No. 18-1484

IN THE

Supreme Court of the United States

ZIMMER BIOMET HOLDINGS, INC., ET AL.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO, ET AL.,

Respondents.

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

RESPONDENT JAMES KARL'S BRIEF IN OPPOSITION

ALLISON M. ZIEVE
RYLEE SOMMERS-FLANAGAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

[Additional counsel listed on signature page]

JASON LOHR
Counsel of Record
ALEC SEGARICH
LOHR RIPAMONTI & SEGARICH LLP
140 Geary Street, 4F
San Francisco, CA 94108
(415) 683-7947
jason.lohr@lrllp.com

Attorneys for respondent James Karl

July 2019

QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in declining to grant a writ of mandamus to correct claimed errors in the district court's denial of a motion to transfer venue.

2. Whether petitioners waived any claim that a federal court is foreclosed from considering state law and policy in determining whether a forum-selection clause is valid and enforceable.

PARTIES TO PROCEEDING AND RELATED CASES

The parties to the proceeding in this Court are listed in the petition for writ of certiorari.

The following proceedings are directly related to this case:

- *Karl v. Zimmer Biomet Holdings, Inc., et al.*, No. 3:18-cv-04176-WHA, U.S. District Court for the Northern District of California. No judgment entered (case pending).
- *Zimmer Biomet Holdings, Inc., et al., v. U.S. District Court for the Northern District of California*; *James Karl*, real party in interest, No. 18-73216, U.S. Court of Appeals for the Ninth Circuit. Order denying petition for mandamus entered Feb. 26, 2019.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO PROCEEDING AND RELATED CASES ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 3

Background and district court proceedings 3

Appellate proceedings 6

Subsequent district court proceedings 6

REASONS FOR DENYING THE WRIT 7

I. The district court's recent holding that no forum-selection clause applies to the claims in this case negates the premise of Zimmer's petition. 7

II. The court of appeals' discretionary denial of the petition for mandamus does not warrant review. 9

A. The district court did not "disregard" *Atlantic Marine*. 9

B. This case implicates no conflict over the standard for issuance of mandamus in cases involving transfer orders. 11

III. Zimmer's claim that courts may not consider state public policy in assessing the validity of a forum-selection clause was waived below and does not warrant review. 19

A. Zimmer's second question was neither raised nor decided below. 20

B. The district court's consideration of state law does not implicate a conflict among the courts of appeals and is consistent with this Court's cases. 21

CONCLUSION 25

APPENDIX

Order re Motion to Conditionally Certify Collective Action, United States District Court for the Northern District of California, Dkt. 70, July 2, 2019.....1a

TABLE OF AUTHORITIES

Pages

Cases

Adema Technologies, Inc. v. Wacker Chemical Corp.,
657 F. App'x 661 (9th Cir. 2016) 25

Albemarle Corp. v. AstraZeneca UK Ltd.,
628 F.3d 643 (4th Cir. 2010) 23, 24

Allen v. Lloyd's of London,
94 F.3d 923 (4th Cir. 1996) 23

Atlantic Marine Construction Co. v. U.S. District Court,
571 U.S. 49 (2013).....1, 5, 10

Bankers Life & Casualty Co. v. Holland,
346 U.S. 379 (1953).....11

Bauman v. U.S. District Court,
557 F.2d 650 (9th Cir. 1977) 6, 12, 14

In re Bozic,
888 F.3d 1048 (9th Cir. 2018) 14, 16, 17

Bremen v. Zapata Off-Shore Co.,
407 U.S. 1 (1972).....4, 22

Cheney v. U.S. District Court,
542 U.S. 367 (2004).....12, 13

Dart Cherokee Basin Operating Co. v. Owens,
135 S. Ct. 547 (2014).....15

Dolin v. Facebook, Inc.,
289 F. Supp. 3d 1153 (D. Haw. 2018) 25

Hendrickson v. Octagon, Inc.,
2014 WL 2758750 (N.D. Cal. 2014) 17

Highmark Inc. v. Allcare Health Management Systems, Inc.,
572 U.S. 559 (2014).....9

Hosick v. Catalyst IT Services, Inc.,
143 F. Supp. 3d 1072 (D. Or. 2015).....25

Imperium Insurance Co. v. Allied Insurance Brokers, Inc.,
2012 WL 4103889 (D. Md. 2012).....24

Jones v. GNC Franchising, Inc.,
211 F.3d 495 (9th Cir. 2000).....22

Kerr v. U.S. District Court,
426 U.S. 394 (1976).....11

Kingdomware Technologies, Inc. v. United States,
136 S. Ct. 1969 (2016).....21

Lauro Lines s.r.l. v. Chasser,
490 U.S. 495 (1989).....18

Manetti-Farrow, Inc. v. Gucci America, Inc.,
858 F.2d 509 (9th Cir. 1988).....22

Martinez v. Bloomberg LP,
740 F.3d 211 (2d Cir. 2014).....22, 23

In re McGraw-Hill Global Education Holdings LLC,
909 F.3d 48 (3d Cir. 2018).....13, 15, 17, 19

Midamines SPRL Ltd. v. KBC Bank NV,
601 F. App'x 43 (2d Cir. 2015).....23

In re National Presto Industrial, Inc.,
347 F.3d 662 (7th Cir. 2003).....13, 15, 18

NC Contracting, Inc. v. Munlake Contractors, Inc.,
2012 WL 5303295 (E.D.N.C. 2012).....24

In re Octagon, Inc.,
600 F. App'x 581 (9th Cir. 2015).....17

In re Orange, S.A.,
818 F.3d 956 (9th Cir. 2016).....14, 17, 18

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981).....9

Ponomarenko v. Shapiro,
287 F. Supp. 3d 816 (N.D. Cal 2018) 25

In re Rolls Royce Corp.,
775 F.3d 671 (5th Cir. 2014) 13

S.K.I. Beer Corp. v. Baltika Brewery,
612 F.3d 705 (2d Cir. 2010) 23

Sprietsma v. Mercury Marine,
537 U.S. 51 (2002).....21

Stewart Organization v. Ricoh Corp.,
487 U.S. 22 (1988).....22

Sun v. Advanced China Healthcare, Inc.,
901 F.3d 1081 (9th Cir. 2018) 25

In re Union Electric Co.,
787 F.3d 903 (8th Cir. 2015) 13

Whiting-Turner Contracting Co. v. Westchester Fire Insurance Co.,
2013 WL 3177881 (D. Md. 2013).....24

Will v. United States,
389 U.S. 90 (1967).....12, 19

STATUTES AND RULES

28 U.S.C. § 1391 5

28 U.S.C. § 1404(a).....5, 10

California Bus. & Prof. Code § 17200, *et seq*.....3

California Labor Code § 925.....4, 15

MISCELLANEOUS

15A Charles A. Wright, *et al.*, Federal Practice & Procedure,
(2d ed. 1986 & Apr. 2019 update) 18

INTRODUCTION

This case is remarkably *not* worthy of review by this Court. Petitioners Zimmer Biomet Holdings, Inc., et al. ("Zimmer"), ask this Court to review a two-sentence order denying a petition for mandamus challenging a district court order denying a motion to transfer venue. Zimmer's questions presented presuppose both (1) that the district court committed clear error in not enforcing a forum-selection clause that the court found invalid and in its balancing of considerations relevant to the transfer motion, and (2) that the court of appeals abused its discretion in denying mandamus. Those inherently factbound propositions would not merit consideration by this Court in any event, but it gets worse: After the court of appeals denied the petition for mandamus, the district court determined—and Zimmer agreed—that the forum-selection clause on which Zimmer bases its petition does not even apply to respondent. The court further determined that, although Zimmer's contract with respondent contains a different forum-selection clause, that clause by its terms is inapplicable to the claims in this case. Because Zimmer's petition assumes the applicability of a valid forum-selection clause, the district court's recent order renders both questions presented in the petition irrelevant here.

Even taken on its own terms, the petition fails to justify review. First, its assertion that the district court "ignored" this Court's decision in *Atlantic Marine Construction Co. v. U.S. District Court*, 571 U.S. 49 (2013), is flatly wrong. Consistent with *Atlantic Marine*, the district court began by resolving the parties' dispute over whether the forum-selection clause on which Zimmer relied was valid, as the "ordinar[y]" requirement that a court transfer a case to a specified forum applies "[w]hen

the parties have agreed to a *valid* forum-selection clause." *Id.* at 62. Nothing in the district court's determination of that antecedent question conflicts with *Atlantic Marine*.

Second, Zimmer asserts that the Ninth Circuit denied its request for a writ of mandamus because that court applies the factors determining the appropriateness of mandamus relief differently from other circuits. All of the courts of appeals agree, however, that the party seeking mandamus must demonstrate both clear error and indisputable entitlement to relief, and that the court has discretion to decline to issue mandamus relief if doing so would not be appropriate in the circumstances. The Ninth Circuit's order denying mandamus offers no reason to conclude that it was not based on these broadly applied considerations. In any event, the claimed circuit split does not exist. The Ninth Circuit decisions Zimmer cites do not evince disagreement with decisions of other circuit courts on whether an order denying a motion to transfer satisfies the requirements for granting mandamus relief.

Finally, Zimmer asserts that the decision below implicates a claimed disagreement among the circuits over whether courts may look to state law and policy to determine the enforceability of a forum-selection clause. But Zimmer failed to preserve that issue, which it did not raise below. Moreover, the Ninth Circuit's order neither addresses nor resolves any such issue. And again, the claimed circuit split does not exist. The Ninth Circuit (and district courts within it) follows the same approach to consideration of forum-selection clauses and motions to transfer as other courts of appeals, in line with the teachings of this Court.

STATEMENT

Background and district court proceedings

Respondent James Karl has lived and worked in California since 2015, when he moved there to take a job with Zimmer, a medical-device manufacturer. When he began working for Zimmer, he signed a sales associate agreement with the three of the Zimmer entities. Zimmer classifies its sales associates as independent contractors.

Mr. Karl's sales territory is limited to California. He has never worked at Zimmer's Indiana headquarters and has visited it only twice, both times while working for a Zimmer distributor several years before he began working for Zimmer. Since coming to work for Zimmer, Mr. Karl has not taken more than one week off at any one time because of the constant needs of the customers (surgeons) whose accounts he manages. When he takes time off, he must remain available by email and telephone.

Mr. Karl filed this action in the Northern District of California as a proposed class and collective action on behalf of himself and a class of other Zimmer sales representatives. The complaint alleges seven causes of action: one under the Fair Labor Standards Act (FLSA) for Zimmer's failure to compensate Mr. Karl and other sales representatives for all overtime hours worked, five for violations of the California Labor Code springing from Zimmer's misclassification of Mr. Karl and other sales representatives as independent contractors, and one for violation of California Bus. & Prof. Code § 17200, *et seq.*, alleging that Zimmer's decision to misclassify its sales representatives is an unfair and illegal business practice. Compl. ¶¶ 50–96.

The Zimmer sales associate agreement set forth certain restrictive covenants, followed by a forum-selection clause identifying Indiana as the exclusive forum

for litigation "pursuant to the restrictive covenants set forth above or otherwise." Resp. App. 7a (Order, D. Ct. Dkt. 70). Exhibit C to the agreement—a separate "non-compete, non-solicit, and confidentiality agreement" that does not apply to sales associates—contained a different forum-selection clause, which identified Indiana as the exclusive forum for litigation "initiated pursuant to this Agreement or otherwise." Pet. App. 6. Quoting both provisions, Zimmer moved to transfer, dismiss, and/or strike the complaint.

The district court, discussing only the provision from Exhibit C, denied the motion. Pet. App. 6. Citing this Court's opinion in *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972), the district court began by stating that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." Pet. App. 6 (quoting *Bremen*, 407 U.S. at 15).

The district court then considered Mr. Karl's argument that the clause was voidable under California Labor Code section 925. That statute provides that an "employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision" that would "[r]equire the employee to adjudicate outside of California a claim arising in California" or would "[d]eprive the employee of the substantive protection of California law with respect to a controversy arising in California." Cal. Labor Code § 925(a). Section 925 further provides that contract terms that violate subsection (a) are "voidable." *Id.* § 925(b). Section 925 applies to contracts entered into, modified, or extended on or after January 1, 2017. *Id.* § 925(f).

Holding that Mr. Karl was an employee within the meaning of the statute and that his contract, which was modified on June 1, 2018, was subject to the statute, the district court concluded that the agreement "falls within Section 925's orbit." Pet. App. 14. Accordingly, the court held that the forum-selection clause was not enforceable. *Id.*

Having found the forum-selection clause void as a matter of state law, the court used the factors pertinent under 28 U.S.C. § 1404(a) to decide the motion to transfer. *Id.* 14–15 (quoting § 1404(a)). The court gave weight to Mr. Karl's choice of forum and noted the inconvenience of transfer to him. *Id.* 17–18. On the other hand, the court held that "Indiana's more central geography weighs in favor of transfer given the potential nationwide FLSA collective action." *Id.* 17. The court concluded that "the convenience of the parties is a neutral factor in deciding defendants' motion to transfer." *Id.* Turning to the public-interest factors, the court held that court congestion and court familiarity with federal law were neutral considerations, and that its own familiarity with California law weighed only slightly against transfer. *Id.* 20–21. But the court determined that "California's strong public policy," as discussed in connection with section 925, "shows that the local interest in adjudicating this action is great." *Id.* 20. The court therefore denied the motion to transfer.

With respect to the motion to dismiss based on improper venue, the court relied on this Court's holding that "[a]n action filed in a district that satisfies 28 U.S.C. § 1391 may not be dismissed under Federal Rule of Civil Procedure 12(b)(3)." *Id.* (citing *Atl. Marine*, 571 U.S. at

55–56). Because venue was proper under section 1391, the court denied the motion to dismiss.[1]

Appellate proceedings

Zimmer filed a petition for mandamus, asking the court of appeals to order transfer to Indiana. Zimmer argued that the district court erred by not applying *Atlantic Marine*, which held that a "valid" forum-selection clause should be enforced unless doing so would be unreasonable; by misapplying California Labor Code section 925; by misinterpreting the employment contract; and by applying the wrong test for determining employment status. In the 1½-page argument addressing *Atlantic Marine*, the petition for mandamus argued that the district court did not "overtly apply" the decision. Pet. Mand., Ct. App. Dkt. 1-2, at 14.

Citing the same longstanding precedent on the considerations for mandamus that petitioners cited in their mandamus petition, the court denied the petition. The court's opinion states, in its entirety: "Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied." Pet. App. 1–2.

Subsequent district court proceedings

The case has continued to proceed in the district court. At a hearing on June 6, 2019, on a motion to conditionally certify a collective action, the district court realized—and Zimmer did not contest—that Zimmer had been relying on a forum-selection clause that is not part of its

[1] Zimmer also moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and to strike under Rule 12(f). The court denied those motions.

agreement with Mr. Karl. Instead, Zimmer was relying on language from Exhibit C to the agreement, which is a contract to be signed by any additional salespeople or employees brought on by the sales associate. Resp. App. 8a–9a (Order, D. Ct. Dkt. 70); *see* D. Ct. Transcript of Proceedings, June 6, 2019, at 27 ("You tried to pull a fast one on me. You quoted this language. This is Exhibit C, and Exhibit C is not the main agreement.").

Now focusing on the forum-selection clause in the sales associate agreement, the court considered the parties' arguments about whether that clause applies to all disputes between the parties or only to disputes over the agreement's restrictive covenants. In a decision issued on July 2, 2019, the court found that the reach of the clause is ambiguous. *See* Resp. App. 9a. It therefore construed the contract against the drafter, held that the clause is limited to claims seeking to enforce restrictive covenants, and thus held that the clause does not apply in this case. *See id.* 12a–13a.

REASONS FOR DENYING THE WRIT

I. The district court's recent holding that no forum-selection clause applies to the claims in this case negates the premise of Zimmer's petition.

Zimmer's petition is premised on the assertion that Mr. Karl is a party to a forum selection clause that is both legally valid and applicable to the specific claims in this case. Subsequent to the court of appeals' denial of mandamus, however, the district court determined that disputed, fact-bound question of state contract law adversely to Zimmer. *Id.* Because a dispute about contract interpretation underlies Zimmer's petition and has now been decided against Zimmer, a decision addressing the legal questions Zimmer seeks to present

would not affect the outcome of this case. This case is therefore particularly ill-suited for this Court's review.

Importantly, the forum-selection clause quoted in Zimmer's petition for certiorari (at 5) is *not* taken from the sales associate agreement with Mr. Karl. Rather, the clause Zimmer quotes is set forth in a contract attached as Exhibit C to that agreement, and Zimmer has now *conceded* that Exhibit C does not apply to Mr. Karl or other sales associates. *See* D. Ct. Dkt. 68, at 3 (Zimmer Supp. Br. stating that "Exhibit C does not apply to persons who sign the Sales Associate Agreement"). Consequently, the forum-selection clause on which Zimmer relies here is inapplicable to this case. Resp. App. 9a.

The relevant document—the sales associate agreement—includes a different forum-selection provision. That provision states:

> Furthermore, to the extent any legal proceedings are initiated pursuant to the restrictive covenants set forth above or otherwise, the exclusive venue for such litigation shall be a court located in [Indiana].

Id. Because the parties agree that Mr. Karl's claims do not pertain to restrictive covenants, whether that venue provision applies in this case depends on the meaning of "or otherwise."

In recent motion papers, Zimmer argued that "or otherwise" extends the venue clause to *any dispute* (whether "pursuant to the restrictive covenants … or otherwise"). *Id.* at 10a. Mr. Karl argued that "or otherwise" extends the venue clause to disputes over *any restrictive covenants* (whether "set forth above or otherwise"). *Id.* at 11a. The district court found both readings "plausible" and, therefore, applied the well-

established rule that ambiguities are construed against the drafter. *Id.* at 9a.

Absent reversal of the district court's contract construction, there is no basis for any of Zimmer's contentions in this Court—all of which are incorrectly premised on the assertion that Mr. Karl's claims fall within the scope of a forum-selection clause in an agreement to which he is a party. And the correctness of the district court's decision on this issue of contract interpretation is neither encompassed in the questions presented nor suitable for this Court's review.

II. The court of appeals' discretionary denial of the petition for mandamus does not warrant review.

Zimmer's petition faces another large hurdle at the start: It seeks review of a decision placed firmly within the discretion of the court of appeals. "[M]atters of discretion are reviewable for abuse of discretion." *Highmark Inc. v. Allcare Health Mgmt. Syst., Inc.*, 572 U.S. 559, 563 (2014). Establishing that a court abused its discretion generally requires a showing that the court's decision was premised on an erroneous view of the law or on clearly erroneous factual findings, or that it considered impermissible factors, failed to consider factors that it was required to consider, or balanced the relevant factors unreasonably or arbitrarily. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). Here, Zimmer cannot make such a showing.

A. The district court did not "disregard" *Atlantic Marine*.

Zimmer's argument that the Ninth Circuit erred in denying mandamus begins with the assertion that the district court "disregarded" *Atlantic Marine*. Pet. 9. *Atlantic Marine*, however, supports the district court's view that the validity of a forum-selection clause, if

disputed, is an issue that must be resolved before considering a motion to transfer venue premised on that clause.

Atlantic Marine states that a federal district courts typically should enforce a "valid" forum-selection clause through transfer under 28 U.S.C. § 1404(a): "When the parties have agreed to a *valid* forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause." 571 U.S. at 62. The opinion repeatedly uses the term "valid" to limit the universe of forum-selection clauses it is addressing, *see id.* at 61 & n.4, 62 & n.5, 63, 65, 66 n.8, and specifies that the Court's "analysis presupposes a contractually valid forum-selection clause," *id.* at 62 n.5. Although in *Atlantic Marine* "there was no dispute that the forum-selection clause [at issue] was valid," *id.* at 54–55, the unmistakable import of the opinion is that a district court must first resolve any dispute about the validity of the clause before ordering a transfer or considering whether "extraordinary" circumstances warrant denying transfer, *id.* at 62.

In the order that was the subject of Zimmer's mandamus petition, the district court, consistent with *Atlantic Marine*, therefore began by considering the validity under state law of the forum-selection clause that it then understood to be at issue (the clause in Exhibit C). *See* Pet. App. 6 (quoting clause). Moreover, the court's consideration of that issue cannot have involved "disregard" for *Atlantic Marine*, because in *Atlantic Marine* the Court had no occasion to address what grounds may (or may not) render a clause invalid.

In sum, even before the district court determined (and Zimmer conceded) that the clause Zimmer invokes is *not* a term of the contract between Zimmer and Mr. Karl, and even before the district court held that the clause that is

part of their contract does not apply to the claims in this case, the court did not disregard *Atlantic Marine*.

B. This case implicates no conflict over the standard for issuance of mandamus in cases involving transfer orders.

Zimmer's contention that this case implicates a conflict over the legal standard applied by the courts of appeals to petitions for mandamus challenging a district court's denial of a motion to transfer is likewise incorrect. There is no reason to believe that the point over which Zimmer claims disagreement was decisive in this case, and its claim that the Ninth Circuit applies a standard different from other appellate courts is, in any event, unfounded.

1. The courts of appeals agree on the basic framework for addressing a petition for mandamus challenging an order denying a motion to transfer. Where such orders are at issue, as with other mandamus petitions, a claim of error does not alone satisfy the demanding standard for issuance of the writ. Instead, whether the district court erred is only one of the factors that a court of appeals weighs in deciding whether to exercise its discretion to issue the "drastic" remedy of mandamus. *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 402 (1976) ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations."). Mandamus is not a remedy invoked to correct every error. *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382–83 (1953) (rejecting the notion that "every interlocutory order which is wrong might be reviewed under the All Writs Act" and declining to issue a writ of mandamus where the court's order, "even if erroneous," "involved no abuse of judicial power").

Because "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the

invocation of this extraordinary remedy," *id.* (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)), this Court has set forth stringent conditions for issuance of a writ of mandamus: The petitioning party must "have no other adequate means to attain the [desired] relief." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004). The petitioner must show his "right to issuance of the writ is clear and indisputable." *Id.* at 381. And "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* Moreover, this Court has admonished that mandamus "does not run the gauntlet of reversible errors," but rather serves "to confine the lower court to the sphere of its discretionary power." *Will*, 389 U.S. at 103.

In common with other courts of appeals, the Ninth Circuit implements these requirements by demanding that a party seeking mandamus demonstrate that there is no adequate alternative, such as appeal from final judgment, for obtaining the relief sought; that the party will suffer damage or prejudice that cannot be corrected by other means if the writ is denied; that the party demonstrate that the district court committed a clear error; and that the party show that issuance of a writ of mandamus is an otherwise appropriate exercise of the court's discretion. *Bauman*, 557 F.2d at 654–55.[2] In its petition to the Ninth Circuit, Zimmer acknowledged the applicability of the standards set forth in *Bauman*, and

[2] Among the circumstances bearing on whether to exercise the court's discretion are whether "[t]he district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules," and whether "[t]he district court's order raises new and important problems, or issues of law of first impression." *Bauman*, 557 F.2d at 654–55.

the court of appeals likewise cited *Bauman* in stating that Zimmer had not demonstrated entitlement to relief.

Other courts of appeals, including those that Zimmer claims to be in conflict, consider these same factors, both in mandamus proceedings generally and in mandamus proceedings involving assertedly erroneous rulings on motions to transfer. *See, e.g.*, *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 57 (3d Cir. 2018) (stating that a writ of mandamus is "extraordinary" and "typically appropriate 'only upon a showing of (1) a clear and indisputable abuse of discretion or error of law, (2) a lack of an alternate avenue for adequate relief, and (3) a likelihood of irreparable injury'" (citation omitted)); *In re Union Elec. Co.*, 787 F.3d 903, 908 (8th Cir. 2015) ("Such a writ remains an extraordinary form of relief, and our review is narrowly circumscribed. We therefore review the district court's ruling only for 'a clear error' …. We will not, however, disturb a district court's transfer order where 'the facts and circumstances are rationally capable of providing reasons for what the district court has done.' Finally, the issuance of such a writ remains at all times a matter of our discretion." (citation omitted)); *In re Rolls Royce Corp.*, 775 F.3d 671, 675 (5th Cir. 2014) (stating that "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," "must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable," and "even if the first two prerequisites have been met … must be satisfied that the writ is appropriate under the circumstances." (quoting *Cheney v. U.S. Dist. Ct.*, 542 U.S. at 380–81)); *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003) (stating that mandamus "is granted only upon a demonstration that the district court so far exceeded the proper bounds of judicial discretion as to be legitimately considered ursurpative [sic] in

character or in violation of a clear and indisputable legal right, or at the very least, patently erroneous and that the injury caused by the challenged order cannot be repaired by any means other than mandamus, such as by waiting till the appeal from the final judgment").

2. Zimmer contends that other circuits apply this standard differently than does the Ninth Circuit. Specifically, Zimmer argues that other circuits recognize that mechanisms of review other than mandamus may be inadequate to provide relief for an erroneous denial of a motion to transfer, and that such error may involve the likelihood of irreparable injury. *See* Pet. 14 (citing cases). According to Zimmer, however, the Ninth Circuit "generally" requires parties "aggrieved by a failure to enforce a forum-selection clause" to "wait until after final judgment to contest such rulings." *Id.* 13 (citing *In re Orange, S.A.*, 818 F.3d 956 (9th Cir. 2016), and *In re Bozic*, 888 F.3d 1048 (9th Cir. 2018)).

Even if this purported disagreement existed, there is no reason to suppose that its resolution would impact the outcome of *this* case. Nothing in the order denying the mandamus petition suggests that the court denied mandamus relief despite concluding that Zimmer had demonstrated a clear error. Rather, the court of appeals cited only its longstanding precedent setting forth factors for exercise of its discretion to grant a writ of mandamus. Pet. App. 1–2 (citing *Bauman*, 557 F.2d 650). Thus, Zimmer has no way to know why the court denied its petition, other than that the petition did not satisfy the generally applied mandamus factors.

Furthermore, because Zimmer's mandamus petition challenged the district court's decision as erroneous for four discrete reasons, only one of which was the *Atlantic Marine* issue on which it focuses here, Zimmer cannot

even be sure that the court of appeals' attention was focused on that issue when it decided to deny review. In fact, Zimmer's mandamus petition spent more time discussing each of the other issues, emphasizing issues of state law, such as contract interpretation and purported "new and important issues" concerning the applicability of California Labor Code § 925 to contracts "entered into or modified after January 1, 2017." Pet. for Mand., Ct. App. Dkt. 1-2, at 23–24. The record in this case thus offers no "signal" that the court below "relied on [a] legally erroneous premise." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 555 (2014) (reviewing discretionary decision to deny permission to appeal where there were "many signals that the Tenth Circuit relied on the legally erroneous premise that the District Court's decision was correct").

Under these circumstances, the more likely reason for the denial of mandamus is Zimmer's failure to satisfy the requirement that, as Zimmer acknowledges, all the courts of appeals impose as a prerequisite to mandamus: The petitioner must demonstrate a clear error so great as to amount to a usurpation of power that, under the circumstances of the case, justifies the discretionary issuance of extraordinary relief. Decisions on which Zimmer itself relies have denied mandamus for just this reason. For example, in *In re McGraw-Hill*, the Third Circuit agreed with the petitioner that the district court had erred, but "discern[ed] no basis for exercising [its] discretion" where the error did not "approach[] the magnitude of an unauthorized exercise of judicial power." 909 F.3d at 63 (citation omitted). The court emphasized, "Even if we were to conclude that this error did meet that standard, we retain discretion over whether to grant the writ." *Id.*; *see also In re Nat'l Presto Indus.*, 347 F.3d at 665 (denying mandamus relief where "we suspect that the

balance favors [transfer,] [b]ut the balance is not so far askew as to justify the extraordinary relief sought"), *cited in* Pet. 14.

The denial of mandamus below is fully consistent with such decisions. In the absence of any statement by the court of appeals that its denial rested on disagreement with other appellate courts about the inadequacy of alternatives to mandamus to correct clearly erroneous orders denying transfer, there is no basis for Zimmer's assumption that this case involves any decisional conflict requiring resolution by this Court.

3. Zimmer's claim of conflict misreads not only the decision below, but also other Ninth Circuit precedents. The decisions cited by Zimmer demonstrate that a Circuit rule that review of orders denying transfer must "generally" await final judgment, Pet. 13, does not exist. And Ninth Circuit case law does not bear out Zimmer's contention that the court disagrees with other circuits about whether post-judgment appeals are adequate to remedy harms arising from erroneous refusals to transfer. To the contrary, in the Ninth Circuit, as in others, "[m]andamus may sometimes be appropriate to correct a clearly erroneous transfer order." *In re Bozic*, 888 F.3d at 1054.

Zimmer's contention that *In re Bozic* reveals that the court refuses to consider mandamus even when faced with clearly erroneous orders denying transfer is flatly wrong. In *Bozic*, the court denied mandamus because, although the district court had erred, "issuance of the writ would have no practical impact on this case in its current procedural posture." *Id.* at 1052. The court's consideration of the practical impact of its decision in the unique procedural circumstances of the case is fully consistent with the recognition of other circuits that a court retains

discretion to deny mandamus even in cases of clear error. *See In re McGraw-Hill*, 909 F.3d at 57. Moreover, *Bozic* suggests no disagreement with the point that alternatives to mandamus often may be inadequate to review clearly erroneous denials of transfer motions. Zimmer's citation to *Bozic*'s final footnote, *see* Pet. 13, in which the court stated that it was "not clear" that the petitioner would be entitled to relief even under other circumstances, 888 F.3d at 1056 n.8, is a reservation of decision on issues not presented and sets forth no rule that could possibly pose an inter-circuit conflict.

Likewise, in *In re Octagon, Inc.*, 600 F. App'x 581 (9th Cir. 2015), a nonprecedential ruling cited by Zimmer, the court did not suggest that mandamus relief was generally unavailable to correct an erroneous denial of a motion to transfer. Instead, the court declined to grant mandamus where the claim of error—"a routine and fact-intensive question of contract interpretation"—did not reflect any unusual circumstances warranting mandamus relief. *Id.* at 582; *see Hendrickson v. Octagon, Inc.*, 2014 WL 2758750, at *2 (N.D. Cal. 2014) (discussing ambiguities in the forum-selection clause).

Zimmer relies principally on *In re Orange, S.A.*, 818 F.3d 956, to support its argument that the Ninth Circuit "generally" requires parties to wait until after final judgment to challenge denial of transfer based on a forum selection clause. Pet. 13. *In re Orange*, however, did not involve denial of a motion to transfer, but denial of a motion to *dismiss* on forum non conveniens grounds, based in part on a non-disclosure agreement (NDA) that contained a forum-selection clause providing for litigation in France. *Id.* at 959. The district court had concluded that the claims "were so factually distinct from the NDA" that the forum-selection clause could not apply. *Id.* at 962.

Recognizing that *Atlantic Marine* would strongly support a forum non conveniens dismissal if the claims were subject to the NDA's forum-selection clause, the court of appeals addressed the petitioner's arguments on the merits. The court ultimately denied mandamus, however, because the petitioner had "fail[ed] to show how the district court's conclusion is legal error," let alone a "clear and indisputable one." *Id.* at 963.

Having found mandamus inappropriate on this basis, the court discussed the other *Bauman* factors only briefly. The court observed that the petitioner had "present[ed] no argument as to why it will not be able to contest the district court's decision to deny dismissal for forum non conveniens after entry of final judgment." *Id.* at 963. Yet even had the petition offered such an argument, the question whether a post-judgment appeal is an adequate remedy for a failure to *dismiss* is a different question from whether it is adequate to remedy a failure to *transfer*. *Compare Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498–501 (1989) (holding that an erroneous failure to dismiss for forum non conveniens based on a forum-selection clause can be adequately vindicated on appeal from final judgment); *with In re Nat'l Presto Indus.*, 347 F.3d at 663 ("Presto would not have an adequate remedy for an improper failure to transfer the case by way of an appeal from an adverse final judgment because it would not be able to show that it would have won the case had it been tried in a convenient forum."), *and* 15A Charles A. Wright, *et al.*, Federal Practice & Procedure § 3914.12 (2d ed. 1986 & Apr. 2019 update) (stating that "exceptional circumstances would be required to justify reversal" for erroneous denial of transfer "after an otherwise proper trial"). *Orange* discusses only the former; it cannot create a circuit-split over the latter.

Thus, no case supports Zimmer's contention that parties in the Ninth Circuit "generally must … wait until after final judgment to contest" an order denying a motion to transfer based on a purportedly applicable forum-selection clause. Pet. 13. On this point, there is no conflict for this Court to resolve.

* * *

Here, the parties do not know why the court of appeals denied Zimmer's petition. All we know is that, based on the balance of factors, the court decided not to exercise its discretion to grant mandamus relief. Zimmer's theory that the Ninth Circuit's two-sentence order denying relief necessarily shows an abuse of discretion can be correct only if every assertedly erroneous order denying transfer warrants mandamus. That position plainly goes too far, as it effectively creates a right of automatic interlocutory appeal. Such an approach runs counter to this Court's admonition that mandamus is "reserved for really extraordinary causes." *Will*, 389 U.S. at 107; *see In re McGraw-Hill*, 909 F.3d at 57 (stating that "mandamus must not become a means by which the court corrects all potentially erroneous orders").

III. Zimmer's claim that courts may not consider state public policy in assessing the validity of a forum-selection clause was waived below and does not warrant review.

Zimmer argues that the Ninth Circuit erred in "refus[ing] to enforce the parties' forum-selection clause because of a California statute," Pet. 16, and that, in doing so, it implicated a conflict among the circuits "over whether state or federal policy controls that forum-selection clause enforcement." *Id.* The Ninth Circuit, however, did not say that it denied mandamus "because of a California statute." And Zimmer did not even argue

below, as it does now, that courts considering whether to enforce a forum-selection clause may not consider state public policy bearing on its validity. Zimmer thus waived the second question that it asks the Court to consider. Moreover, Zimmer's claim that the circuits disagree over whether courts may consider state policy in such cases is wrong. For each of these reasons, Zimmer's second question presented does not warrant review.

A. Zimmer's second question was not raised or decided below.

The court of appeals' two-sentence order mentions neither public policy nor state law; it exhibits neither deference to state law nor even consideration of state law. The order states only that Zimmer has failed to demonstrate that "this case warrants the extraordinary remedy of mandamus." Pet. App. 1. The only conclusion that can be drawn from the brief order is that the petition for a writ of mandamus failed to satisfy the longstanding guidelines for the court's exercise of discretion to grant or deny such a petition.

Moreover, Zimmer did not argue in either the district court or the court of appeals that state public policy may not be considered in assessing the validity of a forum-selection clause. To the contrary, Zimmer stated: "Courts look to the laws *of the forum state* to determine whether enforcement would contravene a strong public policy." Pet. for Mand., Ct. App. Dkt. 1-2, at 15 (emphasis added). Zimmer went on to argue that, under the facts of this case, the district court erred in finding that California Labor Code § 925 embodies a strong public policy against enforcement of the forum-selection clause. *Id.* at 15–18. Zimmer did *not* argue, however, that the court erred in looking to California law.

Zimmer's argument in its mandamus petition mirrored its argument in the district court. There too, as reflected in the district court's opinion, Zimmer argued that enforcement was not contrary to *California* public policy. *See* Motion to Transfer, D. Ct. Dkt. 14, at 10 (argument heading stating "Enforcement of The Forum-Selection Clause Will Not Contravene California Public Policy"); Reply re Motion to Transfer, D. Ct. Dkt. 18, at 3–6. Because Zimmer did not argue that the district court was foreclosed from considering state law, the district court, unsurprisingly, did not address the point.

This Court "normally decline[s] to entertain" arguments that the parties "failed to raise ... in the courts below." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016); *see*, *e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Because Zimmer's second question was not in dispute in the lower courts, the petition should be denied.

B. The district court's consideration of state public policy does not implicate a conflict among the courts of appeals and is consistent with this Court's cases.

1. Zimmer incorrectly contends that decisions of the First, Fifth, and Ninth Circuits are in conflict with decisions of the Second and Fourth Circuits on the question whether state or federal "public policy" is relevant to enforcement of a forum-selection clause under *Bremen* and *Atlantic Marine*. Although Zimmer's failure to raise the issue in the lower courts should end the inquiry, the lack of a conflict among the courts of appeals would render Zimmer's second question unworthy of review in any event.

Focusing first on the Second Circuit, Zimmer argues that the Second Circuit applies federal policy, not state

policy, when considering whether enforcement of a forum-selection clause would contravene "a strong public policy of the forum in which the suit is brought." *Bremen*, 407 U.S. at 18. The cases on which it relies, however, do not say that. Rather, when considering enforcement of forum-selection clauses, the Second Circuit, like the Ninth, applies the standard set forth in this Court's decisions, including *Bremen* and *Atlantic Marine*. *See Martinez v. Bloomberg LP*, 740 F.3d 211, 228 (2d Cir. 2014); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). That standard, although based on federal law, incorporates, as one element, consideration of a strong public policy of the forum. *Bremen*, 407 U.S. at 392; *see also Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (noting that "state policies should be weighed in the balance" in determining whether to enforce a "valid forum-selection clause"); *accord Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 499 n.21 (9th Cir. 2000) (discussing *Stewart Org.* and stating that "the public policy of the forum is not dispositive in a § 1404(a) determination" but is a "factor that should be weighed in the court's § 1404(a) 'interest of justice' analysis").

Whether, in applying that federal standard, the Second Circuit looks to the public policy as set forth in state law or federal law depends on the claims alleged and the arguments made by the parties. Thus, in *Martinez*, cited by Zimmer, Pet. 18, although the plaintiff alleged discrimination under both the federal Americans with Disabilities Act (ADA) and state law, his argument on *Bremen*'s public policy prong focused on federal law: He argued that because "the U.K. Employment tribunal could not adjudicate his *federal* disability claims, the district court's decision" enforcing a forum-selection clause providing for suit in England "subverts *federal* policy by effectively requiring that he forfeit his *statutory*

rights under the ADA." 740 F.3d at 228 (emphasis added). Given that the plaintiff's argument was based on "federal policy," the Second Circuit logically "look[ed] to federal cases and statutes" to determine whether enforcement of the clause would contravene that policy. *Id.* at 228.

Likewise, in *Midamines SPRL Ltd. v. KBC Bank NV*, 601 F. App'x 43 (2d Cir. 2015), also cited by Zimmer, Pet. 19, the court did not hold that New York law and public policy were irrelevant to the determination whether application of the forum-selection clause at issue would be unjust. Rather, the court "decline[d] to consider these arguments for the first time on appeal." *Id.* at 46. The court noted that the arguments would in any event be unavailing because the asserted state policy would not render the clause unenforceable, but it did not suggest that an argument based on a strong state public policy would be inappropriate, if timely made and well founded.

In addition, in *S.K.I. Beer Corp. v. Baltika Brewery*, 612 F.3d 705 (2d Cir. 2010), not cited by Zimmer, the Second Circuit considered whether enforcement of a forum-selection clause would run counter to state policy. *Id.* at 712 (rejecting the argument that transfer would violate a strong New York state policy, where the appellant's "assertion that New York law would not be applied and [it] would not have a substantive remedy in St. Petersburg is unsupported by any evidence").

As for the Fourth Circuit, Zimmer cites only one case, *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643 (4th Cir. 2010). In *Albemarle*, the court recited prior Fourth Circuit precedent summarizing *Bremen* and stating that a forum-selection clause may be unreasonable where enforcement "would contravene a strong public policy *of the forum state*." *Id.* at 651 (quoting *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996)

(emphasis added)). Based on this principle, the plaintiff pointed to a South Carolina statute that purported to make *all* forum-selection clauses permissive. The court declined to apply that state law, finding both that the federal policy recognized in *Bremen* preempted or overrode such a blanket state policy, and that the South Carolina courts' enforcement of forum-selection clauses showed that the state did *not* in fact have a policy against enforcement. *Id.* at 652.

Although Zimmer frames *Albemarle* as rejecting consideration of state public policy, district courts in the Fourth Circuit have not read *Albemarle* to reject consideration of state public policy when applying *Bremen*'s policy prong. *See, e.g.*, *Whiting-Turner Contracting Co. v. Westchester Fire Insur. Co.*, 2013 WL 3177881, at *3 (D. Md. 2013) (where the forum state was Maryland, declining to apply Pennsylvania public policy); *Imperium Ins. Co. v. Allied Ins. Brokers, Inc.*, 2012 WL 4103889, at *2 (D. Md. 2012) (holding that "enforcement of the clause in this case would not contravene the public policy interests of Maryland"); *NC Contracting, Inc. v. Munlake Contractors, Inc.*, 2012 WL 5303295, at *5 (E.D.N.C. 2012) (noting that the decision whether to enforce a forum-selection clause "requires determining whether enforcement of the forum-selection clause would contravene a strong public policy of North Carolina").

Thus, the Fourth Circuit, like the Second and the Ninth, recognizes that consideration of whether enforcement would contravene a strong state public policy is incorporated into the federal standard. The First and Fifth Circuits agree. *See* Pet. 18 (citing cases). There is thus no conflict among the circuits warranting review of this issue—an issue that Zimmer waived below.

2. Finally, the Ninth Circuit's approach to motions to transfer is consistent with this Court's precedents. Zimmer cites *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018), and *Adema Technologies, Inc. v. Wacker Chemical Corp.*, 657 F. App'x 661 (9th Cir. 2016), as cases to the contrary. But both of those opinions quote, discuss, and apply *Atlantic Marine* and *Bremen*, relying on some of the same portions of those opinions as Zimmer. And after doing so, both affirm orders enforcing forum-selection clauses. District courts within the Circuit take the same approach. *See, e.g.*, *Dolin v. Facebook, Inc.*, 289 F. Supp. 3d 1153 (D. Haw. 2018) (applying *Atlantic Marine* and granting motion to transfer); *Ponomarenko v. Shapiro*, 287 F. Supp. 3d 816 (N.D. Cal. 2018) (same); *Hosick v. Catalyst IT Servs., Inc.*, 143 F. Supp. 3d 1072 (D. Or. 2015) (same).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALLISON M. ZIEVE
RYLEE SOMMERS-FLANAGAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Denis Kenny
Scherer Smith & Kenny LLP
140 Geary Street, Seventh floor
San Francisco, CA 94108
(415) 433-1099

JASON LOHR
Counsel of Record
ALEC SEGARICH
LOHR RIPAMONTI & SEGARICH LLP
140 Geary Street, 4F
San Francisco, CA 94108
(415) 683-7947
jason.lohr@lrllp.com

Attorneys for respondent James Karl

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES KARL, individually and on behalf of all others similarly situated,

Plaintiff,

v.

ZIMMER BIOMET HOLDINGS, INC., a Delaware corporation; ZIMMER US, INC., a Delaware corporation; BIOMET U.S. RECONSTRUCTION, LLC, an Indiana limited liability company; BIOMET BIOLOGICS, LLC, an Indiana limited liability company; and BIOMET, INC., an Indiana corporation,

Defendants.

No. C 18-04176 WHA

ORDER RE MOTION TO CONDITIONALLY CERTIFY COLLECTIVE ACTION AND MOTION TO FILE UNDER SEAL

INTRODUCTION

In this putative employment class action, plaintiff moves for conditional certification of an FLSA collective action and to file under seal. To the extent stated below, the motions are **GRANTED**.

STATEMENT

In August 2015, plaintiff James Karl signed a sales associate agreement with defendants Zimmer US, Inc. ("Zimmer US"); Biomet U.S. Reconstruction, LLC ("Biomet Reconstruction"); and Biomet Biologicals, LLC

("Biomet Biologics"). He thereafter began working for those three entities as a sales representative in California. Pursuant to the agreement, plaintiff sold medical devices in the surgical field—particularly, orthopedics—such as replacement hips and surgical tools. The agreement also classified plaintiff as an independent contractor. Sales representatives such as plaintiff were primarily paid on commission (Dkt. No. 53-1, Exhs. 1 at 164:15–165:22; 13 ¶ 1; 21 ¶ 1).

Defendant Zimmer Biomet Holdings, Inc. ("Zimmer Biomet Holdings") was formed in June 2015 as a result of a merger between two previous competitors, Zimmer Holdings, Inc. and Biomet, Inc. Zimmer Biomet Holdings is a holding company and the parent corporation of various subsidiaries, including the three subsidiary entities plaintiff contracted with. It did not have any employees or directly contract with independent contractor sales representatives who sell orthopedic products (Dkt. Nos. 53-1, Exh. 1 at 110:19–111:7; 57-14 ¶ 3).

The subsidiaries of Zimmer Biomet Holdings were responsible for selling and distributing various product lines (with each subsidiary selling different products). These products included orthopedic reconstructive products, sports medicine, biologics, extremities, and trauma products, office-based technologies, spine, craniomaxillofacial and thoracic products, dental implants, and related surgical products. The primary customers were surgeons, other specialists, hospitals, and other health care dealers (Dkt. No. 53-1, Exh. 1 at 22:4–21, 110:17–24).

As to the three subsidiary entities plaintiff directly contracted with, Zimmer US engaged Biomet Reconstruction and Biomet Biologics in designing, manufacturing, and marketing medical devices and biologics related to knees, hips, sports medicine, foot and ankle, extremi-

ties, and trauma. These three entities (and Zimmer Biomet Holdings' subsidiaries generally) used two different sales models relevant to this action: (1) direct, and (2) distributor (Dkt. No. 57-14 ¶¶ 4, 6, 14).

Under the direct territory sales model, the Zimmer Biomet Holdings subsidiaries contracted directly with independent contractor sales representatives who sold primarily their products. Under the distributor sales model, the subsidiary entities contracted with a third-party distributor—who owned and operated its independent business—who was in turn responsible for all sales within a geographic territory, including hiring sales representatives (*id.* ¶¶ 6, 14).

Plaintiff filed the instant action in July 2018, alleging that defendants misclassified him and others similarly situated as independent contractors. Relevant to this motion, plaintiff seeks to represent other sales representatives who were classified as independent contractors and allegedly subsequently denied overtime pay under the FLSA. Plaintiff now moves under Section 216(b) of the FLSA to conditionally certify a collective action and to disseminate notice. Plaintiff's proposed FLSA class is defined as follows (Dkt. No. 53 at 3):

> Any person who signed a contract, from three years prior to the date on which notice is issued to the date on which notice is issued, with Zimmer Biomet, or any of its subsidiaries, that engages the person as an independent contractor for the solicitation of sales of Zimmer Biomet products and/or services in the market segments or product lines: Orthopedics, S.E.T., Biologics, Reconstructive, Spine, CMF, Thoracic, Knee, Hip, Foot & Ankle, Sports

> Medicine, Extremities, Surgical, Microfixation, Bone Healing, Cement, Trauma.

Defendants oppose. They contend that (1) those individuals who have not contracted with the same entities as plaintiff (*i.e.*, Zimmer US, Biomet Reconstruction, and Biomet Biologicals) should be excluded from the collective; (2) those individuals who contracted with third-party distributors should be excluded from the collective; (3) the forum-selection clause narrows the scope of the collective; and (4) fact-intensive inquiries bar conditional certification. This order follows full briefing and oral argument, followed by supplemental briefing.

ANALYSIS

The FLSA provides employees with a private right of action to enforce the minimum wage and overtime provisions of the Act. *See* 29 U.S.C. § 216(b). "[W]orkers may litigate jointly if they (1) claim a violation of the FLSA, (2) are 'similarly situated,' and (3) affirmatively opt in to the joint litigation, in writing." *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1100 (9th Cir. 2018). "Similarly situated" means "plaintiffs must be alike with regard to some *material* aspect of their litigation." *Id.* at 1114. "[W]hat matters is not just any similarity between party plaintiffs, but a legal or factual similarity material to the resolution of the party plaintiffs' claims, in the sense of having the potential to advance these claims, collectively, to some resolution." *Id.* at 1115. In other words, "[p]arty plaintiffs are similarly situated, and may proceed in a collective, to the extent they share a similar issue of law or fact material to the disposition of their FLSA claims." *Id.* at 1117.

A majority of district courts in our circuit employ a two-step approach to collective actions. *See Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 466–67 (N.D. Cal.

Aug. 16, 2004) (Judge Vaughn Walker); *Campbell*, 903 F.3d at 1109–10 (noting the two-step approach favorably). In the first step of this approach, plaintiffs move for preliminary certification and show that the members of the defined collective are "similarly situated" for purposes of providing notice of the action. At this early stage, the standard is "lenient" and district courts simply evaluate whether there is "some factual basis beyond the mere averments in their complaint for the class allegations." *Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 536 (N.D. Cal. Apr. 11, 2007) (Judge Marilyn Patel); *see also Campbell*, 903 F.3d at 1109. The second stage occurs when discovery is complete and the case is ready to be tried. The party opposing collective certification may then move for decertification. *Leuthold*, 224 F.R.D. 466–67.

Here, plaintiff alleges that each member of the putative collective signed an independent contractor agreement, subjecting them to a uniform company policy of treating them as exempt workers under FLSA. Plaintiff thus argues that "all of Zimmer Biomet's Sales Representatives are similarly situated to himself because they are victims of a common policy that misclassified them as independent contractors when they are in fact employees" (Dkt. No. 53 at 21). This order agrees (in accepting plaintiff's broad allegation as true) that there is sufficient material similarity between plaintiff and the putative collective members with respect to the disposition of their FLSA claim. This order also agrees with defendants, however, that the proposed FLSA class should be narrowed in scope, as discussed below.

…

3. NON-CALIFORNIA DIRECT CONTRACTOR SALES REPRESENTATIVES.

Defendants argue that the sales associate agreements signed by plaintiff and putative collective members contained a forum-selection clause designating Indiana as the exclusive forum for any dispute arising between the parties to the contract.[2] They point to the clause that stated as follows (Dkt. No. 56 at 13):

> This Agreement (including, but not limited to, the validity, performance, interpretation and enforcement thereof), the relationship established herein, and any dispute between the parties shall be governed by and subject to the internal laws (exclusive of conflicts of law provisions) and decisions of the trial and appellate courts of the State of Indiana. Furthermore, to the extent any legal proceedings are initiated pursuant to this agreement or otherwise, the exclusive venue for such litigation shall be a court located in Kosciusko County, Indiana or the United States District Court for the Northern District of Indiana, South Bend Division. Accordingly, Sales Representative irrevocably consents to the personal jurisdiction and exclusive venue in such courts.

Defendants contend that the prior order dated November 6, 2018, denying defendants' motion to transfer after finding the forum-selection clause unenforceable was based on *California's* strong public policy against litigation labor disputes out-of-state, as codified under California Labor Code Section 925 (Dkt. No. 27 at 8), and thus pertains to only those putative collective members residing and working in California. Approximately 85

---

[2] Sales representatives can negotiate for another forum, such as Texas, as the exclusive forum (*see, e.g.*, Dkt. No. 53-4 ¶ 28).

percent of the Zimmer US, Biomet Reconstruction, and Biomet Biologics entities' (with whom plaintiff contracted with) direct contractors reside and work in states other than California, according to defendants (Dkt. No. 56 at 14). Defendants argue that because these forum-selection clauses are presumptively valid and enforceable (inasmuch as they are outside the purview of California Labor Code Section 925), challenges to these persons' forum-selection clauses "would necessitate analysis of multiple different state regulations and public policies" (*ibid.*) (citing *Atlantic Marine Const. Co. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568, 583 (2013)). This order disagrees.

As plaintiff points out, defendants do not quote from the sales associate agreement, as they seemingly try to imply. Rather, defendants slickly quote the forum-selection provision from a different document called "Exhibit C: Non-Compete, Non-Solicit and Confidentiality Agreement," which is referenced in but merely appended to the sales associate agreement (Dkt. No. 53-1, Exh. 13 at 160). In contrast to the forum-selection clause found in Exhibit C, the sales associate agreement itself stated in relevant part (*id.* at 153 (¶ 28) (emphasis added)):

> Governing Law and Venue. This Agreement (including, but not limited to, the validity, performance, interpretation and enforcement thereof), the relationship established hereunder, and any dispute between the parties shall be governed by and subject to the internal laws (exclusive of conflicts of law provisions) and decisions of the trial and appellate courts of the State of Indiana. *Furthermore, to the extent any legal proceedings are initiated*

> *pursuant to the restrictive covenants set forth above or otherwise*, the exclusive venue for such litigation shall be a court located in Kosciusko County, Indiana or the United States District Court for the Northern District of Indiana, South Bend Division. Accordingly, Representative, including Principal Owner(s), individually, irrevocably consents to the personal jurisdiction and exclusive venue in such courts.

Plaintiff thus argues that the forum-selection clause in the sales associate agreement applied only to litigation involving the *restrictive covenants* set forth in the sales associate agreement. The restrictive covenants referenced therein, found in paragraph seven of the sales associate agreement, is related to non-compete and non-solicit covenants (*id.* at 142 (¶ 7)). The restrictive covenant provision in the sales associate agreement further stated in relevant part (*id.* at 144 ¶ 7(g) (emphasis added)):

> Restrictive Covenants for Representative's Principal Owners, Employees, and Representatives. Representative represents and warrants that each Principal Owner who has not executed this Agreement, and each officer, sales associate, employee, and contractor of Representative will execute the agreement *attached hereto as Exhibit C* prior to retaining such person.

Exhibit C (referenced in the sales associate agreement's restrictive covenant provision), in turn, contains the actual forum-selection clause defendants quote in their opposition (*see* Dkt. No. 53-1, Exh. 13 at 162 (¶ 13)). But Exhibit C does not apply to plaintiff or other sales

representatives, according to plaintiffs. Rather, Exhibit C pertains to *helpers* that sales representatives themselves might retain, with the result of binding those helpers to the same restrictive covenants. Plaintiff thus contends that defendants attempt to create a broader forum-selection clause than what actually exists (Dkt. No. 59 at 14). As such, plaintiff argues that since the instant action relates to defendants' compliance with the FLSA—and does not concern restrictive covenants—the forum-selection clause does not apply here and thus gives no basis for narrowing the collective action.

Defendants, of course, now assert in supplemental briefing that the relevant forum-selection clause in the sales associate agreement itself was clearly intended to apply to all legal proceedings (including those involving FLSA claims) between the parties to the agreement (Dkt. No. 68 at 1). They point to the phrase "or otherwise" (as prompted by the Court during oral argument) in the relevant forum-selection clause and assert that this phrase referred to *any* legal proceedings initiated between the parties, including those unrelated to restrictive covenants.[3]

This order finds both sides' interpretation plausible. That is, the phrase "or otherwise" in the relevant forum-selection clause could be reasonably understood as either applying to claims involving restrictive covenants only or broadly encompassing all claims.

---

[3] The phrase at issue is found in the following context: "Furthermore, to the extent any legal proceedings are initiated pursuant to the restrictive covenants set forth above *or otherwise*, the exclusive venue for such litigation shall be a court located in Kosciusko County, Indiana or the United States District Court for the Northern District of Indiana, South Bend Division" (Dkt. No. 53-1, Exh. 13 at 153 (¶ 28) (emphasis added)).

Specifically, defendants contend as follows: the forum-selection clause language in paragraph 28 of the sales associate agreement ("legal proceedings ... initiated pursuant to the restrictive covenants set forth above") related to paragraph 7(a)(ii) of the agreement, which was the only section addressing legal proceedings in connection with restrictive covenants (Dkt. No. 68 at 1–2). And, following the phrase "or otherwise" in paragraph 28 ("legal proceedings ... initiated pursuant to the restrictive covenants set forth above *or otherwise*"), according to defendants, broadly "refer[red] to the opposite of the word[s] that came before it," *i.e.*, "pursuant to restrictive covenants" (*id.* at 2). Defendants further argue that " 'as set forth above' is a dependent clause and reads together with the phrase 'restrictive covenants,' " and thus assert that "the sentence reads with equal grammatical power, 'to the extent any legal proceedings *are initiated* pursuant to the restrictive covenants set forth above or [*initiated*] otherwise' " (*ibid.*).

Defendants' reading, however, is not the only plausible reading. As plaintiff argues, the phrase "or otherwise" may equally refer to the location of the relevant restrictive covenants (as opposed to subject matter). Moreover, plaintiff further points out that the relatively narrow scope of the forum-selection provision ("to the extent any legal proceedings are initiated pursuant to the restrictive covenants set forth above or otherwise, the exclusive venue for such litigation shall be a court located in Kosciusko County, Indiana....") is illustrated by its contrast to the broadly worded choice-of-law provision within the same paragraph ("This Agreement ..., the relationship established hereunder, and any dispute between the parties shall be governed by and subject to the internal laws (exclusive of conflict of law provisions) and

decisions of the trial and appellate courts of the State of Indiana.") (Dkt. No. 53-1, Exh. 13 at 153 (¶ 28)).

Contrary to defendants' assertion, plaintiff's interpretation does not necessarily "eviscerate" the plain meaning of the forum-selection clause. The phrase "or otherwise" was immediately preceded by "set forth above," *not* the language regarding subject matter (*i.e.*, restrictive covenants). And, defendants cite no authority for the assertion that the parties would have used the word "elsewhere" rather than "or otherwise" in order to denote a different location for the relevant restrictive covenants. Rather, either wording would have seemingly sufficed under these circumstances. As such, this order finds either side's interpretation potentially valid (and equally consistent with *Gleave v. Graham*, 954 F. Supp. 599, 609 (W.D.N.Y. 1997), *aff'd*, 152 F.3d 918 (2d Cir. 1998)). Nor is this order persuaded that the mere use of the definite article "the" before the phrase "restrictive covenants" in this context compels the conclusion that the *only* relevant restrictive covenants were contained in the sales associate agreement.

Defendants further contend that the integration language in the sales associate agreement clearly shows that the agreement contained the only restrictive covenant language applicable to the parties of that agreement (Dkt. No. 68 at 3). This order disagrees. The integration language defendants cite to stated as follows (Dkt. No. 53-1, Exh. 13 at 152 (¶ 21) (emphasis added)):

> This Agreement, which includes all the terms and conditions hereunder, *and all exhibits, manuals, policies, riders, and/or ancillary agreements attached hereto or incorporated herein* is intended to be the exclusive and final statement of the terms and understandings

> relative to the subject matter hereof, merging herein and amending, restating, and superseding all prior negotiations and prior written or oral agreements between [the parties] as to any part of the subject matter of this Agreement and the relationship. In the event there is a conflict between this Agreement and any materials incorporated hereto or by reference, the terms of this Agreement shall control.

Thus the integration clause itself contemplated that other documents outside the agreement (but attached to or incorporated by reference)—documents that may have included other relevant restrictive covenants—were also controlling.

Defendants next point out that the sentence immediately following the forum-selection language at issue broadly stated as follows: "Accordingly, Representative ... irrevocably consents to the personal jurisdiction and exclusive venue in such courts" (*id.* at 153 (¶ 28)). This sentence, defendants contend, did not contain language limiting consent to exclusive venue in Indiana to only legal proceedings involving restrictive covenants (Dkt. No. 68 at 3–4). Plaintiff's interpretation would thus be "absurd," according to defendants, as it would mean a partial consent to a non-exclusive venue. Defendants further contend the alleged absurdity of plaintiff's interpretation by pointing to the fact that a direct sales representative changed the designated forum to Tarrant County, Texas in his agreement as the exclusive forum (*ibid.*; Dkt. No. 53-4, Exh. A ¶ 28). These arguments, however, fail to sufficiently show that defendants' interpretation is the unambiguously correct interpretation. This order, however, does not find that allegedly inefficient or narrow forum-selection clauses are necessarily rendered implausible.

Thus at bottom, this order finds that the scope of the forum-selection clause is ambiguous. There is a plausible reading of the relevant forum-selection clause that would bar the FLSA claim from compelled litigation in Indiana. As such, the clause will be construed against the drafter of the agreement. *See Sandquist v. Lebo Auto., Inc.*, 1 Cal. 5th 233, 247 (2016) ("[A]mbiguities in written agreements are to be construed against their drafters.").[4] Accordingly, this order finds that the forum-selection clause related to restrictive covenants only, and plaintiff may therefore represent the FLSA claim nationwide for other sales representatives who are similarly situated.[5]

…

CONCLUSION

To the foregoing extent, plaintiff's motion for conditional certification and administrative motion to file under seal are **GRANTED**. The parties shall **MEET AND CONFER** regarding the issue of notice and jointly submit a proposed notice by **JULY 10 AT NOON**.

IT IS SO ORDERED.

Dated: July 2, 2019.

/s/
WILLIAM ALSUP

---

[4] Defendants offer no authority for their suggestion that broad, general clauses regarding the parties' acknowledgment of the terms of the agreement render the terms themselves unambiguous (*see* Dkt. No. 68 at 4).

[5] Paragraph 28 included a jury waiver for "any and all controversies arising among the parties under the agreement" (Dkt. No. 53-1 ¶ 28). Defendants argue that the putative collective action cannot include sales representatives outside of California, Georgia, and North Carolina because those states prohibit jury waivers and

UNITED STATES DISTRICT
JUDGE