2025 WL 2739719 (Cal.App. 2 Dist.) (Appellate Brief)
Court of Appeal, Second District, California,
Division 6.

BAYWA R.E. WIND, LLC, Plaintiff and Appellant,
v.
RSG UNDERWRITING MANAGERS, LLC, et al., Defendants and Respondents.

No. B337522.
September 4, 2025.

(Superior Court No. 24CV00202 Hon. Jed Beebe)

Joint Respondents' Brief

James Koelzer, (Bar No. 183760), *Douglas J. Collodel, (Bar No. 112797), David Ktshozyan, (Bar No. 299414, Clyde & Co US LLP, 355 S. Grand Avenue, Suite 1400, Los Angeles, CA 90017, Telephone: 213.358.7600, Facsimile: 213.358.7650, james.koelzer@clydeco.us, douglas.collodel@clydeco.us, david.ktshozyan @clydeco.us, for defendant and respondent, AGCS Marine Insurance Company.

Natalie M. Limber, (Bar No. 304252), Sonia Martin, (Bar No. 191148), Dentons US LLP, 601 S. Figeroa Street, Suite 2500, Los Angeles, CA 90017, Telephone: 213.623.9300, Facsimile: 213.623.9924, natalie.limber@dentons.com, sonia.martin @dentons.com, for defendant and respondent Scottsdale Insurance Company.

Edward P. Murphy, (Bar No. 182778), Foran Glennon Palandech Ponzi & Rudloff PC, 38 Corporate Park, Irvine, CA 92606, Telephone: 949.791.1060, Facsimile: 949.791.1070, emurphy@fgppr.com, for defendants and respondents RSG Underwriting Managers, LLC trading as Power.Energy.Risk; Lloyd's Syndicate CSL 1084; Lloyd's Syndicate 1458 RenaissanceRe Management Limited; QBE Insurance (UK) Limited; Lloyd's Syndicate Atrium 609; Convex Insurance UK Limited; Everest Indemnity Insurance Company; Accident Fund General Insurance Company (AFGIC); HDI Global Specialty SE; QBE (UK) Limited.

***4** Counsel of record for Respondent, Scottsdale Insurance Company, hereby certifies under California Rules of Court, Rule 8.208 that the following listed parties have a direct pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal.

Respondent, Scottsdale Insurance Company, is a wholly-owned subsidiary of Nationwide Mutual Insurance Company. Nationwide Mutual Insurance Company has no parent company and is not publicly traded.

Dated: September 4, 2025 DENTONS US LLP

By: <<signature>>

Natalie M. Limber

Sonia Martin

Attorneys for Defendant and

Respondent Scottsdale Insurance

Company

***5** Counsel of record for Respondents, RSG Underwriting Managers, LLC trading as Power.Energy.Risk; Lloyd's Syndicate CSL 1084; Lloyd's Syndicate 1458 RenaissanceRe Management Limited; QBE Insurance (UK) Limited; Lloyd's Syndicate Atrium 609; Convex Insurance UK Limited; Everest Indemnity Insurance Company; Accident Fund General Insurance Company (AFGIC); HDI Global Specialty SE; QBE (UK) Limited, hereby certifies under California Rules of Court, Rule 8.208 that the following listed parties have a direct pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal.

Counsel of record for Respondents, RSG Underwriting Managers, LLC trading as Power.Energy.Risk; Lloyd's Syndicate CSL 1084; Lloyd's Syndicate 1458 RenaissanceRe Management Limited; QBE Insurance (UK) Limited; Lloyd's Syndicate Atrium 609; Convex Insurance UK Limited; Everest Indemnity Insurance Company; Accident Fund General Insurance Company (AFGIC); HDI Global Specialty SE; QBE (UK) Limited, hereby certifies under California Rules of Court, Rule 8.208 that the following listed parties have a direct pecuniary interest in the outcome of this case. These representations are made to enable the Court to evaluate possible disqualification or recusal.

Respondent, RSG Underwriting Managers, LLC trading as Power.Energy.Risk, is a subsidiary of Ryan Specialty, LLC. Ryan Specialty, LLC's parent company is Ryan Specialty Holdings, Inc, which is traded on the New York Stock Exchange under the symbol RYAN.

***6** Respondent, Lloyd's Syndicate CSL 1084, is managed by Chaucer Syndicates Limited and Chaucer Underwriting Services Limited, which are wholly owned subsidiaries of China Reinsurance Group Corporation, which is publicly traded on the Hong Kong Stock Exchange.

Respondent, Lloyd's Syndicate 1458 RenaissanceRe Management Limited, is a wholly-owned subsidiary of RenaissanceRe Holdings Ltd., which is publicly traded on the New York Stock Exchange.

Respondent, QBE UK Limited (which was improperly sued here as QBE Insurance (UK) Limited), is a wholly-owned subsidiary of QBE Holdings (EO) Limited.

Respondent, Lloyd's Syndicate Atrium 609, is managed by Atrium Underwriters Limited, which is a wholly-owned subsidiary of Atrium Underwriting Group Limited. Atrium Underwriting Group Limited is a wholly-owned subsidiary of Alopuc Limited (a UK holding company) and Alopuc Limited is in turn a wholly-owned subsidiary of Northshore Holdings Limited, a Bermudan company. The ultimate beneficial owners of Northshore Holdings Limited are affiliates of Stone Point Capital LLC. The balance of the Northshore Holdings Limited shareholding is held by Dowling Capital Partners and Atrium Underwriting Limited management and staff.

Respondent, Convex Insurance UK Limited, is a wholly-owned subsidiary of Convex Re Limited.

Respondent, Everest Indemnity Insurance Company, is a wholly-owned subsidiary of Everest Reinsurance Company, which ***7** is a wholly owned subsidiary of Everest Reinsurance Holdings, Inc., which is a wholly owned subsidiary of Everest Underwriting Group (Ireland) Limited, which is a wholly owned subsidiary of Everest Group, Ltd., which is publicly traded on the New York Stock Exchange.

Respondent, Accident Fund General Insurance Company (AFGIC), is a wholly-owned subsidiary of Accident Fund Insurance Company of America, which is owned by Blue Cross Blue Shield of Michigan.

Respondent, HDI Global Specialty SE, is wholly-owned by HDI Global SE (via a holding company). HDI Global SE is part of the Talanx Group, a publicly traded company on the Frankfurt Stock Exchange.

***8** Respondent, QBE UK Limited (which was improperly sued here as QBE (UK) Limited), is a wholly-owned subsidiary of QBE Holdings (EO) Limited.

Dated: September 4, 2025

FORAN GLENNON PALANDECH

PONZI & RUDLOFF PC

By: Edward P. Murphy

Edward P. Murphy

Attorneys for Defendants and

Respondents RSG Underwriting

Managers, LLC trading as

Power.Energy.Risk; Lloyd's

Syndicate CSL 1084; Lloyd's

Syndicate 1458 RenaissanceRe

Management Limited; QBE

Insurance (UK) Limited; Lloyd's

Syndicate Atrium 609; Convex

Insurance UK Limited; Everest

Indemnity Insurance Company;

Accident Fund General Insurance

Company (AFGIC); HDI Global

Specialty SE; QBE (UK) Limited

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***16** Preliminary Statement

In this insurance coverage action brought by BayWa r.e. Wind, LLC, this Court is called upon to determine the propriety of the trial court's exercise of discretion in staying an action under the insurance policy's mandatory forum-selection clause. Unquestionably, BayWa (through its broker) negotiated and accepted two insurance policies containing the forum-selection provision, which identified New York as the governing forum and law under the policies' "Choice of Law and Jurisdiction" provision. Now, however, BayWa seeks to exploit what it believes is more favorable California law, rather than honoring the contractual commitment it made when securing its insurance.

First, BayWa contends the trial court erred in finding the Choice of Law and Jurisdiction provision is mandatory. But BayWa's argument inexplicably suppresses the pivotal language, incorrectly takes words out of context, and proposes a strained reading that belies the plain contractual terms. Hence, the trial court properly rejected BayWa's contention and found the provision to be mandatory. In turn, the trial court required BayWa to prove the parties' chosen forum was unreasonable (which BayWa could not do). The trial court's stay order is consistent with the Supreme Court's recent validation of mandatory forum selection agreements.

Next, BayWa argues against enforcement based on public policy grounds. Its first public-policy argument suggests its extra-contractual theory and damages for insurance bad faith are guaranteed; the second one elevates the efficient proximate cause ***17** doctrine to a fundamental right. Neither assertion is valid, as the trial court correctly concluded.

In short, long before a dispute arose, the parties (including some who are domiciled abroad) selected New York as the forum where any disagreement about insurance coverage had to be resolved. This Court should affirm the trial court's exercise of discretion to stay the instant action while BayWa's duplicate action proceeds to its conclusion in New York.

Statement of Facts

A. The salient insurance policy provisions.

BayWa obtained Construction All Risk and Delay insurance from the Insurers [1] under Policy No. PER 20 WPC 0251, for the policy period December 31, 2020 to December 31, 2022. (CT at 12, 28-72, 231.) Thereafter, the Insurers issued BayWa that coverage under Policy No. PER 22 WPO 0227 (the pertinent policy on this appeal) for the policy period December 31, 2022 to August 17, 2023 (the "Policy"). [2] (CT at 12, 73-130, ***18** 231.) The Insurers negotiated the terms of the Policy through RSG Underwriting Managers, LLC trading as Power.Energy.Risk and BayWa through its broker, CAC Specialty. (CT at 194.)

Relevant here, both insurance policies contain provisions setting forth the choice of law and the sole jurisdiction for which the parties contracted.[3] They provide, in pertinent part:

Choice of Law And Jurisdiction:

Law: The insurance shall be governed by and construed in accordance with the law of New York.

Jurisdiction: Each party agrees to submit to New York jurisdiction subject to LMA5020 (14/09/2005) Service of Suit Clause naming: Mendes & Mount, 750 Seventh Avenue, New York, NY 10019-6829, USA.

The interpretation, performance and enforcement of this agreement shall be governed by the laws of the state of New York without regard to principles of ***19** conflicts of law and any disputes between the insured and underwriters arising under or in connection with this insurance policy shall be subject to the exclusive jurisdiction of the courts of the state of New York and to the extent permitted by law the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.

(CT at 35, 81-82, 194-195.)

BayWa asserts, albeit erroneously, that the Service of Suit clause governs forum selection. (AOB at 20.) The material portions of this clause provide:

It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States.

It is further agreed that service of process in such suit may be made upon:

Mendes & Mount (Attorneys), 750 Seventh Avenue, New York N.Y. 10019-6829

and that in any suit instituted against any one of them upon this contract, Underwriters will abide by ***20** the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Insured (or Reinsured) to give a written undertaking to the Insured (or Reinsured) that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Insured (or Reinsured) or any beneficiary hereunder arising out of this contract of insurance (or reinsurance), and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

(CT at 92.)

B. Overview of BayWa's claim.

BayWa was involved in a wind-powered electrical project for which the Insurers provided insurance coverage. (CT at 12-13, 231.) In December 2022 through January 2023, torrential rains pummelled the project. (CT at 16-17, 231.) BayWa alleged the storms caused property damage and related business losses and ***21** provided the Insurers with notice of its claimed loss. (CT at 17, 231.) The parties investigated and communicated their respective positions regarding BayWa's damages and coverage under the Policy. (CT at 18-20; and see, CT at 132-189.)

Statement of the Case

A. BayWa sues the Insurers in New York and California.

BayWa filed the instant action against the Insurers, asserting causes of action for declaratory relief, breach of contract and breach of the implied covenant of good faith and fair dealing. (CT at 7-26.) Based on the advice of its counsel, the Insurers' statements about the application of New York law, and to avoid possibly forfeiting its litigation right, BayWa also filed a lawsuit in New York. (CT at 232.)

B. The Insurers move to stay or dismiss the action.

Based on the Policy's mandatory forum selection clause designating New York as the exclusive jurisdiction for any dispute, the Insurers moved to stay or dismiss BayWa's lawsuit. (CT at 190-203.) An underwriter's declaration, which verified that BayWa's broker negotiated the Policy's terms, accompanied the motion. (CT at 193-195.)

BayWa opposed the motion, contending the jurisdiction provision was permissive and arguing New York law is contrary to two fundamental California policies (specifically, those which allow bad faith lawsuits and apply the efficient proximate cause ***22** of loss doctrine). (CT at 204-229.) It, too, submitted a declaration, but did not dispute that the parties entered into the contracts following negotiations through their respective agents. (CT at 230-232.)

The Insurers' reply memorandum refuted BayWa's contentions. (CT at 235-245.) It explained why the Choice of Law and Jurisdiction provision was mandatory and that no fundamental California policy was implicated. (*Id*.)

C. The trial court stayed the instant action.

The trial court entertained oral argument [RT at 4-15], announcing at the outset its tentative ruling that the forum selection provision was mandatory and applying it would not be unreasonable [RT at 4-5]. In its discussion with BayWa's counsel, the court noted the parties (some of which were headquartered in other countries) had bargained for the application of New York law in New York courts with the Insurers' agreement (through the service-of-suit provision) not to contest personal jurisdiction in American courts. (RT at 7-11.) The trial court also explained that BayWa's interpretation would excise the exclusive jurisdiction language from the Policy, while the court's interpretation gave meaning to both provisions. (RT at 12-13.)

On April 4, 2024, the trial court entered its order granting a stay of the action under Code of Civil Procedure sections 410.30 and 418.10. (CT at 248-250.) Notice of entry of the order was filed on April 5, 2024. (CT at 251-256.) BayWa filed its notice of appeal on May 10, 2024. (CT at 264-269.)

***23 Statement of Appealability**

This appeal follows the trial court's order staying the proceedings under Code of Civil Procedure section sections 410.30 and 418.10. The order is appealable under Code of Civil Procedure section 904.1(a)(3), which permits an appeal "from an order

granting … a motion to stay the action on the ground of inconvenient forum." The order fully adjudicates all disputes in the trial court on the jurisdictional issue. (Cal. Rules of Court, rule 8.204(a)(2)(B).)

Standard of Review

Nearly fifty years ago, the Supreme Court held "it is readily apparent that courts possess *discretion* to decline to exercise jurisdiction in recognition of the parties' free and voluntary choice of a different forum." (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495 [emphasis added].) Since then, the application of the abuse of discretion standard to the enforcement of forum selection clauses has become well-established. (E.g., *Schmidt v. Trinut Farm Management, Inc.* (2023) 92 Cal.App.5th 997, 1006 [noting that departure from the abuse of discretion standard "has been criticized as inconsistent with Supreme Court authority"]; *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 147 [same]; *Korman v. Princess Cruise Lines, Ltd.* (2019) 32 Cal.App.5th 206, 214 [adopting abuse ***24** of discretion standard]; *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 7-9 [same].) [4]

"The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence; its conclusions of law are reviewed de novo; and its application of the law to the facts is reversible only if arbitrary and capricious." (*Majestic Asset Management LLC v. The Colony at California Oaks Homeowners Assn.* (2024) 107 Cal.App.5th 413, 423-424 [quoting *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712].) Hence, if the trial court correctly interpreted the law and substantial evidence supports its findings of fact, the court's ruling regarding a forum selection clause will be upheld unless the ruling "exceed[s] the bounds of reason." (*America Online,* 90 Cal.App.4th at 7.)

The trial court's determination should not be reversed "unless a clear case of abuse is shown and unless there has been a miscarriage of justice." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) This Court has "previously commented on the 'daunting task' confronting an appellant who seeks reversal of a trial court's discretionary ruling. [Citation] To succeed, the appellant must demonstrate that the ruling was arbitrary, ***25** capricious, whimsical, or exceeded the bounds of reason." (*Dreamweaver Andalusians, LLC v. Prudential Ins. Co. of America* (2015) 234 Cal.App.4th 1168, 1171.)

Legal Discussion

I. The principles governing the review of forum selection provisions.

To start, the United States Supreme Court's commentary in *M/S Bremen v. Zapata Off–Shore Co.* (1972) 407 U.S. 1, is noteworthy and instructive here. The High Court stated that "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect." (407 U.S. at 12-13; accord, *Atlantic Marine Constr. Co. v. United States Dist. Court for Western Dist. of Tex.* (2013) 571 U.S. 49, 63; *Richards v. Lloyd's of London* (9th Cir. 1998) 135 F.3d 1289, 1292-1293 (en banc).)

Our nation's high court also recognized that consenting to suit in a particular jurisdiction overcomes personal jurisdiction issues arising out of the Due Process Clause, which "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. (See *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472; see also, *ParaFi Digital Opportunities LP v. Egorov* (2025) 108 Cal.App.5th 124, 140 [quoting *Burger King*]; *Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583, 588 ***26** ["Such clauses provide a degree of certainty, both for businesses and their customers, that contractual disputes will be resolved in a particular forum"].) The *Burger King* court went on to indicate that "particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. Where such forum-selection provisions have been obtained through 'freely negotiated' agreements and are not "unreasonable and unjust," their enforcement does not offend due process." (471 U.S. at 473, fn. 14 [citations omitted].) [5]

Most recently, in *EpicentRx, Inc. v. Superior Court of San Diego County* (2025) 18 Cal.5th 58, 2025 WL 2027272, at *1 [Supreme Court No. S282521], the California Supreme Court revisited forum selection issues in a case involving a claim that forum selection clauses "would effectively deprive plaintiff of its right to a jury trial," and enforcement of the clauses would be contrary to California public policy. The court acknowledged California's public policy to protect the constitutional right to jury trials for California citizens and then outlined the public-policy exception to the general rule of forum-selection enforceability. (*Id*., 2025 WL 2027272 at *6.) The Supreme Court ultimately held that Californians can "freely and voluntarily negotiate[] away" their rights to a California forum. (*Id*.; and see *id*. at *13 ***27** ["California has a strong public policy in favor of the right to a jury trial and against predispute waivers of that right. But California does not have a strong public policy against forum selection clauses or agreements to litigate in a jurisdiction that does not recognize the same civil jury trial right. The considerations surrounding each policy are distinct, and one does not necessarily follow from the other."].)

EpicentRx's holding conforms to long-standing precedent, which binds parties to their bargains unless enforcement of the clause would be unreasonable. (*Smith, supra*, 17 Cal.3d at 495-496; *EpicentRx*, *supra*, 2025 WL 2027272 at *6 [noting *Smith*]; *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 464.)

When analyzing whether the clause should be enforced, there is a distinction between a mandatory and a permissive forum selection clause. (*Korman*, *supra*, 32 Cal.App.5th at 215.) A mandatory clause ordinarily is given effect without any analysis of issues regarding convenience and is reviewed, instead, to evaluate whether enforcement of the clause would be unreasonable. (*Ibid*.; *Intershop Communications v. Superior Court* (2002) 104 Cal.App.4th 191, 196.) In contrast, a permissive clause, which does not expressly require litigation in the selected forum, triggers the traditional *forum non conveniens* analysis. (*Id*.)

***28 II. In accordance with the parties' mandatory forum selection clause, the trial court properly found this matter must be adjudicated in New York (where a parallel lawsuit is under way).**

A. The Policy's forum selection clause is mandatory because it identifies New York as the exclusive jurisdiction for disputes.

BayWa's opening salvo offers nothing more than a drill round. (AOB at 23-25.) Lobbying for a permissive forum choice, BayWa inexplicably fails to present the entire forum selection provision, which this Court needs to evaluate. [6] Once again, the Choice of Law and Jurisdiction provision states, in full:

Choice of Law And Jurisdiction:
Law: The insurance shall be governed by and construed in accordance with the law of New York.

Jurisdiction: Each party agrees to submit to New York jurisdiction subject to LMA5020 (14/09/2005) Service of Suit Clause naming: Mendes & Mount, 750 Seventh Avenue, New York, NY 10019-6829, USA.

The interpretation, performance and enforcement of this agreement shall be governed by the laws of the ***29** state of New York without regard to principles of conflicts of law and any disputes between the insured and underwriters arising under or in connection with this insurance policy shall be subject to the exclusive jurisdiction of the courts of the state of New York and to the extent permitted by law the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.

(CT at 35, 81-82, 194-195.)

This provision plainly requires the parties to apply New York law and submit to New York as the exclusive jurisdiction for resolution of any contract-related disputes. (*Id*.) In a misguided effort to avoid this explicit contractual language, BayWa selectively quotes a portion of the provision, stopping with the sentence that states the parties agree to "submit to" New York

jurisdiction and ignoring the critical terms in the remainder of the provision. (AOB at 24.) From this incomplete snippet, BayWa argues California courts routinely find "submit to" language indicates a permissive forum selection clause. (AOB at 23-25, citing *Animal Film, LLC v. D.E.J. Productions, Inc.* (2011) 193 Cal.App.4th 466, 470; *Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 357.) BayWa's faulty argument is based on a misreading of California law.

In *Animal Film*, the pertinent part of the contract specified that "the parties hereto submit and consent to the jurisdiction of the courts present in the state of Texas in any action brought to enforce (or otherwise relating to) this agreement." (193 Cal.App.4th 466, 470 [boldface & capitalization omitted].) And in *Berg*, the forum selection clause stated, "[t]he company [MTC] ***30** has expressly submitted to the jurisdiction of the State of California and United States Federal courts sitting in the City of Los Angeles, California, for the purpose of any suit, action or proceedings arising out of this Offering." (61 Cal.App.4th at 357.)

But neither *Animal Film* nor *Berg* apply here because the Policy has additional key language, which the policies at issue in those cases lacked. Here, the Policy explicitly sets New York as the exclusive forum to resolve disputes between BayWa and the Insurers. The key language from the Policy's "Choice of Law And Jurisdiction" provision, which was omitted from BayWa's opening brief and argument for a permissive forum clause states:

> The interpretation, performance and enforcement of this agreement shall be governed by the laws of the state of New York without regard to principles of conflicts of law and *any disputes between the insured and underwriters arising under or in connection with this insurance policy* ***shall*** *be subject to the exclusive jurisdiction of the courts of the state of New York* and to the extent permitted by law the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.

(CT at 81-82, emphasis added.) BayWa ignores, but cannot avoid, this critical portion of the forum selection clause.

The just-quoted paragraph confirms the compulsory nature of the provision. It is like those found by courts to be mandatory forum selection clauses. (E.g., *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1294; *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1492; ***31** *CQL Original Products, Inc. v. National Hockey League Players' Assn.* (1995) 39 Cal.App.4th 1347, 1352; see also, *Nedlloyd Lines*, *supra*, 3 Cal.4th at 468-469.)

In *Olinick*, the agreement provided: "The parties agree to the exclusive jurisdiction and venue of the Supreme Court of the State of New York for New York County and/or the United States District Court for the Southern District of New York for the resolution of all disputes arising under this Agreement." (138 Cal.App.4th at 1294.) The appellate court found the clause contained express language of exclusivity of jurisdiction, which specified a mandatory location for litigation. (*Id.*; accord, *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1677, and 1672 fn. 4 [quoting the agreement: "[A]ny appropriate state or federal district court located in the Borough of Manhattan, New York City, New York shall have exclusive jurisdiction over any case of controversy arising under or in connection with this Agreement ...."]; see also, *Nedlloyd Lines*, *supra*, 3 Cal.4th at 468-469 ["This agreement shall be governed by and construed in accordance with Hong Kong law and each party hereby irrevocably submits to the non-exclusive jurisdiction and service of process of the Hong Kong courts."].) [7]

***32** Similarly, in *Lu*, the provision stated: "[a]ny and all litigation that may arise as a result of this Agreement shall be litigated in Dade County, Florida." (11 Cal.App.4th at 1492.) The Court of Appeal affirmed the trial court's dismissal order based on this forum selection clause. (*Id.*) Notably, that clause did not need to use the term "exclusive" for the trial and appellate courts to find it was a mandatory forum selection clause. (See also, *Docksider, Ltd. v. Sea Technology, Ltd.* (9th Cir.1989) 875 F.2d 762, 763-764 [rejecting contention that contractual language must contain express term such as "exclusively" to make forum selection clause mandatory, stating "the prevailing rule is clear … that where venue is specified with mandatory language the clause will be enforced"].)

In fact, minimal language expressing a forum choice can suffice to make that choice mandatory. Recognizing that the language was not as emphatic as that in other cases with mandatory clauses, an appeals court nonetheless found the clause in question was mandatory when it simply stated: "To the extent permitted by the applicable laws the parties elect Hamburg to be the place of jurisdiction." (*Intershop Communications*, *supra*, 104 Cal.App.4th at 196; see also, *Phillips v. Audio Active Ltd.* (2d Cir. 2007) 494 F.3d 378, 386 [concluding that the phrase "are to be brought in England" establishes England as an obligatory venue].)

Our last illustration is from *CQL*, *supra*, in which the forum selection clause provided: "This Agreement shall be governed by the law of Ontario, Canada and any claims arising ***33** hereunder shall, at the Licensor's election, be prosecuted in the appropriate court of Ontario. The Licensee hereby attorns to the jurisdiction and judgment of the courts of the Province of Ontario, Canada, and agrees that a judgment of an Ontario court shall be enforceable in the jurisdiction in which the Licensee is located." (39 Cal.App.4th at 1352.) This language, which again lacks the word "exclusive," was enough to require litigation in Ontario – the appellate court upheld the trial court's enforcement of the provision and dismissal of the action. (*Id*. at 1355.)

In view of this authority, and considering the Policy's entire forum selection provision, this Court should confirm the trial court's conclusion that BayWa and the Insurers entered into a mandatory forum selection agreement.

B. BayWa's discussion of other contract provisions does not morph the Policy's mandatory forum selection clause into a permissive one.

BayWa continues its impotent assault by turning to two other provisions in the Policy – Service of Suit and Applicable Law (U.S.A.) – to support its argument for a "permissive" interpretation. (AOB at 25-28.) But neither can transform the mandatory Choice of Law and Jurisdiction's clause into a permissive one.

The service provision reflects the Insurers' willingness to concede personal jurisdiction and to provide a recipient for the orderly service of a lawsuit. (See CT at 92 [stating the Insurers will submit to the jurisdiction of a competent court and their agent is "authorized and directed to accept service of process on ***34** behalf of Underwriters in any such suit" and to assure the insured "that they will enter a general appearance upon Underwriters' behalf"].) In short, this clause has nothing to do with forum choice or the law to be applied, but rather benefits the insured by obviating the need to investigate who to serve and how to prove a threshold jurisdictional issue regarding parties who are headquartered in foreign countries. (See *Pulte Homes Corp. v. Williams Mechanical, Inc.* (2016) 2 Cal.App.5th 267, 274 ["An agent for service of process has the necessary authority because the corporation has expressly held that person out to the world as authorized to receive notice of actions."].) The trial court correctly understood this. (RT at 7-8.)

BayWa's reliance of the Policy's Applicable Law provision is tethered to the Service of Suit clause [CT at 91]. (AOB at 27-28.) Thus, it fails for the same, just-discussed, reason.

C. BayWa's recitation of the forum non conveniens factors is irrelevant and, in any event, counterbalanced by legitimate reasons to uphold the parties' agreement to litigate exclusively in New York.

The mandatory nature of the parties' forum selection clause precludes the need to weigh traditional *forum non conveniens* factors. (*Korman*, *supra*, 32 Cal.App.5th at 215; *Intershop Communications*, *supra*, 104 Cal.App.4th at 196; *Animal Film*, *supra*, 193 Cal.App.4th at 471.) "[*I*]*f there is a mandatory forum selection clause, the test is simply whether application of the clause is unfair or unreasonable,* and the clause is usually given effect." (*Olinick*, *supra*, 138 Cal.App.4th at 1294 (original italics), ***35** quoting *Berg*, *supra*, 61 Cal.App.4th at 358.) Accordingly, this Court may disregard BayWa's argument regarding these factors. [8] (AOB at 28-31.)

As an aside, BayWa's presentation of the *forum non conveniens* factors only showcases its own interests. Yet, the Insurers have an interest in the negotiated venue, as they may have occasion to enforce their rights under the Policy or to seek a court's determination in coverage disputes. Also, as noted, it is entirely reasonable for international insurance companies to select one location for lawsuits involving their policies. (*Ante* at 25-26; accord: *Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 516 [acknowledging that a "contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."].) Thus, the inclusion of New York as the contractually agreed-upon forum reflects the parties' desire "to agree in advance on a forum where any and all of their disputes must be brought to eliminate surprise of having to litigate in a hostile forum." (*Phillips*, *supra*, 494 F.3d at 386.)

***36 D. The trial court rightly rebuffed BayWa's claim of ambiguity in the Policy's forum selection provision.**

This Court should summarily reject BayWa's ambiguity argument [AOB at 31-36] because the parties negotiated the Policy terms [CT at 194]. As the Court of Appeal stated in *Carolina Beverage Corp. v. FIJI Water Co., LLC* (2024) 102 Cal.App.5th 977, 990, "where, as here, two sophisticated and longstanding commercial businesses negotiate a contract, they are stuck with the terms of that contract." (See also, *Foxcroft Productions, Inc. v. Universal City Studios, LLC* (2022) 76 Cal.App.5th 1119, 1131-1132, citing *Farmers Automobile Ins. Assn. v. St. Paul Mercury Ins. Co.* (7th Cir. 2007) 482 F.3d 976, 977 (opn. of Posner, J.) [the argument for this rule is "pretty feeble" when made by a sophisticated commercial actor rather than an individual consumer].)

Further, BayWa's ambiguity contention rests on the hollow premise that its interpretation of the Choice of Law and Jurisdiction provision as being permissive is reasonable. As shown above, the Policy contains a mandatory forum selection clause, thereby invalidating the entire basis for BayWa's ambiguity argument.

Furthermore, applying contract-interpretation rules, any notion of ambiguity is readily dispelled. While BayWa spills much ink trying to concoct an ambiguity (primarily by relying on the Service of Suit provision) [AOB at 31-36], there is none because the plain language of the Policy's Choice of Law and Jurisdiction clause provides for exclusive jurisdiction in New ***37** York.[9] This conclusion flows from the application of ordinary rules governing contract interpretation that require the insurance policy's terms to be given their "ordinary and popular sense." (*Palmer v. Truck Ins. Exch.* (1999) 21 Cal.4th 1109, 1115; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.)

If the policy language is "clear and explicit, it governs." (*Palmer*, *supra*, 21 Cal.4th at 1115 (quotation omitted).) "[L]anguage in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract .... Courts will not strain to create an ambiguity where none exists." (*Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 18-19.) Additionally, even if different language could have been used – and the Insurers do not suggest any clarification is needed – "just because language could be more precise or explicit does not mean it is ambiguous." (*City of Carlsbad v. Insurance Co. of State of Pennsylvania* (2009) 180 Cal.App.4th 176, 182.) Courts "may not … rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid." (*Safeco Ins. Co. v. Gilstrap* (1983) 141 Cal.App.3d 524, 533.)

Lastly, "when interpreting a contract, [this Court strives] to interpret the parties' agreement to give effect to all of a contract's terms, and to avoid interpretations that render any portion ***38** superfluous, void or inexplicable." (*Jenkins v. Dermatology Management, LLC* (2024) 107 Cal.App.5th 633, 646, quoting *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1507.)

To sum, when viewed under these governing principles, BayWa and the Insurers entered into a contractual agreement that plainly contains a mandatory forum –New York – in which their disputes must be litigated. In addition, BayWa's proposed alternative interpretations [AOB at 32-33] fail, as each requires the removal of the Policy's references to New York as the exclusive jurisdiction. The trial court rightly declined BayWa's unreasonable reading of the Policy and properly honored the terms of not only the Choice of Law and Jurisdiction provision, but the Service of Suit clause, too. (RT at 7-8, 12-13.)

E. BayWa did not meet its burden to show enforcement of the forum selection clause would diminish an unwaivable California public policy right.

Once a forum selection clause is adjudged to be mandatory, the only question left is whether enforcement of the clause would be unreasonable. (*Animal Film*, *supra*, 193 Cal.App.4th at 471.) Bearing in mind the significance given to the contracting parties' decision to select a particular forum, "both the United States Supreme Court and the California Supreme Court have placed a substantial burden on a plaintiff seeking to defeat such a clause ...." (*Lu*, *supra*, 11 Cal.App.4th at 1493; CQL, *supra*, 39 Cal.App.4th at 1354.) BayWa has not met this heavy burden.

***39 1. There is no fundamental right to bring a "California" bad faith claim.**

Enforcing the forum selection clause in the instant action would not, as BayWa contends, violate public policy by denying it California's remedies for bad faith claims. (AOB at 38-42.) BayWa alludes to public policy considerations, which allow for tortious breaches of contracts and punitive damages. (AOB at 38-39.) But it failed to cite any California appellate decision that holds a claim for insurance bad faith is an unwaivable right.

BayWa's contention is irreconcilable with the Supreme Court's decision in *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, upon which the trial court relied [RT at 5]. *Boghos* held that an arbitration provision in a disability insurance contract could be enforced; it found the contract did not implicate a statutory public policy, which had to be protected through guaranteed procedural safeguards (including precluding responsibility for arbitrators' fees). (*Id*. at 506, citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100-102.) Consequently, the Supreme Court rejected the suggestion that insurance bad faith claims embody a statutory public policy precluding their waiver.[10] (*Boghos*, *supra*, at 507.) Specifically, it held:

While the business of insurance is sufficiently affected with a public interest to justify its regulation by the state (see Ins. Code, § 680 et seq.), as Boghos ***40** observes, the fact of regulation does not suffice to demonstrate that any given insurance-related claim entails an unwaivable statutory right, or that any given claim seeks to enforce a public policy articulated in a statute. (*Id*.)

BayWa does not discuss this passage. Rather, it turns to several cases from the 1970s, which speak to public policy reasons that *may* support exemplary damages for breaching the implied covenant of good faith and fair dealing. (AOB at 38, referencing *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 575, *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820, and *Spindle v. Travelers Ins. Companies.* (1977) 66 Cal.App.3d 951, 959.) But none of these decisions –all of which pre-date *Boghos* – held that an insurance bad faith claim was embodied in an unwaivable public policy. Moreover, as the *Boghos* court, noted, "[w]hile insurance bad faith claims were for a time thought to have a statutory basis in the Unfair Practices Act (Ins. Code, §790 et seq.), we definitively rejected that position in *Moradi– Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304, 250 Cal.Rptr. 116, 758 P.2d 58, and expressly overruled prior contrary authority." (*Boghos*, *supra*, 36 Cal.4th at 507.) BayWa also fails to address this quote from *Boghos*.

Equally unavailing is BayWa's reliance on federal district court decisions. (AOB at 41, citing *Connex Railroad LLC v. AXA Corporate Solutions Assurance* (C.D. Cal. 2016) 209 F.Supp.3d 1147, *Tri–Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.* (S.D. Cal. 2015) 88 F.Supp.3d 1156, ***41** *Brighton v. Lutheran Church-Missouri Synod* (C.D. Cal., Feb. 1, 2013, No. SACV12883JSTMLGX) 2013 WL 12136522, *Skye Bioscience, Inc. v. PartnerRe Ireland Insurance Dac* (C.D. Cal., June 20, 2023, No. 2:23-CV-01218-CAS (AFMX)) 2023 WL 4768734, *Gomez v. Great-West Life & Annuity Insurance Company* (S.D. Cal. 2022) 638 F.Supp.3d 1156, and *Harris v. Provident Life and Acc. Ins. Co.* (2d Cir. 2002) 310 F.3d 73.) None even mentions the Supreme Court's holding in *Boghos* nor posits a valid reason to create a fundamental public policy and, therefore, should be disregarded. (See also, *Nedlloyd Lines*, *supra*, 3 Cal.4th at 468 [stating the court found "no authority exalting the implied covenant of good faith and fair dealing over the" parties' express forum selection agreement].)

The trial court properly rejected BayWa's argument that its bad faith claim renders unreasonable the enforcement of the Policy's forum selection clause. This Court should uphold that conclusion.

2. The efficient proximate cause doctrine is not a fundamental California right.

BayWa's attempt to find solace in California's efficient proximate cause doctrine also fails. (AOB at 43-46.) The doctrine sets forth "a workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer whenever there exists a causal or dependent relationship between covered and excluded perils." (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 404.) "When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate ***42** cause of the loss." (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131.)

As the trial court noted, however, BayWa's earth movement claims and damages were not written out of the Policy but rather were capped and, consequently, the Policy did not minimize the efficient proximate cause doctrine. (RT at 5; *contra*, AOB at 46-49.) The trial court's reasoning is sound.

In *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 750, the Supreme Court recognized efficient proximate cause as an interpretive rule for first-party insurance. It noted that "[t]he efficient proximate cause doctrine 'is neither a California invention nor novel.'" (*Id.* at 753.) The *Julian* court found that "[p]olicy exclusions are unenforceable to the extent that they conflict with section 530 and the efficient proximate cause doctrine." (*Id.* at 754.) Yet, "an insurer is not absolutely prohibited from drafting and enforcing policy provisions that provide or leave intact coverage for some, but not all, manifestations of a particular peril." (*Julian*, *supra*, 35 Cal.4th at 759; accord, *De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213, 1223.)

The Court of Appeal in *De Bruyn* focused on the question "whether the policy 'plainly and precisely communicate[s] an excluded risk' to a reasonable insured." (158 Cal.App.4th at 1224 [citing *Julian*, *supra*, 35 Cal.4th at 759].) And like the Supreme Court in *Julian* – which held that an insurance policy provision excluding the peril of rain inducing a landslide did not violate Insurance Code section 530 or the efficient proximate cause ***43** doctrine [35 Cal.4th at 761] – the *De Bruyn* court held that a provision excluding the peril of mold resulting from a sudden release of water did not violate section 530 or the efficient proximate cause doctrine. (158 Cal.App.4th at 1224; accord, *City of Carlsbad*, *supra*, 180 Cal.App.4th at 183-184 [recognizing that, if the exclusion "plainly and precisely communicates" to the insured which manifestations the policy does not cover, the efficient proximate cause doctrine and Insurance Code section 530 would not assist the insured because an insurer is allowed to exclude some manifestations of a covered peril].)

"Ordinarily, an insurer is free to limit the risks it will assume and will be liable only for a loss within the terms of the policy, and a court will not rewrite the terms of a policy based solely on public policy reasons. It is the ordinary rule that '[a]n insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected.'" (*Underwriters of Interest Subscribing to Policy Number AXX-XXX-XXX v. ProBuilders Specialty Ins. Co.* (2015) 241 Cal.App.4th 721, 729 [citations omitted]; *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 967-968 [declining to rewrite insurance contracts, even for considerations of public policy, because "we do not rewrite any provision of any contract, including the standard policy underlying any individual policy, for any purpose."]; accord, *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1073 [reversing Court of Appeal which ***44** applied "sound public policy" rather than the plain, unambiguous language of the policy].)

Without any other support, BayWa turns to Insurance Code section 530 and 530.5 and asserts the plain statutory language does not limit the efficient proximate cause doctrine to exclusions. (AOB at 44-46.) But neither statute assists BayWa here. Section 530 provides:

> An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

Section 530.5 provides:

> If a loss or damage results from a combination of perils, one of which is a landslide, mudslide, mudflow, or debris flow, coverage shall be provided if an insured peril is the efficient proximate cause of the loss or damage and coverage would otherwise be provided for the insured peril. Coverage shall be provided under the same terms and conditions as would be provided for the insured peril.

Both statutes lack language stating their requirements are unwaivable. Certainly, the Legislature knows how to express such an intent. (E.g., Corp. Code §31512 ["Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void."]; Civ. Code §1670.10(a)(1) ["a contract … to transfer ownership of a dog or cat in which ownership is contingent upon the making of payments over a ***45** period of time subsequent to the transfer of possession of the dog or cat is void as against public policy."]; Civ. Code §1751 ["Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void."]; see also, Civ. Code §§1667, et seq. [unlawful contracts].)

In the end, what BayWa is griping about, perhaps, is having to face what it perceives as less favorable law in New York. [11] Even if true, however, potential differences in the laws of the two competing forums do not provide a basis to deny enforcement of the Policy's forum selection clause. (*EpicentRx*, *supra*, 2025 WL 2027272, at *5 ["we have held that the fact that 'the law of the forum state is more favorable to the plaintiff than that of the alternate jurisdiction' - including the availability of a jury trial - should not be accorded any weight in the traditional *forum non conveniens* balance of interests, as long as some remedy is afforded in the alternate jurisdiction."]; *CQL*, *supra*, 39 Cal.App.4th at 1357.)

As the Supreme Court made clear in *EpicentRx*, even constitutional rights can be deemed insufficient to preclude honoring and enforcing the parties' contractual forum selection. Here, BayWa tries to use a causation rule (which does not rise to the level of a constitutional right) to avoid its contractual obligation. This Court should not validate BayWa's desperate attempt.

***46 Conclusion**

For all the stated reasons, this Court should affirm the trial court's order staying the instant action pending the resolution of BayWa's lawsuit in New York.

DATED: September 4, 2025

Respectfully submitted,

CLYDE & CO US LLP

By: <<signature>>

James Koelzer

David Ktshozyan

Douglas J. Collodel

Attorneys for Defendant and

Respondent AGCS Marine

Insurance Company

***47** Dated: September 4, 2025

DENTONS US LLP

By: <<signature>>

Natalie M. Limber

Sonia Martin

Attorneys for Defendant and

Respondent Scottsdale Insurance

Company

Dated: September 4, 2025

FORAN GLENNON PALANDECH

PONZI & RUDLOFF PC

By: Edward P. Murphy

Edward P. Murphy

Attorneys for Defendants and

Respondents RSG Underwriting

Managers, LLC trading as

Power.Energy.Risk; Lloyd's

Syndicate CSL 1084; Lloyd's

Syndicate 1458 RenaissanceRe

Management Limited; QBE

Insurance (UK) Limited; Lloyd's

Syndicate Atrium 609; Convex

Insurance UK Limited; Everest

Indemnity Insurance Company;

Accident Fund General Insurance

Company (AFGIC); HDI Global

Specialty SE; QBE (UK) Limited

Footnotes

1 The Insurers, and Respondents on this appeal, are: RSG Underwriting Managers, LLC, trading as Power.Energy.Risk; Lloyd's Syndicate CSL 1084; Lloyd's Syndicate 1458 RenaissanceRe Management Limited; QBE Insurance (UK) Limited; Lloyd's Syndicate Atrium 609; Convex Insurance UK Limited; Everest Indemnity Insurance Company; Accident Fund General Insurance Company (AFGIC); HDI Global Specialty SE; QBE (UK) Limited; AGCS Marine Insurance Company; and Scottsdale Insurance Company.

2 Both policies provided the same basic insurance, but differed in the primary coverage, limits of liability, and deductibles. (CT at 12-15.) The Choice of Law and Jurisdiction provisions differ only to the extent that the first policy notes the submission to New York jurisdiction is subject to "NMA1998 (24/04/86) Service of Suit clause" while the second is subject to "LMA5020 (14/9/2005) Service of Suit clause," with both provisions identifying Mendes & Mount's address in New York. (CT at 35, 81.)

3 Although BayWa is seeking coverage only under the second policy, the Insurers have insured BayWa since December 31, 2020 with the understanding that any action would be brought in New York and disputes would be decided under New York law. (See CT at 35, 81-82, 194-195.) As the trial court found, and as shown below, BayWa must abide by the terms to which it agreed and for which the Insurers correspondingly afforded BayWa insurance coverage.

4 BayWa suggests the interpretation of a forum selection clause is a legal question that is reviewed de novo. (AOB at 22.) While the general proposition may be true, it is immaterial to this appeal, which turns on the discretionary enforcement of the parties' agreement, not a dispute over the construction of the contract as a matter of law.

5 BayWa does not dispute the fact that the parties negotiated the Policy terms through their representatives. (CT at 194; and see, CT at 204-232.) Yet, even forum selection clauses made without negotiation remain enforceable. (*Korman*, *supra*, 32 Cal.App.5th at 216.)

6 Strangely, BayWa does not reference the entirety of this provision in its mandatory-versus-permissive argument. (See AOB at 23-28.) Yet, it does quote the entire provision in its Statement of the Case, Section C.1. [AOB at 19-20] and

references the relevant language when trying to devise a non-existent ambiguity [AOB at 31-32]. And BayWa recognizes the trial court's reliance on the material language to find the Policy's forum selection clause is mandatory. (AOB at 31-32.)

7 BayWa's misdirected argument for a permissive forum selection clause focuses on the words "submit to." (AOB at 23-25.) But it does not cite the Supreme Court's decision in *Nedlloyd Lines*, which completely undermines BayWa's "submit to" contention because it found such language "reflects the parties' clear contemplation that 'the agreement' is to be completely and absolutely controlled by Hong Kong law." (*Nedlloyd Lines*, *supra*, 3 Cal.4th at 469.)

8 As the trial court found the forum selection clause was mandatory, it did not consider the alternative ground for staying the instant action based on a weighing of the *forum non conveniens* factors.

9 The key language, which BayWa glosses over, states: "any disputes between the insured and underwriters arising under or in connection with this insurance policy shall be subject to the exclusive jurisdiction of the courts of the state of New York." (CT at 81.)

10 Because there is no fundamental California public policy associated with insurance bad faith claims, BayWa's discussion of New York law [AOB at 39-40] is immaterial to this appeal.

11 Because the efficient proximate cause rule does not impact the instant action, BayWa's discussion of New York law [AOB at 49-50] is irrelevant here.

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