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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

LISA GALAVIZ, derivatively on behalf of ORACLE CORPORATION,

Plaintiff,

vs.

JEFFREY S. BERG, H. RAYMOND BINGHAM, MICHAEL J. BOSKIN, SAFRA A. CATZ, LAWRENCE J. ELLISON, HECTOR GARCIA-MOLINA, JEFFREY O. HENLEY, DONALD L. LUCAS, CHARLES E. PHILLIPS, JR., NAOMI O. SELIGMAN, and DOES 1-50, inclusive,

Defendants;

—and—

ORACLE CORPORATION,

Nominal Defendant.

Case No. C-10-3392-RS

NOMINAL DEFENDANT ORACLE CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS UNDER FED. R. CIV. PRO. 12(b)(3) FOR IMPROPER VENUE; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Date:	December 2, 2010
Time:	1:30 p.m.
Ctrm:	3, 17th Floor
Judge:	Honorable Richard Seeborg

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 2, 2010, at 1:30 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Richard Seeborg, Courtroom 3, 17th floor, 450 Golden Gate Avenue, San Francisco, California 94102, Oracle Corporation ("Oracle") will move and hereby does move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(3) Plaintiff's Complaint for breach of fiduciary duty, abuse of control, and unjust enrichment based on violation of the False Claims Act (31 U.S.C. §§ 3729-3733). *See* Order re Scheduling of Motions, Dkt. No. 31 (Oct. 4, 2010); *see also R.A. Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996) (holding that motions to dismiss premised on a forum-selection clause should be brought under Rule 12(b)(3)).

This Motion is made on the grounds set forth in the attached Memorandum of Points and Authorities and is based on the following:

- this Notice of Motion and Motion and supporting Memorandum of Points and Authorities;
- the Declaration of Philip T. Besirof and its supporting exhibits;
- the papers already on file with the Court in this action; and
- such further written and oral argument as may be presented at or before the time this Motion is taken under submission by the Court.

ISSUE TO BE DECIDED

(Civ. L.R. 7-4(a)(3))

In light of the forum-selection clause in Oracle's bylaws, which provides that the sole and exclusive forum for derivative actions brought against the company shall be Delaware Chancery Court, should this action be dismissed?

INTRODUCTION

Nominal defendant Oracle Corporation ("Oracle"), a Delaware corporation, seeks dismissal of this derivative action. Oracle's bylaws contain a forum-selection clause that specifies that Delaware Chancery Court shall be the "sole and exclusive forum for any actual or purported derivative action brought on behalf of the Corporation." This action falls squarely within the scope of the forum-selection clause, which was duly adopted by Oracle's Board of Directors. Forum-selection clauses are presumptively valid. The action therefore should be dismissed.[1]

BACKGROUND

Oracle is a Delaware corporation. Compl. ¶ 11. Oracle operates under a Certificate of Incorporation granting the Board the "power to adopt, amend or repeal Bylaws of the Corporation." Besirof Decl., Ex. A.

In 2006, the Board of Directors ("Board") adopted a resolution amending Oracle's bylaws ("Bylaws"); the amendment added a forum-selection clause for derivative suits. Besirof Decl., Ex. B. The forum-selection clause states: "The sole and exclusive forum for any actual or purported derivative action brought on behalf of the Corporation shall be the Court of Chancery in the State of Delaware." Besirof Decl., Ex. C. On July 10, 2006, Oracle filed a Form 8-K with the Securities and Exchange Commission publicly disclosing the new provision. Besirof Decl., Ex. D. Oracle's Bylaws also have been publicly available on its website since August 2006. *See* Oracle's Bylaws, http://www.oracle.com/corporate/investor_relations/bylaws.pdf (last visited on October 28, 2010); Besirof Decl. at ¶ 6.

On May 29, 2007, a qui tam action was filed against Oracle in the Eastern District of Virginia based on alleged violations of the False Claims Act, 31 U.S.C. §§ 3729-3733. *United States ex rel. Paul Frascella v. Oracle Corporation*, Case No. 07-cv-529. On July 29, 2010,

[1] Pursuant to the Court's October 4, 2010 order, this motion to dismiss is based solely on Oracle's forum-selection clause. *See See* Order re Scheduling of Motions, Dkt. No. 31. Defendants will move to dismiss on other grounds, if necessary, following resolution of the venue issue.

approximately four months after the qui tam action was unsealed, the United States filed a complaint in intervention in that case. Four days later, on August 2, 2010, Plaintiff filed this derivative Complaint, which relies extensively on the qui tam and intervention complaints, alleging that certain Oracle directors and officers breached their fiduciary duties and abused their control in connection with contracts between Oracle and the federal government.

Plaintiff here (as in the qui tam and intervention complaints) alleges that Oracle negotiated a software products and services contract with the federal government through the General Services Administration. *See* Compl. ¶ 41. According to Plaintiff, Oracle failed to provide accurate information to the federal government and failed to provide the agreed-upon pricing. *Id.* ¶¶ 56-72. Plaintiff asserts that during the relevant time period, Oracle Board members "authorized or recklessly ignored" the Company's efforts to defraud the federal government. *Id.* ¶¶ 89-90. Without making a demand on the Board, Plaintiff filed this derivative suit purportedly on behalf of Oracle to redress alleged injuries suffered by Oracle. *Id.* ¶¶ 86-87.

ARGUMENT

I. THE FORUM-SELECTION CLAUSE IN ORACLE'S BYLAWS APPLIES DIRECTLY TO THIS ACTION.

Federal courts look to federal law to determine the validity and enforceability of a forum-selection clause. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988).[2] When interpreting forum-selection

[2] Plaintiff correctly pleads federal question jurisdiction based on allegations in the Complaint that "relate to" violations of the False Claims Act. Compl. ¶ 8; *see also Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986). In any event, in light of the controlling forum-selection clause, this Court need not address subject matter jurisdiction. *See Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007) (holding that a "district court … may dispose of an action by a *forum non conveniens* dismissal bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant"); *Potter v. Hughes*, 546 F.3d 1051, 1055 (9th Cir. 2008) (resolving a demand futility motion while specifically not addressing subject matter jurisdiction because other questions were "'logically antecedent' to the issue of whether we have jurisdiction over this action"); *In re LimitNone LLC*, 551 F.3d 572, 576 (7th Cir. 2008) (holding, in a removed case, that the "district court was not required to determine its own subject-matter jurisdiction before ordering the case transferred" pursuant to forum-selection clauses).

clauses, federal courts "look for guidance 'to general principles for interpreting contracts.'" *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (internal citation omitted).[3]

Plaintiff purportedly brings her action "derivatively on behalf of Oracle Corporation." Compl. ¶ 1. The action falls squarely within the forum-selection clause, which provides that the "sole and exclusive forum for any *actual or purported derivative action brought on behalf of the Corporation* shall be the Court of Chancery in the State of Delaware." Besirof Decl., Ex. C (emphasis added).

The forum-selection clause requires that any derivative action be filed in Delaware Chancery Court. The Ninth Circuit has held that a forum-selection clause is mandatory if its language "clearly require[s] *exclusive* jurisdiction." *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989); *see also BRC Grp., LLC v. Quepassa Corp.*, No. C 09-01506, 2009 WL 2424669, at *3 (N.D. Cal. Aug. 7, 2009) ("The express language of a forum-selection clause may render it mandatory in one of two ways: (1) where it clearly designates a forum as the exclusive one, or (2) where it specifies venue in addition to jurisdiction."). Oracle's forum-selection clause designates Delaware as the "sole and exclusive" forum for all derivative actions and "the Court of Chancery in the State of Delaware" as the specific venue where derivative actions must be brought. Therefore, derivative actions purportedly brought on behalf of Oracle must be brought in that court.

II. THE COURT SHOULD DISMISS THIS CASE BECAUSE THE FORUM-SELECTION CLAUSE IS PRESUMPTIVELY VALID AND ENFORCEABLE.

Forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).[4]

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[3] The analysis and result would be the same under Delaware law. *See Aveta, Inc. v. Colon*, 942 A.2d 603, 607 n.7 (Del. Ch. 2008) ("Generally under Delaware law, 'forum selection clauses are *prima facie* valid and should be enforced unless the clause is shown by the resisting party to be unreasonable under the circumstances.'") (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)).

[4] Although *Bremen* was an admiralty case, its holding applies to forum-selection clauses "in general." *R.A. Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996).

Delaware law, which governs a Delaware corporation's internal affairs, *see Burks v. Lasker*, 441 U.S. 471, 477-78 (1979), permits a corporation's board to amend the bylaws if that power is conferred on the board in the corporation's certificate of incorporation. *See* 8 DEL. C. § 109(a). Consistent with this requirement, Oracle's Certificate of Incorporation empowers its Board to amend the Bylaws. Besirof Decl., Ex. A. A bylaw "may contain any provision … relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees" so long as the provision is "not inconsistent with law or with the certificate of incorporation." 8 DEL. C. § 109(b).

Adoption of the forum-selection clause was a valid act by the Board. Besirof Decl., Ex. A. The forum-selection clause addresses "the rights or powers of [Oracle's] stockholders," and was passed unanimously by resolution of the Board consistent with the power granted to it under Oracle's Certificate of Incorporation. Besirof Decl., Ex. B. The Delaware Chancery Court, citing Delaware Corporate Code Section 109(b), has stated that "corporations are free to [adopt] charter provisions selecting an exclusive forum for intra-entity disputes." *In re Revlon, Inc. Shareholders Litig.*, 990 A.2d 940, 960 & n.8 (Del. Ch. 2010); *cf. Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999) (enforcing, in a derivative suit against a limited liability company, a forum-selection clause in its governance documents). The forum-selection clause here is presumptively valid: it was validly adopted by the Board, and there was public notice of its adoption.

III. THERE IS NO BASIS FOR REBUTTING THE FORUM-SELECTION CLAUSE'S PRESUMPTIVE VALIDITY AND ENFORCEABILITY.

To avoid enforcement of a valid forum-selection clause, the "party challenging the clause bears a 'heavy burden of proof' and must 'clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or over-reaching.'" *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004) (quoting *Bremen*, 407 U.S. at 15).

Applying *Bremen*, the Ninth Circuit has articulated three circumstances in which forum-selection clauses should not be enforced: (1) the forum-selection clause was procured through fraud or undue influence; (2) the forum-selection clause will deprive the resisting party of its day

in court; or (3) the forum-selection clause violates "a strong public policy of the forum in which the suit is brought." *Argueta*, 87 F.3d at 325 (internal citations omitted).[5] These exceptions are construed "narrowly." *Id.*

Plaintiff cannot meet her "heavy burden" of demonstrating that any of these exceptions applies. There is no evidence of fraud or undue influence in this case. The Board adopted the forum-selection provision based on the authority granted to it under Oracle's Certificate of Incorporation. *See*, *supra*, II.

Enforcing the forum-selection clause will not deprive Plaintiff of her claim. On the contrary, Delaware Chancery Court is the most logical forum in which to litigate: Oracle is a Delaware corporation; Delaware law will govern the merits of Plaintiff's claims, *see In re Silicon Graphics Inc. Securities Litig.*, 183 F.3d 970, 990 (9th Cir. 1999); and, unlike in California, it is indisputable that all of the individual defendants are subject to personal jurisdiction in Delaware. *See* 10 DEL. C. § 3114(a).

A party opposing enforcement of a forum-selection clause must make a very strong showing of inconvenience. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594-95 (1991) (describing the "serious inconvenience" that a party must show to demonstrate an inconvenient forum). Plaintiff cannot meet this burden. First, as a derivative plaintiff, Plaintiff's choice of forum deserves little weight. *See, e.g.*, *Koster v. (American) Lumbermen's Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) (holding that in a derivative action "the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened"). Second, requiring Plaintiff to pursue her claim in Delaware will not inconvenience her, as there is no allegation that she is a witness to any of the underlying facts. *See San Francisco Tech., Inc. v.*

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[5] In most cases involving forum-selection clauses, the clauses are contained in contracts. Bylaws are a type of contract. *See Stolow v. Greg Manning Auctions Inc.*, 258 F. Supp. 2d 236, 249 (S.D.N.Y. 2003) ("The bylaws of a corporation constitute a contract between a corporation and its members."); *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 239 (Del. 2008) (noting that bylaws are an "internal governance contract"). Indeed, interpretation of corporate bylaws is governed by general rules of contract interpretation. *See Andrew Farms v. Calcot, Ltd.*, 258 F.R.D. 640, 648 (E.D. Cal. 2009); *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008).

The Glad Products Co., No. 10-CV-00966 JF (PVT), 2010 WL 2943537, at *10 (N.D. Cal. July 26, 2010); *Farmer v. Ford Motor Co.*, No. C-07-3539-SI, 2007 WL 4224612, at *3 (N.D. Cal. Nov. 28, 2007).

Finally, enforcing the forum-selection clause would not violate a strong public policy of federal courts. "Courts routinely honor mandatory forum selection clauses, including federal California courts." *Mahoney v. Depuy Orthopaedics, Inc.*, No. CIV F 07-1321, 2007 WL 3341389, at *6 (E.D. Cal. Nov. 8, 2007). Indeed, the overriding policy of the federal courts is "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Undermining that policy, derivative actions are commonly filed in multiple jurisdictions. *See* Deborah A. DeMott, *Shareholder Derivative Actions: Law and Practice* § 4:1 (2003). Here, in fact, shortly after Plaintiff filed the Complaint in federal court, a virtually identical copy-cat action was filed in San Mateo County Superior Court; Oracle has removed that action to this Court and the Court has ordered it related to this case.[6] Moreover, the *Prince* plaintiff has moved to remand his case to state court, seeking to require Oracle to defend two different (although substantively identical) lawsuits in two different procedural postures. These are precisely the types of litigation tactics that forum-selection clauses are designed to avoid. Enforcing the forum-selection clause in Oracle's Bylaws will promote certainty and predictability, while avoiding duplicative litigation.

[6] *Prince v. Berg, et al.*, Case No. C-10-4233 RS (initially filed on August 19, 2010).

CONCLUSION

For the reasons stated above, the Complaint should be dismissed.

Dated: October 28, 2010

MORRISON & FOERSTER LLP

By: /s/ Jordan Eth
Jordan Eth

Attorneys for Nominal Defendant
ORACLE CORPORATION