause should not be invalidated on the basis of fraud or overreach by TQL.

The second factor considered is whether enforcing the clause would violate a strong public policy of the forum. Because "Ohio recognizes the validity of forum selection clauses," the enforcement of such clauses does not generally violate the public policy of Ohio.[58] "Undeniably, the state of Ohio has an interest in providing a local forum for its residents * * *."[59] As such, courts have found that forum selection clauses do not violate Ohio public policy.[60] Enforcing a forum selection clause selecting an Ohio court system when the employer has a principal place of business in Ohio "would not violate, but would instead promote, public policy in Ohio."[61] In the present case, TQL is an Ohio limited liability company, headquartered in Ohio. As such, the court finds that Ohio public policy is not violated by enforcing a forum selection clause that selects the Clermont County Court of Common Pleas as the forum.

Finally, as mentioned, the third factor considers whether enforcing a forum selection clause would be unreasonable or unjust. A forum selection clause is unreasonable or unjust, therefore requiring invalidation, when "the chosen forum is so inconvenient as to, in effect, afford no remedy at all, thus depriv[ing] litigants of their day

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[58] *Zilbert*, 2014-Ohio-1838 at ¶ 24.
[59] *IntraSee*, 2012-Ohio-2684 at ¶ 15, citing *Barrett*, 68 Ohio App.3d at 824.
[60] *Zilbert*, 2014-Ohio-1838 at ¶ 24; *IntraSee*, 2012-Ohio-2684 at ¶ 15.
[61] *IntraSee*, 2012-Ohio-2684 at ¶ 15.

in court."[62] "A finding of unreasonableness or injustice must be based on more than inconvenience to the party seeking to avoid the forum selection clauses' requirements."[63] "[M]ere distance, mere expense, or mere hardship to an individual litigant is insufficient to invalidate a forum selection clause."[64] Furthermore, an employee's lack of contacts with the state of Ohio, by itself, "does not support the conclusion that it would be unreasonable to enforce [a] forum selection clause" selecting an Ohio court.[65] Ohio courts have explained why "mere distance" is insufficient to invalidate a forum selection clause:

> "[W]here matters impacting upon the convenience of a particular forum were known to or foreseeable by plaintiff at the time the contract was negotiated and accepted, and where plaintiff can point to no change in circumstances which would justify relief from its contractual commitment, such matters do not justify a refusal to enforce the clause."[66]

In determining whether a selected forum is sufficiently unreasonable or unjust, "Ohio courts consider the following factors: (1) which law controls the contractual dispute; (2) the residency of the parties; (3) where the contract was executed; (4) where

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[62] (Internal citation omitted.) *Salehpour*, 2013-Ohio-4436 at ¶ 17, quoting *Info. Leasing Corp.*, 2003-Ohio-566 at ¶ 18. *See Zilbert*, 2014-Ohio-1838 at ¶ 26, citing *Info. Leasing Corp.*, 2003-Ohio-566 (holding same).

[63] *Zilbert*, 2014-Ohio-1838 at ¶ 25, citing *Preferred Capital, Inc. v. Ferris Bros., Inc.*, 167 Ohio App.3d 653, 2005-Ohio-6221, 856 N.E.2d 984 (9th Dist.).

[64] *Salehpour*, 2013-Ohio-4436 at ¶ 18, quoting *IntraSee, Inc.*, 2012-Ohio-2684 at ¶ 20. *See Info. Leasing Corp.*, 2013-Ohio-566 at ¶ 19 (rejecting the argument that a forum selection clause is unjust and unreasonable based only upon "inconvenience to the party seeking to avoid the forum-selection clause's requirements.").

[65] *IntraSee*, 2012-Ohio-2684 at ¶ 16. *See Veteran Payment Systems, LLC*, 2015 WL 545764 at *6 (rejecting the defendant-employee's argument that an Ohio forum was unjust or unreasonable where the employee insisted he was "'nearly bankrupt and does not have the funds to litigate this action so far from his home. He also suggests that it is unfair for him to have to do so when his only connection to Ohio - aside from the forum selection clause he acknowledges that he signed – is that his former employer maintains its headquarters in Ohio.").

[66] *Four Seasons Enterprises*, 2000 WL 1679456 at *4, quoting *Interamerican Trade Corp.*, 973 F.2d at 489-490.

the witnesses and parties to the litigation are located; and (5) whether the forum clause's designated location is inconvenient to the parties."[67]

The case of *Zilbert v. Proficio Mortgage. Ventures, L.L.C.*, 8th Dist. Cuyahoga No. 100299, 2014-Ohio-1838, illustrates a case in which a forum selection clause in an employment contract was unenforceable because enforcing the clause would have resulted in litigation in a jurisdiction that would be so unreasonable, difficult, and inconvenient to the employees as to create a considerable risk that the employees would be deprived of their day in court.[68] The employment contract provided Utah as the forum, but the employees were Ohio residents.

Applying the first factor, the court noted that the employment contracts included a choice of law provision naming Utah law as governing disagreements.[69] As such, the employer would receive the benefit of Utah law even if the case was litigated in Ohio, and thus this factor did not "weigh heavily in favor of one jurisdiction over the other."[70]

The other factors, however, weighed strongly in favor of not enforcing the Utah forum selection provision. The second factor, the parties' residency, weighed against enforcement because the employer was not a Utah corporation and did not have its principal place of business in Utah, but all of the defendants were Ohio residents and the employer had offices in Ohio too.[71] Under the third and fourth factors, the employment agreements were signed and executed in Ohio and most, if not all, of the

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[67] *Zilbert*, 2014-Ohio-1838 at ¶ 27, citing *Original Peter Pan v. CWC Sports Group, Inc.*, 194 Ohio App.3d 50, 2011-Ohio-1684, 954 N.E.2d 1220 (8th Dist.). *See IntraSee*, 2012-Ohio-2684 at ¶ 16, citing *Buckeye Check Cashing of Arizona, Inc.*, 2007 WL 641824 at *7 (applying the same five factors to determine whether a selection forum clause is unreasonable or unfair).
[68] *Zilbert*, 2014-Ohio-1838 at ¶ 31.
[69] Id. at ¶ 28.
[70] Id.
[71] Id. at ¶ 29.

witnesses were located in Ohio, also weighing against enforcement.[72] Finally, under the last factor, Utah was not a convenient forum for either the employer or the employees, since the employees were in Ohio, the employer was a Delaware corporation, and its offices were in Ohio, not Utah.[73] Upon considering all of these factors, the court held that the forum selection clause should not be enforced.[74]

Another instance in which enforcing the forum selection clause in an employment contract was found unreasonable appears in *Deaconess Homecare, Inc. v. Waters*, 1st Dist. Hamilton No. C-00-277, 1999 WL 1488974 (Dec. 8, 1999). In that case, the First District Court of Appeals succinctly summarized why it would be unreasonable and unjust to enforce an Ohio forum selection clause against an employee residing in Tennessee: "(1) Tennessee law controls the dispute; (2) both parties are Tennessee residents; (3) the contract was executed in Tennessee; (4) all of the witnesses are in Tennessee; and (5) Ohio is not a convenient forum for the parties or the witnesses."[75]

In contrast, the case of *IntraSee v. Ludwig*, 9th Dist. Lorain Nos. 10CA009916, 11CA010024, 2012-Ohio-2684, illustrates a situation in which it was not unreasonable to enforce an Ohio forum selection clause where the employer was based in Ohio and the employee resided in Minnesota. The first factor, which law controls the dispute, did not "weigh heavily" in the analysis because the forum selection clause named Ohio and the employment contract also included an Ohio choice of law provision.[76] As to the residency of the parties, the employee resided in Minnesota, but the employer had a

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[72] Id.
[73] Id. at ¶ 31.
[74] Id.
[75] *Deaconess Homecare, Inc.*, 1999 WL 1488974 at *1.
[76] *IntraSee*, 2012-Ohio-2684 at ¶ 17, citing *Buckeye Check Cashing of Arizona, Inc.*, 2007 WL 641824 at *8,

principal office in Ohio.[77] Because the residency spanned two jurisdictions, this factor did not heavily weigh in the analysis.[78] The third factor, where the contract was signed, also weighed little because it was signed by the employer in Ohio and by the employee in Minnesota.[79]

As to the location of the witnesses and parties, the parties were in separate states, and it was unclear what witnesses would be called.[80] However, because the complaint involved a claim dealing with one of the employer's customers in Minnesota, the fourth factor weighed "slightly" in favor of finding the clause unreasonable.[81]

Finally, under the fifth factor, regarding the convenience to the parties, the court noted that the distance, expense, and hardship on the employee would not invalidate the forum selection clause.[82] Although the employee lived far from Ohio, she had notice from the contract that she could have been hailed into court in Ohio to defend a lawsuit, and she was a resident of Minnesota at the time she signed the employment agreement.[83] Upon considering these factors, the *IntraSee* Court concluded that the forum selection was enforceable and that the employee had waived personal jurisdiction by signing the employment contract.[84]

In turning to the instant case, the court finds that the chosen forum of the Clermont County Court of Common Pleas is not so inconvenient, unreasonable, or unjust as to deprive Moritz of her day in court. Regarding the first factor, which law

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[77] *IntraSee*, 2012-Ohio-2684 at ¶ 18.
[78] Id.
[79] Id.
[80] Id. at ¶ 19.
[81] Id.
[82] Id. at ¶ 20.
[83] Id. at ¶ 21.
[84] Id. at ¶ 22.

controls, Ohio law controls the dispute. This factor therefore does not weigh heavily in the court's analysis. As to the second factor, residency of the parties, Moritz is a Georgia resident and TQL is an Ohio resident. Because their residencies cover multiple jurisdictions, this factor is not particularly weighty either. Regarding the third factor, where the contract was executed, the Agreement appears to have been executed in Georgia because that is where Moritz signed it, and that is where the manager who signed on TQL's behalf was located as well. Thus, this third factor weighs slightly in favor of Moritz.

The fourth factor considers where the witnesses and parties to the litigation are located. The parties to the litigation are located across two states, Ohio and Georgia. Neither party has presented evidence or argument about where most of the witnesses are located. Given the nature of TQL's claims, it is reasonable to infer that witnesses will be called from both Georgia and Ohio. As such, the fourth factor does not weigh heavily in the court's analysis.

Finally, the court must consider whether the forum selection clause's designated location of Ohio is inconvenient to the parties. Because Ohio is headquartered and has a large presence in Ohio, Ohio is a convenient place for TQL to litigate this suit. As to Moritz, she posits that Ohio is inconvenient for her because she cannot afford to travel to Ohio, nor can she afford to pay for witnesses on her behalf to travel to Ohio. The court recognizes that this is likely true for Moritz; however, mere expense and distance are insufficient to render Ohio an inconvenient forum.[85] Moritz would have known at the time she entered into the Agreement that TQL was an Ohio company and that the

[85] *See Salehpour*, 2013-Ohio-4436 at ¶ 18, quoting *IntraSee, Inc.*, 2012-Ohio-2684 at ¶ 20; *Info. Leasing Corp.*, 2013-Ohio-566 at ¶ 19.

selected forum for litigation may be the Clermont Court of Common Pleas, located in Ohio.[86] Because Moritz can "point to no change in circumstances which would justify relief from [her] contractual commitment, such matters do not justify a refusal to enforce the clause."[87]

After reviewing all of the five factors and weighing them, the court cannot conclude that enforcement of the forum selection clause in the Agreement would result in litigation in a jurisdiction so unreasonable, difficult, and inconvenient that Moritz would, for all practical purposes, be deprived of her day in court. Accordingly, the forum selection clause should be enforced. Therefore, the court finds that Moritz has waived any objections she may have had to the jurisdiction of the Clermont County Common Pleas and that this court may exercise personal jurisdiction over her.

CONCLUSION

For the foregoing reasons, the court finds the defendant Justin Moritz's motion to quash service of process and/or to dismiss for lack of personal jurisdiction is not well-taken and is hereby denied.

Counsel are directed to conference and call the Assignment Commissioner within three days of the date of filing of the within Decision/Entry in order to schedule a hearing

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[86] Courts presume that a party who has signed a contract "read and understood" the contract and is "bound" by it. *Preferred Capital, Inc.*, 2007-Ohio-257 at ¶ 10, citing *Haller v. Borror Corp.*, 50 Ohio St.3d 10, 14, 552 N.E.2d 207 (1990). See *Zilbert*, 2014-Ohio-1838 at ¶ 17 ("However, it is one of the most basic tenets of contract law that a document should be read before being signed, and further that a party to a contract is presumed to have read what he or she signed * * *.").

[87] *Four Seasons Enterprises*, 2000 WL 1679456 at *4, quoting *Interamerican Trade Corp.*, 973 F.2d at 489-490.

on the plaintiff's motion for temporary restraining order. The hearing shall be scheduled and held within five days of the date of the conference call.

IT IS SO ORDERED.

DATED: 5-5-17

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served on this 15th day of May 2017 by e-mail on Barry F. Fagel, attorney for the plaintiff, at bfagel@lindhorstlaw.com, and on John A. Yaklevich, attorney for the defendants LEI Transportation, Inc. and Justin Moritz, at javyaklevich@gmail.com.

Judicial Assistant to Judge McBride