SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York; and FERN A. FISHER, DEPUTY CHIEF ADMINISTRATIVE JUDG FOR NEW YORK CITY COURTS AND ADMINISTRATIVE AUTHORITY OF THE CIVIL COURT OF THE CITY OF NEW YORK,

Petitioners,

- against –

NORTHERN LEASING SYSTEMS, INC.; LEASE FINANCE GROUP LLC; MBF LEASING LLC; LEASE SOURCE-LSI, LLC, a/k/a LEASE SOURCE, INC.; GOLDEN EAGLE LEASING LLC; PUSHPIN HOLDINGS LLC; JAY COHEN, a/k/a ARI JAY COHEN, individually, as a principal of NORTHERN LEASING SYSTEMS, INC, as a member of LEASE FINANCE GORUP LLC, and as an officer of PUSHPIN HOLDINGS, INC.; NEIL HERTZMAN, individually and as an officer of NORTHERN LEASING SYSTEMS, INC.; JOSEPH I. SUSSMAN, P.C.; JOSEPH I. SUSSMAN, individually and as a principal of JOSEPH I. SUSSMAN, P.C.; and ELIYAHU R. BABAD, individually and as a principal or associate of JOSEPH I. SUSSMAN, P.C.,

Respondents.

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INDEX NO. 450460/2016

IAS Part 46

Assigned Justice:
HON. LUCY J. BILLINGS, J.S.C.

BRIEF OF AMICUS CURIAE
THE NEW YORK CITY BAR ASSOCIATION

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PRELIMINARY STATEMENT

The New York City Bar Association (the Association), through its Civil Court Committee (the Committee), submits this brief as *amicus curiae* to present points and arguments that will assist the Court but that are not presented by the parties to this proceeding. Specifically, courts should decline to enforce the Northern Leasing entities'[1] forum selection clauses on a ground that Petitioners have not raised: *forum non conveniens*.

Approximately 25% of the caseload in the New York County's Civil Court (the Civil Court)[2] consists of Northern Leasing entities' small dollar cases concerning out-of-state transactions—equipment finance leases—against non-New Yorkers.[3] Typically, these defendants are unsophisticated small business people of modest means from distant states who have no contact with New York State. Respondents bring these suits in New York County based on a forum selection clause buried in the fine print of the equipment finance leases.[4]

Under New York Law, a party may move to dismiss a case from a contractually agreed upon forum where a trial in that forum would be "so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court."[5] However, because very few of the small business people in distant states who are sued by

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[1] The Northern Leasing Respondents (collectively Northern Leasing) include Respondent Northern Leasing Systems, Inc. (a New York corporation), Lease Finance Group LLC (a Delaware limited liability company), MBF Leasing LLC (a New York limited liability company), Lease Source-LSI LLC (also known as Lease Source, Inc.) (a New York limited liability company), Golden Eagle Leasing LLC (a New York limited liability company), and Pushpin Holdings LLC (a Delaware limited liability company); see also Verified Petition, NYSCEF doc. 1 (April 7, 2016) at 7-9, ¶¶ 25 - 30 (April 7, 2016).

[2] The New York City Civil Court is comprised of its five county courts, New York (Manhattan), Queens, Bronx, Kings (Brooklyn), and Richmond (Staten Island).

[3] *See* Petition n. 1, above at 2-6 and ¶ 9; *see also* Eddy Valdez Affidavit, (March 28, 2016) (Valdez aff), Exhibit C to Fern A. Fisher Affidavit, NYSCEF doc 177, at 2 ¶¶ 3 – 4.

[4] *See e.g.*, Memorandum of Law of Respondents Northern Leasing In Opposition To Petition And In Support of Motion to Dismiss, etc. (June 8, 2016) (Northern Leasing opposition memorandum), NYSCEF doc. 302, 79 et seq.

[5] *British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234, 234 (citing *The Bremen v Zapata Off-Shore Co.*, 407 US 1, 12-18 [1972]); *see also Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222 (1st Dept 2006).

Northern Leasing have lawyers or even appear in the case, the defense is rarely raised—an indicator of just how inconvenient the forum is.

Moreover, Northern Leasing's mass filing of cases with no nexus to New York unreasonably burdens the New York County Civil Court—a local court of limited monetary and geographic jurisdiction, designed to hear matters that transpire in New York City. In the context alleged in the Attorney General's Petition, Northern Leasing's forum selection clauses should not be enforced because enforcement is unreasonable and unjust for these non-New Yorkers, and, given the burdens imposed by Respondents' mass filings, for the Civil Court and its other litigants whose matters fall squarely in its limited jurisdiction.

ARGUMENT

NEW YORK COURTS SHOULD NOT RETAIN JURISDICTION OVER NORTHERN LEASING'S SUITS AGAINST OUT-OF-STATE DEFENDANTS IN COURTS OF LIMITED JURISDICTION UNDER THE CIRCUMSTANCES PRESENTED IN THIS CASE

A forum selection clause in a negotiated contract between business entities generally establishes personal jurisdiction in the selected forum. Nevertheless, courts have long recognized that they can, and should, exercise their discretion to decide whether such a provision should control the forum when circumstances demonstrate that proceeding in that forum would be unjust to the defendant or would place undue burdens on the court, or both.

Here, Petitioners allege that the Northern Leasing entities engage in a variety of deceptive and fraudulent business practices to ensnare unsophisticated small business owners into unconscionable equipment finance leases for credit card processing equipment for their

businesses.[6] The businesses, and the individuals sued, are almost always outside New York, with no actual connections to New York. The leases are typically for four-year terms, cannot be canceled mid-term (even if the equipment is defective), and have only a limited cancellation window at the end of the four-year term.[7] The lease financing agreements are on a pre-printed form, are not negotiated, and are guaranteed personally by either the owner or even an unwitting employee of the business.[8] Upon default in payment, the Respondents file suits against the personal guarantors, for low-dollar damages, generally in the Civil Court of New York County.

The extraordinary default rate in these suits indicates that the actions burden defendants unfairly. Although four out of six of the Northern Leasing entities are registered as New York corporations or companies,[9] their actions place extraordinary burdens on the Civil Court as well. The sheer number of these suits also adversely affects the interests of other litigants unconnected to the Northern Leasing suits by occupying court resources. Based on the facts alleged in the Petition and below, the Respondents should not be permitted to bring what are essentially small debt collection cases against non-New York residents in the New York City Civil Court in a manner that misuses already scarce judicial resources and abuses the court system.

A. The New York City Civil Court is a Court of Limited Jurisdiction and Already Substantially Overburdened

1. Background of the New York City Civil Court

The Civil Court of the City of New York was established on September 1, 1962 with the

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[6] *See generally* Petition, n. 1, above at 2-3, ¶¶ 2 – 4.

[7] *See* n. 1, above at 2, ¶ 3 – 4; *see also* Affidavit of Jay Cohen (June 8, 2016) (Cohen aff), NYSCEF doc. 206, at 6 – 7 (June 8, 2016).

[8] *See* Petition n.1, above at 10 – 11; *see also* Cohen aff, n. 7, above.

[9] *See* n. 1, above.

merger of the City Court and the Municipal Court of the City of New York.[10] Over the years, the Civil Court's jurisdiction increased and staff was added to keep pace and improve service to the court's litigants.[11] However, the court itself remains one of limited jurisdiction.

The court is limited to hearing cases only up to $25,000 in value, exclusive of interest and costs.[12] The court's jurisdiction is also geographically limited, generally to matters arising or property located within New York City.[13] Service of process is limited to within New York City, unless service beyond is authorized by any law other than the CPLR.[14] In essence, the Civil Court's jurisdiction typically is limited to cases of (relatively) low value and to persons or entities within, or whose actions have a direct nexus to, New York City.

2. The Civil Court is Already Overburdened

Despite its limited geographic scope, the Civil Court is the largest civil jurisdiction court, by volume, in the United States.[15] According to the Civil Court's annual report, in 2015, there were 200,312 cases filed with the court: 55,414 consumer debt cases and 144,898 other cases ranging from tort to commercial cases, no-fault claims to ejectments.[16] In 2014, there were 257,704 total cases filed in the Civil Court.[17]

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[10] *See* New York State Unified Court System, Civil Court History, https://www.nycourts.gov/COURTS/nyc/civil/civilhistory.shtml (accessed July 5, 2016).

[11] *Id.*

[12] New York City Civil Court Act (CCA) § 201, et seq. The court's jurisdiction includes actions for rescission or reformation of transactions of up to $25,000. *See* CCA § 202.

[13] The $25,000 limit also applies to actions to recover money or chattels and for actions on real property within New York City. *See* CCA § 203.

[14] CCA § 404.

[15] *See* Civil Court History, n. 10, above.

[16] *See* Memorandum from Eddy Valdez to Alia Razzaq, Re. NYC Civil Court Consumer and Non Consumer Matters/2015 (Apr. 15, 2016) (Amicus Exhibit F, Affirmation in Support Of Motion To Appear As Amicus Curiae, [Amicus aff] at 14, ¶ 32.) We note the Attorney General's argument that the Northern Leasing cases are substantially consumer law cases under General Business Law § 349. *See* Memorandum of Law In Support Of The

Set against those numbers is an ongoing funding crisis. The New York court system remains impaired by $170 million in cuts imposed on the Judiciary by the New York State Legislature in 2011.[18] In its report in support of the Judiciary's 2016-2017 budget request (Association Report on Judiciary Budget), the Association noted that there are now 2,000 fewer court personnel than there were in 2009.[19] Despite increases in efficiency, the harsh effects of the cuts burden the entire court system.[20] The courts at all levels have suffered, from the Supreme and appellate courts, to the New York City Criminal and Family Courts. In Supreme Court in Manhattan, there is a six-week delay in entering judgments.[21] The New York City Criminal Court is short ten judges, causing lengthy delays in the resolution of criminal cases.[22] Many other delays in both the civil and criminal justice systems have been documented.[23]

The Civil Court's resources have also been severely hampered by the budget cuts,[24] maybe more so since it and the other civil courts are at the bottom of the judicial branch hierarchy. As of January 2016, when the Association issued its Report, staffing shortages in New York County Civil Court led to No Fault cases being assigned trial dates in February 2017.[25]

Verified Petition (Petitioners memo in support of petition) 40-42, No. 450460/2016, NYSCEF No. 184. We think it is a colorable argument. However, it is immaterial to this brief whether the Civil Court classifies the Northern Leasing cases as consumer debt or otherwise.

[17] *See* Memorandum from Eddy Valdez to Alia Razzaq, Re. 2014 NYC Civil/Small Claims/L&T Filings (Mar. 12, 2015) (Amicus Exhibit G, Amicus aff, n. 16, above at 14 ¶ 32, n. 16, above, Amicus Exhibit G, ¶ 30.)

[18] New York City Bar Association, Report in Support of the Judiciary's 2016-2017 Budget Request at 1 (January 2016) (Association's Judiciary Budget Report) (Amicus Exhibit E, Amicus aff, n. 16, above at 14, ¶ 31.)

[19] *Id.*

[20] *Id.*

[21] *Id.* at 2.

[22] *Id.* at 3.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 4.

Litigants in other cases routinely wait a year to get a pretrial conference,[26] and no trials were scheduled in the Commercial Landlord Tenant Part due to a lack of judges—a commercially untenable situation.[27] Clerks were seven months behind in issuing judgments, and, due to staffing shortages, they are covering two or more jobs.[28] Boxes of transcripts, affidavits of service of process, and other documents have not been filed due to staffing shortages. Currently, in New York County, it takes at least 16 weeks for the court to retrieve from storage and make available to a defendant a court file from a pre-2011 case, as might be needed to move to vacate an old default judgment or answer an old case upon vacatur.[29] Recently, New York County Civil Court lost another two clerks, and the Association's understanding is that they will not be replaced.[30]

3. Northern Leasing's Suits Substantially Increase the Civil Court's Burden

The Northern Leasing entities account for a huge number of the cases filed in New York County Civil Court. According to the affidavit of the Civil Court's Deputy Chief Clerk:

- from 2010 to 2015, Respondents filed 30,768 cases,[31]
- in 2014, they filed 27% of the total cases filed (8,304 out of 32,332),[32] and
- in 2015, they filed 26.6% of the total cases filed (7,421 out of 27,869).[33]

Notably, the Respondents enter default judgments in New York County at a high rate:

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[26] *Id.*

[27] *Id.*

[28] *Id.* at 5. For instance, where once there was an appeals clerk and a judgment clerk, now one clerk performs both functions.

[29] *See* Amicus aff, n. 16, above at 11-12 ¶ 24; *see also* Committee's Letter to Office of Court Administration, John W. McConnell, *Proposed Solutions to the File Access Problem in New York City Civil Court* (June 11, 2015), Amicus Exhibit B, Amicus aff, n. 16, above at 9, 11-12, ¶¶ 19 and 24.

[30] Association Report on Judiciary Budget at 5, n. 18, above

[31] Valdez aff n. 3, above at 2, ¶ 3.

[32] *Id.* at 2, ¶ 4 ("Total Actions" are total general, commercial and consumer credit filings in New York County Civil Court).

[33] *Id.* At 2, ¶¶ 3-4.

- From 2010-2015, they obtained default judgments in 63% of those cases (19,413/30,768).[34]
- In 2015, they obtained 59.4%[35] (4,691/7,886) of defaults in non-consumer debt cases, and 48.6% (4,691/9,654) of all defaults in the county.[36]

The Respondent's default rate in New York County is statistically equivalent to the 2015 default rate for *all* non-consumer cases in Bronx County, the Civil Court's most economically distressed county,[37] which also has a 59.3% default rate (13,019/21,939).[38] Significantly, if one subtracts the Northern Leasing cases from the New York County totals, the New York County non-consumer default rate drops to 13.4% (3,195/23,830).

The substantially higher default rate in Northern Leasing cases is a result of several factors: First, the cases are for relatively low dollar amounts, typically around $2500.[39] Second, the cases also involve small business defendants, mainly sole proprietors, whose businesses are located far from New York State, and the contracts are executed and the equipment is delivered and used in those far off states.[40] Third, these defendants appear to lack the sophistication of more experienced business people[41] and were unaware of the New York forum selection clauses in the lease agreements—indeed, many were not even shown the pages in which the clauses appeared before they signed the agreements.[42]

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[34] *Id.* At 2, ¶ 4.

[35] *Id.*

[36] *Id.*

[37] For 2014, Bronx had the highest poverty rate at 31.5% compared to Manhattan (New York), 17.7%. Bronx also had only 17,466 total employer establishments compared to 105,998 in Manhattan. *See* Quick Facts (Bronx Borough), New York, United States Census Bureau at https://www.census.gov/quickfacts/table/INC110214/36005,36047,36061,36085,36081,36 (last accessed July 15, 2016).

[38] *See* Valdez aff, n. 3, above at 2, ¶ 4.

[39] *See* Petition, n. 1 above, NYSCEF doc. 1, 5; Cohen aff n. 7, above.

[40] *See* Cohen aff n. 7 above, at 6 *et seq.*

[41] *See* Petition, n. 1, above, NYSCEF doc. 1 at 11 – 12.

[42] *See id.* at 15 - 17.

In short, the vast majority of these cases have no nexus to New York City or State; but Northern Leasing has engineered a confluence of factors to their own benefit, allowing them to bring a multitude of cases for small dollar amounts against largely unsophisticated non-New York defendants who are presented a Hobson's choice of defaulting on a case or spending an amount more than the damages sought to travel to New York to defend these small-dollar cases, or to hire a New York lawyer to do so.[43] This results in a windfall of default judgments in favor of the Northern Leasing entities in a manner that overtaxes the New York Civil Court system and harms unrelated litigants in other cases by depriving them of fair access to the courts.[44]

4. The New York City Bar Association's Civil Court Committee Views the Respondents' Practices with Concern

The Association is comprised of over 24,000 legal professionals, many of them attorneys based in New York City. The Civil Court Committee consists of members who practice regularly in the Civil Court. Its members work in legal services offices, private practices representing small businesses and individuals, government agencies, the New York courts, and local law school clinics and have expertise in litigation, debt collection, and consumer protection.[45] The Committee's work includes identifying problems in the Civil Court, addressing the needs of its

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[43] *See Lease Fin. Group LLC v Indries*, 49 Misc. 3d 1219(A); 2015 NY Slip Op 51810(U) 5 (N.Y. City Civ. Ct. 2015) ("Indeed a question might be raised if the purpose of the forum selection clause in this case is not to 'provide certainty and predictability in the resolution of [the dispute]' but rather to increase the likelihood of obtaining a default judgment against Defendant because of the distance he would have to travel and the expense he would incur to travel to and stay in New York City as compared to the small amount of money sought.") (internal citation omitted).

[44] Not only have the number of filings by the Northern Leasing entities impacted Civil Court, they have also affected other New York State courts, such as Nassau and Suffolk, as well as in the Illinois court system. The Cook County Circuit Court in Illinois reports that of 1,896 matters filed by the Northern Leasing entities in Cook County Court since 2014, 1,809 were against defendants from outside Illinois. (Judge Fern A. Fisher Affidavit (April 7, 2016) [Fisher aff], NYSCEF doc. 120, at 8 ¶ 18; *See also* Stephen M. Brandt Affidavit, Exhibit F to Fisher aff [Brandt aff], NYSCEF doc. 180, at 1.) Sixty-nine of those defendants are residents of New York who were sued in Illinois. *See id.*

[45] Amicus aff, n. 16, above at 8-9 ¶¶ 17-18.

litigants, and issuing reports, proposals and taking positions in support of efficiency, justice and access in the Civil Court.[46] Some Committee members have defended parties sued by Respondents in the Civil Court.[47]

The Committee's members have observed and been affected by the backlog of cases in the Civil Court, and in New York County in particular, as a result of the Respondents' numerous case filings. Over time, the Committee has become greatly concerned about the impact on the court as a result, about the general unfairness to the Northern Leasing defendants themselves, and the decrease in access to justice experienced by New York litigants with no connection whatsoever to these cases whose access to the Court has been impaired.

B. The Northern Leasing Forum Selection Clauses Are Unfair to Defendants, and Unreasonable in Their Operation

1. The Purpose and Rationale of Forum Selection Clauses

The Northern Leasing entities invoke the jurisdiction of the New York courts for these suits on the basis of non-negotiated forum selection clauses that they include in their form lease agreements.[48]

Normally, the New York courts enforce contractual provisions with respect to choice of law and forum selection.

> It is well-accepted policy that forum-selection clauses are *prima facie* valid. In order to set aside such a clause, a party must show that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and

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[46] *Id.* at ¶ 3.

[47] *Id.*

[48] *See* Petition, n. 1, above, NYSCEF doc. 1 at 2-3, ¶¶ 2 and 5.

> inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court.[49]

New York courts have stated that "the 'very point' of forum selection clauses, which render the designated forum convenient as a matter of law, is to avoid litigation over personal jurisdiction, as well as disputes arising over the application of the long-arm statute."[50]

New York courts generally favor upholding forum selection clauses because they contribute to commercial efficiency and reliance.[51] Moreover, public policy favors retention of suits in New York where New York is the designated forum, particularly where such matters involve significant commercial or financial interests.[52]

> In order to encourage the parties to significant commercial, mercantile or financial contracts to choose New York law, it is important not only that the parties be certain that their choice of law will not be rejected by a New York Court but also that, in the unlikely event that a dispute does arise and the parties have agreed that such dispute may be heard by a New York Court, such Court will in fact proceed to hear and determine the case. New York Courts are the tribunals most expert in New York law, and although it is not uncommon for a court to be required to apply the law of another jurisdiction to the facts before it, it is to be expected that the parties to a contract who decide to choose New York law will also wish to provide that actions on such contracts be heard by the New York Courts. To the extent there is uncertainty about any aspect of the ability of a contracting party effectively to submit itself to the jurisdiction of the New York Courts, such uncertainty

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[49] *British W. Indies Guar. Trust Co.*, n. 5, above at 234; *See also Sterling*, n. 5, above at 222 (calling the policy "well-settled").

[50] *Sterling*, 35 AD3d at 222 (quoting *National Union Fire Ins. Co. of Pittsburgh, Pa. v Williams*, 223 AD2d 395, 397-398 [1996]);

[51] *See e.g., Boss v American Express Financial Advisors, Inc.*, 6 NY3d 242, 246 (2006), quoting *Brooke Group Ltd. V. JCH Syndicate*, 488, 87 NY2d 530 (1996) ("Forum selection clauses are enforce[able] because they provide certainty and predictability in the resolution of disputes....").

[52] *See Credit Francais Int'l, S.A. v Sociedad Financiera De Comercio*, 128 Misc 2d 564, 570 (Sup Ct 1985) ("Just as the dollar has become the international standard for monetary transactions, so may parties agree that New York law is the standard for international disputes"); *see generally* 2-R327 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 327.04 (David L. Ferstendig, Gen. Ed.).

> will almost certainly operate to deter the parties from selecting New York law in the first place.[53]

Although the Civil Court Act does not explicitly provide for choice of law and forum selection clauses, the Civil Court has tended to accept them.[54]

2. Courts May Refuse to Enforce Forum Selection Clauses for Good Cause, Including Unreasonableness and Unjustness.

New York courts allow the presumption in favor of upholding a forum selection clause to be overcome where a party shows that enforcement would be unreasonable or unjust, or that the clause is invalid because of fraud or overreaching.[55] The means for doing so is a *forum non conveniens* motion under CPLR 327(a).

CPLR 327(a) provides that a defendant may move to dismiss a case based on an inconvenient forum, and the court "may dismiss or stay the action in whole or in part on any conditions that may be just."[56] Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit.[57] The court may also consider whether the transaction

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[53] NY Civ Prac CPLR ¶ 327.04 (citing Sponsor's Memorandum in Support of Legislation (A.7307-A) (1984) p. 2).

[54] *Northern Leasing Sys., Inc. v French*, 48 Misc. 3d 43; 13 NYS3d 855 (1st Dep't 2015) (finding defendant consented to jurisdiction of New York's courts in underlying equipment lease and guaranty); *MBF Leasing, LLC v Reicks*, 40 Misc. 3d 1216(A), 975 NYS2d 710, 2013 N.Y. Slip Op. 51207(U) (N.Y. City Civ. Ct. 2013) (court upheld personal jurisdiction over a Nebraska defendant based on basis forum selection clause contained in the contract between the parties, stating that the venue selection clause under CPLR § 501 "explicitly authorizes parties to select venue by means of a pre-litigation contractual provision").

[55] *The Bremen*, 407 US at 15; *French*, n. 54, above; *MBF Leasing LLC v Inci*, 50 Misc. 3d 1210(A); 2016 NY Slip Op 50070(U) (N.Y. City Civ. Ct. 2016); *Indries*, n. 43, above.

[56] CPLR 327(a) provides:

> (a) When the court finds that it is in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

Id.; *see generally*, NY Civ Prac, n. 52, above at ¶ 327.00 et seq.

[57] *Credit Francais*, 128 Misc 2d at 571.

out of which the cause of action arose occurred primarily in a foreign jurisdiction.[58] The domicile or residence in New York of any party to an action does not prevent the court from staying or dismissing the action, if substantial justice so dictates.[59]

Ordinarily, a *forum non conveniens* motion must be made by a party: a court cannot dismiss a case *sua sponte* on that ground.[60] The rationale is that there is obvious potential for unfairness when a court dismisses a case on the basis of an issue that no party has raised or addressed.[61] However, it is not an error for a court to suggest to the parties that the forum is not convenient or to dismiss a case without a formal document labeled "notice of motion," as long as the parties have had an opportunity to address the issue.[62]

A court may dismiss a case on *forum non conveniens* grounds where enforcement of a forum selection clause is found to be unreasonable or unjust.[63] Unreasonableness and injustice have been found where there is no substantial nexus to New York and where the size of the amount in dispute was so small "that a trial in the contractual forum would be so gravely difficult

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[58] *Id.* (citing *Silver v Great Amer. Ins. Co.*, 29 NY2d 356, 361 [1972]).

[59] *See* CPLR 327 (a) ("The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."); *see also Silver*, n. 58, above. (Hawaii physician's suit against a New York corporation in New York County dismissed on *forum non conveniens* grounds where Court of Appeals found doctrine should turn on considerations of justice, fairness and convenience, not solely on residence of one of the parties.)

[60] *See* CPLR 327(a); *VSL Corp. v Dunes Hotels and Casinos, Inc.*, 70 NY2d 948 (1988) (finding that the lower court acted outside its authority by dismissing case on *forum non conveniens* grounds *sua sponte*).

[61] *Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 136 (2014) ("Our opinion in VSL is a one sentence memorandum, but the rationale for it seems evident: there is an obvious potential for unfairness when an appellate court dismisses a case on the basis of an issue that no party has raised or addressed. VSL holds that CPLR 327(a)'s requirement of a 'motion' prohibits such a potentially unfair procedure").

[62] *Id.* at 136.

[63] The Attorney General has also made substantial allegations of fraudulent statements and promises made to induce some of the Northern Leasing defendants to enter the lease agreements. (Petition 12 et seq.) Fraud is one ground for dismissal, but it is not necessary to support our points: that the small sums at issue in the contracts, their lack of nexus to New York and the sheer number of them burdening the Civil Court make Northern Leasing's forum selection clause inherently unreasonable and unjust.

and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court."[64] The leading cases on this subject involve members of the Northern Leasing group.

In *Northern Leasing Sys., Inc. v French*,[65] French had entered into an equipment lease and guaranty with the plaintiff. The court found the defendant's general allegations of fraud insufficient to invalidate the forum selection clause, but set the clause aside, nevertheless, for unreasonableness, where the controversy had no substantial nexus with New York: the lease agreement was signed in California, defendant's business was there, the equipment was there, and the defendant resided there with no ties to New York. Further, he was 86 years old and the $1,839.77 principal amount due was minor. Quoting *Silver v Great American Insurance Company*,[66] the court reiterated that "our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York."[67]

Similarly, in *MBF Leasing LLC v. Inci*,[68] a small business owner from California, was sued by plaintiff in Civil Court under a personal guarantee pursuant to a forum selection clause in an equipment lease agreement for a merchant payment processing machine. The court examined a series of cases and concluded that, in general, in cases where forum selection clauses were enforced, the parties had been sophisticated businesses or business people. The court found

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[64] *British W. Indies Guar. Trust Co.*, n. 5, above at 234; *accord Sterling*, n. 5, above at 222.
[65] 48 Misc. 3d 43; 13 NYS3d 855.
[66] 29 NY2d 356, 361 (1972).
[67] *Id.* at 45 (citing *Silver*, 29 NY2d at 361).
[68] 50 Misc. 3d 1210(A).

that Inci was not a sophisticated business entity, though, merely a small merchant in California.[69] The court also found the case had no substantial nexus with New York because, as in *French*, the defendant signed the lease agreement in California, the vendor/supplier was located in California, and the equipment was located at Inci's California business where he resided with no ties to New York. Finally, as in *French*, the amount in dispute was relatively small.[70] The court reiterated that New York trial courts should not be overburdened by actions having no substantial nexus with New York and dismissed the case.[71]

So too, in *Lease Finance Group LLC v Indries*,[72] the defendant, a Romanian immigrant residing in California who owned a California business, was sued in New York for $2,254 under a personal guaranty of obligations in an equipment finance lease for a credit card processing machine. Lease Finance Group (one of the Respondents here) brought the lawsuit in New York under a forum selection clause in the lease. The court granted the defendant's motion for summary judgment and dismissed the case on the ground of unconscionability. The court found that a forum selection clause requiring the defendant to travel 2,700 miles from California to New York City to defend himself in a case seeking roughly $2,600 was "so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone" without the necessity of examining whether it was also procedurally unconscionable.[73] Moreover, the court found that even if the forum selection clause were not unconscionable, it would be

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[69] *Id.* at 3.
[70] *Id.* at 4.
[71] *Id.*
[72] *See Indries* n. 43, above at 1.
[73] *Id.* at 5.

unreasonable and unjust to enforce it because there was no substantial nexus with New York: [74] the agreement was signed by defendant in California, the original lessor was a California corporation, the defendant resided in California where the business and equipment were located and the amount in dispute was relatively minor.

Like the defendants in *French*, *Inci* and *Indries,* most—if not all—of the non-New York defendants in the Northern Leasing cases are (1) individual business owners, (2) whose small businesses are located outside New York State, (3) who make no purposeful efforts to sell into either New York City or New York State, (4) who are solicited by vendors located outside New York, (5) who have signed non-cancellable equipment lease agreements in the state where they live and do business (not New York), (6) who are sued personally, not in the name of the business, (7) by a Northern Leasing entity, (8) on a relatively small amount, (9) in New York Civil Court, (10) on the basis of a New York forum selection clause in the equipment finance lease.[75] Northern Leasing itself admits that its cases are all "micro-ticket" leases involving leases of less than $2,500[76], with small businesses,[77] on pre-printed form contracts[78], and that are non-cancellable.[79]

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[74] *Id.*

[75] *See* Petition, n. 1, above, NYSCEF, doc. 1 at 2, ¶¶ 2 – 4.

[76] Cohen aff, n. 7, above at 2, ¶ 4.

[77] *Id.* At 4, ¶ 6.

[78] *Id.* At 6-7, ¶ 12 - 13. The Respondent states that its leases use 490 different forms, but most of them have the same terms.

[79] *Id.* At 7-8, ¶¶ 14 – 15.

3. Northern Leasing's Forum Selection Clauses Have Been Found Unfair to the Defendants and Unreasonably Burdensome on the Civil Court

The problem extends far beyond the 54 affidavits of the non-New York defendants cited by the Attorney General. The manifest unfairness of these cases to non-New York small business owner defendants and the burden of the large number of filings on the court have also been observed by Civil Court personnel.

Judge Cavallo, a former Housing Court Judge with the Civil Court, acted as a Judicial Hearing Officer handling pro se cases in a special part set up in Civil Court for the Northern Leasing entities' cases in 2014. Every Thursday, he conferenced a new case every fifteen minutes. Certain fact patterns became apparent to him:[80]

> Every case was directed at the owner who had allegedly signed a personal guarantee. The vast majority of the defendants told the same basic story. A sales representative from a corporation, allegedly unrelated to Northern Leasing, appeared at the defendant's place of business with credit card processing machines. The sales representative promised that the machine would save money. If the defendants expressed reluctance, the sales representative suggested a trial period or told the defendants that they could send the equipment back and cancel the contract. Some admitted signing the contracts and personal guarantees and providing the financial information which allowed Northern Leasing to debit their bank accounts for monthly payment....
>
> Every defendant who spoke to me objected strenuously to the New York forum clause in the contract.... Many expressed outrage that they had to spend at least a thousand dollars to come and stay in New York to defend a case that was seeking a few thousand dollars.... Most of the people who settled did so because they understood that they were better off financially if they could settle for the cost of a trip to New York than to have the case on their credit report.[81]

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[80] Ernest J. Cavallo Affidavit (Mar. 5, 2015) (Cavallo aff) (Exhibit B to Fisher aff NYSCEF doc. 176, at 2, ¶ 3.)

[81] *Id.* At 2, 4 ¶¶ 4 and 6.

Moreover, the sheer number of the Northern Leasing cases also strains the system. As Judge Goetz stated in *MBF Leasing LLC v. Inci*:

> [T]here is a concern, as expressed by the courts in *Sterling National Bank* and *French*, that New York trial courts not be overburdened by actions having no substantial nexus with New York. According to the Court's internal case management system, out of approximately 28,000 filings in New York County Civil Court in 2015, 7,548 filings were for cases similar to this case (lease finance agreements entered into outside New York City with New York City forum selection clauses for relatively small amounts). While not every single pending case involves a defendant outside the New York City metropolitan area, the undersigned, as one of two judges assigned to hear these cases since April, 2015, has observed that the vast majority of the cases involve defendants located in far flung locations. The sheer number of similar cases filed reveals that this Court is indeed overburdened with cases having no substantial nexus to New York City.[82]

The unfairness of Northern Leasing's forum selection clause is apparent not only from affidavits filed in this case and the observations of judges handling the Northern Leasing cases, but also objectively, as manifested in the staggering default rate in cases brought by Northern Leasing. As discussed above, 63% of the cases that Northern Leasing filed from 2010 to 2015 resulted in default judgments—a predictable result of Northern Leasing's practice of designating, in contracts of adhesion, a distant forum for the litigation of disputes with unsophisticated small business defendants for low dollar amounts. The costs of defending these cases make it economically infeasible for defendants to put in any defense at all. It is exactly the scenario that the courts in *British West Indies* and *Sterling National Bank*[83] said would deprive defendants of their day in court, and led those courts to set aside the forum selection clauses in those cases. In

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[82] 50 Misc. 3d 1210(A); 2016 NY Slip Op 50070(U), at 5.

[83] *See* n. 5, above.

fact, compounding the unfairness, there is evidence that even though four of the six Northern Leasing entities are based in New York, *they have been suing New York residents in Cook County, Illinois*.[84] Grave inconvenience for the defendant is a designed feature of Northern Leasing's litigation strategy, not a mere side-effect.

4. Northern Leasing's Mass Filings Have an Adverse Impact on New York Litigants Who Have No Connection Whatsoever to the Northern Leasing Entities.

The sheer number of cases burdens not only the court and the defendants, but is also fundamentally unfair to litigants *not* connected to any Northern Leasing Entity contract. The additional 7,500 cases filed each year by the Northern Leasing entities against non-New York defendants with no nexus to New York divert resources from others with legitimate business before the court and with no other forum in which to bring their cases. In the Civil Court, two judges have been diverted from other duties and assigned to hear the Northern Leasing cases.[85] Each case also requires courtroom space and expenditures of time and resources on the part of clerks and court personnel. Diversion of these resources prevents other, non-related litigants from having their cases efficiently and expeditiously handled.

As discussed above, litigants in New York Civil Court must currently wait a year to get a pretrial conference.[86] As of January 2016, there were no trials scheduled in the Commercial Landlord Tenant Part due to a lack of judges.[87] Clerks are seven months behind in issuing judgments, and boxes of transcripts and other documents are not filed due to staff shortages. A bad situation caused by the already high volume of the Civil Court, coupled with budget cuts, is

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[84] Fisher aff, n. 44, above at 4-5, ¶ 8 (citing Brandt Affidavit n. 44, above).

[85] *See Inci*, above at 5.

[86] Association's Judiciary Budget Report, n. 18, above at 4.

[87] *Id.* at 4.

made worse by 7,500 additional cases per year being thrust into the system. The Northern Leasing entities have taken unfair advantage of the confluence of budget cuts and personnel shortages that have beset the New York court system and used it to their advantage to turn the Civil Court into their *de facto* collection agent, a system financed by New York taxpayers. Meanwhile, New York residents are paying for the courts but are not getting the service they deserve.

C. This Court Should Recognize that the Northern Leasing Entities' Forum Selection Clauses are Unreasonable and Unjust and, Thus, Unenforceable in the Cases at Issue.

The Catch-22 for the out-of-state defendants sued by the Northern Leasing entities is that, in order to move to dismiss their cases for *forum non conveniens*, they would have to travel to New York to do so—incurring costs for travel, hotel, transportation and food, not to mention the opportunity costs of lost business to those who are frequently the sole employee. Hiring local counsel to navigate New York commercial and procedural law would incur even more cost—all for suits that average $2,500. It is no wonder that so many defendants default, and those who do not settle on Northern Leasing's terms to their detriment.

In the unusual circumstances of these cases—involving thousands of non-New York defendants in contracts with no substantial nexus to New York, where the amount in dispute is so small "that a trial in the contractual forum would have been so gravely difficult and inconvenient" that defendants would be deprived of their day in court[88]—the interests of the Civil Court's orderly operation and of fairness to its litigants support finding that the Northern Leasing forum selection clauses are unreasonable and unjust as applied to the non-New York

[88] *See British W. Indies Guar. Trust Co.*, n. 5 above at 234.

defendants and should be set aside. Further, a court may apply that finding to dismiss a Northern Leasing case on *forum non conveniens* grounds, without regard to whether a *forum non conveniens* motion was made. A court could take that step under the New York Court of Appeals' reasoning in *Mashreqbank.*[89]

Although a court may not normally make a finding of *forum non conveniens* on its own initiative,[90] the *Mashreqbank* court states that this rationale is based on the potential for unfairness when an appellate court dismisses a case on grounds that no party has raised or addressed.[91] Here though, the Attorney General's Petition has raised the issue that the Northern Leasing entities' forum selection clauses are voidable because of fraud and unconscionability, and Respondents have had an opportunity to respond.[92] Thus, the potential unfairness raised by the *Mashreqbank* court is not present here.

Moreover, such a finding is not unreasonable and would not violate New York's public policy of upholding enforcement of forum selection clauses generally. It is also necessary because the Civil Court's recently adopted practice of permitting telephone conferences by defendants does not alleviate the burden imposed on the Civil Court by Northern Leasing's filings of massive numbers of cases.

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[89] *Mashreqbank*, n. 61, above.

[90] *See VSL*, n. 60, above.

[91] *Mashreqbank*, n. 91, above, at 136.

[92] *See* Northern Leasing opposition memorandum, n. 4, above at 79 *et seq.*

5. A Finding That Northern Leasing's Forum Selection Clauses are Unreasonable and Unjust in the Circumstances Here Would Not Violate New York's Public Policy.

Setting aside the Northern Leasing entities' forum selection clauses would not undermine New York's general policy in favor of enforcing forum selection clauses to support commercial efficiency and reliance[93] because the contracts in these cases are not the kind involving significant commercial or financial interests.[94]

New York public policy favors New York courts retaining lawsuits where New York is the designated forum and making New York court resources available because New York is the center of world banking, trade, finance and other activities. [95] However, the courts' policy of retaining even those matters that might have a tenuous relationship to the state—or none at all—is predicated on the notion that those matters are of "sufficient substance."[96] In *Credit Francais*,[97] for instance, the matter was for $2,000,000 unpaid principal (in 1985 dollars) owed by a Venezuelan financial institution. The court there stated that "[w]e have declared in no uncertain terms that we are prepared to accept jurisdiction of such disputes provided that the matter in controversy *is of sufficient substance, so that we are not burdened by the petty disputes of persons from out of State*."[98]

The decisional law articulating the general policy also assumes that the choice of forum has been made in a negotiated agreement between commercially sophisticated parties. For

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[93] *See Boss*, n. 51, above at 246.

[94] *See generally* NY Civ Prac, at n. 52 above.

[95] *Credit Francais*, n. 52, above at 569.

[96] *See Credit Francais*, n. 52, above at 570; *see also* NY Civ Prac, n. 52, above. (The sponsors of CPLR 327(b) sought to encourage the parties to "significant commercial, mercantile or financial contracts to choose New York law," by assuring them that both the choice and the forum would be available to them).

[97] *Credit Francais*, n. 52, above at 564.

[98] *Id.* at 569 (emphasis added).

instance, in *Sterling Nat. Bank v Eastern Shipping Worldwide, Inc.*,[99] a world-wide shipping company entered a lease agreement with a national bank that named venue in New Jersey. In *Nat. Union Fire Ins. Co. of Pitt., Pa. v Williams*,[100] a real estate limited partnership executed promissory notes that contained choice of law and forum selection clauses with a national insurance company. In *Brax Capital Group, LLC v WinWin Gaming, Inc.*,[101] the defendant was a corporate executive with intertwining corporate and personal roles involved in procuring investors for a corporation he chaired.

The *Inci* court determined that the forum selection clause need not be upheld and that the case should be dismissed on *forum non conveniens* grounds where the defendant was a small merchant in California, not a sophisticated business entity (as in *Sterling National Bank*), nor an investor (as in *National Union Fire Insurance.*), nor a party seeking investors in a corporation (as in *Brax Capital Group*).[102]

Here, the cases filed by the Northern Leasing entities are not large commercial matters representative of the kinds of significant business transactions for which New York has committed to provide judicial resources commensurate with its position as an international commercial center.[103] Rather, they are cases in which only a few thousand dollars are at stake, involving mom and pop businesses that operate outside New York State. Nor have the equipment finance leases been, in any sense, "negotiated" between sophisticated commercial entities—they

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[99] 35 AD3d 222, (1st Dept 2006).

[100] 223 AD2d 395, 397-98, (1st Dept 1996).

[101] 83 AD3d 591, (1st Dept 2011).

[102] *Inci*, n. 82, above at 3.

[103] *See Credit Francais*, n. 52, above at 569.

are form contracts, sometimes procured by fraudulent promises and statements, signed by sole proprietors of small businesses, and in some cases, even by their employees.

6. The Civil Court's Practice of Permitting Teleconferencing Does Not Cure the Unreasonableness or Injustice of Northern Leasing's Forum Selection Clauses.

The Respondents assert that, because the Civil Court has instituted a practice of allowing foreign defendants in the Northern Leasing cases to teleconference some parts of the cases against them, such proceedings are not procedurally unfair.[104] We disagree.

Although the practice might permit an out-of-state defendant under such circumstances to "attend" some court proceedings remotely, such accommodation is *prospective* and does not affect any default judgments to date. Nor does the practice substantially affect the unreasonableness analysis in these cases: the defendants and their businesses are still out of state, the contracts were drawn up outside New York, the equipment was delivered and operated outside New York, and the amounts in controversy are, relatively, miniscule—"micro-ticket" in the Respondent's own words. Further, given the intricacies of the law governing these cases (New York commercial law and procedure in particular), the defendants would best be served by hiring New York attorneys to defend them. But that cost would be so high, relative to the size of these cases, as to be prohibitive. Thus, the cases are still fundamentally unreasonable and unfair to defend.[105] Further, the rule itself is not readily available or apparent to any *pro se* litigant consulting the New York Courts' website.

Besides, the practice of allowing some telephonic conferences does nothing to decrease the burden of the sheer number of these low-dollar, non-New York cases on the Civil Court

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[104] Northern Leasing opposition memorandum, n. 4, above, at 11.

[105] *British W. Indies Guar. Trust Co.*, n.5, above at 234.

itself. In fact, this accommodation may have the opposite effect: by making it marginally easier for foreign defendants to defend cases brought in Civil Court on the basis of non-negotiated forum selection clauses, it may make the forum even *more* attractive for other businesses to follow Northern Leasing's strategy of using the New York courts as their de facto collection agent—causing even more delay to bona fide New York litigants.

CONCLUSION

A "Hobson's Choice" is the choice of taking what is offered or nothing at all; that is, two bad choices.[106] That is the choice that the Northern Leasing entities offer their non-New York customers who wish to dispute their lease in these cases: spending the money to come to New York to contest these small dollar cases, or not, and defaulting. New York Courts deplore such a choice in cases like these, especially when there are more convenient forums available.

It is not the Association's purpose to argue against enforcement of forum selection clauses in New York courts in general, or in the Civil Court in particular. Rather, the Association argues that where, as here, forum selection clauses are found in leases which lack nexus to New York, where the amounts sued upon are so small that defendants default rather than incur the costs of defending the suits, and where the massive number of suits burdens the Civil Court by diverting its scarce resources and hurt parties with no connection to any Northern Leasing entity, this Court should recognize that those forum selection clauses are unreasonable and unjust and, thus, unenforceable.

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[106] *See* Bryan A. Garner, *Garner's American Usage*, "Hobson's Choice," (Oxford University Press, 2009). Tradition has it that Thomas Hobson, a hostler in 16th century Cambridge, England, always gave his customers a choice of either the horse nearest the door, or none at all.

If the individual defendants had the resources and incentive to move to dismiss under CPLR 327(a) on *forum non conveniens* grounds, the courts would grant those motions. In the absence of these defendants, and in an attempt to alleviate the burden on the Civil Court, the Committee makes the argument in their place.

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