

NO. \_\_\_\_\_

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**SUPREME COURT OF TEXAS**

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**IN RE LAIBE CORPORATION**

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Appeal From the Second Court of Appeals, Fort Worth, Texas  
Cause No. 02-09-00089-CV

Original Proceeding Out of The 271<sup>st</sup> District Court for  
Wise County, Texas  
Trial Court Case No. 08-07-513

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**PETITION FOR WRIT OF MANDAMUS**

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**RELATOR REQUESTS ORAL ARGUMENT**

**IDENTITY OF PARTIES AND COUNSEL**

In order to allow the members of the Court to assess disqualification and recusal issues under Texas Rules of Appellate Procedure 15 and 15(a), Relator certifies the following is a complete list of the parties, attorneys the trial court judge and any other person who had any interest in the outcome of this lawsuit:

1. Laibe Corporation - Relator
2. David Whitehurst - Attorney for Relator
3. Frank G. Cawley - Attorney for Relator
4. Acuity Insurance – Liability insurance carrier for Relator
5. Jackson Drilling, L.P. - Real Party in Interest
6. William Clary - Attorney for Real Party in Interest
7. John Fostel - Respondent Trial Court Judge

**TABLE OF CONTENTS**

IDENTY OF PARTIES AND COUNSEL ..... ii

TABLE OF CONTENTS..... iii, iv

INDEX OF AUTHORITIES..... v, vi

STATEMENT OF THE CASE.....1

STATEMENT OF JURISDICTION.....2

ISSUES PRESENTED.....3

WHY THIS CASE WARRANTS REVIEW .....4

STATEMENT OF FACTS .....5

ARGUMENT AND AUTHORITIES.....6

**A. Standard of Review.....7**

**B. Respondent clearly abused his discretion to the extent that Respondent found the forum selection clause in the New Equipment Purchase Agreement ambiguous.....7**

**C. Respondent clearly abused his discretion to the extent that Respondent determined that enforcement of the forum selection clause in the New Equipment Purchase Agreement would be unreasonable or unjust.....9**

**D. Respondent clearly abused his discretion to the extent that Respondent determined that the selected forum would be seriously inconvenient for trial.....10**

**E. The Court of Appeals Erred to the Extent that it Denied Relator’s Petition for Writ of Mandamus Based on the Affirmative Defense of Laches.....11**

**1. There was No Unreasonable Delay in Seeking Mandamus Relief as a Matter of Law .....13**

**2. Plaintiff Fails to Establish Any Harm.....14**

CONCLUSION AND PRAYER .....15

CERTIFICATE OF SERVICE .....16

CERTIFICATION .....16

APPENDIX

    Reporter’s Record ..... Tab A

Clerk's Record ..... Tab B  
Memorandum Opinion..... Tab C

## INDEX OF AUTHORITIES

CASES	Page(s)
<i>In re AdvancePCS Health, L.P.</i> , 172 S.W.3d 603, 608 (Tex. 2005).....	10
<i>In re AIU Insurance Co.</i> , 148 S.W.3d 109, 113 (Tex. 2004).....	7, 11
<i>In re Automated Collection Technologies</i> , 156 S.W.3d 557, 559 (Tex. 2004).....	7
<i>In re Bahn</i> , 13 S.W.3d 865, 871 (Tex. App.-Fort Worth 2000, orig. proceeding) .....	12, 14
<i>Carnival Cruise Lines, Inc. v. Shute</i> , 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991).....	9, 10
<i>In re Daniel J. Vaughan, M.D.</i> 2004 Tex. App. LEXIS 1608, 2004 WL 308665 (Tex. App.-Eastland, Feb. 19, 2004, orig. proceeding) (not designated for publication) .....	12
<i>In re International Profit Assoc., Inc.</i> , 2009 Tex. LEXIS 5, *4 (January 9, 2009).....	2
<i>In re Jindal Saw Ltd.</i> , 264 S.W.3d 755 (Tex. App. – Houston [1 <sup>st</sup> Dist.], orig. proceeding) .....	14
<i>Luxury Travel Source v. Am. Airlines, Inc.</i> , 2008 Tex. App. LEXIS 9688, *28 (Tex. App. Fort Worth Dec. 31, 2008).....	10
<i>In re Lyon Fin. Servs., Inc.</i> 257 S.W.3d 223, 228, 230, 231, 234(Tex. 2008) (per curiam).....	2, 8, 9, 11
<i>In re Oakwood Mobile Homes, Inc.</i> , 987 S.W.2d 571, 574 (Tex. 1999).....	10
<i>Sanchez v. Hester</i> , 911 S.W. 2d 173, 177 (Tex. App.-Corpus Christi 1995, orig. proceeding).....	12
<i>Strickland v. Lake</i> , 163 Tex. 445, 448, 357 S.W.2d 383, 384 (Tex. 1962) (orig. proceeding) .....	14
<i>Wallace v. Munson</i> , 2004 Tex. App. LEXIS 7726, No. 13-03-188-CV, 2004 WL 1902118	

(Tex. App. – Corpus Christi 2004, no pet.)(not designated for publication).....9

**STATUTES AND RULES**

TEX GOV'T CODE §22.002 .....2

TEX. R. CIV. P. 94.....12

## STATEMENT OF THE CASE

This is a Petition For Writ of Mandamus to compel the trial court judge, the Honorable John Fostel of the 271<sup>st</sup> Judicial District Court For Wise County, Texas to vacate orders denying Relator's Motion To Dismiss and Motion To Reconsider based on the forum selection clause contained in the contract out of which the underlying case arises.

This is a breach of contract, breach of warranty, deceptive trade practices act case arising out of the sale of a water drilling rig by Laibe to Plaintiff. Laibe and Plaintiff entered into the New Equipment Purchase Agreement - the contract for the sale of the water drilling rig - on March 10, 2006. The New Equipment Purchase Agreement contains a forum selection clause requiring all disputes arising out of the contract to be filed in Marion County, Indiana. Plaintiff filed suit in the 271<sup>st</sup> District Court for Wise County, Texas. Laibe moved to dismiss the lawsuit based on the forum selection clause. After holding an evidentiary hearing, the Honorable John Fostel denied Laibe's Motion To Dismiss. Laibe filed a Motion To Reconsider which the trial court denied by order dated December 19, 2008.<sup>1</sup> Laibe seeks a writ of mandamus compelling Respondent to grant Defendant's Motion To Dismiss and/or Defendant's Motion To Reconsider.

Laibe filed a Petition For Writ of Mandamus in the Second Court of Appeals. The Second Court of Appeals requested briefing from the parties. After considering the briefs, the Second Court of Appeals denied the Petition For Writ of Mandamus by a memorandum opinion dated April 24, 2009.

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<sup>1</sup> Although Respondent's Order denying Relator's Motion To Reconsider is dated December 19, 2008, Relator did not receive the Order until the middle of January, 2009.

## STATEMENT OF JURISDICTION

In this original proceeding, Laibe complains of Respondent's Order denying Laibe's Motion To Dismiss and Motion For Reconsideration. Specifically, Respondent's orders constitute a clear abuse of discretion as they deprive Laibe of the benefit of the bargained for contractual right to have all disputes arising out of the New Equipment Purchase Agreement heard in courts in Marion County, Indiana.

Pursuant to Texas Government Code Section 22.002, this Court has jurisdiction over this original proceeding. Mandamus relief is available to enforce forum-selection agreements because there is no adequate remedy by appeal when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause that covers the dispute. *In Re International Profit Assoc., Inc.*, 2009 Tex. LEXIS 5, \*4 (January 9, 2009); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231 (Tex. 2008) (per curiam).

## ISSUES PRESENTED

1. Whether the Respondent clearly abused his discretion in interpreting and refusing to enforce the forum selection clause contained in the New Equipment Purchase Agreement;
  - a. Whether the Respondent clearly abused his discretion to the extent that Respondent found the forum selection clause in the New Equipment Purchase Agreement ambiguous;
  - b. Whether Respondent clearly abused his discretion to the extent that Respondent based his decision on the fact that the forum selection clause at issue lacks a mutuality of obligation;
  - c. Whether Respondent clearly abused his discretion to the extent that Respondent based his decision on the fact that the New Equipment Purchase Agreement was not authentic.
  - d. Whether the Respondent clearly abused his discretion to the extent that Respondent determined that enforcement of the forum selection clause in the New Equipment Purchase Agreement would be unreasonable or unjust;
  - e. Whether the Respondent clearly abused his discretion to the extent that Respondent determined that the selected forum would be seriously inconvenient for trial.
2. Whether the Respondent clearly abused his discretion in denying Defendant's Motion To Dismiss;
3. Whether the Respondent clearly abused his discretion in denying Defendant's Motion To Reconsider.
4. Whether the Court of Appeals erred to the extent that it denied Relator's Petition For Writ of Mandamus based on the affirmative defense of laches asserted for the first time on appeal;
5. Whether the Court of Appeals erred to the extent that it denied Relator's Petition For Writ of Mandamus based on the affirmative defense of laches due to a 9 week interval between Respondent's final Order and the filing of the Petition For Writ of Mandamus.

## WHY THIS CASE WARRANTS REVIEW

Respondent and the Court of Appeals refused to enforce the forum selection clause contained in the New Equipment Purchase Agreement despite the fact that the forum selection clause is substantively identical to forum selection clauses this Court has found to be enforceable. In refusing to enforce a valid forum selection clause, Respondent and the Court of Appeals disregarded controlling precedent and denied Laibe of the benefit of the bargain without requiring Plaintiff to meet the “heavy burden” this Court has repeatedly required. This Court should grant review in this case in order to reaffirm and reinforce to Texas trial and appellate courts that its decisions must be followed and that its pronouncements must not be ignored.

## STATEMENT OF FACTS

This case arises out of the sale of a water drilling rig to Plaintiff by Laibe in March of 2006. (RR 4:16 – 5:4). The contract for the purchase of the water drilling rig was executed on March 10, 2006. (Id.). In the year after delivery, various problems arose with the drilling rig’s hydraulic pump. (CR 80-81 at paragraph 9). On June 8, 2007, the rig caught fire, and Plaintiff took the rig out of use. (CR 81 at paragraph 9).

On July 10, 2008, Plaintiff sued Laibe alleging causes of action for violations of the Texas Deceptive Trade Practices Act, common law fraud and breach of contract. (CR 79-85). In its Original Answer, Laibe moved to dismiss based on the forum selection clause contained in the New Equipment Purchase Agreement. (CR 66-76). On the day of the hearing on Laibe’s Motion To Dismiss, Plaintiff’s counsel filed its Response to Defendant’s Motion To Dismiss and a Brief in Support of Plaintiff’s Response To Motion To Dismiss. (CR 28-55, 56-64). Plaintiff argued that the forum selection clause is unenforceable because it is ambiguous with respect to the identity of the proper forum. (CR 56-64). Plaintiff also argued that the forum selection clause is unenforceable because it is unfair because it is contained in a “form contract” and because it restricts Plaintiff to a single forum while permitting Laibe to bring suit in other forums. (CR 56-64).

On September 30, 2008, the trial court held an evidentiary hearing on Laibe’s Motion To Dismiss. (RR1). At the hearing, Doug Jackson, Plaintiff’s manager/partner, testified that the signature on the New Equipment Purchase Agreement appeared to be his signature, but he did not remember signing it. (RR 20:7 – 21:16).

By order file stamped on October 2, 2008, the trial court denied the Motion To Dismiss. (CR 26). Respondent signed a separate Order Denying Defendant's Motion To Dismiss on October 8, 2008. (CR 24). Because Plaintiff did not file any response or brief prior to the September 30, 2008 hearing, Laibe filed a Motion To Reconsider in order to provide the trial court with additional evidence and responses to Plaintiff's arguments. (CR 6-20). By order dated December 19, 2008, the trial court denied Laibe's Motion To Reconsider. (CR 1).

On March 23, 2008, Laibe file its Petition For Writ of Mandamus in the Court of Appeals. On April 3, 2008, the Court of Appeals entered an order setting a briefing schedule for the parties. Plaintiff filed a Response brief in which it alleged that the forum selection clause should not be enforced because Laibe did not exercise due diligence in asserting its rights, because the forum selection clause is ambiguous, and because forum selection clause is fundamentally unfair because the New Equipment Purchase Contract is a "form contract", Laibe failed to inform Plaintiff of the forum selection clause and Plaintiff could not reject the contract.

On April 24, 2009, the Court of Appeals denied mandamus relief through a memorandum opinion without specifying the grounds on which it relied.

### **ARGUMENT AND AUTHORITIES**

In the last five years, this Court has granted mandamus relief six times in cases in which the trial court denied motions to dismiss based on forum selection clauses.<sup>2</sup> Each and every argument Plaintiff raised in opposition to Laibe's Motion To Dismiss has been rejected by this Court in recent opinions. Yet despite this Court's clear and unmistakable

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<sup>2</sup> *In Re International Profit Assoc., Inc.*, 2009 Tex. LEXIS 5, \*4 (January 9, 2009); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231 (Tex. 2008) (per curiam); *In re AutoNation, Inc.*, 228 S.W.3d 663, 667 (Tex. 2007) (orig. proceeding); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784, 48 Tex. Sup. Ct. J. 789 (Tex. 2005); *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559 (Tex. 2004); *In re AIU Ins. Co.*, 148 S.W.3d 109, 113 (Tex. 2004).

message that lower courts should enforce forum selection clauses, Texas courts remain reluctant to do so.

**A. Standard of Review**

A forum-selection clause is generally enforceable, and the burden of proof on a party challenging the validity of such a clause is heavy. *In re AIU Insurance Co.*, 148 S.W.3d 109, 113 (Tex. 2004). Enforcement of a forum selection clause is mandatory unless the opposing party *clearly* demonstrates that enforcement would be unreasonable and unjust, or that the clause was invalid due to fraud or overreaching. *In re Automated Collection Technologies*, 156 S.W.3d 557, 559 (Tex. 2004).

**B. Respondent clearly abused his discretion to the extent that Respondent found the forum selection clause in the New Equipment Purchase Agreement ambiguous**

The forum selection clause at issue in this case is clear and unambiguous. It specifically places the exclusive jurisdiction for any disputes arising out of the contract in courts in Marion County, Indiana. The forum selection clause states as follows:

**YOU AGREE THAT THE COURT OF THE STATE OF INDIANA FOR MARION COUNTY OR ANY FEDERAL COURT HAVING THE JURISDICTION IN THAT COUNTY SHALL HAVE EXCLUSIVE JURISDICTION OF ALL DISPUTES ARISING UNDER THIS CONTRACT.** You agree and consent that we may serve you by registered or certified mail, which shall be sufficient to obtain jurisdiction. Nothing stated in this Contract is intended to prevent us from commencing any action in any court having proper jurisdiction.

(CR 17, 36, 49, 73)(emphasis in original).

Clearly, Plaintiff agreed that Marion Indiana courts have “exclusive jurisdiction” over “all disputes arising under this Contract.” However, Plaintiff contends that the last sentence quoted above renders the first sentence ambiguous. Specifically, Plaintiff argues that the last sentence allows Laibe to bring a lawsuit in jurisdictions other than

Marion County, Indiana which means that jurisdiction in Marion County, Indiana is not truly “exclusive.”

First of all, the forum selection clause is unambiguous with respect to the jurisdiction in which Plaintiff is permitted to bring suit. Quite clearly, Plaintiff is only permitted to bring a lawsuit in courts in Marion County, Indiana. The provision concerning proper jurisdiction for lawsuits Laibe may file has absolutely no impact on the exclusive jurisdiction for Plaintiff’s lawsuit. Laibe believes that the forum selection clause unambiguously sets exclusive jurisdiction for all disputes in Marion County, Indiana regardless of who brings the lawsuit. However, there can be no reasonable interpretation that permits Plaintiff to file a lawsuit in any jurisdiction other than Marion County, Indiana.

Secondly, Plaintiff’s real argument is not that the contract is ambiguous, but that it is unfair to require Plaintiff to sue only in Marion County, Indiana while permitting Laibe to sue elsewhere. However, this Court has recently held that a substantively identical forum selection clause was enforceable. *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, (Tex. 2008) (per curiam). In *Lyon*, the forum selection stated as follows:

Jurisdiction. The state and federal courts in the Commonwealth of Pennsylvania will have jurisdiction over all matters arising out of this Agreement and the Lease Documents; provided, however, that nothing contained herein will prohibit [Lyon] from initiating action against Obligor, any Surety or the Collateral in any jurisdiction in which they reside or are located, as the case may be.

*Id.* at 230.

Like the forum selection in this case, the forum selection clause begins by identifying the exclusive jurisdiction for all matters arising out of the agreement. This “exclusive” jurisdiction is followed by a provision permitting one of the parties to bring action in a

different jurisdiction. This Court held that as long as consideration exists with respect to the underlying contract, forum selection clauses do not require mutuality of obligation. *Id.* at 233. In other words, parties may agree that one party must file suit in one jurisdiction but that the other party is not so bound. *See id.*

Plaintiff seems to believe that if the forum selection clause is ambiguous, it is automatically unenforceable, and Plaintiff is permitted to file suit anywhere it pleases. This is not correct. The finding of an ambiguity in a contract agreement does not result in an unenforceable contract. *Wallace v. Munson*, 2004 Tex. App. LEXIS 7726, No. 13-03-188-CV, 2004 WL 1902118 (Tex. App.--Corpus Christi 2004, no pet.)(not designated for publication). Rather, a finding of an ambiguity simply allows for the admission of parol evidence in order to ascertain and give effect to the intentions of the parties as expressed in the agreement. *Id.* Thus, even if the forum selection clause at issue is susceptible to the interpretation Plaintiff espouses, Respondent was required to apply this interpretation. Because Plaintiff's interpretation does not render the forum selection clause ambiguous or unfair, Respondent clearly abused his discretion in denying Laibe's Motion To Dismiss and Motion To Reconsider.

**C. Respondent clearly abused his discretion to the extent that Respondent determined that enforcement of the forum selection clause in the New Equipment Purchase Agreement would be unreasonable or unjust**

Plaintiff also appears to argue that enforcement of the forum selection clause contained in the New Equipment Purchase Agreement would be unreasonable or unjust because it is a "form contract." In support of this position, Plaintiff cites *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991). However, contrary to Plaintiff's position, in *Shute*, the U.S. Supreme Court rejected the contention

that forum selection clauses in form contracts are invalid. *Id.* In fact, the *Shute* Court actually upheld the enforcement of the forum selection clause at issue in that case. *Id.* Thus, rather than supporting Plaintiff's position, *Shute* actually favors Laibe's position in this case.

Further, even assuming that the New Equipment Purchase Agreement is a "form contract," this would not render the forum selection clause unenforceable. This is simply an argument that the contract is a contract of adhesion. However, a bargain is not negated simply because one party may have been in a more advantageous bargaining position; only if there is evidence of fraud, unfair surprise, or oppression will a court refuse to enforce a forum selection clause. *Luxury Travel Source v. Am. Airlines, Inc.*, 2008 Tex. App. LEXIS 9688, \*28 (Tex. App. Fort Worth Dec. 31, 2008). In addition, this Court has repeatedly held that contracts of adhesion are not per se unconscionable or void. *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 608 (Tex. 2005); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999). Thus, even if the New Equipment Purchase Agreement is considered to be a contract of adhesion, there is no evidence that it was executed as a result of any fraud, unfair surprise or oppression. Accordingly, to the extent that Respondent based his decision on the basis that the New Equipment Purchase Agreement is a contract of adhesion, Respondent clearly abused his discretion.

**D. Respondent clearly abused his discretion to the extent that Respondent determined that the selected forum would be seriously inconvenient for trial**

Although Plaintiff did not expressly assert that the forum selection clause at issue is unenforceable because the selected forum would be seriously inconvenient, Plaintiff elicited testimony that litigating this cause in Indiana would impose a hardship on

Plaintiff and its witnesses. (RR 16:4 – 18:10). However, this Court has rejected the argument that a hardship on parties or witnesses renders forum selection clauses unenforceable. This Court observed that:

inconvenience in litigating in the chosen forum may be foreseeable at the time of contracting, and when that is the case, "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."

*In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 234 (Tex. 2008) (per curiam).

This Court further observed that "by entering into an agreement with a forum-selection clause, the parties effectively represent to each other that the agreed forum is not so inconvenient that enforcing the clause will deprive either party of its day in court, whether for cost or other reasons." *Id.* Unless the forum selection clause requires litigation in a "remote alien forum", inconvenience will not render a forum selection clause unenforceable. *Id.*; *In re AIU Insurance Co.*, 148 S.W.3d 109, 113 (Tex. 2004)(holding that a forum selection clause requiring litigation in New York did not require litigation in a "remote alien forum"). Accordingly, to the extent that Respondent based his decision on the inconvenience of litigating this cause in Indiana, Respondent clearly abused his discretion.

**E. The Court of Appeals Erred to the Extent that it Denied Relator's Petition For Writ of Mandamus Based on the Affirmative Defense of Laches**

Plaintiff claims that mandamus relief should be denied because Laibe allegedly failed to exercise due diligence in seeking mandamus relief. Although unclear, it appears that Plaintiff's "due diligence" claim is in reality a claim that this mandamus action is barred by the doctrine of laches. Again, although it is not readily apparent, it appears that Plaintiff bases its laches defense on 1) alleged delays in the trial court and 2) the interval

APPENDIX