

KRONENBERGER ROSENFELD, LLP
Karl S. Kronenberger (CA Bar No. 226112)
Liana W. Chen (CA Bar No. 296965)
150 Post Street, Suite 520
San Francisco, CA 94108
Telephone: (415) 955-1155
Facsimile: (415) 955-1158
karl@kr.law
liana@kr.law

Attorneys for Defendants Kotaro Shimogori,
Comcopious Limited, Comcopious California, Inc.,
and Pan Digital Network Limited

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

HELEXO PTE LIMITED, a Singapore
Company,

Plaintiff,

v.

KOTARO SHIMOGORI, an individual;
COMCOPIOUS LIMITED, a Hong Kong,
China Company *doing business as*
ICANPAY; **COMCOPIOUS CALIFORNIA,**
INC., a California corporation; **ICANPAY**
CALIFORNIA, INC., an FTB suspended
California corporation; **PAN DIGITAL**
NETWORK LIMITED fka COMCOPIOUS
UK LIMITED, a UK limited liability
company; and **DOES 1 through 25**,
inclusive,

Defendants.

Case No. 34-2022-00319099-CU-EN-GDS

**DEFENDANTS KOTARO SHIMOGORI,
COMCOPIOUS LIMITED, COMCOPIOUS
CALIFORNIA, INC., AND PAN DIGITAL
NETWORK LIMITED'S REPLY IN
SUPPORT OF MOTION TO STAY OR
DISMISS ACTION FOR FORUM NON
CONVENIENS UNDER CCP §§410.30
and 418.10(a)(2)**

TELEPHONE APPEARANCE

Date: November 30, 2022
Time: 1:30 p.m.
Dept.: 53

Reservation No.: 2674889

Complaint Filed: April 29, 2022

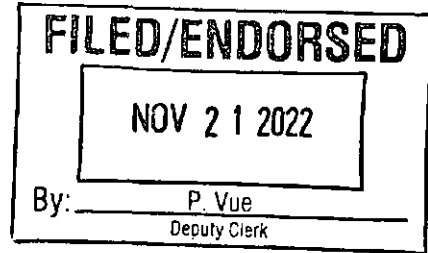


TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT.....	2
A. Plaintiff disregards the legal standard and respective burdens for forum non conveniens motions.	2
B. Hong Kong is a "suitable" forum, as that term is defined by the relevant authority. ...	3
C. A single defendant's residence is not presumptively a convenient forum in a multi- defendant lawsuit.	3
D. Defendants have satisfied their forum non conveniens burden regardless of whether the Court considers the Processing Agreement.	5
E. The MOU does not affect the forum non conveniens analysis.	7
F. Plaintiff disregards Defendants' analysis of the private and public policy factors.	7
CONCLUSION	9

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bullock v. City of Antioch,</i>	
78 Cal. App. 5th 407 (2022).....	6
<i>Chong v. Superior Ct.,</i>	
58 Cal. App. 4th 1032 (1997).....	3
<i>Ford Motor Co. v. Ins. Co. of N. Am.,</i>	
35 Cal. App. 4th 604 (1995).....	4
<i>Fox Factory, Inc. v. Superior Ct.,</i>	
11 Cal. App. 5th 197 (2017).....	2
<i>Hahn v. Diaz-Barba,</i>	
194 Cal. App. 4th 1177 (2011).....	2
<i>Hansen v. Owens-Corning Fiberglas Corp.,</i>	
51 Cal. App. 4th 753 (1996).....	3, 4
<i>Medina v. Safe-Guard Prod., Internat., Inc.,</i>	
164 Cal. App. 4th 105 (2008).....	6
<i>Mireskandari v. Gallagher,</i>	
59 Cal. App. 5th 346 (2021).....	8
<i>Nat'l Football League v. Fireman's Fund Ins. Co.,</i>	
216 Cal. App. 4th 902 (2013).....	4
<i>Offshore Rental Co. v. Cont'l Oil Co.,</i>	
22 Cal. 3d 157 (1978).....	8
<i>Quanta Computer Inc. v. Japan Commc'ns Inc.,</i>	
21 Cal. App. 5th 438 (2018).....	5
<i>Sonora Diamond Corp. v. Superior Ct.,</i>	
83 Cal. App. 4th 523 (2000).....	4
<i>Stangvik v. Shiley Inc.,</i>	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

54 Cal. 3d 744 (1991).....	3
----------------------------	---

Defendants Kotaro Shimogori, Comcopious Limited, Comcopious California, Inc., and Pan Digital Network Limited ("Defendants") submit this reply brief in support of their motion to stay or dismiss this action under the doctrine of forum non conveniens pursuant to Code of Civil Procedure ("CCP") §§410.30 and 418.10(a)(2).

INTRODUCTION

This is a business-to-business dispute between a Hong Kong company and a Singapore company. Defendants have moved to stay or dismiss this lawsuit under the doctrine of forum non conveniens. In their opening brief, Defendants explained why Hong Kong is a suitable forum, and why the relevant private and public policy factors weigh in favor of adjudicating this case in Hong Kong rather than in California.

In its Opposition, Plaintiff largely ignores the established forum non conveniens framework. Instead, Plaintiff devotes the bulk of its brief to arguing that the Processing Agreement between Plaintiff and Defendant Comcopious Limited *dba* iCanPay ("iCanPay") is unlawful. However, even if the Court does not consider the Processing Agreement's forum selection clause, Defendants have still met their burden under the forum non-conveniens framework, as summarized below:

- Suitability of Hong Kong Courts. Defendants have shown that Hong Kong is a suitable forum because it provides due process, and because Defendants have agreed to submit to the jurisdiction of the Hong Kong courts. Plaintiff argues that a Hong Kong judgment could not be enforced in California. However, Plaintiff is wrong as a matter of law, as California has enacted the Uniform Foreign-Country Money Judgments Recognition Act. See CCP §§1713-1725.
- Policy Factors. Plaintiff fails to address the relevant policy factors for evaluating forum non-conveniens. In fact, Plaintiff's sole policy argument is that California has an interest in this dispute because some of the credit card transactions submitted under the Processing Agreement involved California consumers. However, the Complaint does not allege that any California consumer was harmed, and Plaintiff does not seek any redress for California consumers. Rather, this is a business-to-

business dispute between two foreign business entities.

Finally, Plaintiff argues that the Court cannot rely on the Processing Agreement as a basis for finding forum non conveniens because the Processing Agreement is unlawful. However, Defendant has met its burden of showing forum non conveniens irrespective of the Processing Agreement's forum selection clause. Moreover, the Court has not determined that the Processing Agreement is unlawful. Even if the Processing Agreement were unlawful, Plaintiff still knowingly agreed to resolve disputes in Hong Kong separate and apart from the allegedly unlawful provisions, and iCanPay could still enforce the agreement under the *pari delicto* exception.

For all of these reasons, the Court should stay or dismiss this case under the doctrine of forum non-conveniens.

ARGUMENT

A. Plaintiff disregards the legal standard and respective burdens for forum non conveniens motions.

Plaintiff glosses over the standard for analyzing forum non conveniens, disregarding the shifting of burdens.

California courts use a two-step analysis in analyzing forum non conveniens. See *Fox Factory, Inc. v. Superior Ct.*, 11 Cal. App. 5th 197, 203 (2017). First, courts determine whether the alternative forum is a suitable forum. See *id.* If it is, courts next consider the private and public interests in retaining the action for trial in California. See *id.*

"It is well settled under California law that the moving parties satisfy their burden on the threshold suitability issue by stipulating to submit to the jurisdiction of the alternative forum and to waive any applicable statute of limitations." *Hahn v. Diaz-Barba*, 194 Cal. App. 4th 1177, 1190 (2011). The burden then "quickly shift[s] to the plaintiff on the issue of appropriateness of the alternative forum once the defendant consents to jurisdiction in the alternative forum." *Hahn v. Diaz-Barba*, 194 Cal. App. 4th 1177, 1191 (2011).

While Defendants have satisfied their burden, Plaintiff has not met its burden.

B. Hong Kong is a "suitable" forum, as that term is defined by the relevant

1 **authority.**

2 Because Hong Kong courts provide litigants with due process, and because
3 Defendants have agreed to submit to the jurisdiction of Hong Kong courts, the burden shifts
4 to Plaintiff to demonstrate why Hong Kong is not a suitable forum. Plaintiff argues, without
5 authority, that Hong Kong is not a suitable forum because “[t]he United States does not
6 recognize or allow for enforcement of judgments from Hong Kong.” (Opp. at 12:2-3.)

7 Plaintiff is incorrect. California has adopted the Uniform Foreign-Country Money
8 Judgments Recognition Act. See CCP §§1713-1725. The Act states, “[e]xcept as
9 otherwise provided in subdivisions (b), (c), (d), and (f), a court of this state *shall* recognize
10 a foreign-country judgment to which this chapter applies.” CCP §1716 (emphasis added).
11 In fact, California courts have recognized the ability to enforce a judgment entered by a
12 Hong Kong court. See *Chong v. Superior Ct.*, 58 Cal. App. 4th 1032, 1038 (1997)
13 (“HBZ *can* enforce a judgment rendered by a Hong Kong court” (emphasis in original)).

14 Because none of the exceptions to section 1716 arguably apply here, Plaintiff’s
15 argument about the enforceability of a Hong Kong judgment in California fails, and Hong
16 Kong remains a suitable forum.

17 **C. A single defendant’s residence is not presumptively a convenient forum in a**
18 **multi-defendant lawsuit.**

19 Plaintiff argues that this Court is more convenient than Hong Kong because
20 Defendant Shimogori’s “place of residence ‘is presumptively a convenient forum.’” (Opp.
21 at 9:13-14 (quoting *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744 (1991)). However, the *Stangvik*
22 court explained that “a resident defendant may overcome the presumption of convenience
23 by evidence that the alternate jurisdiction is a more convenient place for trial of the action.”
24 See *id.* at 756 (finding that even though defendant was a California corporation, California
25 was an inconvenient forum, and Norway and Sweden were more convenient).

26 Importantly, the presumptive validity of the defendant’s place of residence loses
27 significance in multi-defendant actions where other defendants reside outside the forum.
28 Thus, in *Hansen v. Owens-Corning Fiberglas Corp.*, 51 Cal. App. 4th 753 (1996), the court

1 recognized that the vast majority of the defendants had contacts in California, and at least
2 one defendant was a resident of California. Even so, the court found that Montana was a
3 more convenient forum because the locus of harm was in Montana and most potential
4 witnesses were in Montana. See *id.*

5 While Defendant Shimogori is a California resident, Defendant iCanPay is the party
6 to the Processing Agreement and thus the focus of this dispute. iCanPay is a Hong Kong
7 resident, and iCanPay's records and contractors are located in Hong Kong.

8 Shimogori's sole connection to this case is Plaintiff's alter ego theory. However,
9 "[a]lter ego is an extreme remedy, sparingly used." *Sonora Diamond Corp. v. Superior Ct.*,
10 83 Cal. App. 4th 523, 539 (2000). As such, Plaintiff's bald claim of alter ego liability is
11 insufficient to rebut Defendants' forum non conveniens showing. In a forum non
12 conveniens analysis, "[t]here thus must be evidence—not merely bald assertions—to
13 support the trial court's determination." *Ford Motor Co. v. Ins. Co. of N. Am.*, 35 Cal. App.
14 4th 604, 610 (1995). The court has a "duty to weigh and interpret the evidence and draw
15 reasonable inferences therefrom." *Nat'l Football League v. Fireman's Fund Ins. Co.*, 216
16 Cal. App. 4th 902, 918 (2013). Plaintiff has not supported its alter ego allegations with any
17 relevant evidence. (Opp. at 4:11-15 (citing Rome Decl. ¶¶4-9, 15-17 & Ex. 1 and Musante
18 Decl. ¶¶24-44).)¹ By contrast, Defendants have submitted a declaration explaining why

19
20 ¹ In support of their alter ego argument, Plaintiff cites to Paragraphs 24-44 of the Musante
21 Declaration and Paragraphs 4-9, 15-17 and Exhibits A-J of the Rome Declaration. (Opp.
22 at 4:10-14.) However, Plaintiff's evidence does not reflect an alter ego relationship.

- 23 • Paragraphs 24-44 of the Musante Declaration do not refer to Shimogori at all, let
24 alone present evidence demonstrating an alter ego relationship between Shimogori
25 and iCanPay.
- 26 • Paragraph 4 of the Rome Declaration describes the contents of the Processing
27 Agreement without reference to Shimogori.
- 28 • Paragraphs 5-8 of, and Exhibits B-D to, the Rome Declaration are corporate filings
for various business entities that identify Shimogori as a principal or officer. Such
filings do not reflect an alter ego relationship.
- Paragraph 9 of the Rome Declaration is a purely conclusory attorney statement
about whether iCanPay transacts business in Hong Kong.
- Paragraph 15 of, and Exhibits G-I to, the Rome Declaration show that Chandler

1 Shimogori is not an alter ego of iCanPay. (07/1/22 Shimogori Decl. ¶8.)

2 Given Plaintiff's lack of evidence showing an alter-ego relationship between
3 Shimogori and iCanPay, Shimogori's California residence does not affect the forum non
4 conveniens analysis where iCanPay is based in Hong Kong.

5 **D. Defendants have satisfied their forum non conveniens burden regardless of**
6 **whether the Court considers the Processing Agreement.**

7 Plaintiff argues that the Court should not consider the Processing Agreement's
8 forum selection clause because the Processing Agreement is illegal and unenforceable.
9 (Opp. at 13:10-11.) Plaintiff's argument fails for multiple reasons.

10 First, the presence of a forum selection clause is not dispositive in a forum non-
11 conveniens analysis, and other factors can be equally—if not more—important. See
12 *Quanta Computer Inc. v. Japan Commc'ns Inc.*, 21 Cal. App. 5th 438, 447-48 (2018) (trial
13 court acted in its discretion in disregarding enforceable forum selection clause in business-
14 to-business dispute where policy factors favored adjudicating case in Asia). Here, even if
15 the Court disregards the Processing Agreement's forum selection clause, the relevant
16 policy factors still weigh in favor of adjudicating this case in Hong Kong. More specifically,
17 Defendants have met their burden of showing that this Court is an inconvenient forum
18 separate and apart from the Processing Agreement's forum selection clause. Among the
19 many reasons this Court is an inconvenient forum is the fact that Plaintiff is a Singapore
20 business entity and iCanPay is Hong Kong business entity.

21 Second, regardless of the ultimate enforceability of the Processing Agreement,
22

23 Partners and Conpak previously served as iCanPay's corporate secretary in Hong
24 Kong. Such facts do not reflect an alter ego relationship.

- 25 • Paragraph 16 of, and Exhibit J to, the Rome Declaration describe a bank statement
26 from a third party who received payments from two Comcopious entities' bank
27 accounts.
- 28 • Paragraph 17 of the Rome Declaration is a description of the amount of time
Plaintiff's attorneys spent reviewing the Processing Agreement. Again, such facts
do not reflect an alter ego relationship.

None of this evidence shows an alter ego relationship between iCanPay and Shimogori.

1 Plaintiff knowingly agreed to the forum selection clause. Thus, Plaintiff understood that
2 disputes with iCanPay would be resolved in Hong Kong. Plaintiff cannot now be surprised
3 if this action proceeds in Hong Kong. Thus, the presence of the forum selection clause in
4 the Processing Agreement weighs in favor of resolving this dispute in Hong Kong
5 regardless of the agreement's ultimate enforceability.

6 Third, the enforceability of the Processing Agreement has not yet been determined.
7 Plaintiff argues that the doctrine of issue preclusion prevents Defendants from litigating the
8 enforceability of the Processing Agreement. Not so. The threshold requirements for issue
9 preclusion to apply are: 1) the issue sought to be precluded from re-litigation is identical to
10 that decided in a prior proceeding; 2) the issue was actually litigated in the prior proceeding;
11 3) the issue was necessarily decided in the former proceeding; 4) the decision in the former
12 proceeding is final and on the merits; and 5) the party against whom preclusion is sought
13 is the same as, or in privity with, the party to the former proceeding. *See Bullock v. City of*
14 *Antioch*, 78 Cal. App. 5th 407, 415–16 (2022).

15 While this Court analyzed a very similar agreement in *Life-FX Products LLC v.*
16 *Comcopious Limited, et al.*, Case No. 34-2018-0024285-CU-CO-GS ("*Life-FX*"), it did so
17 in the context of a motion to dismiss and not as part of a final adjudication on the merits.
18 Moreover, the factual background was different in that case, and thus the issues were not
19 identical. *Life-FX* involved the alleged movement of the plaintiffs' funds to "PiroPay," a
20 purported unlicensed money transmitter. In this case, by contrast, Helexo is a high-risk
21 business that became frustrated when banks shut down its processing. Given this history,
22 there is no issue preclusion regarding the validity of the Processing Agreement.

23 Fourth, even if the Processing Agreement were unlawful, Comcopious could still
24 enforce it, and the forum selection clause, under the *pari delicto* exception. The *pari delicto*
25 exception allows an illegal contract to be enforced so long as the party seeking its
26 enforcement is less morally blameworthy than the party against whom the contract is being
27 asserted, and there is no overriding public interest to be served by voiding the agreement.
28 *See Medina v. Safe-Guard Prod., Internat., Inc.*, 164 Cal. App. 4th 105, 110 (2008).

1 Here, Comcopious is less morally blameworthy than Helexo. Helexo operates
2 multiple gambling websites, which are unlawful in California (as recently confirmed by
3 referendum). See Penal Code §§330, *et seq.* (7/11/22 Shimogori Decl. *passim.*) By
4 contrast, Helexo claims that Comcopious is morally blameworthy because: a) it engaged
5 in technical infractions of credit card processing rules, and b) it “stole” Helexo’s money.
6 However, Helexo has submitted no non-conclusory evidence that Comcopious stole any
7 funds. And as a matter of California policy, infractions of merchant processing rules are
8 less morally blameworthy than promoting illegal gambling. Thus, it is likely that Defendants
9 will be entitled to enforce the Processing Agreement under the *pari delicto* exception.

10 For all of these reasons, the presence of the forum selection clause in the
11 Processing Agreement weighs in favor of adjudicating this action in Hong Kong.

12 **E. The MOU does not affect the forum non conveniens analysis.**

13 Plaintiff argues that the “Processing Agreement is not at issue” because a
14 Memorandum of Understanding dated September 8, 2021 (“MOU”) governs this dispute.
15 (Opp. at 10:2-13.) Plaintiff’s argument fails for multiple reasons.

16 First, contrary to Plaintiff’s argument, Plaintiff has alleged a cause of action for
17 breach of the Processing Agreement. (Compl. ¶¶95-100.) Thus, the Processing Agreement
18 is at issue. Second, three of the four Defendants are not parties to the MOU. Third, while
19 the MOU does not contain a foreign selection clause, it contains nothing that rebuts
20 Defendants’ showing that Hong Kong is a more convenient forum than California.

21 Thus, the MOU has no effect on the forum non conveniens analysis.

22 **F. Plaintiff disregards Defendants’ analysis of the private and public policy**
23 **factors.**

24 Plaintiff incorrectly argues that “Defendants fail entirely to analyze the private and
25 public factors that would favor Hong Kong.” (Opp. 11:13-14.) Contrary to Plaintiff’s
26 argument, Defendants addressed all of the relevant private and public factors in their
27 opening brief, as summarized below. (Defs’ MPA at 7-8.)

- 28 • Access to Sources of Proof. In their opening brief, Defendants explained that

1 the relevant documentary evidence is located in Hong Kong. Other than Shimogori, Plaintiff
2 has not identified any witnesses or documents located outside of Hong Kong, let alone in
3 California. And because Shimogori has submitted to the jurisdiction of Hong Kong courts,
4 his presence in California does not affect Plaintiff's access to proof.

5 • Costs of Obtaining Attendance of Witnesses. In addition to party witnesses,
6 all of whom are located abroad or have submitted to jurisdiction in Hong Kong, Defendants
7 identified three-to-four potential non-party witnesses in Hong Kong. (7/1/22 Shimogori
8 Decl. ¶4.) By contrast, the only witness identified by Plaintiff, *i.e.*, Shimogori, has submitted
9 to the jurisdiction of Hong Kong courts. Thus, the cost of securing witnesses in Hong Kong
10 will likely be less than in California. Plaintiff has not identified any additional costs in
11 proceeding in Hong Kong rather than California.

12 • Availability of Compulsory Process. While Plaintiff has not identified any non-
13 party witnesses, under Hong Kong law, civil litigants can use compulsory process to secure
14 the attendance of witnesses.

15 • Avoidance of Burdening Court. This Court is a busy court, which does not
16 need to be burdened by this complex commercial matter between two foreign businesses.

17 • Interests of California and California Jurors. Neither the State of California
18 nor California jurors have any interest in deciding a credit card processing dispute between
19 two foreign businesses, where no California consumers were affected.

20 • Controlling Law and Conflicts of Law. While Plaintiff asserts claims under
21 California law, it is unclear what law will apply to this case. The Processing Agreement
22 specifies that Hong Kong law applies to disputes. Even without this choice of law provision,
23 the Court would need to "search to find the proper law to apply based on the interests of
24 the litigants and the other involved states." *Mireskandari v. Gallagher*, 59 Cal. App. 5th
25 346, 362 (2021) (quoting *Offshore Rental Co. v. Cont'l Oil Co.*, 22 Cal. 3d 157, 161 (1978)
26 (internal quotations omitted)). A Hong Kong court is better positioned to apply Hong Kong
27 law than this Court.

28 In its Opposition, Plaintiff does not respond to any of Defendants' arguments

1 regarding these private and public factors. And the one policy argument that Plaintiff makes
2 in its Opposition is erroneous. Plaintiff argues that "California has an interest in this dispute
3 in that California and federal laws were violated by Shimogori that impacted transactions
4 that occurred in California that involved California consumers." (Opp. at 12:6-8.) However,
5 this action does not seek redress for California consumers. Rather, this action seeks
6 redress for a Singapore business from a Hong Kong business. In fact, if Plaintiff provided
7 its online gambling services to California residents, it violated California's anti-gambling
8 laws. See Penal Code §§330, *et seq.*

9 With the exception of this flawed argument, Plaintiff has failed to rebut Defendants'
10 showing that the private and public policy factors weigh in favor of adjudicating this case
11 in Hong Kong.

12 CONCLUSION

13 For the foregoing reasons, the Court should stay or dismiss this action under the
14 doctrine of forum non conveniens pursuant to CCP §§410.30 and 418(a)(2).

15
16 Respectfully Submitted,

17 DATED: November 18, 2022

KRONENBERGER ROSENFELD, LLP

18 By: Karl S. Kronenberger
19 Karl S. Kronenberger

20 Attorneys for Defendants Kotaro Shimogori,
21 Comcopious Limited, Comcopious
22 California, Inc., and Pan Digital Network
23 Limited
24
25
26
27
28