STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08-CVS-9450

SPEEDWAY MOTORSPORTS INTERNATIONAL LTD.,

Plaintiff,

vs.

BRONWEN ENERGY TRADING, LTD.,
BRONWEN ENERGY TRADING UK, LTD.,
DR. PATRICK DENYEFA NDIOMU,
BNP PARIBAS (SUISSE) SA,
BNP PARIBAS S.A.,
SWIFT AVIATION GROUP, INC.,
SWIFT AIR, LLC,
SWIFT AVIATION GROUP, LLC, and
SWIFT TRANSPORTATION CO., INC.,

Defendant.

**DEFENDANT SWIFT AVIATION GROUP, INC.'S OPPOSITION BRIEF TO BNP PARIBAS, S.A.'S MOTION TO DISMISS CROSS-CLAIM**

Defendant Swift Aviation Group, Inc. ("SAG, Inc.") respectfully submits this Brief in Opposition to Defendant BNP Paribas S.A.'s Motion to Dismiss Cross-Claims pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure and Rule 15.6 of the North Carolina Rules of Practice and Procedure for the North Carolina Business Court. SAG, Inc. opposes BNP Paribas S.A.'s motion to dismiss for the reasons set forth below.

## I. OVERVIEW

This litigation began with claims filed by Speedway Motorsports International, Ltd. ("SMIL") arising out SMIL's losses on guarantees it issued for the purchase and sale of petroleum products from the Kuwait Petroleum Corporation ("KPC"). In its complaints, SMIL sought to recover claimed losses of millions of dollars from SAG, Inc., despite the fact that no written documents or contracts existed between SMIL and SAG, Inc. Rather, SMIL based its claims against SAG, Inc., in part, on Third Party Letter of Credit Agreements between the

Bronwen defendants and SAG, Inc., to which SMIL was not a signatory or party. Those Third Party Letter of Credit Agreements, SMIL claims, made Bronwen an agent for SAG, Inc.

SAG, Inc. denied SMIL's claims and filed its own cross-claims against BNP Paribas S.A. ("BNP Paris"). SAG, Inc.'s cross-claims arose out of BNP Paris' misrepresentations and its repeated breaches of the fiduciary duties it owed to SAG, Inc. BNP Paris moved to dismiss these claims on the basis that: (i) the Third Party Letter of Credit Agreements contain a forum selection clause; and (ii) there is prior pending litigation in Paris based upon the same claims. BNP Paris claims that forum selection clauses in the Agreements between SAG, Inc. and the Bronwen defendants for the delivery and sale of petroleum products also govern claims for torts committed by BNP Paris during its relationship with SAG, Inc., regardless of the fact that many of BNP Paris' tortious acts predate the Agreements themselves. BNP Paris further argues that the action now pending in Paris' Commercial Court provides the best forum for litigating the fiduciary breach and misrepresentation issues raised by SAG, Inc.

SAG, Inc. opposes this Motion to Dismiss.

## II. SUMMARY OF ARGUMENT

BNP Paris invokes a forum selection clause in a contract that it did not sign and under which it had no obligation. It seeks to use this forum selection clause to shield itself against claims that do not deal with or arise from BNP Paris' issuance of Letters of Credit. Properly read, the forum selection clause was intended to place any disputes concerning BNP Paris' issuance of letters of credit into French commercial courts. BNP Paris' motion tries to expand this selection clause to govern its entire relationship with SAG, Inc., including its inducement of SAG, Inc. to enter into contracts with Bronwen, and the hedges and trades that ultimately resulted in significant losses on the spot contracts—actions that did not arise out of or in connection with the letters of credit.

BNP Paris' efforts to dismiss these claims based upon the Paris litigation also is flawed. Under North Carolina law, litigation pending in a foreign jurisdiction does not warrant dismissal. The Court may stay these claims if, and only if, litigating SAG, Inc.'s claims in this Court would work a "substantial injustice" and the forum provided by the Paris courts is "convenient, reasonable and fair." Given the presence of all of the parties necessary to a proper adjudication of these claims, as well as the fact that SAG, Inc.'s claims involve actions by BNP Paris that preceded the Third Party agreements and arose independently of the issuance of the letters of credit, BNP Paris cannot show that litigating SAG, Inc.'s cross-claims in this Court would create a "substantial injustice."

## III. STATEMENT OF FACTS

In early 2007, SAG, Inc. entered into a series of "spot" contracts with KPC, each of which granted to SAG, Inc. the right to purchase a shipment of oil for resale. (Cross-cl. ¶ 8.) Each spot contract required SAG, Inc. to provide a tanker to receive the oil, and to present a bank-issued letter of credit guaranteeing payments to KPC upon loading and shortly after departing port. (Cross-cl. ¶¶ 9-10.)

SAG, Inc. turned to BNP Paris to establish a banking relationship for the purpose of obtaining the necessary letters of credit. (Cross-cl. ¶¶ 15-16.) BNP Paris held itself out to SAG, Inc. as possessing significant experience in energy trading, financing and hedging. (Cross-cl. ¶ 20.) Because SAG, Inc. did not possess the necessary logistics to load, ship and discharge the oil, BNP Paris recommended that SAG, Inc. enter into a contractual relationship with another of its clients—the Bronwen defendants—for the purpose of meeting those obligations. (Cross-cl. ¶ 21.)

In a letter that predated any contractual agreement between Bronwen and SAG, Inc., BNP Paris informed SAG, Inc. that Bronwen was an "active international oil trading company"

holding a $100 million secured line of credit through BNP Paris. (Cross-cl. ¶ 23.) BNP Paris further described Bronwen as "trustworthy, competent and very professional" and informed SAG, Inc. that Bronwen "would not enter into any commercial contract beyond its capability." *Id.*

BNP Paris informed SAG, Inc. that the bank would not participate in the transactions or issue the necessary letters of credit unless SAG, Inc. not only retained Bronwen but also surrendered to Bronwen all of its rights and obligations under the spot contracts. (Cross-cl. ¶¶ 18-21.) The spot contracts received by SAG, Inc. required performance within a short time frame, and, without the necessary logistical support, SAG, Inc. would have difficulty meeting its obligations. (Cross-cl. ¶ 14.) Relying on BNP Paris' recommendation and its representation that Bronwen possessed a $100 million secured line of credit, SAG, Inc. agreed to enter into a series of Third Party Letter of Credit Agreements with Bronwen. (Cross-cl. ¶ 24.)

However, BNP Paris failed to disclose key facts. First, BNP Paris did not reveal that its recommendation of Bronwen was tainted by a conflict of interest, since BNP Paris planned to reap immediate and substantial profits from hedging orders and other transactions placed by Bronwen. (Cross-cl. ¶¶ 35-36.) Second, BNP Paris misrepresented the financial risk to SAG, Inc., telling SAG, Inc. that the transactions were backed by Bronwen's $100 million secured line of credit. (Cross-cl. ¶ 38.) BNP Paris made this representation despite the fact that it knew Bronwen had no real financial assets, and despite the fact that BNP Paris never intended to collect any losses from Bronwen. *Id.* Third, BNP Paris neglected to tell SAG, Inc. that it was trying to funnel opportunities to Bronwen to strengthen the bank's position in Nigeria. (Cross-cl. ¶¶ 41-43.) In short, BNP Paris misled SAG, Inc. as to Bronwen's financial resources and the hazards of engaging in the transactions, and omitted material information regarding its own

conflicts of interest. Each of these acts occurred before SAG, Inc. executed any written contracts.

Induced by the bank's representations, SAG, Inc. then entered into a series of contracts with Bronwen titled "Third Party Letter of Credit Agreements." (Cross-cl. ¶ 24.) By its terms, each Agreement was a contract between Bronwen and SAG, Inc., and took the form of a letter to BNP Paris representing the terms of that contract. The Third Party Agreements each provided that: Bronwen was required to obtain and open a letter of credit in SAG, Inc.'s name; all instructions concerning the letter of credit were to be given by Bronwen; SAG, Inc. "irrevocably and unconditionally" waived its right to take any actions on either the letter of credit or the petroleum products; BNP Paris could endorse all bills of lading and other documents as agreed between it and Bronwen; and BNP Paris would "deal exclusively" with Bronwen. (Cross-cl., Exs. 2-6.)

Thus, the Third Party Agreements barred SAG, Inc. from interfering in any way in the "relations" between Bronwen and BNP Paris. Significantly, the Third Party Agreements not only did not bind BNP Paris but specifically provided that "the Bank has no obligation to issue the Letter of Credit and that the Bank may issue it at its sole discretion." (Cross-cl. ¶ 26.)

As the Third Party Agreements were executed, Bronwen requested and BNP Paris issued Letters of Credit to cover six petroleum shipments. (Cross-cl. ¶ 44.) These Letters of Credit provided the financial guarantee KPC required to release the petroleum. Each shipment ultimately was sold for millions of dollars more than the value of the Letter of Credit guaranteeing its purchase price, but BNP Paris claims Bronwen lost more than $20 million operating the spot contracts. (Def.'s Mot. to Dismiss Cross-Cl., Ex. A (Writ of Summons at 3); Cross-cl. ¶ 55.)

BNP Paris' losses were caused by its and Bronwen's mismanagement of the spot contracts. (Cross-cl. ¶¶ 47-51.) On numerous occasions, Bronwen failed to secure a buyer to take timely delivery of a shipment, incurring expensive demurrage charges as fully loaded tankers sat waiting for discharge. (Cross-cl. ¶ 48.) Bronwen also spent tens of millions of dollars improperly hedging the price of oil through BNP Paris, while BNP Paris profited from those and other bank fees. (Cross-cl. ¶¶ 37, 49.)

Although these alleged losses mounted over six shipments, BNP Paris never informed SAG, Inc. that Bronwen was losing money, or that BNP Paris was collecting millions of dollars in fees. (Cross-cl. ¶¶ 40, 52.) To the contrary, BNP Paris encouraged SAG, Inc. to continue entering into additional Third Party Agreements with Bronwen to facilitate the operation of spot contracts. (Cross-cl. ¶ 34.)

On April 17, 2008, BNP Paris filed a civil action against Bronwen and SAG, Inc. in the Commercial Court of Paris, attempting to collect approximately $8.6 million that BNP Paris claims is due and owing as a consequence of the Third Party Agreements. (Def.'s Br. in Supp. of Mot. to Dismiss Cross-Cl. at 4-6.) Although BNP Paris forecasted, in its Paris complaint, that SAG, Inc. would accuse it of "alleged breaches, even fraudulent behavior," SAG, Inc. has not filed any counterclaims in the Paris action.

On April 22, 2008, SMIL filed this action in North Carolina Superior Court, hoping to recoup the $12 million SMIL pledged to BNP Paris as a partial guarantee for Bronwen's activities. SAG, Inc. then filed its cross-claims against BNP Paris for misrepresentation and breach of fiduciary duty.

## IV. ARGUMENT

BNP Paris' reliance on the forum selection clause that appears in the Third Party Agreements is misplaced. That clause provides:

> Any disputes arising hereunder or in connection herewith shall be exclusively submitted to the commercial court of Paris, France.

Contrary to BNP Paris' contentions, the forum selection clause does not require SAG, Inc. to litigate its claims against BNP Paris in Paris. BNP Paris was not a signatory to the Third Party Agreements, and SAG, Inc.'s claims against BNP Paris do not "arise from" its contracts with Bronwen. Moreover, the forum selection clause is void as against public policy for overreaching and because enforcement would be unreasonable in this case.

BNP Paris also claims that the Paris lawsuit is a prior pending action addressing "the same documents and issues" as those raised by SAG, Inc.'s cross-claims, and, therefore, the claims should be dismissed from this suit. That argument flatly contradicts North Carolina law. Litigation in Mecklenburg County—the only forum in which jurisdiction may be had over all parties to this action—would not "work a substantial injustice" against BNP Paris.

### A. SAG, Inc.'s Cross-Claims Are Not Governed By the Forum-Selection Clause

#### 1. BNP Paris Is Not a Signatory to the Third Party Agreements

First, BNP Paris ignores the rather startling fact that it is relying entirely on a forum selection clause in an agreement that it did not sign and under which it was explicitly not bound. While forum selection clauses are generally enforceable as a matter of contract, "a party cannot be required to submit to a foreign court any dispute which it has not agreed to submit." *Bassett Seamless Guttering, Inc. v. GutterGuard, LLC*, No. 05-CV-184, 2006 WL 156874,*8 (M.D.N.C. Jan. 20, 2006), *citing First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 1924 (1995); *accord Union Steel Am. Co. v. M/V Sanko Spruce*, 14 F. Supp. 2d 682, 693 (D.N.J. 1998) ("Where two parties contract to litigate any dispute arising under their contract in a specified forum, this Court presumes that they are speaking only of disputes with each other in the absence of language about disputes with third parties."). Here:

> BNP Paribas (Paris) was not a signatory to any of the Third Party Letter Agreements, nor did it have any obligations under these Agreements. Indeed, the Third Party Letter Agreements by their explicit terms did not bind BNP Paribas (Paris) in any way.

(Cross-Cl. ¶26.)

The Third Party Agreements were contracts between Bronwen and SAG, Inc. In those Agreements, SAG, Inc. agreed that certain claims between it and Bronwen, arising out of their performance of the terms of the contracts, would be litigated in Paris. No such agreement was reached with BNP Paris.

**2. BNP Paris' Tortious Conduct Did Not Arise From or in Connection With the Third Party Agreements**

Perhaps even more important, the claims asserted by SAG, Inc. against BNP Paris do not "arise under" or "in connection" with the Third Party Letter of Credit Agreements. Instead, SAG, Inc.'s claims stem from its overarching relationship with BNP Paris, a series of interactions that began months before any Third Party Agreement was executed and continued well after the last was signed.

While SAG, Inc. did not sign its first contract with Bronwen until mid-July 2007, BNP Paris' fiduciary duty arose in March or April of 2007 when SAG, Inc. approached BNP Paris to request financing and logistics assistance. BNP Paris agreed to help, holding itself out as having superior expertise in energy trading, financing and hedging. Then, acting from a position of trust, BNP Paris instructed SAG, Inc. to cede its rights and obligations under the spot contracts to Bronwen, all while assuring SAG, Inc. that Bronwen was a reputable, well-financed oil trading company. (Cross-cl. ¶¶ 17-23.)

Through these actions—all of which occurred before Bronwen and SAG, Inc. signed the Third Party Agreement—BNP Paris created a relationship of confidence. That relationship arose as a matter of fact and independently from any contract. *See S.N.R. Management Corp. v.*

*Danube Partners 141, LLC*, 659 S.E.2d 442, 451 (N.C. Ct. App. 2008) ("[I]n North Carolina, there are two types of fiduciary relationships: (1) those that arise from legal relations … and (2) those that exist as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other"), *quoting Rhone-Poulenc Agro S.A. v. Monsanto Co.*, 73 F. Supp. 2d 540, 546 (M.D.N.C. 1999).

While it is true BNP Paris instructed SAG, Inc. to formally nominate the bank as its "attorney-in-fact" on the face of the Third Party Agreements, the fiduciary duty already existed. For that reason, claims based on BNP Paris' repeated breaches of its fiduciary duty and its numerous material misrepresentations do not "arise from" or "in connection with" the written contracts. They arise from the separate, overarching relationship between BNP Paris and SAG, Inc.

In contrast, BNP Paris' French lawsuit is rooted firmly in the text of the Third Party Agreements. (Def.'s Br. in Supp. of its Mot. to Dismiss, Ex. A.) BNP Paris is trying to recover the millions of dollars it and Bronwen allegedly lost while operating the spot contracts, arguing that the terms of the Third Party Agreements obligate SAG, Inc. to financially guarantee their losses. Disposition of BNP Paris' claims will turn on the French court's interpretation of the Third Party Agreement itself; as a consequence, those claims are properly before the Commercial Court of Paris. Were SAG, Inc. arguing that BNP Paris had breached the Third Party Agreements—by, for example, refusing to honor a letter of credit delivered to KPC—those claims, too, might be litigated in Paris. But SAG, Inc. is not arguing that BNP Paris breached the Third Party Agreements. SAG, Inc.'s cross-claims are based on BNP Paris' extra-contractual tortious conduct and misrepresentations.

By way of illustration, BNP Paris' most egregious acts occurred in April 2007 when it downplayed the significant risks SAG, Inc. would face by following the bank's advice. (Cross-cl. ¶¶ 20-23, 38.) BNP Paris claimed Bronwen "would not enter into any commercial contract beyond its capability," and assured SAG, Inc. of the protections provided by Bronwen's $100 million secured line of credit, all while knowing that Bronwen had no real assets. (Cross-cl. ¶ 38.) And then—still months before the first Third Party Agreement was signed—BNP Paris omitted material information, failing to disclose that it would earn millions of dollars if Bronwen handled the oil shipments. (Cross-cl. ¶ 36.) The mere fact that BNP Paris compounded these torts by remaining silent as SAG, Inc. entered into contracts with Bronwen does not mean these claims "arise" out of subsequently signed agreements.

**3. This Forum Selection Clause Was Intended to Govern Only Limited Claims**

Finally, the forum selection clause must be interpreted in the context of the Bronwen-SAG, Inc. contracts, which were narrow in scope. SAG, Inc. and Bronwen agreed to litigate claims between them arising from Bronwen's efforts to obtain the necessary letters of credit in Paris. The forum selection clause was never intended to encompass claims for BNP Paris' unrelated tortious conduct.

In its brief, BNP Paris implies that the Third Party Agreements were broadly worded contracts, governing all aspects of the dealings between itself, SAG, Inc. and Bronwen. In reality, each Third Party Letter of Credit Agreement addressed only: (i) Bronwen's agreement to provide the Letters of Credit; (ii) SAG, Inc.'s agreement to share liability for the Letters of Credit; and (iii) SAG, Inc.'s transfer of its rights and obligations under the contracts. (Cross-Cl., Exs. 2-6.) The Agreements did <u>not</u> govern many other facets of the transactions that are currently in dispute between the parties to the North Carolina lawsuit, including:

- the duties owed and representations made by BNP Paris to SAG, Inc.;
- Bronwen and BNP Paris' separate procurement of guarantees from SMIL;
- Bronwen's and BNP Paris' decision to undertake ill-advised, multi-million dollar hedging transactions;
- Bronwen's chartering of tankers to transport the petroleum; or
- Bronwen's and BNP Paris' flawed attempts to arrange buyers for the petroleum shipments.

The forum selection clause must be read in the limited context in which it appears. It was not intended to—and cannot be read to—sweep in all disputes SAG, Inc. might have with any parties to this lawsuit. To find otherwise, the Court would have to chart new legal territory, expanding a narrowly applicable forum selection clause to govern any action with even a fleeting connection to the underlying contract.

The case of *Busse v. Pacific Cattle Feeding Fund #1, Ltd.*, 896 S.W.2d 807 (Tex. Ct. App. 2005), is instructive. In *Busse*, an investor brought suit after he purchased cattle from the defendant and simultaneously entered into a feeding and finishing contract with the defendant's company. According to the investor, the defendant had induced him to complete the transactions by fraudulently representing that demand for the cattle would be high after feeding and finishing, when in fact the business was failing. After the investor filed suit, the defendant argued that a forum selection clause in the feeding and finishing contract—specifying Iowa as the venue for suits involving "this agreement and the rights and obligations of the parties hereto"—required a change of venue. *Id.* at 813.

The Court of Appeals, however, recognized the very real distinction between contract claims and claims arising from "fraud and misrepresentation allegations" that "deal not with the

terms of the contract, but predate the contract and deal with inducement to sign the contract." *Id.* Citing Fifth Circuit authority, the Court noted:

> A forum selection clause … does not apply to a tort action alleging that the plaintiff was induced by misrepresentations to enter into the contract, where construction of the rights and liabilities of the parties under the contract is not involved.

*Id., citing Caton v. Leach Corp.*, 896 F.2d 939 (5th Cir. 1990).

Similarly, here the Court is not being asked to "construct" the rights and liabilities of BNP Paris under the Third Party Agreements. Instead, BNP Paris created a relationship of confidence with SAG, Inc. months before the contracts were signed and used that relationship to persuade SAG, Inc. to take actions against its interest, all in order to benefit its own business priorities. The fact that BNP Paris' tortious acts continued while and even after Third Party Agreements were signed is beside the point.

Like any other contract term, a forum selection clause must be interpreted as it is written. *See Hickox v. R&G Group Int'l Inc.*, 161 N.C. App. 510, 514 n. 2 (2003). SAG, Inc. and Bronwen never agreed that all claims arising between them or with BNP Paris, regardless of subject matter, should be litigated in Paris. *See, e.g., Curwood Inc. v. Prodo-Pak Corp.*, No. 07-C-544, 2008 WL 644884, *6 (E.D. Wis. 2008) (declining to extend a forum selection clause to claims arising under separate contract because "[i]t does not say "any dispute between the parties," or "any dispute over the subject matter of this agreement"); *Morgan Trailer Mfg. Co. v. Hydraroll Ltd.*, 759 A.2d 926, 932 (Pa. Sup. Ct. 2000) ("While [plaintiff] certainly had a contract with appellees, that does not mean that all future relations with appellees are somehow connected to that contract").

SAG, Inc.'s claims for breach of fiduciary duty and misrepresentation are not craftily worded contract claims. "[W]here a plaintiff's suit is truly broader than the forum selection

clause and the structure of the complaint is not an attempt to avoid the forum selection clause, enforcement of the forum selection clause would be unreasonable." *Pegasus Transp. Inc. v. Lynden Air Freight, Inc.*, 152 F.R.D. 574, 577 (N.D. Ill. 1993).

**B. The Forum Selection Clause Violates North Carolina Public Policy**

In any event, enforcement of the Paris forum selection clause in this instance would violate public policy. In North Carolina, a forum selection clause will not be enforced if it is the product of fraud or unequal bargaining power, or if enforcement of the clause would be unfair or unreasonable. *See Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 146, 423 S.E.2d 780, 784 (N.C. 1992).

Such is the case here. As alleged in SAG, Inc.'s cross-claim, BNP Paris required SAG, Inc. to:

- cede all of its rights and obligations under the spot contracts to Bronwen;
- surrender its ability to direct or even monitor Bronwen's and BNP Paris' activities;
- retain at least some exposure for potential losses; and
- execute the Third Party Agreements containing the forum selection clause in question.

(Cross-cl. ¶¶ 29-32.) All the while, BNP Paris misled SAG, Inc. as to the true risks it faced under the Agreements and concealed the bank's own conflicts of interest.

These and other facts establish the very sort of impermissible "overreaching" that defeats a forum selection clause. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916 (1972). In *Dove Air, Inc. v. Bennett*, the Western District of North Carolina refused to enforce a forum selection clause based on similar facts. Summarizing the decision in a subsequent opinion, Judge Tilley of the Middle District noted "overreaching" existed where:

> [T]he joint venture agreement was wholly one-sided, written by the defendant, and gave the defendant sole authority to accept or reject purchases; the plaintiff had no authority to bind the defendant; the plaintiff was reimbursed only for pre-approved purchases; all accounting of the plaintiff's operations were to be done by the defendant; the plaintiff had to indemnify the defendant (with no reciprocal agreement); and a one-sided non-compete clause prohibited the plaintiff from competing but allowed the defendant to transact business with others.

*St. Andrews Presbyterian College v. Southern Ass'n of Colleges and Schools, Inc.*, No. 07-CV-640, 2007 WL 4219402, *8 (M.D.N.C. 2007), summarizing the facts of *Dove Air, Inc. v. Bennett*, 226 F. Supp. 2d 771 (W.D.N.C. 2002).

By the same reasoning, the terms of the Third Party Agreements were "wholly one-sided," placing all of the power in the hands of Bronwen and BNP Paris and leaving SAG, Inc. without any practical recourse.

Finally, enforcement of the forum selection clause here would be unreasonable and unfair, because SAG, Inc. would, for all practical purposes, be denied its day in court. *See Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) (noting forum selection clauses "may be found unreasonable" if the complaining party will "for all practical purposes" be denied his day in court or the "fundamental unfairness of the chosen law may deprive the plaintiff of a remedy").

If required to litigate its claims for misrepresentation and breach of fiduciary duty before the Commercial Court of Paris, SAG, Inc. will be denied the right to conduct civil discovery. *See* Affidavit of Claude Badier ("Badier Aff."), attached hereto as Exhibit A. The Commercial Court permits neither document discovery nor depositions, and BNP Paris will disclose only the information that supports its side of the case. *See* Badier Aff. at ¶¶ 4-9. In this instance—where BNP Paris purposefully kept SAG, Inc. in the dark about the operation of the spot contracts and concealed its dealings with Bronwen—the relevant evidence is within BNP Paris' sole possession. SAG, Inc. must have civil discovery to effectively pursue its claims.

These Third Party Letter of Credit Agreements epitomize the very sort of overreaching and unfairness that violates North Carolina's public policy. Enforcement of the clause would rob SAG, Inc. of any practical remedy for BNP Paris' tortious acts.

**C. Business Court Action Will Not "Work a Substantial Injustice"**

BNP Paris also argues this Court should dismiss the cross-claims because "the facts at issue in the Cross-claims" are "currently the subject of the litigation … instituted by BNPP France in the Commercial Court of Paris." (Def.'s Br. in Supp. of its Mot. to Dismiss Cross-cl. at 6.) In essence, BNP Paris argues that the existence of a "prior pending action" requires this Court to dismiss the North Carolina cross-claims.

To the contrary, as discussed above, the Paris lawsuit involves BNP Paris' claim that SAG, Inc. should be responsible under the Third Party Agreement for guaranteeing Bronwen and the bank's substantial losses. SAG, Inc. has not filed any counterclaims in the Paris action. In short, SAG, Inc.'s cross-claims are <u>not</u> pending in Paris; they <u>are</u> pending here.

But even if the claims in the two lawsuits were identical—which they are not—North Carolina law does not permit this Court to dismiss SAG, Inc.'s cross-claims because of a prior pending action in another jurisdiction. Dismissal is appropriate <u>only</u> where claims are already pending in another North Carolina state court or a federal court sitting within North Carolina. As the Supreme Court has repeatedly stated:

> Under the law of this state, where a prior action is pending between the same parties for the same subject matter **<u>in a court within the state having like jurisdiction</u>**, the prior action serves to abate the subsequent action.

*Eways v. Governor's Island*, 326 N.C. 552, 558, 391 S.E.2d 182, 185 (1990). *See also Cushing v. Cushing*, 263 N.C. 181, 186, 139 S.E.2d 217, 222 (1964) (noting that, in order to justify

dismissal, the first action must be pending in a court of competent jurisdiction within the state of North Carolina).[1]

Upon motion from a defendant, this Court does have discretion to stay proceedings here if the claims are pending in a foreign jurisdiction, but only if: (i) litigation in North Carolina would "work a substantial injustice"; and (ii) the Commercial Court of Paris would be a "convenient, reasonable, and fair" forum for resolution of SAG, Inc.'s claims. *See* N.C. GEN. STAT. § 1-75.12 (2007). That is not the case here.

Far from "working a substantial injustice," North Carolina's Business Court presents the only forum that may exercise jurisdiction over all of the parties involved in the oil transactions. SMIL's corporate offices are in Mecklenburg County; SAG, Inc. has consented to jurisdiction here; the Bronwen entities have not objected to these proceedings; and BNP Paris waived its objections to personal jurisdiction. The Mecklenburg County Superior Court has the best chance of any forum to adjudicate these intertwined disputes.

Second, and for all of the reasons discussed above, the Commercial Court of Paris is not a "convenient, reasonable and fair" forum in which these claims may be heard. The Commercial Court of Paris does not permit written discovery or depositions. *See* Badier Aff. at ¶ 6. If required to proceed in that forum, SAG, Inc. will have no way to determine the true scope of BNP Paris' breaches and misrepresentations. BNP Paris should not be permitted to hide behind that procedural distinction.

BNP Paris argues that this Court will only "duplicate the efforts of the Commercial Court of Paris" if it allows SAG, Inc.'s cross-claims to proceed. The reality is that SAG, Inc.'s cross-

[1] Dismissal for a "prior pending action" is further circumscribed, such that, even if the first action is pending within North Carolina, it abates the second only if its claims were "substantially identical as to parties, subject matter, issues involved, and relief demanded" as to have a *res judicata* effect. The mere fact that a plaintiff *could* have obtained the same relief by filing a counterclaim in the first action is insufficient. *See Hill v. Hill Spinning Co.*, 244 N.C. 554, 558, 94 S.E.2d 677, 680 (1956).

claims have not been raised in Paris. They have been pled here. Moreover, this Court will have to resolve the parties' differences of opinion with regard to the dealings between BNP Paris, SAG, Inc. and Bronwen in order to resolve the SMIL's claims against these parties—regardless of where SAG, Inc.'s cross-claims are litigated. In this circumstances, Mecklenburg County is by far the superior forum for litigation.

## V. CONCLUSION

For all of the foregoing reasons, Swift Aviation respectfully requests that the Court deny BNP Paris' Motion to Dismiss the Cross-Claims.

## VI. CERTIFICATION

I hereby certify that the foregoing brief complies with Business Court Rule 15.8.

Respectfully submitted this 21st day of November, 2008.

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## CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the within and foregoing **DEFENDANT SWIFT AVIATION GROUP, INC.'S OPPOSITION BRIEF TO BNP PARIS, S.A.'S MOTION TO DISMISS CROSS-CLAIM** to be served upon counsel of record electronically and via First Class Mail addressed as follows:

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This 21st day of November, 2008.

/s/ Meredith J. McKee
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