JORDAN ETH (BAR NO. 121617)
jeth@mofo.com
PHILIP T. BESIROF (BAR NO. 185053)
pbesirof@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

DORIAN DALEY (BAR NO. 129049)
dorian.daley@oracle.com
DEBORAH K. MILLER (BAR NO. 95527)
deborah.miller@oracle.com
JAMES C. MAROULIS (BAR NO. 208316)
jim.maroulis@oracle.com
ORACLE CORPORATION
500 Oracle Parkway
Redwood Shores, California 94065
Telephone: 650.506.5200
Facsimile: 650.506.7114

Attorneys for Nominal Defendant
ORACLE CORPORATION

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, et al.,

Defendants;

–and–

ORACLE CORPORATION,

Nominal Defendant.

PHILIP T. PRINCE,

Plaintiff,

vs.

JEFFREY S. BERG, et al.,

Defendants;

–and–

ORACLE CORPORATION,

Nominal Defendant.

Master File Nos. C-10-3392-RS & C-10-4233-RS

NOMINAL DEFENDANT ORACLE CORPORATION'S REPLY TO PLAINTIFF GALAVIZ'S AND PLAINTIFF PRINCE'S OPPOSITIONS TO ORACLE'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(3) FOR IMPROPER VENUE

Hearing Date: December 2, 2010
Time: 1:30 p.m.
Court: 3, 17th Floor
Judge: Hon. Richard Seeborg

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. THE FORUM-SELECTION CLAUSE IN ORACLE'S BYLAWS IS VALID. 1

A. The Board May Adopt Bylaws Without Shareholder Consent. 2

B. The Board Validly Adopted The Forum-Selection Clause. 4

C. The Bylaw Does Not Deprive Plaintiffs Of Any Vested Rights. 6

II. ENFORCEMENT OF THE FORUM-SELECTION CLAUSE IS REASONABLE. 7

III. THE COURT SHOULD DISMISS THE *PRINCE* ACTION WITHOUT CONSIDERING SUBJECT MATTER JURISDICTION. 9

CONCLUSION 11

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

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Int'l Rent-A-Car, Inc. v. Cross,
Civ. No. 7583, 1984 Del. Ch. LEXIS 413 (Del. Ch. May 9, 1984) 2

Aquair Ventures, LLC v. Gulf Stream Coach, Inc.,
No. C-08-2903 SC, 2009 WL 1458264 (N.D. Cal. May 26, 2009) 10

Badie v. Bank of Am.,
67 Cal. App. 4th 779 (1998) 3, 9

CA, Inc. v. AFSCME Emp. Pension Plan,
953 A.2d 227 (Del. 2008) 4

Cal. v. San Francisco Sav. & Loan Soc'y,
66 Cal. App. 53 (1924) 3

Carnival Cruise Lines, Inc. v. Shute,
499 U.S. 585 (1991) 3, 7, 8

Casady v. Modern Metal Spinning & Mfg. Co.,
188 Cal. App. 2d 728 (1961) 6, 7

Douglas v. United States District Court,
495 F.3d 1062 (9th Cir. 2007), *cert. denied*, 522 U.S. 1242 (2008) 3

Elf Atochem N. Am., Inc. v. Jaffari,
727 A.2d 286 (Del. 1999) 5

Fanning v. Capco Contractors, Inc.,
711 F. Supp. 2d 65 (D.D.C. 2010) 8

In re Revlon, Inc. Shareholders Litig.,
990 A.2d 940 (Del. Ch. 2010) 5

Intershop Commc'ns AG v. Super. Ct.,
104 Cal. App. 4th 191 (2002) 9

Joseph E. Seagram & Sons, Inc. v. Conoco, Inc.,
519 F. Supp. 506 (D. Del. 1981) 6

Kerobo v. Southwestern Clean Fuels, Corp.,
285 F.3d 531 (6th Cir. 2002) 10

Kidsco, Inc. v. Dinsmore,
674 A.2d 483 (Del. Ch. 1995) 3, 6

Koster v. (Am.) Lumbermens' Mut. Cas. Co.,
330 U.S. 518 (1947) 10

Lions Gate Entm't Corp. v. Image Entm't Inc.,
No. Civ. A 2011-N, 2006 WL 1668051 (Del. Ch. June 5, 2006)........ 5

M/S Bremen v. Zapata Off-Shore Co.,
407 U.S. 1 (1972) 8, 9

Mahoney v. Depuy Orthopaedics, Inc.,
No. CIV F 07-1321, 2007 WL 3341389 (E.D. Cal. Nov. 8, 2007) 8

Modius, Inc. v. PsiNaptic, Inc.,
No. C 06-02074 SI, 2006 WL 1156390 (N.D. Cal. May 2, 2006) 10

Provincial Gov't of Marinduque v. Placer Dome, Inc.,
582 F.3d 1083 (9th Cir. 2009) 10, 11

Schoon v. Troy Corp.,
948 A.2d 1157 (Del. Ch. 2008) 6

Smith, Valentino & Smith, Inc. v. Super. Ct.,
17 Cal. 3d 491 (1976)........ 9

Spradlin v. Lear Siegler Mgmt. Serv. Co., Inc.,
926 F.2d 865 (9th Cir. 1991) 8, 10

Stern v. Advanta Bank Corp.,
No. C 09-3276 PVT, 2010 WL 1028375 (N.D. Cal. Mar. 18, 2010)........ 10

STATUTES AND RULES

8 Del. Code Ann.
§ 102(b)(1)........ 4
§ 109(a)........ 2, 3
§ 109(b) 4, 6
§ 202(b) 6
§ 211 3

OTHER AUTHORITIES

18 C.J.S. Corporations § 165........ 2

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

INTRODUCTION

Plaintiffs' oppositions[1] rest on a fundamental misunderstanding of Delaware corporate law. According to Plaintiffs, the forum-selection clause contained in Oracle's bylaws is invalid because all Oracle shareholders, including the two Plaintiffs here, did not themselves consent to it. In compliance with Delaware law, however, Oracle's Certificate of Incorporation provides that the "Board of Directors of the Corporation shall also have the power to adopt, amend or repeal the bylaws of the Corporation . . . ." No more is required, and Plaintiffs cite no authority preventing the Board from taking this action.

Both Plaintiffs also argue that the provision is "unreasonable" and "unfair" as it would deprive them of their "day in court." This, too, makes no sense. Plaintiffs are suing in a representative capacity, and they are "witnesses" to nothing. Discovery will occur in the same place, regardless of the court hearing the matter. The provision establishes venue; it does not prevent anyone from filing suit.

In addition, although Galaviz argues that "no court has ever" approved this type of provision, this is just an argumentative way of saying that no cases address this precise issue. Plaintiff Galaviz herself does not cite any court or commentator even hinting that there is any problem with this provision—let alone rejecting it. The lack of authority addressing these provisions is not surprising, as they are a relatively recent phenomenon adopted in response to what many see as an epidemic of wasteful, duplicative derivative litigation.

Whether or not this Court first reaches the subject matter jurisdiction issue, the Court should dismiss this action for improper venue.

ARGUMENT

I. THE FORUM-SELECTION CLAUSE IN ORACLE'S BYLAWS IS VALID.

Plaintiffs do not dispute that their actions fall within the forum-selection clause, which provides that Delaware shall be the "sole and exclusive forum for any actual or purported derivative action brought on behalf of the Corporation." Declaration of Christopher M. Ing ("Ing

[1] This brief responds to both Plaintiffs' opposition briefs.

Decl."), Ex. C.[2] Plaintiffs instead assert that the forum-selection clause is invalid because: (1) they did not consent to be bound by it; (2) the clause belongs in Oracle's Certificate of Incorporation, rather than in its bylaws (Galaviz, but not Prince, makes this argument); and (3) the forum-selection clause cannot change their pre-existing "rights." Plaintiffs' arguments are contrary to Delaware law, which expressly allows a board—consistent with a certificate of incorporation—to amend bylaws without shareholder consent.

A. The Board May Adopt Bylaws Without Shareholder Consent.

Plaintiffs attempt to rewrite Delaware law by arguing that the bylaw containing the forum-selection clause is invalid because they did not consent to be bound by it. Galaviz Opp'n at 7, ECF No. 39; Prince Opp'n at 7-8, ECF No. 24.

As discussed in Oracle's opening brief, section 109(a) provides that "any corporation may, in its certificate of incorporation, confer the power to adopt, amend, or repeal bylaws upon the directors." *See* 8 Del. C. § 109(a). Oracle's Certificate of Incorporation does just that; it provides, "The Board of Directors of the Corporation shall also have the power to adopt, amend or repeal the bylaws of the Corporation . . . ." Ing Decl., Ex. A, Article 5. A board's right to amend bylaws without shareholder approval is well-established. *See*, *e.g.*, 18 C.J.S. Corporations § 165 ("Bylaws ordinarily are binding on stockholders or members whether they expressly consent to them or not."); *Am. Int'l Rent-A-Car, Inc. v. Cross*, Civ. No. 7583, 1984 Del. Ch. LEXIS 413, at *6-9 (Del. Ch. May 9, 1984) (denying plaintiff's motion to enjoin bylaw provision adopted by the board without shareholder approval). Nowhere do Plaintiffs respond to this fundamental point that Oracle's Board had the power to amend the bylaws.

---

[2] Galaviz separately filed "Objections to Evidence" arguing that Oracle did not properly authenticate its: (1) Certificate of Incorporation; (2) July 2006 Board of Directors meeting minutes; (3) Bylaws; and (4) Form 8-K. Although there does not appear to be a serious dispute regarding the authenticity of these corporate records (most of which are publicly available), to eliminate any issue regarding these objections, Oracle contemporaneously submits the Declaration of Christopher M. Ing, Oracle's Managing Counsel & Assistant Secretary, in further support of its motion to dismiss and in response to Galaviz's Objections to Evidence.

1 Plaintiffs argue that since the bylaws are a type of contract, the bylaw requires consent
2 from all shareholders. *Kidsco, Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995) addressed
3 this very issue. The court explained: "[A]lthough the by-laws are a contract between the
4 corporation and its stockholders, the contract was subject to the board's power to amend the by-
5 laws unilaterally." *Id.* (internal citation omitted). That is precisely what happened here.
6 None of the authorities cited by Plaintiffs suggests that under Delaware corporate law,
7 shareholder consent was required for Oracle to adopt this provision. For example, *Douglas v.*
8 *United States District Court*, 495 F.3d 1062, 1065-67 (9th Cir. 2007), *cert. denied*, 522 U.S. 1242
9 (2008) (Prince Opp'n at 8), involved a class action for breach of contract against a long-distance
10 telephone service provider for changing the terms of a service contract without notifying
11 customers. Likewise, *Badie v. Bank of America*, 67 Cal. App. 4th 779 (1998) (Prince Opp'n at 8),
12 involved credit-card customers challenging the validity of an arbitration provision the bank added
13 to existing customer agreements. These cases have nothing to do with Delaware corporate law,
14 let alone the specific issue of a board's power to amend bylaws under section 109(a). *Cf.*
15 *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (holding that a forum-selection
16 clause's validity must be evaluated in the "context" in which it arises).
17 Both Plaintiffs rely on an 86-year-old California case, *California v. San Francisco*
18 *Savings & Loan Society*, 66 Cal. App. 53, 61 (1924), for the proposition that a bylaw cannot
19 unilaterally change shareholder rights. Leaving aside that Delaware—not California—law
20 governs here, the case held only that a bank must give notice to its depositors before adopting a
21 bylaw reducing the rate of interest on deposits, as doing so would "materially change the contract
22 of the depositor." *Id.* at 54. It has nothing to do with this case.
23 Finally, under Delaware law, shareholders themselves can take action if they disapprove
24 of a bylaw. Section 109 provides that shareholders have the right to adopt, amend, or repeal the
25 corporation's bylaws.[3] 8 Del. C. § 109(a); Ing Decl., Ex. C § 10.01. Oracle's shareholders have
26
27 [3] Of course, shareholders also have the right to voice their views in voting for or against directors. *See, e.g.*, 8 Del. C. § 211.
28

taken no action to alter the forum-selection clause in the four years since Oracle adopted it. Having failed to object to this bylaw for more than four years, these two Plaintiffs cannot now voice their personal disagreement with it by filing suit outside of Delaware.

B. The Board Validly Adopted The Forum-Selection Clause.

Galaviz, but not Prince, asserts that the forum-selection clause was approved in violation of Delaware law because this type of provision belongs in the company's charter, not its bylaws. Galaviz Opp'n at 5.

Oracle's opening brief showed that a bylaw "may contain any provision . . . relating to . . . the rights or powers of its stockholders" so long as the provision is "not inconsistent with law or with the certificate of incorporation." 8 Del. C. § 109(b). Galaviz's argument rests on a semantic distinction: She concedes that corporate bylaws may include provisions *relating to* shareholder rights, but asserts that "only a charter can include provisions which *limit* such rights." Galaviz Opp'n at 6. She cites no case law to support her argument, and instead points to section 102(b)(1), which provides that a company's charter *may* contain provisions "creating, defining, limiting, and regulating the powers of the corporation, the directors, and the stockholders." 8 Del. C. § 102(b)(1).

Galaviz's interpretation of section 102(b)(1) has been rejected by the Delaware Supreme Court. In *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 234 (Del. 2008), the court addressed the argument that section 102(b)(1) trumped section 109(b)'s broad language and required any provision that "limited" a board's powers to be contained in the certificate of incorporation, rather than in the bylaws. In rejecting the argument, the court explained that because bylaws, by their very nature, set down rules and procedures that bind a corporation's board and its shareholders, "most, if not all, bylaws could be said to limit" powers. *Id.* The court concluded that section 102(b)(1) did not restrict the scope of bylaws permissible under section 109(b).[4] *Id.* at 233-34.

---

[4] The court ultimately found that the particular bylaw violated another provision of Delaware law because it restricted directors from fully performing their fiduciary duties.

1 Galaviz also points to section 242, which describes the process for amending a certificate
2 of incorporation. This section has nothing to do with amending bylaws, and nothing to do with
3 this case. Indeed, Delaware courts have recognized the difference between a certificate of
4 incorporation, which a board may not amend unilaterally, and a bylaw, which a board can amend
5 on its own (subject to change by shareholders, as described above), so long as the certificate of
6 incorporation (as here) grants that authority. *See Lions Gate Entm't Corp. v. Image Entm't Inc.*,
7 No. Civ. A 2011-N, 2006 WL 1668051, at *7 (Del. Ch. June 5, 2006).
8 In any event, here, the forum-selection clause is procedural; it does not "limit" Plaintiffs'
9 substantive rights. Shareholders remain free to assert the same claims as before.
10 Galaviz also asserts that *In re Revlon, Inc. Shareholders Litig.*, 990 A.2d 940, 960 & n.8
11 (Del. Ch. 2010) supports her position, seizing on the court's reference to "charter" provisions in
12 its discussion of forum-selection clauses. Galaviz Opp'n at 5-7. But *Revlon*'s general
13 endorsement of forum-selection provisions was not limited to those contained in certificates of
14 incorporation. The court, in fact, cited the forum-selection clause in Oracle's bylaws at issue
15 here. 990 A.2d at 960 & n.8; *see also Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286 (Del.
16 1999) (enforcing, in a derivative suit against a limited liability company, a forum-selection clause
17 in its corporate government documents).
18 Finally, Plaintiffs argue—without any support—that the bylaw is defective because "all
19 10 of the [Individual Defendants] were present at the July 2006 meeting" where the bylaw was
20 adopted. Prince Opp'n at 1. That is just another way of saying that directors are prohibited from
21 adopting these provisions, since directors are *always* defendants in derivative actions and
22 plaintiffs can always name them as defendants as a means of avoiding the clause. Moreover, this
23 amendment was adopted more than four years before these suits were filed; more than four years
24 before the United States intervened in the qui tam action; a year before the qui tam action was
25 filed; and at a time when there were no pending derivative cases against Oracle's directors.
26 Plaintiffs offer no basis for evading the clause's plain meaning.
27
28

1 **C. The Bylaw Does Not Deprive Plaintiffs Of Any Vested Rights.**

2 Plaintiffs also argue that the forum-selection clause is invalid because it changes their pre-
3 existing rights. Prince Opp'n at 8-9. As the Delaware Chancery Court explained, "[t]he
4 difficulty with the argument is that [the plaintiffs'] 'vested right' premise is wrong." *Kidsco, Inc.*,
5 674 A.2d at 492. In *Kidsco,* the court rejected the plaintiffs' claim that the directors lacked the
6 power to amend the shareholders' pre-existing rights. *Id.* The court noted that where, as here, the
7 certificate of incorporation authorized the directors to amend the bylaws without shareholder
8 approval—and the shareholders were on notice that the bylaws could be amended—"no vested
9 rights can arise that would contractually prohibit an amendment." *Id.* (citing *Roven v. Cotter*, 547
10 A.2d 603, 608 (Del. Ch. 1988)).

11 Further, the forum-selection clause here does not operate "retroactively." Oracle adopted
12 the forum-selection clause in 2006, but Plaintiffs did not file suit until four years later, in 2010.
13 Because the forum-selection clause applies to suits filed after Oracle's adoption of the clause, it
14 operates prospectively. *See, e.g.*, *Schoon v. Troy Corp.*, 948 A.2d 1157, 1166 (Del. Ch. 2008)
15 (where no suit had been filed against the director at time of the bylaw amendment, director's
16 rights to advancement of fees under the pre-amendment bylaws had not been triggered; amended
17 bylaws controlled).

18 Plaintiffs cite no Delaware case suggesting the Board lacked the power to amend the
19 bylaws to add a forum-selection clause. In fact, while Prince relies on *Joseph E. Seagram &*
20 *Sons, Inc. v. Conoco, Inc.*, 519 F. Supp. 506, 511 (D. Del. 1981), the "only issue properly before
21 the Court" there was whether the corporation's actions were in compliance with section 202(b) of
22 the General Corporate Law.[5] 8 Del. C. § 202(b). Section 202(b) is not at issue here.

23 Prince (but not Galaviz) also points to a California case, *Casady v. Modern Metal*
24 *Spinning & Manufacturing Co.*, 188 Cal. App. 2d 728 (1961), for an "excellent analysis of the
25

26 [5] Section 202(b) expressly provides that where a restriction on transfer of shares is
adopted after shares have been issued, it is not binding upon outstanding shares unless the holders
27 either are parties to the agreement or have voted in favor of the restriction. No such provision is
contained in section 109(b). *Compare* 8 Del. C. § 202(b), *with* 8 Del. C. § 109(b).
28

1 law." Prince Opp'n at 8. Prince argues that *Casady* stands for the proposition that bylaw
2 amendments can relate only to the issuance of future shares. *Id*. But *Casady* involved whether a
3 court should order specific performance of a marital property settlement against a third-party
4 corporation. 188 Cal. App. 2d at 729. It says nothing about Delaware law; does not address the
5 fact that Oracle's Certificate of Incorporation permits the Board to amend the bylaws; and relies
6 on the notion of "vested rights," which—as discussed above—does not apply here.

7 **II. ENFORCEMENT OF THE FORUM-SELECTION CLAUSE IS**
8 **REASONABLE.**

9 Both Plaintiffs argue that, even if valid, enforcement of the forum-selection clause would
10 be unreasonable because: (1) Oracle exerted undue influence or overweening bargaining power
11 in adopting it; (2) Delaware Chancery Court is inconvenient for Plaintiffs; and (3) enforcement
12 violates a strong public policy of the forum in which the suit is brought. Galaviz further argues
13 that enforcement is unreasonable because there was no notice of the provision. Plaintiffs,
14 however, cannot carry the "'heavy burden of proof' . . . required to set aside the clause on
15 grounds of inconvenience." *Carnival Cruise Lines*, 499 U.S. at 595 (quoting *M/S Bremen v.*
16 *Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972)).

17 As discussed, Oracle did not exert undue influence when amending its bylaws to include
18 the forum-selection clause. Oracle's Board acted pursuant to authority granted to it under the
19 Certificate of Incorporation.

20 Indeed, in *Carnival Cruise Lines,* the Supreme Court held that a forum-selection clause
21 was reasonable and enforceable even when its inclusion in a form agreement was "not subject to
22 negotiation." 499 U.S. at 593. The forum-selection clause at issue was buried in a fine-print
23 contract attached to a cruise ticket. *Id.* at 587-88. The plaintiff, a Washington State resident,
24 purchased her ticket from a Washington State travel agent. While on a cruise between Los
25 Angeles, California, and Puerta Vallarta, Mexico, she injured herself. She filed suit in federal
26 court in Washington, and argued that she had not "bargained for" the clause, which required suit
27 to be filed in Florida, and that enforcement would deprive her of her "day in court." *Id.* at 589.
28 Reversing the Ninth Circuit, the Supreme Court upheld the validity of the clause.

In so ruling, the Court pointed to several factors that apply with at least equal force here. The Court noted that a cruise line could be subject to suits "in several different fora." *Id.* at 593. Oracle, too, is subject to this problem, which is exemplified by these very cases, as derivative suits were filed in federal and California state court (and could be filed in Delaware, as well). The clause here, like the clause in *Carnival Cruise Lines*, also "spar[es] litigants the time and expense of pretrial motions to determine the correct forum and conserve[es] judicial resources that otherwise would be devoted to deciding those [issues]." *Id.* at 594. Finally, like the passengers who would benefit from reduced fares in *Carnival Cruise Lines*, *see id.*, shareholders here should benefit as Oracle spends less litigating forum issues and facing duplicative derivative suits.

Further, neither Plaintiff can demonstrate that litigating in Delaware Chancery Court is a "serious inconvenience." *Id.* Plaintiffs claim that "extra costs" and "the absence of witnesses and other evidence in Delaware" could make Delaware inconvenient. These claims are baseless—both legally and factually. *Carnival Cruise Lines* upheld a forum-selection clause that required the Washington State plaintiff, the key witness in the case, to litigate her claims in Florida. *See id.*; *see also Spradlin v. Lear Siegler Mgmt. Serv. Co., Inc.*, 926 F.2d 865, 869 (9th Cir. 1991) (enforcing a forum-selection clause, explaining that the party resisting enforcement failed to produce evidence or offer specific allegations of the alleged inconvenience).

Here, there is no "hardship" at all. Discovery can be conducted anywhere, regardless of where suit is filed. Indeed, with modern discovery procedures, counsel need only hit a button to produce documents or send recorded testimony anywhere in the world. *See, e.g.*, *Fanning v. Capco Contractors, Inc.*, 711 F. Supp. 2d 65, 70 (D.D.C. 2010). Moreover, Plaintiffs bring their suits allegedly on behalf of Oracle—they possess no personal knowledge of the events at issue. *Cf. M/S Bremen*, 407 U.S. at 19 (rejecting a party's inconvenience argument because "it cannot even be assumed that" plaintiff would need to attend the proceeding).

Nor can Plaintiffs raise any federal or California public policy that would be violated by enforcement of the forum-selection clause, because there is none. "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). Similarly, under California law, forum-selection clauses are entitled to great weight. *See Smith, Valentino & Smith, Inc. v. Super. Ct.*, 17 Cal. 3d 491, 495-96 (1976). For example, California courts have enforced forum-selection clauses found in adhesion contracts. *See Intershop Communications AG v. Super. Ct.*, 104 Cal. App. 4th 191, 201 (2002). *Badie v. Bank of America*, 67 Cal. App. 4th 779, 806 (1998) (cited by Plaintiffs) is not on point as the public policy at issue in that case was the right to choose a "judicial forum" rather than "arbitration or some other method of dispute resolution." Here, the forum-selection clause does not deprive Plaintiffs of a judicial forum.

Finally, Plaintiffs had notice of the Board's ability to change its bylaws. Oracle's Certificate of Incorporation provided the Board with that power. And, on July 10, 2006, Oracle filed a Form 8-K with the Securities and Exchange Commission, publicly disclosing the bylaw containing the forum-selection clause. Ing 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 November 17, 2010); Ing Decl. ¶ 6.

In short, if the fine-print forum-selection clause in *Carnival Cruise Lines* that required a personal injury plaintiff to fly cross-country to litigate her claim was valid, then certainly a duly-adopted bylaw by Oracle's Board of Directors, subject to later shareholder amendment or repeal, requiring derivative suits to be filed in Oracle's state of incorporation, easily passes the test.

III. THE COURT SHOULD DISMISS THE PRINCE ACTION WITHOUT CONSIDERING SUBJECT MATTER JURISDICTION.

Prince argues that the Court "should" determine federal jurisdiction before the venue issue based on "judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum." Prince Opp'n at 4 (citing *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007)). Both of these factors, however, support Oracle's position that the Court should consider the venue issue first and resolve the *Prince* case on that ground.

As a derivative plaintiff, Prince's choice of forum deserves little weight, and thus this factor does not help resolve the sequencing question. *See Koster v. (Am.) Lumbermens' Mut. Cas. Co.*, 330 U.S. 518, 524 (1947). Moreover, the venue issue is present in both the *Galaviz* action and the *Prince* action. The forum-selection clause is valid and enforceable, and thus both cases will be dismissed and re-filed, if anywhere, in Delaware Chancery Court. Even if the Court finds the forum-selection clause invalid, that would still result in one court—this Court—determining the federal jurisdiction issue for both cases.[6]

On the other hand, Prince's argument—that federal jurisdiction should be considered first—undermines judicial economy. The parties have briefed the venue issue, and it is ripe for this Court to decide. But if the Court considers jurisdiction first and remands the *Prince* case to state court without addressing the forum-selection clause, the parties will have to start over and re-brief and re-argue this issue.[7] Alternatively, if the Court finds jurisdiction and then finds the forum-selection clause valid, it will dismiss both cases, causing the jurisdiction inquiry to have been a waste of judicial resources. The burden and waste that this imposes on courts and the parties is precisely what *Sinochem* sought to avoid.[8]

Finally, Prince cites *Provincial Government of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083 (9th Cir. 2009), and argues that since this case is a removed action, "practical

---

[6] Galaviz concedes that the claims in both cases "are similar" and states that "the Court has jurisdiction over her action." Galaviz Opp'n at 1.

[7] Galaviz states that if the Court remands *Prince*, she "is prepared to dismiss her action." Galaviz Opp'n at 1. That does not eliminate the duplication of effort discussed above.

[8] Prince suggests that Oracle may have waived its right to challenge venue by removing the case, relying on *Kerobo v. Southwestern Clean Fuels, Corp.*, 285 F.3d 531 (6th Cir. 2002). *See* Prince Opp'n at 5 n.5. As Prince himself acknowledges, *Kerobo* is contrary to Ninth Circuit precedent. In *Spradlin*, 926 F.2d at 865, the Ninth Circuit held that the district court properly enforced a forum-selection clause in a removed case by granting a motion to dismiss pursuant to rule 12(b)(3), and courts in this district have followed that holding. *See, e.g.*, *Stern v. Advanta Bank Corp.*, No. C 09-3276 PVT, 2010 WL 1028375 (N.D. Cal. Mar. 18, 2010); *Modius, Inc. v. PsiNaptic, Inc.*, No. C 06-02074 SI, 2006 WL 1156390 (N.D. Cal. May 2, 2006). The case cited by Prince—*Aquair Ventures, LLC v. Gulf Stream Coach, Inc.*, No. C-08-2903 SC, 2009 WL 1458264, at *2 (N.D. Cal. May 26, 2009)—is off point because the plaintiff in that case waived its challenge to venue when it failed to assert it in its answer and first motion to dismiss. Here, Oracle has not answered the complaint and has asserted its venue challenge in its first motion to dismiss.

consequences" weigh against determining the venue issue first. Prince identifies no "practical consequences" that preclude application of *Sinochem*'s holding because there are none. Plaintiffs do not deny that they are still able to bring their suits, albeit in Delaware. In any event, *Placer Dome* involved a different situation because the district court in that case decided the federal jurisdiction issue. 582 F.3d at 1088.

CONCLUSION

For the reasons stated above and in Oracle's motion to dismiss, the complaints should be dismissed.

Dated: November 18, 2010

MORRISON & FOERSTER LLP

By: /s/ Jordan Eth
Jordan Eth

Attorneys for Nominal Defendant
ORACLE CORPORATION

JORDAN ETH (BAR NO. 121617)
jeth@mofo.com
PHILIP T. BESIROF (BAR NO. 185053)
pbesirof@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

DORIAN DALEY (BAR NO. 129049)
dorian.daley@oracle.com
DEBORAH K. MILLER (BAR NO. 95527)
deborah.miller@oracle.com
JAMES C. MAROULIS (BAR NO. 208316)
jim.maroulis@oracle.com
ORACLE CORPORATION
500 Oracle Parkway
Redwood Shores, California 94065
Telephone: 650.506.5200
Facsimile: 650.506.7114

Attorneys for Nominal Defendant
ORACLE CORPORATION

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, et al.,

Defendants;

–and–

ORACLE CORPORATION,

Nominal Defendant.

PHILIP T. PRINCE,

Plaintiff,

vs.

JEFFREY S. BERG, et al.,

Defendants;

–and–

ORACLE CORPORATION,

Nominal Defendant.

Master File Nos. C-10-3392-RS & C-10-4233-RS

DECLARATION OF CHRISTOPHER M. ING IN SUPPORT OF NOMINAL DEFENDANT ORACLE CORPORATION'S MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

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

1 I, Christopher M. Ing, declare as follows:
2 1. I am Managing Counsel & Assistant Secretary of Oracle Corporation ("Oracle"). I
3 have been employed in Oracle's legal department since 2003. My responsibilities at Oracle
4 include corporate governance matters and maintenance of corporate records. I make this
5 declaration in support of Oracle's Motion to Dismiss and supporting Memorandum of Points and
6 Authorities. I make this declaration based upon my own personal knowledge. If called as a
7 witness, I could and would testify to the facts stated herein.
8 2. Attached as Exhibit A is a true and correct copy of Oracle's Amended and
9 Restated Certificate of Incorporation as of the date hereof. Oracle maintains its Amended and
10 Restated Certificate of Incorporation as part of its corporate records, and I obtained this copy
11 from Oracle's corporate records.
12 3. Attached as Exhibit B is a true and correct copy of excerpts from the Minutes of
13 the July 9-10, 2006 Oracle Board of Directors' meeting (the "Minutes"). In the ordinary course
14 of business, Oracle records minutes from its Board of Directors' meetings. The Minutes were
15 recorded by a person with knowledge, near the time of the meeting, in accordance with Oracle's
16 regular practice. In the ordinary course of business, Oracle maintained these Minutes as part of
17 its corporate records, and I obtained this copy from Oracle's corporate records.
18 4. Attached as Exhibit C is a true and correct copy of Oracle's Amended and
19 Restated Bylaws as of the date hereof. In the ordinary course of business, Oracle maintains its
20 bylaws as part of its corporate records, and I obtained this copy from Oracle's corporate records.
21 5. Attached as Exhibit D is a true and correct copy of Oracle's Form 8-K dated July
22 10, 2006, filed with and available from the U.S. Securities and Exchange Commission.
23 6. I last visited Oracle's website (www.oracle.com) on November 17, 2010, and
24 confirmed that Oracle's bylaws are available to the public. In connection with my duties in
25 maintaining Oracle's corporate records, I have knowledge that Oracle's bylaws have been
26 available on Oracle's website since August 28, 2006.
27 I declare under penalty of perjury under the laws of the United States that the foregoing is
28 true and correct.

1 Executed this 18th day of November, 2010, at Santa Clara, California.

2

3 /s/ Christopher M. Ing

4 CHRISTOPHER M. ING

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

I, Jordan Eth, am the ECF User whose ID and password are being used to file this Declaration of Christopher M. Ing in Support of Oracle's Motion to Dismiss and Supporting Memorandum of Points and Authorities. In compliance with General Order 45, X.B., I hereby attest that Christopher M. Ing has concurred in this filing.

Dated: November 18, 2010

MORRISON & FOERSTER LLP

By: /s/ Jordan Eth
Jordan Eth

Attorney for Nominal Defendant
ORACLE CORPORATION

Exhibit A

Delaware

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AMENDMENT OF "OZARK HOLDING INC.", CHANGING ITS NAME FROM "OZARK HOLDING INC." TO "ORACLE CORPORATION", FILED IN THIS OFFICE ON THE THIRTY-FIRST DAY OF JANUARY, A.D. 2006, AT 5:48 O'CLOCK P.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.

AND I DO HEREBY FURTHER CERTIFY THAT THE EFFECTIVE DATE OF THE AFORESAID CERTIFICATE OF AMENDMENT IS THE THIRTY-FIRST DAY OF JANUARY, A.D. 2006, AT 8 O'CLOCK P.M.

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

4028125 8100

060093665

AUTHENTICATION: 4490622

DATE: 01-31-06

State of Delaware
Secretary of State
Division of Corporations
Delivered 05:48 PM 01/31/2006
FILED 05:48 PM 01/31/2006
SRV 060093665 - 4028125 FILE

CERTIFICATE OF AMENDMENT

OF

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION

Ozark Holding Inc., a corporation organized and existing under the laws of the State of Delaware (hereinafter called the "**Corporation**"), does hereby certify as follows:

1. Article 1 of the Corporation's Amended and Restated Certificate of Incorporation is hereby amended to read in its entirety as set forth below:

Article 1

The name of the Corporation is Oracle Corporation.

2. This Certificate of Amendment of Amended and Restated Certificate of Incorporation shall be effective as of 8:00 pm Eastern Standard Time on January 31, 2006.

3. This Certificate of Amendment of Amended and Restated Certificate of Incorporation has been duly adopted in accordance with the provisions of Section 242 of the General Corporation Law of the State of Delaware.

IN WITNESS WHEREOF, Ozark Holding Inc. has caused this Certificate to be executed in its corporate name this 31st day of January 2006.

OZARK HOLDING INC.
a Delaware corporation

By: Safra A. Catz
Name: Safra A. Catz
Title: President and Chief Financial Officer

(MP) 16157/018/MERGER.SUB/new oracle cert amend cert incorp name.change.doc

Delaware

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "OZARK HOLDING INC.", FILED IN THIS OFFICE ON THE THIRTY-FIRST DAY OF JANUARY, A.D. 2006, AT 4:03 O'CLOCK P.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

4028125 8100

060092731

AUTHENTICATION: 4490279

DATE: 01-31-06

State of Delaware
Secretary of State
Division of Corporations
Delivered 04:12 PM 01/31/2006
FILED 04:03 PM 01/31/2006
SRV 060092731 - 4028125 FILE

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION
OF
OZARK HOLDING INC.

Ozark Holding Inc., a corporation organized and existing under the General Corporation Law of the State of Delaware and originally incorporated in Delaware on September 9, 2005 (the "Corporation"), does hereby certify that:

FIRST: The Amended and Restated Certificate of Incorporation of the Corporation, in the form attached hereto as Exhibit 1, has been duly adopted by written consent of the Board of Directors of the Corporation in accordance with the provisions of Sections 141, 242 and 245 of the General Corporation Law of the State of Delaware.

SECOND: The Amended and Restated Certificate of Incorporation of the Corporation, in the form attached hereto as Exhibit 1, has been duly approved by the written consent of the stockholders of the Corporation in accordance with the provisions of Sections 228, 242 and 245 of the General Corporation Law of the State of Delaware.

THIRD: The Amended and Restated Certificate of Incorporation so adopted reads in full as set forth in Exhibit 1 attached hereto and incorporated herein by reference.

IN WITNESS WHEREOF, the Corporation has caused this Certificate to be signed and attested by its duly authorized officers this 31st day of January 2006.

OZARK HOLDING INC.

By: /s/ Safra A. Catz
Safra A. Catz, President and Chief Financial Officer

EXHIBIT 1

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION
OF
OZARK HOLDING INC.

Article 1

The name of the Corporation is Ozark Holding Inc.

Article 2

The address of the registered office of the Corporation in the State of Delaware is 2711 Centerville Road, Suite 400, in the City of Wilmington, County of New Castle. The name of its registered agent at that address is Corporation Service Company.

Article 3

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

Article 4

A The total number of shares of stock of all classes which the Corporation has the authority to issue is 11,001,000,000, consisting of 11,000,000,000 shares of Common Stock with a par value of $0.01 per share (the "Common Stock"), and 1,000,000 shares of Preferred Stock with a par value of $0.01 per share (the "Preferred Stock").

The Board of Directors is authorized, subject to any limitations prescribed by the law of the State of Delaware, to provide for the issuance of the shares of Preferred Stock in one or more series, to establish from time to time the number of shares to be included in each such series, to fix the designation, powers, preferences and rights of the shares of each such series and any qualifications, limitations or restrictions thereof, and to increase or decrease the number of shares of any such series (but not below the number of shares of such series then outstanding).

The designation and amount of the initial series of Preferred Stock and the powers, preferences and relative, participating, optional and other special rights of the shares of such series, and the qualifications, limitations or restrictions thereof are as follows:

B. Series A Preferred Stock

Section 1. Designation and Amount. The shares of such series shall be designated as "Series A Junior Participating Preferred Stock" (the "Series A Preferred Stock") and the number of shares constituting the Series A Preferred Stock shall be 200,000. Such number of shares may be increased or decreased by resolution of the Board of Directors; *provided*, that no decrease shall reduce the number of shares of Series A Preferred Stock to a number less than the number of shares then outstanding plus the number of shares reserved for issuance upon the exercise of outstanding options, rights or warrants or upon the conversion of any outstanding securities issued by the Corporation convertible into Series A Preferred Stock.

Section 2. Dividends and Distributions.

(A) Subject to the rights of the holders of any shares of any series of Preferred Stock (or any other stock) ranking prior and superior to the Series A Preferred Stock with respect to dividends, the holders of shares of Series A Preferred Stock shall be entitled to receive, when, as and if declared by the Board of Directors out of funds legally available for the purpose, quarterly dividends payable in cash on the first day of March, June, September and December in each year (each such date being referred to herein as a "Quarterly Dividend Payment Date"), commencing on the first Quarterly Dividend Payment Date after the first issuance of a share or fraction of a share of Series A Preferred Stock, in an amount (if any) per share (rounded to the nearest cent), subject to the provision for adjustment hereinafter set forth, equal to 1,000 times the aggregate per share amount of all cash dividends, and 1,000 times the aggregate per share amount (payable in kind) of all non-cash dividends or other distributions, other than a dividend payable in shares of Common Stock of the Corporation or a subdivision of the outstanding shares of Common Stock (by reclassification or otherwise), declared on the Common Stock since the immediately preceding Quarterly Dividend Payment Date or, with respect to the first Quarterly Dividend Payment Date, since the first issuance of any share or fraction of a share of Series A Preferred Stock. In the event the Corporation shall at any time declare or pay any dividend on the Common Stock payable in shares of Common Stock, or effect a subdivision or combination or consolidation of the outstanding shares of Common Stock (by reclassification or otherwise than by payment of a dividend in shares of Common Stock) into a greater or lesser number of shares of Common Stock, then in each such case the amount to which holders of shares of Series A Preferred Stock were entitled immediately prior to such event under the preceding sentence shall be adjusted by multiplying such amount by a fraction, the numerator of which is the number of shares of Common Stock outstanding immediately after such event and the denominator of which is the number of shares of Common Stock that were outstanding immediately prior to such event.

(B) The Corporation shall declare a dividend or distribution on the Series A Preferred Stock as provided in paragraph (A) of this Section immediately after it declares a dividend or distribution on the Common Stock (other than a dividend payable in shares of Common Stock)

(C) Dividends due pursuant to paragraph (A) of this Section shall begin to accrue and be cumulative on outstanding shares of Series A Preferred Stock from the Quarterly Dividend Payment Date next preceding the date of issue of such shares, unless the date of issue of such shares is prior to the record date for the first Quarterly Dividend Payment Date, in which case

dividends on such shares shall begin to accrue from the date of issue of such shares, or unless the date of issue is a Quarterly Dividend Payment Date or is a date after the record date for the determination of holders of shares of Series A Preferred Stock entitled to receive a quarterly dividend and before such Quarterly Dividend Payment Date, in either of which events such dividends shall begin to accrue and be cumulative from such Quarterly Dividend Payment Date. Accrued but unpaid dividends shall not bear interest. Dividends paid on the shares of Series A Preferred Stock in an amount less than the total amount of such dividends at the time accrued and payable on such shares shall be allocated pro rata on a share-by-share basis among all such shares at the time outstanding. The Board of Directors may fix a record date for the determination of holders of shares of Series A Preferred Stock entitled to receive payment of a dividend or distribution declared thereon, which record date shall be not more than 60 days prior to the date fixed for the payment thereof.

Section 3. Voting Rights. The holders of shares of Series A Preferred Stock shall have the following voting rights:

(A) Subject to the provision for adjustment hereinafter set forth, each share of the Series A Preferred Stock shall entitle the holder thereof to 1,000 votes on all matters submitted to a vote of the stockholders of the Corporation. In the event the Corporation shall at any time declare or pay any dividend on the Common Stock payable in shares of Common Stock, or effect a subdivision or combination or consolidation of the outstanding shares of Common Stock (by reclassification or otherwise than by payment of a dividend in shares of Common Stock) into a greater or lesser number of shares of Common Stock, then in each such case the number of votes per share to which holders of shares of Series A Preferred Stock were entitled immediately prior to such event shall be adjusted by multiplying such number by a fraction, the numerator of which is the number of shares of Common Stock outstanding immediately after such event and the denominator of which is the number of shares of Common Stock that were outstanding immediately prior to such event.

(B) Except as otherwise provided herein, in any Certificate of Designations creating a series of Preferred Stock or any similar stock, or by law, the holders of shares of Series A Preferred Stock and the holders of shares of Common Stock and any other capital stock of the Corporation having general voting rights shall vote together as one class on all matters submitted to a vote of stockholders of the Corporation.

(C) Except as set forth herein, or as otherwise provided by law, holders of Series A Preferred Stock shall have no special voting rights and their consent shall not be required (except to the extent they are entitled to vote with holders of Common Stock as set forth herein) for taking any corporate action.

Section 4. Certain Restrictions.

(A) Whenever quarterly dividends or other dividends or distributions payable on the Series A Preferred Stock as provided in Section 2 are in arrears, thereafter and until all accrued and unpaid dividends and distributions, whether or not declared, on shares of Series A Preferred Stock outstanding shall have been paid in full, the Corporation shall not:

(i) declare or pay dividends, or make any other distributions, on any shares of stock ranking junior (either as to dividends or upon liquidation, dissolution or winding up) to the Series A Preferred Stock;

(ii) declare or pay dividends, or make any other distributions, on any shares of stock ranking on a parity (either as to dividends or upon liquidation, dissolution or winding up) with the Series A Preferred Stock, except dividends paid ratably on the Series A Preferred Stock and all such parity stock on which dividends are payable or in arrears in proportion to the total amounts to which the holders of all such shares are then entitled; or

(iii) redeem or purchase or otherwise acquire for consideration shares of any stock ranking junior (either as to dividends or upon liquidation, dissolution or winding up) to the Series A Preferred Stock, provided that the Corporation may at any time redeem, purchase or otherwise acquire shares of any such junior stock in exchange for shares of any stock of the Corporation ranking junior (as to dividends and upon dissolution, liquidation or winding up) to the Series A Preferred Stock

(B) The Corporation shall not permit any subsidiary of the Corporation to purchase or otherwise acquire for consideration any shares of stock of the Corporation unless the Corporation could, under paragraph (A) of this Section 4, purchase or otherwise acquire such shares at such time and in such manner.

Section 5. Reacquired Shares. Any shares of Series A Preferred Stock purchased or otherwise acquired by the Corporation in any manner whatsoever shall be retired and cancelled promptly after the acquisition thereof. All such shares shall upon their cancellation become authorized but unissued shares of Preferred Stock and may be reissued as part of a new series of Preferred Stock subject to the conditions and restrictions on issuance set forth herein, or in any Certificate of Designations creating a series of Preferred Stock or any similar stock or as otherwise required by law

Section 6. Liquidation, Dissolution or Winding Up.

(A) Upon any liquidation, dissolution or winding up of the Corporation, the holders of shares of Series A Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any assets of the Corporation to the holders of Common Stock, the amount of $1,000.00 per share for each share of Series A Preferred Stock then held by them. Thereafter, the holders of shares of Series A Preferred Stock shall be entitled to receive an aggregate amount per share, subject to the provision for adjustment hereinafter set forth, equal to 1,000 times the aggregate amount to be distributed per share to holders of shares of Common Stock plus an amount equal to any accrued and unpaid dividends. In the event the Corporation shall at any time declare or pay any dividend on the Common Stock payable in shares of Common Stock, or effect a subdivision or combination or consolidation of the outstanding shares of Common Stock (by reclassification or otherwise than by payment of a dividend in shares of Common Stock) into a greater or lesser number of shares of Common Stock, then in each such case the aggregate amount to which holders of shares of Series A Preferred Stock were entitled immediately prior to such

event under the preceding sentence shall be adjusted by multiplying such amount by a fraction the numerator of which is the number of shares of Common Stock outstanding immediately after such event and the denominator of which is the number of shares of Common Stock that were outstanding immediately prior to such event.

(B) If the assets of the Corporation legally available for distribution to the holders of shares of Series A Preferred Stock upon liquidation, dissolution or winding up of the Corporation are insufficient to pay the full preferential amount set forth in the first sentence of paragraph (A) above, then the entire assets of the Corporation legally available for distribution to the holders of Series A Preferred Stock shall be distributed among such holders in proportion to the shares of Series A Preferred Stock then held by them.

(C) The foregoing rights upon liquidation, dissolution or winding up provided o the holders of Series A Preferred Stock shall be subject to the rights of the holders of any other series of Preferred Stock (or any other stock) ranking prior and superior to the Series A Preferred Stock upon liquidation, dissolution or winding up.

Section 7. Consolidation, Merger, etc. In case the Corporation shall enter into any consolidation, merger, combination or other transaction in which the shares of Common Stock are exchanged for or changed into other stock or securities, cash and/or other property, then in any such case each share of Series A Preferred Stock shall at the same time be similarly exchanged or changed into an amount per share, subject to the provision for adjustment hereinafter set forth, equal to 1,000 times the aggregate amount of stock, securities, cash and/or any other property (payable in kind), as the case may be, into which or for which each share of Common Stock is changed or exchanged In the event the Corporation shall at any time declare or pay any dividend on the Common Stock payable in shares of Common Stock, or effect a subdivision or combination or consolidation of the outstanding shares of Common Stock (by reclassification or otherwise than by payment of a dividend in shares of Common Stock) into a greater or lesser number of shares of Common Stock, then in each such case the amount set forth in the preceding sentence with respect to the exchange or change of shares of Series A Preferred Stock shall be adjusted by multiplying such amount by a fraction, the numerator of which is the number of shares of Common Stock outstanding immediately after such event and the denominator of which is the number of shares of Common Stock that were outstanding immediately prior to such event.

Section 8. No Redemption. The shares of Series A Preferred Stock shall not be redeemable.

C. Series C Preferred Stock

Section 1. Number and Designation. 11,200 shares of the Preferred Stock of the Corporation shall be designated as Series C Preferred Stock ("Series C Preferred Stock").

Section 2. Rank. The Series C Preferred Stock shall, with respect to dividend rights and rights on liquidation, dissolution and winding-up, rank prior to the Corporation's common stock, par value $0.01 per share ("Common Stock"). All equity securities of the Corporation to which the Series C Preferred Stock ranks prior (whether with respect to dividends or upon liquidation, dissolution, winding-up or otherwise), including the Common Stock, are collectively

the "Junior Securities." All equity securities of the Corporation with which the Series C Preferred Stock ranks on a parity (whether with respect to dividends or upon liquidation, dissolution, winding-up or otherwise) are collectively the "Parity Securities " The respective definitions of Junior Securities and Parity Securities shall also include any rights or options exercisable for or convertible into any of the Junior Securities and Parity Securities, as the case may be. The Series C Preferred Stock shall be subject to the creation of Junior Securities, Parity Securities and any securities that shall rank prior to the Series C Preferred Stock (whether with respect to dividends or upon liquidation, dissolution, winding-up or otherwise).

Section 3. Dividends. (a) Holders of Series C Preferred Stock shall be entitled to receive, when, as and if declared by the Board of Directors, out of funds legally available for the payment of dividends, cash dividends at the annual rate of $15,000 per share. Such dividends shall be payable in arrears in equal amounts quarterly on February 15, May 15, August 15 and November 15 of each year (unless such day is not a business day, in which event on the next succeeding business day) (each of such dates being a "Dividend Payment Date" and each such quarterly period being a "Dividend Period"). Such dividends shall be cumulative from the date of issue, whether or not funds of the Corporation are legally available for the payment of such dividends. Each such dividend shall be payable to the holders of record of shares of the Series C Preferred Stock, as they appear on the Corporation's stock register at the close of business on such record dates, which record dates shall be not more than 60 days or less than 10 days prior to the respective Dividend Payment Date, as shall be fixed by the Board of Directors. Accrued and unpaid dividends for any past Dividend Periods may be declared and paid at any time, without reference to any Dividend Payment Date, to holders of record on such date, not more than 45 days preceding the payment date thereof, as may be fixed by the Board of Directors.

(b) The amount of dividends payable for each full Dividend Period for the Series C Preferred Stock shall be computed by dividing the annual dividend rate by four. The amount of dividends payable for the initial Dividend Period, or any other period shorter or longer than a full Dividend Period, on the Series C Preferred Stock shall be computed on the basis of 30-day months and a 12-month year. Holders of Series C Preferred Stock shall not be entitled to any dividends, whether payable in cash, property or stock, in excess of cumulative dividends, as herein provided, on the Series C Preferred Stock. No interest or sum of money in lieu of interest shall be payable in respect of any dividend payment on the Series C Preferred Stock that may be in arrears.

(c) So long as any shares of the Series C Preferred Stock are outstanding, the Corporation shall not declare, pay or set apart for payment any dividends or distributions on Parity Securities, for any period unless full cumulative dividends have been or contemporaneously are declared and paid or declared and a sum sufficient for the payment thereof set apart for such payment on the Series C Preferred Stock for all Dividend Periods terminating on or before the date of payment of the dividend on such Parity Securities. If dividends are not paid in full or a sum sufficient for such payment is not set apart, all dividends declared upon shares of the Series C Preferred Stock and all dividends declared upon any other Parity Securities shall be declared ratably in proportion to the respective amounts of dividends accumulated and unpaid on the Series C Preferred Stock and accumulated and unpaid on such Parity Securities

(d) So long as any shares of the Series C Preferred Stock are outstanding, the Corporation shall not, and shall cause its subsidiaries not to, directly or indirectly, declare, pay or

set apart for payment any dividends or other distributions on Junior Securities (other than dividends or distributions paid in shares of, or options, warrants or rights to subscribe for or purchase shares of, Junior Securities) or redeem or otherwise acquire any Junior Securities (other than a redemption or acquisition of shares of Common Stock made for purposes of an employee incentive or benefit plan of the Corporation or any subsidiary of the Corporation) (all such dividends, distributions, redemptions or acquisitions being a "Junior Securities Distribution") for any consideration (including any moneys to be paid to or made available for a sinking fund for the redemption of any shares of any such stock), except by conversion into or exchange for Junior Securities, unless in each case the full cumulative dividends on all outstanding shares of the Series C Preferred Stock and any other Parity Securities have been paid or set apart for payment for all past and current Dividend Periods with respect to the Series C Preferred Stock and all past and current dividend periods with respect to such Parity Securities.

Section 4. Liquidation Preference. (a) In the event of any liquidation, dissolution or winding-up of the Corporation, whether voluntary or involuntary, before any payment or distribution of the Corporation's assets (whether capital or surplus) shall be made to or set apart for the holders of Junior Securities, holders of Series C Preferred Stock shall be entitled to receive $261,500 per share of Series C Preferred Stock plus an amount equal to all dividends (whether or not earned or declared) accrued and unpaid thereon to the date of final distribution to such holders; but such holders shall not be entitled to any further payment. If, upon any liquidation, dissolution or winding-up of the Corporation, the Corporation's assets, or proceeds thereof, distributable among the holders of Series C Preferred Stock are insufficient to pay in full the preferential amount aforesaid and liquidating payments on any Parity Securities, then such assets, or the proceeds thereof, shall be distributed among the holders of Series C Preferred Stock and any other Parity Securities ratably in accordance with the respective amounts that would be payable on such shares of Series C Preferred Stock and any such other Parity Securities if all amounts payable thereon were paid in full. For the purposes of this Section 4, (i) a consolidation or merger of the Corporation with, or a conversion of the Corporation into, one or more corporations, or (ii) a sale or transfer of all or substantially all of the Corporation's assets, shall not be deemed to be a liquidation, dissolution or winding-up, voluntary or involuntary, of the Corporation.

(b) Subject to the rights of the holders of any Parity Securities, after payment has been made in full to the holders of the Series C Preferred Stock, as provided in this Section 4, holders of Junior Securities shall, subject to the respective terms and provisions (if any) applying thereto, be entitled to receive any and all assets remaining to be paid or distributed, and holders of Series C Preferred Stock shall not be entitled to share therein.

Section 5. Redemption. (a) The Series C Preferred Stock shall not be redeemable by the Corporation prior to February 2, 2026 (such date, the "Redemption Date"). On and after the Redemption Date, to the extent the Corporation has funds legally available for such payment, the Corporation may redeem at its option shares of Series C Preferred Stock, at any time in whole or from time to time in part, at a redemption price of $261,500 per share, plus accrued and unpaid dividends thereon to the redemption date, in cash without interest.

(b) Shares of Series C Preferred Stock that have been issued and reacquired in any manner, including shares purchased or redeemed, shall (upon compliance with any applicable provisions of the laws of the State of Delaware) have the status of authorized and unissued shares

of the class of Preferred Stock undesignated as to Series and may be redesignated and reissued as part of any series of the Preferred Stock.

(c) Notwithstanding the foregoing provisions of this Section 5, unless full cumulative cash dividends (whether or not declared) on all outstanding shares of Series C Preferred Stock have been paid or contemporaneously are declared and paid or set apart for payment for all dividend periods terminating on or before the applicable redemption date, none of the shares of Series C Preferred Stock shall be redeemed, and no sum shall be set aside for such redemption, unless shares of Series C Preferred Stock are redeemed pro rata.

Section 6. Procedure for Redemption. (a) If fewer than all the outstanding shares of Series C Preferred Stock are to be redeemed, the number of shares to be redeemed shall be determined by the Board of Directors and the shares to be redeemed shall be selected by lot or pro rata (with any fractional shares being rounded to the nearest whole share) as may be determined by the Board of Directors (subject to Section 5(c)).

(b) If the Corporation redeems shares of Series C Preferred Stock, notice of such redemption shall be given by first class mail, postage prepaid, mailed not less than 30 days nor more than 60 days before the redemption date, to each holder of record of the shares to be redeemed at such holder's address as the same appears on the Corporation's stock register; *provided* that neither the failure to give such notice nor any defect therein shall affect the validity of the giving of such notice except as to the holder to whom the Corporation has failed to give said notice or whose notice was defective. Each such notice shall state: (i) the redemption date; (ii) the number of shares of Series C Preferred Stock to be redeemed and, if fewer than all the shares held by such holder are to be redeemed, the number of shares to be redeemed from such holder; (iii) the redemption price; (iv) the place or places where certificates for such shares are to be surrendered for payment of the redemption price; and (v) that dividends on the shares to be redeemed will cease to accrue on such redemption date.

(c) Notice having been mailed as aforesaid, from and after the redemption date (unless the Corporation defaults in providing money for the payment of the redemption price of the shares called for redemption), dividends on the shares of Series C Preferred Stock so called for redemption shall cease to accrue, and all rights of the holders thereof as stockholders of the Corporation (except the right to receive from the Corporation the redemption price) shall cease. Upon surrender in accordance with said notice of the certificates for any shares so redeemed (properly endorsed or assigned for transfer, if the Board of Directors of the Corporation shall so require and the notice shall so state), such shares shall be redeemed by the Corporation at the redemption price aforesaid. If fewer than all the shares represented by any such certificate are redeemed, a new certificate shall be issued representing the unredeemed shares without cost to the holder thereof.

Section 7. Voting Rights. (a) Except as otherwise provided by law, holders of Series C Preferred Stock shall be entitled to (i) vote with the holders of Common Stock in each election of directors of the Corporation submitted for a vote of holders of Common Stock, (ii) 17,000 votes per share of Series C Preferred Stock and (iii) notice of any stockholders' meeting at which directors are to be elected in accordance with the Certificate of Incorporation and by-laws of the Corporation. If the Corporation at any time after the date of issuance of the Series C Preferred

Stock pays any dividend on Common Stock in shares of Common Stock or effects a subdivision or combination of the outstanding shares of Common Stock (by reclassification or otherwise) into a greater or lesser number of shares of Common Stock, then in each such case the number of votes to which holders of Series C Preferred Stock were entitled immediately prior to such event under Section 7(a)(ii) shall be adjusted by multiplying such amount by a fraction the numerator of which is the number of shares of Common Stock outstanding immediately after such event and the denominator of which is the number of shares of Common Stock that were outstanding immediately prior to such event.

(b) The consent or votes required in Section 7(a) shall be in addition to any approval of stockholders of the Corporation which may be required by law or pursuant to any provision of the Corporation's Certificate of Incorporation or by-laws, which approval shall be obtained by vote of the stockholders of the Corporation in the manner provided in Section 7(a).

(c) Except as otherwise required by applicable law or as set forth herein, the shares of Series C Preferred Stock shall not have any relative, participating, optional or other special voting rights and powers and the consent of the holders thereof shall not be required for the taking of any corporate action.

Section 8. General Provisions. (a) The term "Person" as used herein means any corporation, limited liability company, partnership, trust, organization, association, other entity or individual.

(b) The term "outstanding", when used with reference to shares of stock in this Section C, shall mean issued shares, excluding shares held by the Corporation

(c) Each holder of Series C Preferred Stock, by acceptance thereof, acknowledges and agrees that payments of dividends, interest, premium and principal on, and exchange, redemption and repurchase of, such securities by the Corporation are subject to restrictions on the Corporation contained in certain credit and financing agreements.

Article 5

The stockholders of the Corporation shall have the power to adopt, amend or repeal Bylaws. The Board of Directors of the Corporation shall also have the power to adopt, amend or repeal Bylaws of the Corporation, except Bylaws adopted by the shareholders that specify that they cannot be amended or repealed by the Board of Directors.

Article 6

Election of Directors need not be by written ballot unless the Bylaws of the Corporation shall so provide.

Article 7

A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law or (iv) for any transaction from which the director derived an improper personal benefit.

If the Delaware General Corporation Law is hereafter amended to authorize the further elimination or limitation of the liability of a director, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended.

Any repeal or modification of the foregoing provisions of this Article 7 by the stockholders of the Corporation shall be prospective only, and shall not adversely affect any limitation on the personal liability of a director of the Corporation existing at the time of such repeal or modification.

Exhibit B

MINUTES OF THE REGULAR MEETING OF THE BOARD OF DIRECTORS OF ORACLE CORPORATION

July 9-10, 2006

A Regular Meeting of the Board of Directors (the "Board") of Oracle Corporation, a Delaware corporation (the "Corporation"), was held on Sunday and Monday, July 9-10, 2006, beginning at 2:00 p.m., Pacific Daylight Time on July 9, 2006 in the Miramar Rooms II and III at the Ritz-Carlton Hotel, Half Moon Bay, California.

1. ATTENDANCE AND QUORUM

The following directors were present, constituting all members of the Board and a quorum: Lawrence J. Ellison, Chief Executive Officer; Jeffrey O. Henley, Chairman of the Board; Safra A. Catz, President and Chief Financial Officer; Charles E. Phillips Jr., President; Donald L. Lucas, Michael J. Boskin, Jack F. Kemp, Jeffrey S. Berg, Hector Garcia-Molina, Naomi O. Seligman and H. Raymond Bingham.

Also present were Daniel Cooperman, Senior Vice President, General Counsel & Secretary; Douglas Kehring, Senior Vice President, Corporate Development (for Item 3 only); Chuck Rozwat, Executive Vice President, Database Server (for Item 7 only); Thomas Kurian, Senior Vice President 9iAS (for item 7 only); and Larry Sonsini of the law firm Wilson Sonsini Goodrich & Rosati (for item 8 only).

Mr. Henley called the meeting to order and announced that the meeting was held pursuant to a written notice of meeting, which was delivered to all members of the Board. Mr. Cooperman recorded the minutes of the meeting.

REDACTED

16. AMENDMENT AND RESTATEMENT OF BYLAWS

Mr. Cooperman reviewed certain proposed changes to the Corporation's bylaws. The board members reviewed the changes and asked questions. Upon motion duly made, seconded and unanimously carried, the Board took action as follows:

REDACTED

WHEREAS:

A. The Corporation adopted its initial bylaws on September 11, 2005.

B. In connection with the merger of a wholly owned subsidiary of the Corporation with and into Oracle Systems Corporation ("Oracle Systems") (the "Oracle Merger") effected pursuant to Section 251(g) of the Delaware General Corporation Law, as amended (the "DGCL"), the certificate of incorporation, bylaws and directors of the Corporation immediately after the effective time of the Oracle Merger became the same as the certificate of incorporation, bylaws and directors of Oracle Systems immediately prior to the effective time of the Oracle Merger.

C. It is the Board's intention to periodically review and update the Bylaws to reflect changes in management structure and in the DGCL.

D. The Board has determined that it is in the best interests of the Corporation and its stockholders to authorize and approve the form of Amended and Restated Bylaws in the form attached hereto as Exhibit E the "Amended and Restated Bylaws").

RESOLVED THAT:

1. The Amended and Restated Bylaws are hereby adopted.

2. Each of the Chief Executive Officer, Chief Financial Officer, any President, any Executive Vice President, any Senior Vice President, the Secretary, the Treasurer, any Assistant Treasurer, the Assistant Secretary and any Vice President of the Corporation is hereby authorized on behalf of the Corporation to take or cause to be taken all such further actions, and to execute and deliver or cause to be executed and delivered all such further instruments and documents, that in their reasonable judgment are deemed necessary or advisable in order to carry into effect each of the foregoing resolutions, and all actions heretofore taken by any of them in furtherance thereof are hereby, ratified, confirmed, approved and adopted in all respects.

REDACTED

27. ADJOURNMENT

There being no further business to come before the Board, upon motion duly made, seconded and unanimously carried, the meeting was, adjourned at approximately 3:25 p.m.

Following adjournment of the Board meeting, the outside members of the Board met in executive session.

Daniel Cooperman
Secretary

REDACTED

Exhibit C

AMENDED AND RESTATED

BYLAWS

OF

ORACLE CORPORATION

(a Delaware corporation)
Adopted January 31, 2006
Amended and restated by the Board of Directors as of July 10, 2006

TABLE OF CONTENTS

Page

ARTICLE 1
STOCKHOLDERS

Section 1.01. Annual Meetings 1
Section 1.02. Special Meetings 1
Section 1.03. Notice of Meetings 1
Section 1.04. Adjournments 1
Section 1.05. Quorum 1
Section 1.06. Organization 1
Section 1.07. Voting, Proxies 1
Section 1.08. Fixing Date For Determination of Stockholders of Record 2
Section 1.09. List of Stockholders Entitled To Vote 2
Section 1.10. Action By Consent of Stockholders 2
Section 1.11. Nominations and Stockholder Business 3

ARTICLE 2
BOARD OF DIRECTORS

Section 2.01. Number, Qualifications 4
Section 2.02. Election; Resignation; Removal; Vacancies 4
Section 2.03. Regular Meetings 5
Section 2.04. Special Meetings 5
Section 2.05. Telephonic Meetings Permitted 5
Section 2.06. Quorum; Vote Required For Action 5
Section 2.07. Organization 5
Section 2.08. Written Action By Directors 5
Section 2.09. Powers 5
Section 2.10. Compensation of Directors 5

ARTICLE 3
COMMITTEES

Section 3.01. Committees 5
Section 3.02. Committee Rules 6

ARTICLE 4
OFFICERS

Section 4.01. Generally 6
Section 4.02. Chief Executive Officer (CEO) 6
Section 4.03. President 6
Section 4.04. Vice President 6
Section 4.05 Chief Financial Officer (CFO) 6
Section 4.06. Treasurer 7
Section 4.07. Secretary 7
Section 4.08. Delegation of Authority 7
Section 4.07. Removal 7

ARTICLE 5
STOCK

Section 5.01. Certificates 7
Section 5.02. Lost, Stolen or Destroyed Stock Certificates; Issuance of New Certificates 7
Section 5.03. Other Regulations 7

ARTICLE 6
INDEMNIFICATION

Section 6.01. Indemnification of Officers, Directors and Employees ... 7
Section 6.02. Advance of Expenses ... 8
Section 6.03. Non-exclusivity of Rights ... 8
Section 6.04. Indemnification of Contracts ... 8
Section 6.05. Insurance ... 8
Section 6.06. Effect of Amendment ... 8

ARTICLE 7
NOTICES

Section 7.01. Notice ... 8
Section 7.02. Waiver of Notice ... 8

ARTICLE 8
INTERESTED DIRECTORS

Section 8.01. Interest and Directors; Quorum ... 9

ARTICLE 9
MISCELLANEOUS

Section 9.01. Fiscal Year ... 9
Section 9.02. Seal ... 9
Section 9.03. Form of Records ... 9
Section 9.04. Reliance Upon Books and Records ... 9
Section 9.05. Certificate of Incorporation Governs ... 9
Section 9.06. Severability ... 9
Section 9.07. Derivative Action ... 9

ARTICLE 10
AMENDMENT

Section 10.01. Amendments ... 10

AMENDED AND RESTATED

BYLAWS
OF
ORACLE CORPORATION
(a Delaware corporation)
Adopted January 31, 2006
Amended and restated by the Board of Directors as of July 10, 2006

ARTICLE 1
STOCKHOLDERS

Section 1.01. *Annual Meetings.* An annual meeting of stockholders shall be held for the election of directors at such date, time and place, either within or without the State of Delaware, as the Board of Directors shall each year fix. Any other proper business may be transacted at the annual meeting.

Section 1.02. *Special Meetings.* Special meetings of stockholders for any purpose or purposes may be called at any time by the Chairman of the Board, the CEO, the Board of Directors or stockholders holding shares representing not less than twenty percent of the outstanding votes entitled to vote at the meeting. Special meetings may not be called by any other person or persons.

Section 1.03. *Notice of Meetings.* Notice of all meetings of stockholders shall be given in writing or by electronic transmission stating the place, date and time of the meeting and, in the case of a special meeting, the purpose or purposes for which the meeting is called. Unless otherwise required by applicable law or the Certificate of Incorporation of the Corporation, such notice shall be given not less than ten (10) nor more than sixty (60) days before the date of the meeting to each stockholder entitled to vote at such meeting.

Section 1.04. *Adjournments.* Any meeting of stockholders may adjourn from time to time to reconvene at the same or another place, and notice need not be given of any such adjourned meeting if the time, date and place thereof are announced at the meeting at which the adjournment is taken; provided, however, that if the adjournment is for more than thirty (30) days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting. At the adjourned meeting the Corporation may transact any business that might have been transacted at the original meeting.

Section 1.05. *Quorum.* At each meeting of stockholders the holders of a majority of the shares of stock entitled to vote at the meeting, present in person or by proxy, shall constitute a quorum, except where otherwise required by law. If a quorum shall fail to attend any meeting, the chairman of the meeting or the holders of a majority of the shares entitled to vote who are present, in person or by proxy, at the meeting may adjourn the meeting. Shares of the Corporation's stock belonging to the Corporation or to another corporation, if a majority of the shares entitled to vote in the election of directors of such other corporation is held, directly or indirectly, by the Corporation, shall neither be entitled to vote nor be counted for quorum purposes; provided, however, that the foregoing shall not limit the right of the Corporation or any other corporation to vote any of the Corporation's stock held by it in a fiduciary capacity.

Section 1.06. *Organization.* Meetings of stockholders shall be presided over by such person as the Board of Directors may designate, or, in the absence of such a person, the Chairman of the Board, or, in the absence of such person, the CEO of the Corporation, or, in the absence of such person, such person as may be chosen by the holders of a majority of the shares entitled to vote who are present, in person or by proxy, at the meeting. Such person shall be chairman of the meeting and shall determine the order of business and the procedure at the meeting, including such regulation of the manner of voting and the conduct of discussion as seems to him or her to be in order. The Secretary of the Corporation shall act as secretary of the meeting, but in his or her absence the chairman of the meeting may appoint any person to act as secretary of the meeting.

Section 1.07. *Voting; Proxies.* Unless otherwise provided by law, and subject to the provisions of Section 1.06 of these Bylaws, each stockholder shall be entitled to one vote for each share of stock held by such stockholder. Each stockholder entitled to vote at a meeting of stockholders, or to express consent or

dissent to corporate action in writing without a meeting, may authorize another person or persons to act for such stockholder by proxy. Voting at meetings of stockholders need not be by written ballot and need not be conducted by inspectors unless such is demanded by a stockholder or stockholders holding shares representing at least one percent of the votes entitled to vote at such meeting, or by such stockholder's or stockholders' proxy. If a vote is to be taken by written ballot, each such ballot shall state the name of the stockholder or proxy voting and such other information as the chairman of the meeting deems appropriate, and the ballots shall be counted by one or more inspectors appointed by the chairman of the meeting. At all meetings of stockholders for the election of directors a plurality of the votes cast shall be sufficient to elect. All other elections and questions, unless otherwise provided by law or these Bylaws, shall be decided by the vote of the holders of a majority of the shares of stock entitled to vote thereon present in person or by proxy at the meeting.

Section 1.08. *Fixing Date For Determination of Stockholders of Record.* In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, or to express consent to corporate action in writing without a meeting, or entitled to receive payment of any dividend or other distribution or allotment of any rights, or entitled to exercise any rights in respect of any change, conversion or exchange of stock or for the purpose of any other lawful action, the Board of Directors may fix, in advance, a record date, which shall not be more than sixty (60) nor less than ten (10) days before the date of such meeting, nor more than sixty (60) days prior to any other action. If no record date is fixed by the Board of Directors, then the record date shall be as provided by law. A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.

Any stockholder of record seeking to have the stockholders authorize or take corporate action by written consent shall, by written notice to the Secretary, request the Board of Directors to fix a record date for such consent. Such request shall include a brief description of the action proposed to be taken. The Board of Directors shall, within ten (10) days after the date on which such a request is received, adopt a resolution fixing the record date. Such record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board of Directors, and shall not be more than ten (10) days after the date upon which the resolution fixing the record date is adopted by the Board of Directors. If no record date has been fixed by the Board of Directors within ten (10) days of the date on which such a request is received, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting, when no prior action by the Board of Directors is required by applicable law, shall be the first date on which a signed written consent setting forth the action taken or proposed to be taken is delivered to the corporation by delivery to its registered office in the State of Delaware, its principal place of business, or any officer or agent of the corporation having custody of the book in which proceedings of meetings of stockholders are recorded. If no record date has been fixed by the Board of Directors and prior action by the Board of Directors is required by applicable law, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting shall be at the close of business on the date on which the Board of Directors adopts the resolution taking such prior action.

Section 1.09. *List of Stockholders Entitled To Vote.* A complete list of stockholders entitled to vote at any meeting of stockholders, arranged in alphabetical order and showing the address of each stockholder and the number of shares registered in the name of each stockholder, shall be open to the examination of any stockholder, for any purpose germane to the meeting, during ordinary business hours, for a period of at least ten (10) days prior to the meeting, either at a place within the city where the meeting is to be held, which place shall be specified in the notice of the meeting, or, if not so specified, at the place where the meeting is to be held. The list shall also be produced and kept at the time and place of the meeting during the whole time thereof and may be inspected by any stockholder who is present.

Section 1.10. *Action By Consent of Stockholders.* Unless otherwise restricted by the Certificate of Incorporation, and except as set forth in Section 1.08 above, any action required or permitted to be taken at any annual or special meeting of the stockholders may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders who have not consented in writing.

Section 1.11. N*ominations and Stockholder Business*. (a) Nominations of persons for election to the Board of Directors of the Corporation and the proposal of business to be considered by the stockholders may be made at an annual meeting of stockholders only (i) pursuant to the Corporation's notice of meeting (or any supplement thereto), (ii) by or at the direction of the Board of Directors or any committee thereto, or (iii) by any stockholder of the Corporation who is a stockholder of record at the time of giving of notice provided for in this Section 1.11, who is entitled to vote at the meeting and who complied with the notice procedures set forth in this Section 1.11.

(b) For nominations or other business to be properly brought before an annual meeting by a stockholder pursuant to this Section 1.11, the stockholder must have given timely notice thereof in writing to the Secretary of the Corporation, and such business other than the nominations of persons for election to the Board of Directors must be a proper subject for stockholder action under the Delaware General Corporation Law. To be timely, a stockholder's written notice shall be delivered to the Secretary of the Corporation at the principal executive offices of the Corporation, not less than ninety (90) days nor more than one hundred twenty (120) days prior to the date on which the Corporation first mailed its proxy materials for the prior year's annual meeting of stockholders; provided, however, that in the event that the date of the annual meeting is advanced by more than thirty (30) days or delayed (other than as a result of adjournment) by more than thirty (30) days from the anniversary of the previous year's annual meeting, notice by the stockholder to be timely must be delivered not later than the close of business on the later of the ninetieth (90th) day prior to such annual meeting or the tenth (10th) day following the day on which public announcement of the date of such meeting is first made. In no event shall the public announcement of any adjournment or postponement of an annual meeting commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above. Such stockholder's notice shall set forth (i) as to each person whom the stockholder proposes to nominate for election or reelection as a director all information relating to such person that is required to be disclosed in solicitations of proxies for election of directors, or is otherwise required, in each case pursuant to Regulation 14A under the Exchange Act (including such person's written consent to being named in the proxy statement as a nominee and to serving as a director if elected); (ii) as to any other business that the stockholder proposes to bring before the meeting, a brief description of the business desired to be brought before the meeting, the text of the proposal or business (including the text of any resolutions proposed for consideration and in the event that such business includes a proposal to amend the Bylaws of the Corporation, the language of the proposed amendment, the reasons for conducting such business at the meeting and any material interest in such business of such stockholder and the beneficial owner, if any, on whose behalf the proposal is made; and (iii) as to the stockholder giving the notice and the beneficial owners if any on whose behalf the nomination or proposal is made (A) the name and address of such stockholder, as they appear on the Corporation's books, and of such beneficial owner, (B) the class and number of shares of the Corporation which are owned beneficially and of record by such stockholder and such beneficial owner and (C) a representation that the stockholder is a holder of record of stock of the Corporation entitled to vote at such meeting and intends to appear in person or by proxy at the meeting to propose such business or nomination, and (D) a representation whether the stockholder or the beneficial owner, if any, intends or is part of a group which intends (i) to deliver a proxy statement and/or form of proxy to holders of at least the percentage of the Corporation's outstanding capital stock required to approve or adopt the proposal or elect the nominee and/or (ii) otherwise to solicit proxies from stockholders in support of such proposal or nomination. The foregoing notice requirements of this Section 1.11 shall be deemed satisfied by a stockholder if the stockholder has notified the Corporation of his, her or its intention to present a proposal or nomination at an annual meeting in compliance with applicable rules and regulations promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act") and such stockholder's proposal or nomination has been included in a proxy statement that has been prepared by the Corporation to solicit proxies for such annual meeting. The Corporation may require any proposed nominee to furnish such other information as may reasonably be required by the Corporation to determine the eligibility of such proposed nominee to serve as an independent director of the Corporation or that could be material to a reasonable stockholder's understanding of the independence, or lack thereof, of such nominee.

(c) Notwithstanding anything in this Section 1.11 to the contrary, in the event that the number of directors to be elected to the Board of Directors of the Corporation is increased and there is no public announcement specifying the size of the increased Board of Directors made by the Corporation at least one hundred (100) days prior to the first anniversary of the preceding year's annual meeting, a stockholder's notice required by this Section 1.11 shall also be considered timely, but only with respect to nominees for any new positions created by such increase, if it shall be delivered to the Secretary at the principal executive offices of the Corporation not later than the close of business on the tenth (10th) day following the day on which such public announcement is first made by the Corporation.

(d) Only such business shall be conducted at a special meeting of stockholders as shall have been brought before the meeting pursuant to the Corporation's notice of meeting. Nominations of persons for election to the Board of Directors may be made at a special meeting of stockholders at which directors are to be elected pursuant to the Corporation's notice of meeting (i) by or at the direction of the Board of Directors or any committee thereof or (ii) by any stockholder of the Corporation who is a stockholder of record at the time of giving of notice provided for in this Section 1.11, who is entitled to vote at the meeting and who complies with the notice procedures set forth in this Section 1.11. Nominations by stockholders of persons for election to the Board of Directors may be made at such a special meeting of stockholders if the stockholder's written notice required by this Section 1.11 shall be delivered to the Secretary of the Corporation at the principal executive offices of the Corporation, not earlier than the one hundred twentieth (120th) day prior to such special meeting and not later than the close of business on the later of the ninetieth (90th) day prior to such special meeting or the tenth (10th) day following the day on which public announcement is first made of the date of the special meeting and of the nominees proposed by the Board of Directors to be elected at such meeting. In no event shall the public announcement of an adjournment or postponement of a special meeting commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above.

(e) Only those persons who are nominated in accordance with the procedures set forth in this Section 1.11 shall be eligible for election as directors at any meeting of stockholders. Only such business shall be conducted at a meeting of stockholders as shall have been brought before the meeting in accordance with the procedures set forth in this Section 1.11. The chairman of the meeting shall have the power and duty to determine whether a nomination or any business proposed to be brought before the meeting was made in accordance with the procedures set forth in this Section 1.11 and, if any proposed nomination or business is not in compliance with this Section 1.11, to declare that such defective proposal shall be disregarded. Notwithstanding the foregoing provisions of this Section 1.11, unless otherwise required by law, if the stockholder (or a qualified representative of the stockholder) does not appear at the annual or special meeting of stockholders of the Corporation to present a nomination or proposed business, such nomination shall be disregarded and such proposed business shall not be transacted, notwithstanding that proxies in respect of such vote may have been received by the Corporation. For purposes of this Section 1.11, to be considered a qualified representative of the stockholder, a person must be a duly authorized officer, manager or partner of such stockholder or must be authorized by a writing executed by such stockholder or an electronic transmission delivered by such stockholder to act for such stockholder as proxy at the meeting of stockholders and such person must produce such writing or electronic transmission, or a reliable reproduction of the writing or electronic transmission, at the meeting of stockholders.

(f) For purposes of this Section 1.11, "public announcement" shall mean disclosure in a press release reported by the Dow Jones News Service, Associated Press, Reuters, Business Wire or comparable national news service or in a document publicly filed by the Corporation with the Securities and Exchange Commission pursuant to Section 9, 13, 14 or 15(d) of the Exchange Act.

(g) Notwithstanding the foregoing provisions of this Section 1.11, a stockholder shall also comply with all applicable requirements of the Exchange Act and the rules and regulations thereunder with respect to the matters set forth in this section. Nothing in this section shall be deemed to affect any rights of stockholders to request inclusion of proposals in the Corporation's proxy statement pursuant to Rule 14a-8 under the Exchange Act or of the holders of any series of Preferred Stock to elect directors pursuant to any applicable provisions of the Certificate of Incorporation.

ARTICLE 2
BOARD OF DIRECTORS

Section 2.01. *Number; Qualifications.* The Board of Directors shall consist of three or more members, the number thereof to be determined from time to time by resolution of the Board of Directors. Directors need not be stockholders.

Section 2.02. *Election; Resignation; Removal; Vacancies.* Each director shall hold office until the next annual meeting of stockholders and until his or her successor is elected and qualified, or until his or her earlier resignation or removal. Any director may resign at any time upon notice in writing or by electronic transmission to the Corporation. Subject to the rights of any holders of Preferred Stock then outstanding, (i) any director or the entire Board of Directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors, and (ii) any vacancy occurring in the

Board of Directors for any cause, and any newly created directorship resulting from any increase in the authorized number of directors to be elected by all stockholders having the right to vote as a single class, may be filled by a majority of the directors then in office, although less than a quorum, or by a sole remaining director, or by the stockholders. No decrease in the number of directors constituting the Board of Directors shall shorten the term of any incumbent director.

Section 2.03. *Regular Meetings.* Regular meetings of the Board of Directors may be held at such places, within or without the State of Delaware, and at such times as the Board of Directors may from time to time determine. Notice of regular meetings need not be given if the date, times and places thereof are fixed by resolution of the Board of Directors.

Section 2.04. *Special Meetings.* Special meetings of the Board of Directors may be called by the Chairman of the Board, the CEO or the Board of Directors and may be held at any time, date or place, within or without the State of Delaware, as the person or persons calling the meeting shall fix. Notice of the time, date and place of such meeting shall be given by the person or persons calling the meeting to all directors at least four (4) days before the meeting if the notice is mailed, or at least two (2) days before the meeting if such notice is given by telephone, hand delivery, electronic transmission, facsimile or similar communication method. Unless otherwise indicated in the notice, any and all business may be transacted at a special meeting.

Section 2.05. *Telephonic Meetings Permitted.* Members of the Board of Directors, or any committee of the Board, may participate in a meeting of the Board or such committee by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to conference telephone or similar communications equipment shall constitute presence in person at such meeting.

Section 2.06. *Quorum; Vote Required For Action.* At all meetings of the Board of Directors a majority of the total number of authorized directors shall constitute a quorum for the transaction of business. Except as otherwise provided herein or required by law, the vote of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.

Section 2.07. *Organization.* Meetings of the Board of Directors shall be presided over by the Chairman of the Board, or in his or her absence by the CEO, or in his or her absence by a chairman chosen at the meeting. The Secretary shall act as secretary of the meeting, but in his or her absence the chairman of the meeting may appoint any person to act as secretary of the meeting.

Section 2.08. *Written Action By Directors.* Any action required or permitted to be taken at any meeting of the Board of Directors, or of any committee thereof, may be taken without a meeting if all members of the Board or such committee, as the case may be, consent thereto in writing or by electronic transmission, and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the Board or committee. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.

Section 2.09. *Powers.* The Board of Directors may, except as otherwise required by law, exercise all such powers and do all such acts and things as may be exercised or done by the Corporation.

Section 2.10. *Compensation of Directors.* Directors, as such, may receive, pursuant to a resolution of the Board of Directors, fees and other compensation for their services as directors, including, without limitation, their services as members of committees of the Board of Directors.

ARTICLE 3
COMMITTEES

Section 3.01. *Committees.* The Board of Directors may, by resolution passed by a majority of the whole Board, designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The Board may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of the committee, the member or members thereof present at any meetings and not disqualified from voting, whether or not he, she or they constitute a quorum, may unanimously appoint

another member of the Board of Directors to act at the meeting in place of any such absent or disqualified member. Any such committee, to the extent provided in a resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation and may authorize the seal of the Corporation to be affixed to all papers that may require it; but no such committee shall have the power or authority in reference to amending the Certificate of Incorporation (except that a committee may, to the extent authorized in the resolution or resolutions providing for the issuance of shares of stock adopted by the Board of Directors as provided in subsection (a) of Section 151 of the Delaware General Corporation Law, fix the designations and any of the preferences or rights of such shares relating to dividends, redemption, dissolution and distribution of assets of the Corporation, or the conversion into, or the exchange of such shares for, shares of any other class or classes or any other series of the same or any other class or classes of stock of the Corporation, or fix the number of shares of any series of stock or authorize the increase or decrease of the shares of any series), adopting an agreement of merger or consolidation under Sections 251 or 252 of the Delaware General Corporation Law, recommending to the stockholders the sale, lease or exchange of all or substantially all of the Corporation's property and assets, recommending to the stockholders a dissolution of the Corporation or a revocation of a dissolution, or amending the Bylaws of the Corporation; and unless the resolution of the Board of Directors expressly so provides, no such committee shall have the power or authority to declare a dividend, authorize the issuance of stock or adopt a certificate of ownership and merger pursuant to Section 253 of the Delaware General Corporation Law.

Section 3.02. *Committee Rules.* Unless the Board of Directors otherwise provides, each committee designated by the Board may make, alter and repeal rules for the conduct of its business. In the absence of such rules each committee shall conduct its business in the same manner as the Board of Directors conducts its business pursuant to Article 2 of these Bylaws.

ARTICLE 4
OFFICERS

Section 4.01. Generally. The officers of the Corporation shall consist of a Chief Executive Officer, one or more Presidents, one or more Vice Presidents, a Chief Financial Officer, a Treasurer, a Secretary and such other officers, including a Chairman of the Board of Directors, as may from time to time be appointed by the Board of Directors. Officers shall be elected by the Board of Directors. Each officer shall hold office until his or her successor is elected and qualified or until his or her earlier resignation or removal. Any number of offices may be held by the same person. Any officer may resign at any time upon notice in writing or by electronic transmission to the Corporation. Any vacancy occurring in any office of the Corporation by death, resignation, removal or otherwise may be filled by the Board of Directors.

Section 4.02 *Chief Executive Officer (CEO).* Subject to the provisions of these Bylaws and to the direction of the Board of Directors, the CEO of the Corporation shall have the responsibility for the general management and control of the business and affairs of the Corporation and shall perform all duties and have all powers that are commonly incident to the office of chief executive or that are delegated to him or her by the Board of Directors. He or she shall have power to sign all stock certificates, contracts and other instruments of the Corporation that are authorized and shall have general supervision and direction of all of the duties, employees and agents of the Corporation.

Section 4.03. *President.* Each President shall have such powers and duties as may be delegated to him or her by the Board of Directors. A President may be designated by the Board to perform the duties and exercise the powers of the CEO in the event of the CEO's absence or disability.

Section 4.04. *Vice President.* Each Vice President shall have such powers and duties as may be delegated to him or her by the Board of Directors. A Vice President may be designated by the Board to perform the duties and exercise the powers of the President in the event of the President's absence or disability.

Section 4.05. Chief Financial Officer (CFO). The CFO of the Corporation shall have the responsibility for maintaining the financial records of the Corporation. He or she shall render from time to time an account of the financial condition of the Corporation. The CFO shall also perform such other duties as the Board of Directors may from time to time prescribe

Section 4.06. *Treasurer.* The Treasurer shall have custody of all monies and securities of the Corporation. He or she shall make such disbursements of the funds of the Corporation as are authorized and shall render from time to time an account of all such transactions. The Treasurer shall also perform such other duties as the Board of Directors may from time to time prescribe.

Section 4.07. *Secretary.* The Secretary shall issue or cause to be issued all authorized notices for, and shall keep, or cause to be kept, minutes of, all meetings of the stockholders and the Board of Directors. He or she shall have charge of the corporate books and shall perform such other duties as the Board of Directors may from time to time prescribe.

Section 4.08. *Delegation of Authority.* The Board of Directors may from time to time delegate the powers or duties of any officer to any other officers or agents, notwithstanding any provision hereof.

Section 4.09. *Removal.* Any officer of the Corporation may be removed at any time, with or without cause, by the Board of Directors. Such removal shall be without prejudice to the contractual rights of such officer, if any, with the Corporation.

ARTICLE 5
STOCK

Section 5.01. *Certificates.* The shares of the Corporation shall be represented by certificates, provided that the Board of Directors may provide by resolution or resolutions that some or all of any or all classes or series of stock shall be uncertificated shares. Any such resolution shall not apply to shares represented by a certificate until such certificate is surrendered to the Corporation. Every holder of stock represented by certificates shall be entitled to have a certificate signed by or in the name of the Corporation by the Chairman of the Board of Directors, or the President (or CEO) or a Vice President, and by the Treasurer (or CFO) or an Assistant Treasurer, or the Secretary or an Assistant Secretary, of the Corporation, certifying the number of shares owned by such stockholder in the Corporation. Any or all of the signatures on the certificate may be a facsimile.

Section 5.02. *Lost, Stolen or Destroyed Stock Certificates; Issuance of New Certificates.* The Corporation may issue a new certificate of stock in the place of any certificate previously issued by it, alleged to have been lost, stolen or destroyed, and the Corporation may require the owner of the lost, stolen or destroyed certificate, or such owner's legal representative, to give the Corporation a bond sufficient to indemnify it against any claim that may be made against it on account of the alleged loss, theft or destruction of any such certificate or the issuance of such new certificate.

Section 5.03. *Other Regulations.* The issue, transfer, conversion and registration of stock certificates shall be governed by such other regulations as the Board of Directors may establish.

ARTICLE 6
INDEMNIFICATION

Section 6.01. *Indemnification of Officers and Directors.* Each person who was or is made a party or is threatened to be made a party to or is involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (a "proceeding"), by reason of the fact that he or she or a person of whom he or she is the legal representative, is or was a director or officer of the Corporation (including any constituent corporation absorbed in a merger) or, while a director or officer of the Corporation, is or was serving at the request of the Corporation (including any such constituent corporation) as a director, officer or employee of another corporation, or of a partnership, joint venture, trust or other enterprise, including service with respect to employee benefit plans, shall be indemnified and held harmless by the Corporation to the fullest extent permitted by the Delaware General Corporation Law, as the same exists or may hereafter be amended, against all expenses, liability and loss (including attorneys' fees, judgments, fines, ERISA excise taxes and penalties and amounts paid or to be paid in settlement) reasonably incurred or suffered by such person in connection therewith and such indemnification shall continue as to a person who has ceased to be a director or officer and shall inure to the benefit of his or her heirs, executors and administrators; provided, however, that the Corporation shall indemnify any such person seeking indemnity in connection with a proceeding (or

part thereof) initiated by such person only if such proceeding (or part thereof) was authorized by the Board of Directors of the Corporation.

Section 6.02. *Advance of Expenses.* The Corporation shall pay all expenses incurred by such a director or officer in defending any such proceeding as they are incurred in advance of its final disposition; provided, however, that if the Delaware General Corporation Law then so requires, the payment of such expenses incurred by a director or officer in advance of the final disposition of such proceeding shall be made only upon delivery to the Corporation of an undertaking, by or on behalf of such director or officer, to repay all amounts so advanced if it should be determined ultimately that such director or officer is not entitled to be indemnified under this Article 6 or otherwise; and provided further that the Corporation shall not be required to advance any expenses to a person against whom the Corporation brings a claim, in a proceeding, for breach of the duty of loyalty to the Corporation, for acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law or for any transaction from which such person derived an improper personal benefit.

Section 6.03. *Non-exclusivity of Rights.* The rights conferred on any person in this Article 6 shall not be exclusive of any other right that such person may have or hereafter acquire under any statute, provision of the Certificate of Incorporation, Bylaw, agreement, vote or consent of stockholders or disinterested directors or otherwise.

Section 6.04. *Indemnification of Contracts.* The Board of Directors is authorized to cause the Corporation to enter into a contract with any director, officer or employee of the Corporation, or any person serving at the request of the Corporation as a director, officer or employee of another corporation, partnership, joint venture, trust or other enterprise, including employee benefit plans, providing for indemnification rights equivalent to or, if the Board of Directors so determines, greater than, those provided for in this Article 6.

Section 6.05. *Insurance.* The Corporation shall maintain insurance, at its expense, to the extent it determines such to be reasonably available, to protect itself, its officers and directors and any other persons the Board of Directors may select, against any such expense, liability or loss, whether or not the Corporation would have the power to indemnify such person against such expense, liability or loss under the Delaware General Corporation Law.

Section 6.06. *Effect of Amendment.* Any amendment, repeal or modification of any provision of this Article 6 by the stockholders or the Directors of the Corporation shall be prospective only, and shall not adversely affect any right or protection conferred on a person pursuant to this Article 6 and existing at the time of such amendment, repeal or modification.

ARTICLE 7
NOTICES

Section 7.01. *Notice.* Except as otherwise specifically provided herein or required by law, all notices required to be given pursuant to these Bylaws shall be in writing and may in every instance be effectively given by hand delivery (including use of a courier service), by depositing such notice in the mail, postage prepaid, or by sending such notice by electronic transmission or facsimile. Any such notice shall be addressed to the person to whom notice is to be given at such persons address as it appears on the records of the Corporation. The notice shall be deemed given (i) in the case of hand delivery, when received by the person to whom notice is to be given or by any person accepting such notice on behalf of such person, (ii) in the case of delivery by mail, when deposited in the mail, and (iii) in the case of delivery via electronic delivery or facsimile, when dispatched.

Section 7.02. *Waiver of Notice.* Any written waiver of notice, signed by the person entitled to notice or a waiver by electronic transmission by the person entitled to notice, whether before or after the time stated therein, shall be deemed equivalent to notice. Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting at the beginning of the meeting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the stockholders, directors or members of a committee of directors need be specified in any written waiver of notice.

ARTICLE 8
INTERESTED DIRECTORS

Section 8.01. *Interest and Directors; Quorum.* No contract or transaction between the Corporation and one or more of its directors or officers, or between the Corporation and any other corporation, partnership, association or other organization in which one or more of its directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the Board or committee thereof that authorizes the contract or transaction, or solely because his, her or their votes are counted for such purpose if: (i) the material facts as to his, her or their relationship or interest and as to the contract or transaction are disclosed or are known to the Board of Directors or the committee, and the Board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; (ii) the material facts as to his, her or their relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or (iii) the contract or transaction is fair as to the Corporation as of the time it is authorized, approved or ratified by the Board of Directors, a committee thereof, or the stockholders. Common or interested directors may be counted in determining the presence of a quorum at a meeting of the Board of Directors or of a committee that authorizes the contract or transaction.

ARTICLE 9
MISCELLANEOUS

Section 9.01. *Fiscal Year.* The fiscal year of the Corporation shall be determined by resolution of the Board of Directors.

Section 9.02. *Seal.* The Board of Directors may provide for a corporate seal, which shall have the name of the Corporation inscribed thereon and shall otherwise be in such form as may be approved from time to time by the Board of Directors.

Section 9.03. *Form of Records.* Any records maintained by the Corporation in the regular course of its business, including its stock ledger, books of account and minute books, may be kept in electronic form or any other information storage device, provided that the records so kept can be converted into clearly legible form within a reasonable time. The Corporation shall so convert any records so kept upon the request of any person entitled to inspect the same.

Section 9.04. *Reliance Upon Books and Records.* A member of the Board of Directors of the Corporation, or a member of any committee designated by the Board of Directors, shall, in the performance of his or her duties, be fully protected in relying in good faith upon the books of account or reports made to the Corporation by any of its officers, or by an independent certified public accountant, or by an appraiser selected with reasonable care by the Board of Directors or by any such committee, or in relying in good faith upon other records of the Corporation.

Section 9.05. *Certificate of Incorporation Governs.* In the event of any conflict between the provisions of the Corporation's Certificate of Incorporation and Bylaws, the provisions of the Certificate of Incorporation shall govern.

Section 9.06. *Severability.* If any provision of these Bylaws shall be held to be invalid, illegal, unenforceable or in conflict with the provisions of the Corporation's Certificate of Incorporation, then such provision shall nonetheless be enforced to the maximum extent possible consistent with such holding and the remaining provisions of these Bylaws (including without limitation, all portions of any section of these Bylaws containing any such provision held to be invalid, illegal, unenforceable or in conflict with the Certificate of Incorporation) that are not themselves invalid, illegal, unenforceable or in conflict with the Certificate of Incorporation shall remain in full force and effect.

Section 9.07. *Derivative Action*. 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.

ARTICLE 10
AMENDMENT

Section 10.01. *Amendments.* The stockholders of the Corporation shall have the power to adopt, amend or repeal Bylaws. The Board of Directors of the Corporation shall also have the power to adopt, amend or repeal Bylaws of the Corporation, except Bylaws adopted by the stockholders that specify that they cannot be amended or repealed by the Board of Directors.

Exhibit D

Case3:10-cv-03392-RS Document41-5 Filed11/18/10 Page2 of 6

8-K 1 d8k.htm FORM 8-K

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

FORM 8-K

CURRENT REPORT
Pursuant To Section 13 OR 15(d) of
The Securities Exchange Act of 1934

Date of report (Date of earliest event reported): July 10, 2006

Oracle Corporation

(Exact Name of Registrant as Specified in Charter)

Delaware
(State or Other Jurisdiction of Incorporation)

000-51788	**54-2185193**
(Commission File Number)	**(IRS Employer Identification No.)**
500 Oracle Parkway, Redwood City, CA	**94065**
(Address of Principal Executive Offices)	**(Zip Code)**

Registrant's telephone number, including area code: (650) 506-7000

N/A
(Former Name or Former Address, if Changed Since Last Report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below):

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Section 5 - Corporate Governance and Management

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year

The Board of Directors (the "Board") of Oracle Corporation ("Oracle") adopted a resolution amending and restating Oracle's Bylaws (as amended and restated, the "Bylaws") as of July 10, 2006.

Descriptions of the provisions adopted or changed and, if applicable, the previous provision are provided below. These descriptions are summaries and are qualified in their entirety by the Bylaws filed herewith as Exhibit 99.1, the text of which is incorporated by reference in this Section 5.03.

Nominations and Stockholder Business

A new Section 1.11 was added to establish procedures pursuant to which a stockholder may nominate a person for election to the Board or propose business to be considered at a stockholder meeting.

Nominations. To nominate a person for election to the Board, a stockholder must set forth all information relating to the nominee that is required to be disclosed in solicitations of proxies for election of directors, or is otherwise required, in each case pursuant to Regulation 14A under the Securities Exchange Act of 1934.

Stockholder Business. To propose an item of business, a stockholder must provide a brief description of the business, along with the text of the proposal or business. The stockholder also must set forth the reasons for conducting such business at the meeting, and any material interest in such business of such stockholder and the beneficial owner, if any, on whose behalf the proposal is made.

Notice Deadlines. Written notice of a stockholder nomination or proposal of other business must be delivered to Oracle's Secretary not less than 90 nor more than 120 days prior to the date on which Oracle first mailed its proxy materials for the prior year's annual meeting. However, if Oracle's annual meeting is advanced or delayed by more than 30 days from the anniversary of the previous year's meeting, a stockholder's written notice will be timely if its is delivered by the later of the 90th day prior to such annual meeting or the 10th day following the announcement of the date of the meeting.

Notice Requirements. Such notice must contain information specified in the Bylaws as to the director nominee or proposal of other business, information about the stockholder making the nomination or proposal and the beneficial owner, if any, on behalf of whom the nomination or proposal is made, including name and address, class and number of shares owned, and representations regarding the intention to make such a proposal or nomination and to solicit proxies in support of it. With respect to director nominees, Oracle may require any proposed nominee to furnish information concerning his or her eligibility to serve as an independent director or that could be material to a reasonable stockholder's understanding of the independence of the nominee.

At a special meeting of stockholders, only such business shall be conducted as shall have been brought before the meeting pursuant to Oracle's notice of meeting. A stockholder may make nominations of persons for election to the Board at a special meeting if the stockholder delivers written notice to Oracle's Secretary not before the 120th day prior to such special meeting and not after the later of the 90th day prior to such special meeting or the 10th day following the announcement of the meeting date.

If the number of directors to be elected to the Board is increased and Oracle does not make a public announcement specifying the size of the increased Board at least 100 days prior to the first anniversary of the preceding year's annual meeting, a stockholder's written notice of nominees for any new position will be considered timely if it is delivered to Oracle's Secretary by the 10th day following the announcement.

Derivative Actions

A new Section 9.07 was added to provide that the sole and exclusive forum for any actual or purported stockholder derivative action brought on behalf of Oracle be the Court of Chancery in the State of Delaware.

Ability to Issue Uncertificated Shares

Section 5.01 was changed to allow the Board to provide by resolution or resolutions that some or all of any or all classes or series of stock issued by Oracle will be uncertificated shares. Such a resolution will not apply to currently certificated shares until such certificate is surrendered to Oracle.

Previously, Oracle's Bylaws provided every Oracle stockholder with the right to have a certificate certifying the number of shares owned by such stockholder.

Officers

Sections 4.01, 4.02, 4.03, 4.05 and 4.06 were revised to reflect officer positions that had previously been established by the Board pursuant to its power to appoint officers from time to time, as provided in Section 4.01 of the Bylaws.

The revisions reflect the positions of Chief Executive Officer ("CEO") and Chief Financial Officer ("CFO"), and endow the CEO and CFO with some of the duties and powers formerly granted to the President and Treasurer, respectively.

Indemnification and Defense of Officers, Directors and Employees

Sections 6.01 and 6.02 were changed to no longer require Oracle to indemnify or advance expenses to an Oracle employee involved in a legal, administrative or investigative proceeding when that employee is not also an officer or director. Oracle's indemnification and defense of such employees is discretionary (other than where required by applicable law). The new provisions continue to require Oracle to indemnify, hold harmless and advance expenses to any officer or director who was or is made a party or threatened to be made a party to any legal, administrative or investigative proceeding by reason of the fact that he or she is or was an Oracle officer or director, or by reason of his or her service, while an officer or director of Oracle, as a director, officer or employee of another entity at Oracle's request.

Previously, the Bylaws provided for mandatory indemnification and defense of all officers, directors, and employees by Oracle. The new provisions are prospective only, and do not adversely affect any right to indemnification and expenses previously conferred on an Oracle employee.

Technological Updates

Multiple provisions were changed to reflect changes in the technologies used to perform ministerial tasks and to permit electronic communication and storage.

Electronic Notices, Waivers, Consents and Resignations. Provisions were changed to allow notice to be given electronically for all meetings of stockholders (Section 1.03), special meetings of the Board (Section 2.04), and as otherwise required (Section 7.01). Notice by electronic delivery will be deemed given when dispatched (Section 7.01), and any person entitled to notice may waive it by electronic transmission (Section 7.02). The members of the Board may consent to any action without a meeting by electronic transmission or transmissions (Section 2.08), and any director or officer may resign by electronic transmission to Oracle (Sections 2.02 and 4.01).

Previously, Oracle's Bylaws did not provide for electronic notices, waivers, consents and resignations and provided for notice and waiver using obsolete methods of transmittal (e.g., telegram, telex and mailgram). The new provisions eliminate references to these technologies.

Electronic Transmittal and Storage. Provisions were similarly changed to allow the minutes of proceedings of the Board or any committee thereof (Section 2.08), as well as any records kept by Oracle in the regular course of its business (Section 9.03), to be stored in electronic form.

Previously, Oracle's Bylaws did not provide for these records and filings to be stored in electronic form and provided for storage using obsolete technologies (e.g. punch cards, magnetic tape and microphotographs). The new provision eliminates references to these technologies.

Case3:10-cv-03392-RS Document41-5 Filed11/18/10 Page5 of 6

Section 9 - Financial Statements and Exhibits

Item 9.01 Financial Statements and Exhibits

(d) Exhibits

3.02 Amended and Restated Bylaws of Oracle Corporation.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

ORACLE CORPORATION

Date: July 14, 2006

By: /s/ Safra A. Catz
Name: Safra A. Catz
Title: President and Chief Financial Officer