

**IN THE CIRCUIT COURT FOR THE COUNTY
OF ST. LOUIS, STATE OF MISSOURI**

OPIOID MASTER DISBURSEMENT)	
TRUST II, A/KA/ OPIOID MTD II,)	
)	Case No. 22SL-CC02974
Plaintiff,)	
)	Division No. 2
)	
)	JURY TRIAL DEMANDED
)	
ACE AMERICAN INSURANCE)	
COMPANY, <i>et al.</i> ,)	
)	
Defendants.)	

**ASPEN INSURANCE UK, LTD.’S JOINDER IN CERTAIN UK
INSURERS’ MOTION TO DISMISS PLAINTIFF’S FIRST
AMENDED PETITION FOR DECLARATORY RELIEF**

Now comes Defendant, Aspen Insurance UK, Ltd. (“Aspen”), by and through its undersigned counsel, and hereby joins the Motion to Dismiss Plaintiff’s First Amended Petition for Declaratory Relief (“FAP”), filed by co-Defendants, Allianz Global Corporate & Specialty SE, incorrectly sued as “Allianz Global Risks US Insurance Company,” HDI Global SE, Lloyd’s of London Syndicate #1218, a/k/a Newline Syndicate 1218, and SJ Catlin Syndicate SJC 2003 (collectively, “Certain UK Insurers”). The policies that are the subject of Certain UK Insurers’ motion to dismiss—all of which were issued by a UK insurer to an Irish Named Insured—mandate that any dispute over the policies’ terms and conditions is to be litigated in England and Wales under English and Welsh law. Certain Aspen excess policies—which were likewise issued by a UK insurer to an Irish Named Insured—follow form to two of HDI Global SE’s policies, thereby incorporating the followed policies’ England and Wales choice-of-law and forum-selection provisions. The incorporation of these provisions into certain of the Aspen excess policies means that the Court lacks jurisdiction over Aspen with respect to the policies that are

the subject of Aspen’s joinder in Certain UK Insurers’ motion to dismiss. Accordingly, for the reasons explained below and in Certain UK Insurers’ contemporaneously filed motion to dismiss, the FAP must be dismissed with prejudice for lack of jurisdiction with respect to those Aspen policies that contain England and Wales choice-of-law and forum-selection provisions.

ARGUMENT

In this declaratory relief action, Plaintiff, Opioid Master Disbursement Trust II (“Trust”), seeks to recover millions upon millions of dollars in insurance proceeds from the insurers of Mallinckrodt plc and its affiliates (collectively, “Mallinckrodt”), in connection with thousands of underlying lawsuits arising from Mallinckrodt’s alleged liability for causing and contributing to the national opioid epidemic. Among the policies named in the FAP are two policies issued by HDI-Gerling Industrial Insurance Company, UK Branch (together with HDI Global SE, “HDI”):

- 1) HDI Policy No. B0509DY062911, effective November 15, 2011 to November 15, 2012; and
- 2) HDI Policy No. B0509DR539912, effective November 15, 2012 to November 15, 2013

(collectively, “HDI Followed Policies”). HDI is a UK-based insurer with its principal place of business in London. (Certain UK Insurers’ Mot. to Dismiss at 2–3, 6) The HDI Followed Policies were issued to Covidien plc (Mallinckrodt plc’s former parent company), as the Named Insured, which is based in Dublin, Ireland. (Certain UK Insurers’ Mot. to Dismiss at 2–3, 6)

The HDI Followed Policies contain provisions whereby the contracting parties mutually agreed that any dispute over the policies’ terms and conditions—including the choice-of-law and forum-selection provisions themselves—would be litigated in England and Wales and governed by English and Welsh law:

CHOICE OF LAW AND JURISDICTION ENDORSEMENT

Notwithstanding anything to the contrary contained in this Policy, any dispute concerning the interpretation of the terms, conditions, limitations and/or exclusions contained herein is understood and

agreed by both the Insured and Insurers to be subject to the laws of England and Wales.

Each party agrees to submit to the jurisdiction of any court of competent jurisdiction within England and Wales and to comply with all requirements necessary to give such court jurisdiction.

All matters arising hereunder shall be determined in accordance with the law and practice of such court.

(Certain UK Insurers' Mot. to Dismiss at 6–7)

Two other policies named in the FAP were issued by Aspen and are excess to the HDI Followed Policies, which are designated as scheduled underlying insurance: 1) Aspen Policy No. K0A0DKT11A0E, effective November 15, 2011 to November 15, 2012; and 2) Aspen Policy No. K0A0DKT12A0E, effective November 15, 2012 to November 15, 2013 (collectively, “2011–2013 Aspen Following Policies” and attached as “Group Exhibit A,” with premium information redacted). Like HDI, Aspen is a UK-based insurer with its principal place of business in London. Also like the HDI Followed Policies, the 2011–2013 Aspen Following Policies were issued to Covidien plc (Mallinckrodt plc’s former parent company), as the Named Insured, which is based in Dublin, Ireland. (Grp. Ex. A at ASP 19021, ASP 19030)

The 2011–2013 Aspen Following Policies are known as “follow-form” policies, which incorporate by reference the underlying policies’ provisions, unless otherwise provided. *Crown Ctr. Redev. Corp. v. Occidental Fire & Cas. Co. of N.C.*, 716 S.W.2d 348, 351 (Mo. Ct. App. 1986). This is evident from the fact that the 2011–2013 Aspen Following Policies afford coverage “in accordance with the same warranties, terms, conditions, exclusions and limitations” as the HDI Followed Policies, except to the extent the 2011–2013 Aspen Following Policies provide otherwise:

This policy shall provide the Insured with Excess Insurance coverage in accordance with the same warranties, terms, conditions, exclusions and limitations as are contained in the

Followed Policy(ies) set forth in Item 8 above [HDI Followed Policies] and as attached on the inception date of this Policy, subject always to the premium, limits of liability, policy period, warranties, exclusions, limitations and any other terms and conditions of this Policy including any and all endorsements attached hereto which may be inconsistent with the Followed Policy.

(Grp. Ex. A at ASP 19022, ASP 19024, ASP 19031, ASP 19033)

The HDI Followed Policies' England and Wales choice-of-law and forum-selection provisions constitute "warranties, terms, conditions, exclusions and limitations," within the meaning of the 2011–2013 Aspen Following Policies. What is more, the 2011–2013 Aspen Following Policies do not contain independent choice-of-law or forum-selection provisions. Because there is no inconsistency, the 2011–2013 Aspen Following Policies follow form to and thereby incorporate the HDI Followed Policies' choice-of-law and forum-selection provisions. *See, e.g., Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 589 (7th Cir. 2001) (finding that reinsurance contract's "general conditions" clause incorporated arbitration provision of underlying policy by stating that reinsurance contract would "follow all terms clauses and conditions on the original contract as detailed under Class section," even though Class section did not mention arbitration); *C.B. Fleet Co. v. Aspen Ins. UK Ltd.*, 743 F. Supp. 2d 575, 583–85 (W.D. Va. 2010) (holding that Aspen binder contemplating excess follow-form coverage incorporated underlying policy's arbitration provision, where binder stated that coverage would be afforded "in accordance with the same warranties, terms, conditions, exclusions and limitations as are contained in the Followed Policy(ies)," unless inconsistent with Aspen policy's own terms and conditions); *Boeing Co. v. Agric. Ins. Co.*, No. C05-921C, 2005 WL 2276770, at *7 (W.D. Wash. Sept. 19, 2005) (holding that excess follow-form policies incorporated underlying policy's arbitration provision); *Home Ins. Co. of Ill. (N.H.) v. Spectrum Info. Techs., Inc.*, 930 F. Supp. 825, 835 n.9 (E.D.N.Y. 1996) (holding that excess follow-form policy, which

did not contain independent choice-of-law provision, incorporated underlying policy’s choice-of-law provision); *AT&T v. Clarendon Am. Ins. Co.*, No. CIV.A.04C-11-167JRJ, 2008 WL 2583007, at *5 (Del. Super. Ct. Feb. 11, 2008) (holding that excess follow-form policies, which were “subject to the same warranties, terms, conditions, definitions, exclusions and endorsements” and “all terms, conditions, agreements and limitations” of underlying policy, incorporated underlying policy’s choice-of-law provision).

As the alleged successor-in-interest to or assignee of Mallinckrodt’s interest in the 2011–2013 Aspen Following Policies, the Trust is bound by the choice-of-law and forum-selection provisions. *See, e.g., XTRA Lease LLC v. EJ Madison, LLC*, No. 4:14-CV-1866-RLW, 2015 WL 3694712, at *3 (E.D. Mo. June 12, 2015) (holding that assignment of lease in connection with purchase of business bound assignee to contract conditions, including choice-of-law clause).

Moreover, the Trust may not unilaterally waive the forum-selection clause. A forum-selection clause can be waived only if it was placed in the contract for the “sole benefit” of the waiving party, whose waiver cannot impact the rights of the other contracting party. *Corel Corp. v. Ferrellgas Partners, L.P.*, 633 S.W.3d 849, 854 (Mo. Ct. App. 2021). The UK forum-selection clause was not, however, for the sole benefit of either Mallinckrodt or its former parent company and the Named Insured, Covidien plc. The contracting parties freely selected the UK as the appropriate forum in which to resolve any disputes under the 2011–2013 Aspen Following Policies, given that Covidien plc is based in Ireland and Aspen is based in the UK. Because the UK forum-selection clause also benefits Aspen, the Trust may not now unilaterally waive the provision and thereby deprive Aspen of this contractual right.

In sum, given the 2011–2013 Aspen Following Policies’ follow-form nature and lack of independent—much less contrary—choice-of-law or forum-selection provisions, the 2011–2013

Aspen Following Policies incorporate the HDI Followed Policies' England and Wales choice-of-law and forum-selection provisions. Therefore, as to the 2011–2013 Aspen Following Policies, the FAP should be dismissed with prejudice for lack of jurisdiction.

CONCLUSION

Wherefore, for the reasons stated above and in Certain UK Insurers' contemporaneously filed motion to dismiss, which Aspen joins, Aspen respectfully requests that this Court dismiss the FAP with prejudice as to the 2011–2013 Aspen Following Policies, and grant such further relief as this Court deems just.

Dated: October 11, 2022

Respectfully submitted,

/s/ Adam H. Fleischer

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2022, the foregoing was filed electronically with the Court's electronic filing system, which will send electronic notices to all counsel of record. In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rule of Civil Procedure that he has signed the original of this Certificate and the foregoing pleading.

/s/ Adam H. Fleischer