No.

IN THE SUPREME COURT OF ILLINOIS

LARRY D. FABIAN,

Plaintiff-Petitioner,

v.

BGC HOLDINGS, L.P.,

Defendant-Respondent.

Petition for Leave to Appeal From the Appellate Court of Illinois,
First Judicial District, Sixth Division No. 14-1576
There Heard on Appeal From the Circuit Court of Cook County
County Department, Law Division No. 2013 L 011756
The Honorable Patrick Sherlock Presiding

PETITION FOR LEAVE TO APPEAL

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ORAL ARGUMENT REQUESTED

PRAYER FOR LEAVE TO APPEAL

Pursuant to Ill. Sup. Ct. R. 315, Petitioner, Larry D. Fabian, respectfully prays that this Court grant him leave to appeal from the judgment of the Appellate Court of Illinois, First District, Sixth Division.

JURISDICTION

The First District Appellate Court issued its opinion, which is found in the attached Appendix on December 26, 2014, holding that choice of a forum where the employee lives or where the work was performed is not a right guaranteed under the Illinois Wage Payment and Collection Act (hereinafter "IWPCA" or the "Act") and that a forum selection clause in an employment agreement trumps an employee's right to sue in their home county pursuant to the IWPCA. The Appellate Court further held that the trial court erred in dismissing the IWPCA claim with prejudice and reversed and remanded. No petition for rehearing was filed.

POINTS RELIED UPON FOR REVIEW

This Court should grant leave to appeal this matter for the following reasons:

1. Denying this Petition will derogate the right of workers statewide to file suit to claim unpaid wages. If the Appellate Court's decision is not corrected, employers will be able to avoid application of the IWPCA by compelling employees to agree to choice of forum provisions allowing suit to be brought only in far off jurisdictions thus gutting the IWPCA.

2. Had Larry Fabian filed his lawsuit in a circuit court in the Second District or Fourth District his case likely would not have been dismissed. The Appellate Court's opinion will encourage forum shopping because unlike the Second and Fourth Districts, in the First District employment agreements violating the forum selection provisions of the IWPCA will be enforced. The Appellate Court's decision does not follow the reasoning of the Illinois Appellate Court, Second Judicial District and Fourth Judicial District in *Maher & Assocs. v. Quality Cabinets,* 267 Ill. App. 3d 69 (2d Dist. 1994), *English Co. v. Northwest Envirocon,* 278 Ill. App. 3d 406 (2d Dist. 1996), and *Mueller Co. v. Department of Labor*, 187 Ill. App. 3d 519, 524 (4th Dist. 1989).

3. The Appellate Court held that the choice of forum provision of the IWPCA and the clearly defined Illinois public policy are trumped by an employment agreement.

STATEMENT OF FACTS

Larry D. Fabian ("Fabian") was a broker on the floor of the Chicago Mercantile Exchange ("CME") and a resident of Cook County. C. 444. In July 2001, Fabian was hired by an affiliate of Defendant, BGC Partners, Inc. ("BGCP") C. 468. In 2007, Fabian was transferred to BGCP; and, in 2008, became a high-level employee of BCGH, a consolidated subsidiary of BGCP, entitled to other forms of compensation. C. 468.

As a high-level employee, Fabian earned a portion of his compensation in the form of Founding Partner Units, as a form of compensation for his

work. with BGCP a unit which could, at some point after he was no longer employed by BGCP, be converted into BGCP common stock. C. 444; C. 468. The parties entered into a Partnership Agreement which provided in pertinent part:

> "Each of the parties agrees to the fullest extent permitted by law, that all actions arising out of or in connection with this Agreement, the Partnership's affairs, the rights and interests of the Partners... or for recognition or enforcement of any judgment arising out of or in connection with this Agreement or any breach or termination of this Agreement, shall be tried and determined exclusively in the state and federal courts of Delaware, and each of the partners hereby irrevocably submits with regard to any such Action for itself and in respect to its property, generally and unconditionally, to the exclusive jurisdiction of the aforesaid court." C. 397

In March 2009, BGCP failed to properly and fully compensate Fabian. C. 448. After BGCP ignored Fabian's requests for his unpaid compensation, Fabian terminated his employment with BGCP on March 27, 2009, and began working for a different brokerage firm. C. 468.

Four days later, Fabian filed a complaint with the CME arbitration panel. C. 444; C. 468. In the arbitration complaint, Fabian asked the panel to address both his unpaid compensation against BGCP and his claims for his Founding Partner Units under the Partnership Agreement against BGCH. C. 444. The CME arbitration panel conducted a hearing on January 26, 2010, and subsequently issued an order requiring BGCH affiliate Cantor Fitzgerald to pay Fabian $121,750 in unpaid commissions. C. 473. The

arbitration panel declined to hear or resolve Fabian's claims against BGCH. *Id.*

Proceedings in the Circuit Court

Plaintiff filed the instant action on October 24, 2013. C. 2. Plaintiff filed his First Amended Complaint naming additional parties on December 27, 2013. C. 145. Plaintiff's First Amended Complaint sought relief under the IWPCA. C. 145. Defendant filed a Section 615 and 619 Motion to Dismiss on January 24, 2014. C. 290. Defendant's Motion argued in pertinent part that Plaintiff's Complaint should be dismissed pursuant to 2-619(a)(9) because a forum selection clause in the parties' Partnership Agreement designated Delaware as the only forum for the resolution of Plaintiff's claimed violations of Illinois law.

On April 24, 2014, the circuit court entered an Order granting Defendant's Motion to Dismiss pursuant to 2-619(a)(9) for improper forum. C. 514. The circuit court made no determination as to which state law applies to the instant matter.[1] The circuit court's holding was limited to forum. On May 21, 2014, the circuit court entered an order clarifying its April 24, 2014 Order dismissing only Plaintiff's IWPCA claim with prejudice and granting Plaintiff leave to voluntarily dismiss the remaining counts of his complaint without prejudice. C. 519.

[1] The April 25, 2014 Order recites the fact that the Partnership Agreement contains a choice of law provision and the circuit court referenced this when discussing the fairness of the forum selection clause. However any discussion of choice of law is dicta and not necessary to the limited holding that the "Partnership Agreement's forum selection clause mandates dismissal of this action pursuant to 5/2-619(a)(9)." A-1, C. 502.

ARGUMENT

This Court should grant the Petition for Leave to Appeal to prevent a statewide derogation of employee rights and resolve a difference in the rights afforded to aggrieved employees in the First, Second, and Fourth Districts.

The Appellate Court erroneously affirmed a ruling dismissing Petitioner's IWPCA claim filed in Cook County where the alleged violations of Illinois law occurred in Cook County, Petitioner is a resident of Cook County, and the IWPCA and Illinois public policy allows violations of the IWPCA to be litigated in Illinois regardless of the purported restrictions contained in an employment agreement.

The objective of the IWPCA is to provide Illinois employees with a convenient forum to receive all earned benefits in a forum convenient to the employee. This Court should grant the Petition so that the entire state follows the plain language of the IWPCA and not modify or eliminate employees' rights under the IWPCA by requiring them to bring suit in a far off jurisdiction with no interest in enforcement of provisions of the IWPCA.

Denying the Petition would create a dangerous precedent derogating employee rights under the IWPA. The IWPA expressly allows employees to file suit in an Illinois court to recover unpaid wages earned in Illinois. This provision is absolutely necessary for every Illinois employee to preserve his or her rights. If this Court denies the Petition, employers could rely on choice of

forum provisions in employment agreements to require employees to pursue them in other inconvenient forums to secure payment.

I. THE APPELLATE COURT ERRONEOUSLY HELD THAT A CHOICE OF FORUM CLAUSE TRUMPED THE WORD OF, AND PUBLIC POLICY EMBODIED IN, THE IWPCA.

A. Fabian filed suit in the proper forum pursuant to the IWPCA.

The IWPCA allows Illinois employees to bring claims under the IWPCA in the circuit court of the county where the aggrieved employee lives or where the violation occurred. 820 ILCS 115/11. In this case, Fabian is the aggrieved employee, he lived in Cook County, and the violation occurred in Cook County.

It is a basic precept of statutory interpretation that a court should give meaning to each word, clause and sentence in a statute. *People v. Williams*, 116 Ill. App. 2d 332, (1st Dist. 1969); *see also Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990) (noting that statutes "should be construed so that no word or phrase is rendered superfluous or meaningless"); *Snyder v. Olmstead*, 261 Ill. App. 3d 986, 989-90 (1994) (noting that "each word, clause, or sentence must not be rendered superfluous but must, if possible, be given some reasonable meaning"). Instead, the Appellate Court concluded the forum selection clause of the IWPCA is meaningless and can be eliminated by employers by contract or employee handbook.

The IWPCA includes the following phase:

"Any employee aggrieved by a violation of this Act ... may file suit in the circuit court of Illinois, in the county where the alleged violation occurred or where any employee who is a party to the action resides."

735 ILCS 5/2-101, which defines proper venue in a civil action, provides in pertinent part, "every action must be commenced in the... county in which the transaction or some part thereof occurred of which the cause of action arose."

The only difference between the two forum statutes is that under the IWPCA the aggrieved employee may file suit in the county in which she resides. The legislature intended this provision to enable employees to easily enforce their other rights under the IWPCA. The right to file suit in the employee's home county is arguably the most important right afforded by the IWPCA because it enables employees to file suit in a convenient and cost effective forum to enforce the other rights afforded.

In order to give effect to every phrase in the statute, the proper conclusion is that the statutory intent is to grant jurisdiction in a convenient forum that might not otherwise be available. If the Appellate Court's interpretation of the IWPCA is not reversed, the phrase "in the county where the alleged violation occurred" will be rendered meaningless because 735 ILCS 5/2-101 states that all actions may be brought where the violation occurred. This Court should give effect to every phrase in the statute and hold the legislative intent is for the Act to supersede forum selection clauses.

The Appellate Court held "[i]n this case, the forum-selection clause in the partnership agreement did not seek to modify or eliminate the plaintiffs rights under the Act;" yet, the forum-selection clause revoked Plaintiff's right to file suit in the county where he resides. The venue provision of the IWPCA is rendered meaningless by the Appellate Court's decision.

B. The Legislature did not intend to provide additional rights to sales representatives not afforded to employees.

The fundamental purpose of both the Illinois Sales Representative Act (hereinafter "ISRA") and the IWPA is the same: to protect sales representatives and employees against the relatively greater bargaining position of those employing sales representatives and employees and to provide a statutory means for collecting commissions or wages that have been earned. (*Compare Maher & Associates, Inc. v. Quality Cabinets*, 267 Ill. App. 3d 69, 76, 640 N.E.2d 1000, 1005 (2d Dist. 1994) with *Mueller Co. v. Department of Labor*, 187 Ill. App. 3d 519, 524 (4th Dist. 1989)). Both statutes reflect fundamental public policy that, under Illinois law, should not be thwarted by a forum-selection clause.

"The [ISRA] is designated as a corollary to the [IWPCA]" *English Co. v. Northwest Envirocon*, 278 Ill. App. 3d 406, 413 (2d Dist. 1996). The two statutes were enacted at approximately the same time for the same purpose with very similar restrictions and remedies. *Compare* 820 ILCS 115, *et seq.*

and 820 ILCS 120, *et seq*. It is illogical to afford sales representatives additional remedies not afforded to employees.

C. The forum selection clause at issue is void because it violates strong Illinois public policy.

The forum selection clause at issue here should be voided as violative of Illinois public policy. The payment of employees for their labor is a fundamental Illinois public policy. Illinois employees should not bear the expense of prosecuting violations of the IWPCA in a jurisdiction outside of Illinois. Under Illinois law, a forum-selection clause is voidable if it violates a fundamental Illinois public policy. *Maher & Associates, Inc. v. Quality Cabinets*, 267 Ill. App. 3d 69, 74, 203 Ill. Dec. 850, 640 N.E.2d 1000 (1994). This Court should overturn the Appellate Court's decision and hold, consistently with the plain language of the IWPCA and public policy of our state as explained in other appellate opinions, that an employer cannot attempt to avoid suits for collection of unpaid wages in Illinois by including a forum selection clause in their employment agreements.

When the legislature, by enacting a statute, declares the public policy of the State, the judicial branch must defer to that pronouncement. *Lyons v. Turner Construction Co.*, 195 Ill. App. 3d 36, 41 (1st Dist. 1990). Illinois has a clear policy in favor of facilitating aggrieved workers' claims for unpaid wages. Employers cannot directly modify or eliminate the rights granted by this statute. *See Mueller*, 187 Ill. App. 3d at 524.

The Third District held "the public has a clear and definite interest in enforcing the [IWPCA]." *People ex rel. Martin v. Lipkowitz*, 225 Ill. App. 3d

980, 985 (3d Dist. 1992). The primary objective of the IWPCA is to ensure that employees receive all earned benefits upon leaving their employer and the evil it seeks to remedy is the forfeiture of any of those benefits. *Id.* The legislature of Illinois, by enacting this section, evidently desired to make unpaid employees whole without their having to litigate in a potentially distant forum. *Avco Delta Corp. v. United States*, 484 F.2d 692, 704 (7th Cir. 1973). Accordingly, courts have invalidated attempts by employers to modify or eliminate rights granted to an employee under the such as the right to file suit in the county where the employee lives. *See Id; Mueller*, 187 Ill. App. 3d at 524; *Maher*, 267 Ill. App. 3d at 74.

Requiring Fabian to file suit for a violation of the IWPCA in Delaware would greatly increase his expense and directly contradicts the policy underlying the Act to reduce the aggrieved employee's expense. In its decision, the Appellate Court effectively eliminated Fabian's rights under the IWPCA by requiring him to bring suit in a far-off jurisdiction that has no interest in the enforcement of the rights of Illinois employees under the IWPCA.

Delaware has no interest in upholding Illinois law or protecting the rights of Illinois employees. The Defendant and the related entities all share an office in Chicago and have their main office in New York—not Delaware. C. 200. Fabian has no presence or affiliation in Delaware. C. 148.

Accordingly, this Court should overturn the circuit court's Order and allow an Illinois court to enforce Illinois law and policy.

II. THE FIRST DISTRICT OPINION WILL ENCOURAGE FORUM SHOPPING BECAUSE IT DOES NOT FOLLOW THE REASONING OF TWO SECOND DISTRICT OPINIONS AND ONE FOURTH DISTRICT OPINION INTERPRETING THE IWPCA.

Simply put, had Larry Fabian filed his lawsuit in a circuit court in the Second District or Fourth District his case likely would not have been dismissed. Allowing the First District's decision to stand will encourage forum shopping. By relying on *Calanca v. D & S Manufacturing Co.*, 157 Ill. App. 3d 85, 87-88 (1987) (pre-ISRA/IWPCA case) instead of following the reasoning of analogous recent cases from other districts, the First District created a new, contrary, line of reasoning allowing the employer to violate the forum selection provisions of the IWPCA.

The Appellate Court relied on its decision in *Calanca v. D & S Manufacturing Co.*, 157 Ill.App.3d 85, 87-88 (1987) which interpreted an agreement between a sales representative and his employer entered into before the ISRA was enacted. *Calanca* is inapplicable and the First District should have followed the reasoning of recent Second District cases to create uniform law across Illinois rather than holding that "Contracts between businessmen... should be enforced by courts" regardless of what statute or public policy they violate.

The reasoning of *English Co. v. Northwest Envirocon*, 278 Ill. App. 3d 406 (2d Dist. 1996) is sound and would have controlled had Fabian's case been filed in the Second District circuit court where the court held that "the [ISRA] is designated as a corollary to the [IWPCA]" and constitutes the legislature's pronouncement that protecting unpaid workers is fundamental public policy in Illinois. *Id.* at 411. The court reasoned based on the plain language of the statute that the ISRA should to be interpreted broadly to protect the same workers who, but for their status as independent contractors, would be protected by the IWPCA. Thus, the law interpreting the ISRA should guide this Court's interpretation and application of the IWPCA. The ISRA provides in pertinent part: "'Sales representative' means a person who contracts with a principal to solicit orders and who is compensated, in whole or in part, by commission, but shall not include... one who qualifies as an employee of the principal pursuant to the IWPCA." 820 ILCS 120/1(4). This Court should clarify the law statewide and adopt the Second District's reasoning applying cases interpreting the ISRA to cases under the IWPCA and hold that both void forum-selection clauses in employment agreements that interfere with an employee's right granted by statute to file suit in a convenient forum in Illinois.

The Second District has addressed a similar issue in *English Co. v. Northwest Envirocon*, 278 Ill. App. 3d 406 (2d Dist. 1996) and its reasoning is equally applicable here. Just like Fabian, the plaintiff worked for the

defendant under an agreement containing a forum-selection clause requiring disputes to be litigated in another state. As a result of several disputes, the plaintiff terminated its relationship with the defendant, after which the defendant refused to pay compensation owed to the plaintiff, alleging that plaintiff had breached the contract. *Id.* at 409. The plaintiff filed suit under the sales representative counterpart to the IWPCA, the ISRA. *Id.* As in this case, the defendant sought to dismiss the claim by enforcing its forum-selection clause. The Second District found that the forum-selection provision of the ISRA constituted fundamental public policy. *Id.* at 410-11. This Court should adopt the Second District's reasoning and create consistent law throughout the state, holding that the forum selection provisions of both the IWPCA and ISRA constitute fundamental public policy of the state of Illinois.

Again, had the instant case been filed in the Second District rather than the First District, *Maher & Assocs. v. Quality Cabinets,* 267 Ill. App. 3d 69 (2d Dist. 1994) would have controlled where the Second District held that the choice of forum clause in the contract, requiring an action to be brought in Texas, was void against the public policy of Illinois to protect sales representatives. The court reasoned "we may void the forum-selection clause if it violates a fundamental Illinois public policy. When the legislature, by enacting a statute, declares the public policy of the State, the judicial branch must defer to that pronouncement..." The Second District protected workers'

rights by voiding the forum selection clause. *Id.* Thus, had Fabian's case been filed in a circuit court in the Second District, the trial court would have held it must defer to the legislative pronouncement to allow IWPCA claims to be filed in the county where the employee lives or works. This Court should hold consistently with the Second District that the forum selection clause in the present case violates the public policy of Illinois protecting the rights of unpaid workers.

Had Fabian filed suit in a circuit court in the Fourth District his case would not have been dismissed because *Mueller Co. v. Department of Labor*, 187 Ill. App. 3d 519, 524 (4th Dist. 1989) would have controlled. In *Mueller* the Fourth District Court held, "[t]he primary objective of the IWPCA is to ensure employees receive all earned benefits upon leaving their employer and the evil it seeks to remedy is the forfeiture of any of those benefits. To follow the interpretation urged by the plaintiff would allow any employer to negate the protection provided by the Act simply by varying the terms of its employment policy or contract." Here, the Defendant varied the terms of the employment contract thus forfeiting Fabian's right under the IWPCA to file suit in the county in which he resides and works. It is necessary for this Court to grant this Petition to unify the law interpreting the IWPCA throughout the state so that the venue provision of the IWPCA is not rendered meaningless.

III. DENYING THE PETITION WOULD CREATE A DANGEROUS PRECEDENT DEROGATING EMPLOYEE RIGHTS UNDER THE IWPCA.

The IWPCA expressly allows employees to file suit to recover unpaid wages here in Illinois. This is one of the rights guaranteed by the IWPCA and the right the agreement deprived Fabian of. This provision is absolutely necessary for every Illinois employee to preserve her rights. If this Court denies the Petition, employers could rely on choice of forum provisions in employment agreements to require employees to pursue them in other states to secure payment.

If the Petition is denied, an employer of low wage workers could require each employee to sign an employment agreement including a forum selection clause designating any state, such as Alaska or Hawaii, as the only forum for suit. Then the employer could stop paying wages in violation of the Act and the employee could not sue for back wages because the cost of proceeding in Alaska or Hawaii would outweigh the wages owed. If the Petition is denied, average Illinois employees may be, in some cases, be unable to pursue claims for lost wages. The IWPCA will rarely be enforced if it can be circumvented using a choice of forum provision in an employment agreement.

The legislature likely foresaw the potential problem of forcing Illinois workers to travel cross-country (or even cross-state) to pursue lost wage

claims and enacted the instant statute expressly allowing employees to file suit in a convenient forum. The IWPCA will quickly be rendered ineffective if the Petition is denied and employers are allowed to rely on forum-selection clauses to prevent unpaid employees from exercising their rights under the Act. This Court should grant the Petition and uphold Illinois employee rights.

The issue for review here is not what is convenient for Fabian; rather, it is a question of whether this Court values Illinois employees' right to payment of wages. This Court is faced with a simple question: Is an employer's right to chose forum more important than an employee's right for payment for her work?

This Court's interpretation of the IWPCA will affect how business is done in Illinois. Denying the Petition would effectively deprive millions of Illinois workers of the right to sue for wages by taking the teeth out of the IWPCA. If this Court allows employers to include forum selection clauses in employment agreements, we will quickly see forum selection clauses limiting average employees' right to file suit in a convenient forum where Illinois law and public policy will be enforced.

The majority of Illinois employees cannot afford to pursue a lost wage claim in another state and the amount of lost wages sought frequently does not justify the expense of litigating in another state. If this Court denies the Petition, employers could rely on choice of forum provisions in employment agreements to require employees to pursue unpaid wage claims in far off

jurisdictions effectively preventing application of the IWPCA and leaving thousands of employees unpaid.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff/Petitioner, LARRY D. FABIAN, respectfully requests that this Court grant his Petition for Leave to Appeal.

Respectfully submitted,
LARRY D. FABIAN,
Petitioner-Plaintiff,

By: _____
One of His Attorneys

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Dated: January 28, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Illinois Supreme Court Rule 341(c), I certify that this Petition for Leave to Appeal conforms with the requirements of Rules 341(a) and (b). The length of this Petition, excluding the Appendix, is 17 pages.

By: _____
ALEXANDER N. LOFTUS

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Dated: January 28, 2015

No. _____

IN THE SUPREME COURT OF ILLINOIS

LARRY FABIAN,	)	Petition for Leave to Appeal From the Appellate Court of Illinois, First Judicial District, Sixth Division
Petitioner,	)	Appeal No. 14-1576
v.	)	There Heard on Appeal From the Circuit Court of Cook County,
BGC HOLDINGS, L.P.,	)	County Department, Law Division,
Respondent.	)	Circuit Court No. 2013 L 011756

NOTICE OF FILING

TO: James M. Witz, Esq.
Jennifer Schilling, Esq.
Catherine S. Lindemann, Esq.
Littler Mendelson, P.C.
321 North Clark Street, Suite 1000
Chicago, IL 60654

PLEASE TAKE NOTE that on January 28, 2015, we filed the original and 19 copies of the PETITION FOR LEAVE TO APPEAL with the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701, by depositing a copy of a the same in the U.S. Mail located at 311 W. Superior Street, Chicago, Illinois 60654, at or before 5:00 p.m., copies of which are herewith served upon you.

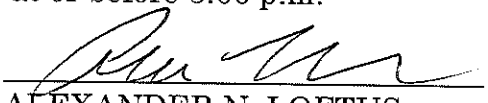
Respectfully submitted,

LARRY FABIAN,
Plaintiff/Petitioner

By: _____
One of His Attorneys

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that I filed with the Illinois Supreme Court and served upon counsel the foregoing NOTICE OF FILING and PETITION FOR LEAVE TO APPEAL by enclosing copies thereof in the U.S. Mail located at 311 W. Superior Street, Chicago, Illinois 60654, with proper postage prepaid, on January 28, 2015, at or before 5:00 p.m.



ALEXANDER N. LOFTUS

APPENDIX

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2014 IL App (1st) 141576

SIXTH DIVISION
Opinion filed: December 26, 2014

No. 1-14-1576

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

LARRY D. FABIAN, Plaintiff-Appellant, v. BGC HOLDINGS, LP, Defendant-Appellee, and BGC PARTNERS, INC., MARK WEBSTER and PATRICK TROY, Defendants.	)	Appeal from the Circuit Court of Cook County. No. 2013 L 011756 Honorable Patrick J. Sherlock, Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court, with opinion. Justices Hall and Rochford concurred in the judgment and opinion.

OPINION

¶ 1 The plaintiff, Larry D. Fabian, appeals from the circuit court order which dismissed, with prejudice, count I of his first amended complaint against the defendant, BGC Holdings, LP (BGC) pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012). In the dismissed count, the plaintiff alleged, in relevant part, that BGC violated the Illinois Wage Payment and Collection Act (Act) (820 ILCS 115/1, *et seq.* (West 2012)) when it refused to pay him certain compensation that it owed upon the termination of his

employment. For the reasons that follow, we reverse the judgment of the circuit court and remand the matter for further proceedings.

¶ 2 On December 27, 2013, the plaintiff filed his first amended complaint alleging the following facts. In July 2001, the plaintiff was hired by Cantor Fitzgerald as a broker at the Chicago Mercantile Exchange (CME). In 2007, he was transferred to Cantor Fitzgerald's spinoff firm, BGC. BGC is a holding company for financial trading entities and is organized as a Delaware limited partnership with its principal place of business in New York. "BGC GP, LLC" is the listed general partner, and "Cantor Fitzgerald, L.P." is listed as a limited partner .[1] In 2008, the plaintiff entered into an "Agreement of Limited Partnership of BGC Holdings, L.P., Amended and Restated as of March 31, 2008" (hereinafter "partnership agreement") with BGC wherein he became "Founding Partner Number 69." Under the terms of the partnership agreement, a founding partner was a class of limited partnership interest holding "founding partner interests," including "founding partner units," "grant units," and "high distribution units." The plaintiff alleged that, while employed with BGC, he earned 100,393 founding partner units as a form of compensation which, upon this termination, could be converted into "BGC Partners Class A Common Stock" (hereinafter "common stock")

¶ 3 On March 27, 2009, the plaintiff terminated his employment with BGC and began working for another securities firm. Four days later, the plaintiff initiated an arbitration proceeding before the CME in which he was awarded $121,758 in commissions owed to him by

[1] Mark Webster is the executive managing director and Patrick Troy is the managing director of BGC's Chicago office. Webster and Troy were individually named in the first amended complaint along with BGC Partners, Inc., but later, the plaintiff voluntarily dismissed all claims against these defendants. Accordingly, they are not parties to this appeal.

Cantor Fitzgerald. The issues of the number of his founding partner units and common stock shares through BGC to which he was entitled were not decided by the arbitration committee.

¶ 4 According to the first amended complaint, BGC informed the plaintiff in a letter dated March 6, 2013, that he forfeited all but 3,188 of his founding partner units because he left to work for a competitor in violation of the partnership agreement's non-compete clause. The letter further stated that the plaintiff's 3,188 founding partner units were sold and the proceeds were applied toward the unfunded balance of his trading account, which still had a remaining unfunded balance. The plaintiff alleged that, on August 22, 2013, he made a written demand upon BGC to liquidate his remaining 97,205 founding partner units or the equivalent common stock and send him the proceeds. He further alleged that BGC's statements of his holdings did not show that any of his shares had been forfeited. In a September 17, 2013, response letter, BGC disputed the number of total founding partner units the plaintiff claimed that he accrued and continued asserting its position that he forfeited any remaining founding partner units when he violated the partnership agreement's non-compete provision.

¶ 5 Count I of the first amended complaint, directed at BGC, BGC Partners, Inc., Webster and Trow, alleged that they knowingly violated the Act by refusing to liquidate the remaining 97,205 founding partner units owed by the plaintiff, causing him damages in excess of $860,856.35. Based essentially on the same allegations, the plaintiff also asserted common law claims against BGC for breach of contract (count II), breach of fiduciary duty (count III), and conversion (count IV), as well as two counts seeking declaratory judgments (counts VII and VIII). Additionally, the plaintiff alleged a claim under the Act (count V) and a breach of contract claim (count VI) against BGC Partners, Inc. for its alleged refusal to pay him 30,000 shares of Cantor Gaming stock.

¶ 6 The plaintiff attached to his complaint various portions of the partnership agreement, which included the following forum-selection and choice-of-law clauses:

> "SECTION 13.04 *Jurisdiction and Forum; Waiver of Jury Trial.* (a) Each of the Partners agrees, to the fullest extent permitted by law, that all Actions arising out of or in connection with this Agreement, the Partnership's affairs, the rights or interests of the Partners or the estate of any deceased Partner ***, or for recognition and enforcement of any judgment arising out of and in connection with this Agreement or any breach or termination or alleged breach or termination of this Agreement, shall be tried and determined exclusively in the state or federal courts in the State of Delaware, and each of the Partners hereby irrevocably submits with regard to any such Action for itself and in respect to its property, generally and unconditionally, to the exclusive jurisdiction of the aforesaid courts. Each of the Partners hereby expressly waives, to the fullest extent permitted by law, any right it may have to assert, and agrees not to assert, by way of motion, as a defense, counterclaim or otherwise, in any such Action: (i) any claim that it is not subject to personal jurisdiction in the aforesaid courts for any reason; (ii) that it or its property is exempt or immune from jurisdiction of any such court or from any legal process commenced in such courts; (iii) that (A) any of the aforesaid courts is an inconvenient or inappropriate forum for such Action, (B) venue is not proper in any of the aforesaid courts; and (iv) this Agreement, or the subject matter hereof or thereof, may not be enforced in or by any of the aforesaid courts.
>
> * * *

SECTION 13.13. *Governing Law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without regard to its conflicts of law principles."

¶ 7 On January 30, 2014, BGC brought a combined motion pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)), seeking the dismissal of all of the counts of the first amended complaint directed against it. In the section 2-615 (735 ILCS 5/2-615 (West 2012)) portion of its motion, BGC sought dismissal of all of the counts of the first amended complaint based upon the choice-of-law clause contained in the partnership agreement. In the section 2-619(a)(9) portion of its motion, BGC argued that the partnership agreement contained a valid forum-selection clause, requiring that any actions arising out of the agreement be brought in the State of Delaware.

¶ 8 The plaintiff responded to the motion arguing, as to the section 2-619(a)(9) portion, that the forum-selection provision of the partnership agreement violated the Illinois public policy embodied in the Act and, therefore, did not bar his claim thereunder. Further, in his affidavit, the plaintiff stated that he was presented with the partnership agreement and told that he had less than 24 hours to sign and return it and, therefore, he was deprived an opportunity to negotiate any provision of the agreement or have it reviewed by an attorney.

¶ 9 On April 25, 2014, the circuit court ruled on the section 2-619(a)(9) portion of BGC's motion. The circuit court granted the motion, and in its written order, found that the plaintiff's claims arose out of the partnership agreement which identifies Delaware as the chosen forum. The circuit court determined that the forum-selection provision was enforceable because it did not contravene Illinois public policy which favors enforcement of such provisions, and further, that the parties, all of whom were sophisticated businessmen, freely entered into the partnership

agreement and agreed to litigate their claims in Delaware. The circuit court determined that the plaintiff had not established that the forum-selection clause was so seriously inconvenient that he would be deprived his day in court or that the location of the parties or witnesses weighed in favor of either forum. The circuit court dismissed the counts of the plaintiff's first amended complaint directed against BGC, "with prejudice."

¶ 10 On May 12, 2014, the plaintiff filed a combined motion for clarification of the court's April 25 order and a motion to voluntarily dismiss all of the counts asserted against BGC Partners, Inc., Webster and Troy. In the motion, the plaintiff asked the circuit court to clarify which counts against BGC were dismissed with prejudice and to confirm that the court did not reach the merits of the arguments raised in BGC's section 2-615 motion.

¶ 11 On May 21, 2014, the circuit court clarified its order, stating that: (1) the plaintiff's claim against BGC under the Act (count I) was dismissed, with prejudice; (2) the remaining claims were dismissed, with prejudice as to re-filing in Illinois, but without prejudice as to filing in Delaware; and (3) it did not reach the merits of BGC's section 2-615 grounds for dismissal. Additionally, the circuit court granted the plaintiff's motion to voluntarily dismiss all claims against BGC Partners, Inc., Webster, and Troy, without prejudice, pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2012)). The plaintiff immediately appealed the circuit court's "with prejudice" dismissal of count I of his first amended complaint.

¶ 12 Although neither of the parties raised any challenge to our jurisdiction, we have a duty, *sua sponte*, to consider our jurisdiction and to dismiss an appeal if jurisdiction is lacking. *Greer v. Yellow Cab Co.*, 221 Ill. App. 3d 908, 917 (1991). The plaintiff states in his opening brief that we have jurisdiction over this appeal pursuant to Illinois Supreme Court Rule 303 (eff. June 4, 2008). Final orders are appealable as a matter of right under Illinois Supreme Court Rule 301

(eff. Feb. 1, 1994). A judgment or order is "final" if it disposes of the rights of the parties, either on the entire case or on some definite or separate part of the controversy. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 501 (1997). "A dismissal with prejudice is usually considered a final judgment" (*id.* at 502) as it indicates that the plaintiff will not be allowed to amend his complaint, thereby terminating the litigation (*J. Eck & Son, Inc. v. Reuben H. Donnelley Corp.*, 188 Ill. App. 3d 1090, 1093 (1989)). Here, the circuit court initially dismissed the plaintiff's entire first amended complaint against BGC, with prejudice, based on the forum-selection clause of the partnership agreement. The court later clarified its order, holding that count I was "dismissed with prejudice;" and that the remaining claims against BGC were "dismissed with prejudice to refiling in Illinois, but without prejudice to filing in Delaware." Additionally, the court granted the plaintiff's motion to voluntarily dismiss Webster, Troy and BGC Partners, Inc., and they were "voluntarily dismissed without prejudice."

¶ 13 Clearly the dismissal of count I was a final order as it was entered "with prejudice." We find that the dismissal of the remaining counts against BGC was also a final order as it terminated the plaintiff's right to bring those claims in Illinois. See *Dace International, Inc. v Apple Computer, Inc.*, 275 Ill. App. 3d 234 (1995) (reviewing the circuit court's grant of the defendant's section 2-619 motion asserting that the parties' forum-selection clause required claims be brought in California). As to the court's inclusion of the language "without prejudice to filing in Delaware," we deem that language superfluous and note that the substance of the court's order demonstrates that the order was a final one as to the plaintiff's ability to bring his common-law claims against BGC in Illinois. See *Schal Bovis*, 314 Ill. App. 3d at 567 (appealability of an order is based on its substance); *Nemanich v. Dollar Rent-A-Car Services,*

Inc., 90 Ill. App. 3d 484, 486-87 (1980) (interpreting court order "transferring" action to California as a final and appealable order).

¶ 14 Finally, when the plaintiff voluntarily dismissed the remaining defendants (Troy, Webster, and BGC Partners), the final orders relating to the dismissal of the claims against BGC became appealable. *Dubina*, 178 Ill. 2d at 503. The fact that the plaintiff could refile the voluntarily dismissed claims within one year is irrelevant to the appealability of the order as our supreme court has held that such actions are new actions and not a continuation of the prior proceeding. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 (2008); *Dubina*, 178 Ill. 2d at 503. We therefore conclude that we have jurisdiction under Rule 301 to entertain this appeal.

¶ 15 Turning to the merits of this appeal, we note that the plaintiff argues only that the circuit court erred in dismissing count I of his first amended complaint in response to BGC's section 2-619(a)(9) motion by reason of the forum-selection clause contained in the partnership agreement. He makes no argument in his brief as to the propriety of the dismissal of the remaining counts pled against BGC, and the issue is, therefore, forfeited. Ill. S.Ct R 341(h) (eff. Feb. 6, 2013); *Vancura v. Katris* 238 Ill.2d 352, 369 (2010).

¶ 16 A forum-selection clause in a contract is *prima facie* valid and, courts should enforce it unless the opposing party shows that enforcement would contravene the strong public policy of the state in which the case is brought (*Yamada Corp. v. Yasuda Fire & Marine Insurance Co.*, 305 Ill. App. 3d 362, 367 (1999)) or that enforcement would be unreasonable under the circumstances such that the selected forum " 'will be so gravely difficult and inconvenient that [the opposing party] will for all practical purposes be deprived of [its] day in court' " (*Calanca v. D & S Manufacturing Co.*, 157 Ill.App.3d 85, 87-88 (1987) (quoting *M.S. Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)). In this case, the plaintiff argues only that the circuit court

erred in determining that the parties' forum-selection clause did not violate the public policy of Illinois; he has made no argument that enforcement would be unreasonable under the circumstances. Consequently, the latter issue has also been forfeited. *Vancura*, 238 Ill. 2d at 369 (2010).

¶ 17 The U.S. Supreme Court has stated that a forum-selection clause "should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Zapata Off-Shore Co.*, 407 U.S. at 15. There is no public policy in Illinois disfavoring forum-selection clauses as such. *Yamada Corp.*, 305 Ill. App. 3d at 371 In fact, Illinois public policy favors the enforcement of forum-selection clauses, and the plaintiff fails to point to any applicable Illinois judicial or statutory declaration to the contrary. Rather, the plaintiff argues that, in this case, enforcement of the parties' forum-selection clause and the consequent dismissal of count I of his first amended complaint violates the public policy of Illinois which is embodied in the Act. In support of his argument in this regard, the plaintiff relies upon *English Co. v. Northwest Envirocon Inc.*, 278 Ill. App. 3d 406 (1996) and *Maher and Associates, Inc. v. Quality Cabinets*, 267 Ill. App. 3d 69 (1994). However, we find the plaintiff's reliance on these cases misplaced.

¶ 18 In *English*, the circuit court determined that the parties' forum and choice-of-law clauses violated Illinois public policy found in the anti-waiver section of the Illinois Sales Representative Act (820 ILCS 120/2 (West 1992)) *English*, 278 Ill. App. 3d at 408. However, the appellate court reversed the circuit court's decision on the basis that the statute did not apply to the defendant. *Id.* at 415-16. Here, the Act does not contain an anti-waiver section, or any similar provision.

¶ 19 Next, we question the analysis in *Maher*, which found that the forum-selection clause in the parties agreement was void as against the public policy of Illinois contained in the anti-waver section of the Illinois Sales Representative Act (820 ILCS 120/2 (West 1992). When the *Maher* court determined that the forum-selection clause violated public policy, it failed to address the issue of whether a court in the parties' selected forum could apply the Illinois Sales Representative Act. Rather, the court in *Maher* merely relied on a federal district court's memorandum order and concluded that the forum-selection clause was void because the Illinois legislature had pronounced that "protecting sales representatives is fundamental public policy in Illinois." *Maher*, 267 Ill. App. 3d at 75. Accordingly, we do not find the holding in *Maher* persuasive on the narrow issue the plaintiff raises in this case.

¶ 20 Neither do we find the holding in *Mueller Co. v. Department of Labor*, 187 Ill. App. 3d 519, 524 (1989), relevant to the case at bar. In *Mueller*, the parties' employment contract attempted to alter the meaning of "earned" vacation time, and the court found that the contract could not change the employee's rights to vacation time afforded under the Act. *Id.* In this case, the forum-selection clause in the partnership agreement did not seek to modify or eliminate the plaintiffs rights under the Act; it merely provided for the resolution of disputes arising out of the partnership agreement in Delaware courts.

¶ 21 Contracts between businessmen, such as the one entered into in this case, should be enforced by courts, absent some compelling reason why they should not be enforced. *Calanca*, 157 Ill.App.3d at 88. The plaintiff fails to convince us that the forum-selection clause in a contract should be voided on public policy grounds merely because a court in a forum other than Illinois might be required to resolve a claim based upon an Illinois statutory cause of action. The foregoing analysis leads us to conclude that it should not be. We find, therefore, that the circuit

court correctly declined to declare the forum-selection clause in the partnership agreement void as against Illinois public policy.

¶ 22 However, our analysis continues as the circuit court not only dismissed count I of the plaintiff's amended complaint by reason of the forum-selection clause in the partnership agreement, it did so "with prejudice." Although we generally review dismissals pursuant to section 2-619 of the Code *de novo*, the question of whether that dismissal should have been "with prejudice" is a matter committed to the sound discretion of the circuit court, and we, therefore, review its resolution of that issue using an abuse of discretion standard. See *Bruss v. Przybylo*, 385 Ill. App. 3d 399, 405 (2008); *Muirfield Village-Vernon Hills , LLC v. K. Reinke, Jr., & Co.*, 349 Ill.App.3d 178, 195 (2004).

¶ 23 A decision enforcing a forum-selection clause has no bearing on the question of whether there are any facts which the plaintiff can prove that will entitle him to recover, *i.e.* the merits of his claim. Rather, the decision only resolves the issue of where the plaintiff may litigate the merits of his claim. *Zapata Off-Shore Co.*, 407 U.S. 1 at 12. Dismissal of an action based upon a forum-selection clause is not an adjudication of the merits of a plaintiff's claim. See *A.W. Wendell & Sons, Inc. v. Qazi*, 254 Ill. App. 3d 97, 108 (1993).

¶ 24 A dismissal "with prejudice" is regarded as a final judgment on the merits and is deemed to be as conclusive of the rights of the parties as if the matter had proceeded to trial and been resolved by a final judgment adverse to the plaintiff. *People v. Chicago & Illinois Midland Ry. Co.*, 258 Ill.App.3d 409 (1994). Consequently, since the dismissal of a cause of action based upon the enforcement of a forum-selection clause, as is the case here, is not an adjudication on the merits, we conclude that the circuit court abused its discretion in dismissing count I of the plaintiff's first amended complaint "with prejudice."

¶ 25 Based upon the foregoing analysis, we could simply exercise our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) and amend the dismissal of count I to reflect that it is without prejudice to the plaintiff's right to pursue his claim under the Act in the Delaware courts. However, since the decision of whether count I should, or should not, be dismissed "with prejudice" rests on the enforceability of the choice-of-law clause of the partnership agreement and not the forum-selection clause, we decline to do so.

¶ 26 In the section 2-615 portion of its motion, BGC sought dismissal of count I of the plaintiff's first amended complaint based upon the choice-of-law clause contained in the partnership agreement. The circuit court never ruled on the issue and the parties have not addressed the question in their briefs before this court. We believe, therefore, that the appropriate course of action for us to take is to reverse the "with prejudice" dismissal of count I of the plaintiff's first amended complaint based upon the forum-selection clause and remand the matter back to the circuit court with directions to rule on BGC's section 2-615 grounds for dismissal of count I. In the event that the circuit court grants BGC's motion to dismiss count I based upon the choice-of-law clause in the partnership agreement, the dismissal should be entered "with prejudice." However, in the event that the circuit court denies the motion, then a dismissal without prejudice to the plaintiff's right to bring his claim against BGC under the Act in the Delaware courts should be entered.

¶ 27 Reversed and remanded with directions.