SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

DEAN DRULIAS, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

1ST CENTURY BANCSHARES, INC., ALAN I. ROTHENBERG, WILLIAM W. BRIEN, M.D., DAVE BROOKS, JASON P. DINAPOLI, ERIC M. GEORGE, ALAN D. LEVY, BARRY D. PRESSMAN, ROBERT A. MOORE, LEWIS N. WOLFF, NADINE WATT, STANLEY R. ZAX, and SANDLER O"NEILL & PARTNERS, L.P.,

Defendants.

Case No.: 16CV294673

ORDER AFTER HEARING ON JUNE 16, 2017

(1) Motion by Defendants to Seal Portions of the First Amended Complaint; (2) Motion by 1st Century Defendants to Stay or Dismiss for Forum Non Conveniens

The above-entitled matter came on regularly for hearing on Friday, June 16, 2017 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh presiding. A tentative ruling was issued by the Court on June 15, 2017. The appearances are as stated in the record. The Court, having reviewed and considered the written submission of all parties, having heard and considered the oral argument of counsel, and being fully advised, orders that the tentative ruling be adopted and incorporated herein as the Order of the Court, as follows:

This putative shareholder class action arises from the sale of defendant 1st Century Bancshares, Inc. to Midland Financial Co., a transaction which plaintiff claims advanced the interests of 1st Century's directors at the expense of its public shareholders. Before the Court are motions by 1st Century and the individual defendants (collectively, the "1st Century Defendants") (1) to file under seal portions of the first amended complaint ("FAC") and (2) to dismiss the action pursuant to Code of Civil Procedure sections 410.30 and 418.10. Plaintiff opposes the latter motion.

I. Factual and Procedural Background

Plaintiff filed this action for breaches of fiduciary duty on May 3, 2016, after the sale had been announced but prior to the shareholder vote on June 20. On May 25, plaintiff filed an application to preliminarily enjoin the shareholder vote. The 1st Century Defendants filed an opposition to plaintiff's application, arguing, among other things, that the action was improperly filed in California in light of a forum selection bylaw designating Delaware as the exclusive forum for any fiduciary duty claims. Prior to the hearing on the preliminary injunction, the parties reached a settlement, and the hearing was taken off-calendar. The shareholder vote proceeded as scheduled on June 20, with over 99.8% of the voting shares approving the transaction.

On August 8, plaintiff filed a motion for preliminary approval of the parties' settlement. The 1st Century Defendants joined in plaintiff's motion, but not in the memorandum supporting it. The parties presented the Court (Hon. Kirwan) with a non-monetary settlement pursuant to which 1st Century provided supplemental disclosures to its shareholders prior to the shareholder vote in exchange for a broad release of claims related to the merger. 1st Century also agreed not to oppose plaintiff's request for attorney fees in the amount of $400,000. Adopting the standard recently announced by the Delaware Chancery Court in *In re Trulia, Inc. Stockholder Litigation*

(Del. Ch. 2016) 129 A.3d 884, the Court found that the disclosures were not adequately material to justify the settlement and release of claims, and denied preliminary approval on November 21.

On January 6, 2017, the first case management conference in this action was held. The Court adopted a schedule for plaintiff to file an amended complaint and for defendants to file a motion to stay or dismiss for forum non conveniens.

Plaintiff filed his FAC on January 13, asserting the following claims for breach of fiduciary duty: (1) breaches of the duties of care, good faith, and loyalty against the individual defendants; (2) breaches of the duty of disclosure against the 1st Century Defendants; and (3) aiding and abetting the individual defendants' breaches of duty against Sandler O'Neill & Partners, L.P. (an investment bank that provided a fairness opinion in connection with the merger).

II. Motion to Seal

The 1st Century Defendants move to file under seal the unredacted version of the FAC, which reflects information that was provided to plaintiff in connection with the parties' settlement discussions.

A. Legal Standard

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3.) In addition, confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court (Unity Pictures Corp.)* (2003) 110 Cal.App.4th 1273, 1285-1286.)

Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*In re Providian*, *supra*, 96 Cal.App.4th at p. 309.)

B. Analysis

As described in the declaration supporting defendants' motion, the materials at issue are (1) documents including confidential minutes of board meetings, confidential financial analyses prepared by Sandler O'Neill, and confidential communications between Midland and 1st Century preceding the merger and (2) deposition testimony provided by 1st Century board member Eric George and Sandler O'Neill managing director Peter Buck in connection with the parties' settlement efforts.

With respect to the first category of information, defendants' counsel declares that these documents reflect confidential business information whose disclosure may prove harmful to 1st Century and its business. As to the second category, counsel declares that the deposition testimony references board members' private information, including personal financial information. This information is appropriately filed under seal. (See *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35 [although pleadings should "as a general rule" be

open to public inspection, pleadings and exhibits thereto may be filed under seal under appropriate circumstances; noting that it is unnecessary to include evidence beyond allegations of ultimate facts in a complaint in any event].)

Having reviewed the redacted versions of the FAC, the Court finds that the redactions are narrowly tailored to the material described above. The factors set forth in rule 2.550(d) are satisfied under the circumstances.

C. Conclusion and Order

The motion to seal the unredacted version of the FAC is accordingly GRANTED.

III. Motion to Dismiss

The 1st Century Defendants move to dismiss this action in light of the forum selection bylaw, citing Code of Civil Procedure sections 410.30 and 418.10. The bylaw provides:

> Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware (or, if the Court of Chancery does not have jurisdiction, the federal district court for the District of Delaware) shall be the sole and exclusive forum for … (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer, other employee or stockholder of the Corporation to the Corporation or the Corporation's stockholders, … (iv) any action to interpret, apply, enforce or determine the validity of the Certificate of Incorporation or these Bylaws or (v) any action asserting a claim governed by the internal affairs doctrine.

Plaintiff does not dispute that the bylaw applies to the claims against the 1st Century Defendants, but argues that they waived their right to enforce it, while plaintiff has a right to a California forum pursuant to Corporations Code section 2116. In addition, he contends that the bylaw does not apply to his claim for aiding and abetting against Sandler O'Neill.

A. Legal Standard

As an initial matter, the Court notes that section 418.10, which authorizes a defendant to file a forum non conveniens motion before making a general appearance, does not apply where the defendant has made a general appearance; however, such a defendant may still bring a forum non conveniens motion pursuant to section 413.30, which authorizes a court to stay or dismiss an action if it finds that "in the interest of substantial justice" it should be heard in a forum outside the state. (Code Civ. Proc., § 410.30, subd. (b); *Britton v. Dallas Airmotive, Inc.* (2007) 153 Cal.App.4th 127, 133 ["Under [section 410.30] subdivision (b), a defendant who has generally appeared may make a forum non conveniens motion at any time, not only on or before the last day to plead."].)

Where a mandatory forum selection provision is asserted, the traditional forum non conveniens factors (whether the designated forum is a suitable alternative forum and whether the balancing of various private and public interest factors favors retaining the action in California) are not considered. (See *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 147, fn.2.) To avoid enforcement of such a provision, the plaintiff bears a "heavy burden" to show that enforcement would be wholly "unreasonable under the circumstances of the case." (*Wimsatt v. Beverly Hills Weight etc. Internat., Inc.* (1995) 32 Cal.App.4th 1511, 1523.)

B. Waiver

"[O]bjections to the venue of an action," including those based on forum selection agreements, "are waived unless promptly presented." (*Smith, Valentino & Smith, Inc. v. Superior Court (Life Ins. Co. of Pennsylvania)* (1976) 17 Cal.3d 491, 497; see also *Trident Labs, Inc. v. Merrill Lynch Commercial Finance Corp.* (2011) 200 Cal.App.4th 147, 157 (hereinafter, "*Trident*") [unreasonable to enforce forum selection clause where defendant chose "to

extensively litigate in the original forum by filing a cross-complaint, conducting substantial discovery, and filing motions seeking relief from the forum court"].)

Cases arising in the context of arbitration clauses are instructive with respect to this issue. Those cases consider the following factors with respect to waiver:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party.

(*Sobremonte v. Superior Court (Bank of America Nat. Trust and Sav. Ass'n)* (1998) 61 Cal.App.4th 980, 992, internal citations and quotations omitted.)

Here, the 1st Century Defendants have consistently asserted their objection based on the forum selection bylaw—including in their opposition to plaintiff's motion for a preliminary injunction—and raised it by motion at the earliest reasonable opportunity consistent with the Court's scheduling orders. The Court has yet to hear any substantive motions in this action, other than the motion for preliminary approval of a settlement, which it denied. Defendants' attempt to settle the action did not waive their right to raise the forum selection bylaw under the circumstances, and plaintiff's argument regarding forum-shopping is unconvincing considering it was plaintiff who chose to file this action in California. The circumstances here are in contrast to those in *Trident*, where the defendant "litigated the suit in California vigorously" over 19 months, "removing the case to the United States District Court, Central District, and, after it was remanded, filing a cross-complaint and other pleadings and engaging in substantial discovery, including discovery motions." (At p. 149.)

The Court accordingly finds that defendants have not waived their right to raise the forum selection bylaw.

C. Analysis as to the 1st Century Defendants

There is no California authority addressing the enforceability of a forum selection *bylaw*, as opposed to a contractual forum selection provision. Federal courts in California have split on the issue of whether such bylaws are enforceable. (See *Galaviz v. Berg* (N.D. Cal. 2011) 763 F.Supp.2d 1170 [forum selection bylaw unilaterally adopted by directors after the alleged wrongdoing at issue in the action would not be enforced]; *In re: CytRx Corp. Stockholder Derivative Litigation* (C.D. Cal., Oct. 30, 2015, No. CV146414GHKPJWX) 2015 WL 9871275 [enforcing Delaware forum selection bylaw, noting that courts have criticized *Galaviz*].) In Delaware, on the other hand, forum selection bylaws are considered "valid and enforceable contractual forum selection clauses," even if unilaterally adopted by the board after shareholders purchased their shares. (*Boilermakers Local 154 Retirement Fund v. Chevron Corp.* (Del. Ch. 2013) 73 A.3d 934, 939; see also *City of Providence v. First Citizens BancShares, Inc.* (Del. Ch. 2014) 99 A.3d 229 [dismissing claims challenging a forum selection bylaw adopted the same day a challenged merger was announced].)

A critical issue, then, is whether California or Delaware law should be applied to determine whether the forum selection bylaw is enforceable. Under the internal affairs doctrine, Delaware law should generally govern a question regarding the validity of bylaws and bylaw amendments. (See *Lidow v. Superior Court (International Rectifier Corp.)* (2012) 206 Cal.App.4th 351, 359 [the internal affairs doctrine is a conflict of laws principle providing that the laws of the state of incorporation should generally govern a corporation's internal affairs, such as the adoption and amendment of bylaws, so that it is not faced with conflicting demands]; *Olincy v. Merle Norman Cosmetics, Inc.* (1962) 200 Cal.App.2d 260, 271 [validity of bylaws is determined according to the law of the state of incorporation].)

"There is, however, a vital limitation to the internal affairs doctrine: The local law of the state of incorporation will be applied ... *except where, with respect to the particular issue, some other state has a more significant relationship ... to the parties and the transaction.*" (*Lidow v.*

Superior Court, *supra*, 206 Cal.App.4th at p. 359 [internal citations and quotations omitted, italics original].) California "courts are less apt to apply the internal affairs doctrine when vital statewide interests are at stake, such as maintaining the integrity of California security markets and protecting its citizens from harmful conduct." (*Id.* at p. 362.) "In contrast, … when less vital state interests are at stake (e.g., whether a foreign corporation headquartered in another state pays promised dividends to its shareholders, or whether the shareholder of a foreign corporation must fulfill certain procedural requirements set before bringing a derivative suit), courts are more apt to apply the internal affairs doctrine." (*Ibid.*)

Here, plaintiff contends that enforcing the forum selection clause would conflict with Corporations Code section 2116, which provides:

> The directors of a foreign corporation transacting intrastate business are liable to the corporation, its shareholders, creditors, receiver, liquidator or trustee in bankruptcy for the making of unauthorized dividends, purchase of shares or distribution of assets or false certificates, reports or public notices or other violation of official duty *according to any applicable laws of the state or place of incorporation or organization*, whether committed or done in this state or elsewhere. Such liability may be enforced in the courts of this state.

(Italics added.)

Corporations Code section 2116 codifies the internal affairs doctrine. (*Vaughn v. LJ Intern., Inc.* (2009) 174 Cal.App.4th 213, 223 (hereinafter, "*Vaughn*").) While it provides that liability under the laws of the state of incorporation "may" be enforced in California, it does not purport to create a *right* to sue in California as urged by plaintiff. Plaintiff cites no authority supporting the proposition that section 2116 creates such a right, and his argument on this point must accordingly fail.

Plaintiff also raises the issue of whether California's interest in applying its own law to the bylaw issue is more significant than Delaware's, given that plaintiff is a California resident, 1st Century is headquartered here, and the individual defendants almost all reside here. The Court does not find this argument persuasive given that 1st Century is a Delaware corporation

whose shareholders may reside anywhere, and California has expressly adopted the internal affairs doctrine for the "salutary" purpose of "enhancing confidence that a predictable legal framework will govern the relationship between investors and the corporation." (*Vaughn, supra,* 174 Cal.App.4th at p. 224.) Notably, there is no dispute that Delaware law will apply to the substance of plaintiff's claims, so there is no concern that a Delaware court would not enforce protections established by California law. The Court finds no unfairness in a requirement that claims against a Delaware corporation under Delaware law be brought in a Delaware court. Further, it is not at all clear that California's law regarding the enforceability of a forum selection bylaw would differ from its law regarding the enforceability of purely contractual forum selection provisions, where the plaintiff bears a "heavy burden" to show that enforcement would be wholly "unreasonable under the circumstances of the case." (*Wimsatt v. Beverly Hills Weight etc. Internat., Inc., supra,* 32 Cal.App.4th at p. 1523.)

Turning to that final issue, plaintiff argues that it would be unreasonable to enforce the bylaw since it was adopted after plaintiff purchased his shares (which was before such bylaws came into vogue in Delaware) and concurrently with the challenged merger. Again, however, it is not unreasonable to impose Delaware law regarding corporate internal affairs on a shareholder in a Delaware corporation. The internal affairs doctrine is a clear and longstanding principle of California law. Similarly, the fact that Delaware corporate law tends to evolve in front of the law of other states is no surprise to anyone. Presumably, plaintiff would not dispute that he is bound by changes in Delaware law following his purchase when it comes to the substance of his claims. The Court sees no reason to draw a distinction with respect to the bylaw provision. While not a derivative action, the circumstances here are analogous to those in *Vaughn*, where a requirement that shareholders in British Virgin Islands corporations receive permission from the high court of that jurisdiction before bringing suit was held to apply to a California lawsuit under the internal affairs doctrine.

In re Facebook, Inc., IPO Securities and Derivative Litigation (S.D.N.Y. 2013) 922 F.Supp.2d 445—which held that a forum selection clause in a certificate of incorporation that did

not become effective until *after* the challenged transaction was no bar to plaintiffs' claims—is not to the contrary. (At p. 463.) Here, there is no dispute that the bylaw became effective before the merger was accomplished and before this action was filed.

For these reasons, Delaware is the proper forum as to the 1st Century Defendants.

D. Analysis as to Sandler O'Neill and Propriety of Dismissing the Action

While not raised by plaintiff, the California Supreme Court has "consistently held that except in extraordinary cases a trial court has no discretion to dismiss an action brought by a California resident on grounds of forum non conveniens," and should instead stay the action so that the court

> *retains jurisdiction* over the parties and the cause; ... it can compel the foreign party to cooperate in bringing about a fair and speedy hearing in the foreign forum; it can resume proceedings if the foreign action is unreasonably delayed or fails to reach a resolution on the merits. ... In short, the staying court can protect ... the interests of the California resident pending the final decision of the foreign court.

(*Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 857-858, internal citations and quotations omitted.) Here, there is no indication that the Delaware courts will not assume jurisdiction over plaintiff's claims; nevertheless, it would be premature to dismiss the action entirely. (See *Auffret v. Capitales Tours, S.A.* (2015) 239 Cal.App.4th 935, 940-943 [trial court properly stayed the action so that it could be established whether the French courts would assume jurisdiction, but improperly dismissed it two years later before there was conclusive proof they would].)

As to Sandler O'Neill, which has been served in this action but has not yet appeared, it is appropriate for the stay to include the derivative claims against this defendant. (See *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1674 [affirming trial court, which held that the existence of other parties did not prevent the court from issuing a stay based on a forum selection agreement executed by only one defendant, where the other defendants did not oppose the motion]; *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11

Cal.App.4th 1490, 1493-1494 [closely-related claims against defendants who were not signatories to a forum selection agreement were appropriately stayed; "[t]o hold otherwise would be to permit a plaintiff to sidestep a valid forum selection clause simply by naming a closely related party who did not sign the clause as a defendant"].) "In the event that plaintiff is unable to obtain jurisdiction over those defendants in [Delaware], plaintiff may apply for a partial lifting of the stay, or a severance of the claim against them." (*Cal-State Business Products & Services, Inc. v. Ricoh, supra,* 12 Cal.App.4th at p. 1674.)

In sum, this entire action is appropriately stayed pending the assumption of jurisdiction by the Delaware courts, but is not appropriately dismissed at this juncture. (Code Civ. Proc., § 410.30, subd. (a) [in granting forum non conveniens motion "the court shall stay or dismiss the action in whole or in part on any conditions that may be just"]; *Archibald v. Cinerama Hotels, supra,* 15 Cal.3d at p. 860 [the "trial court, applying the doctrine of *forum non conveniens*," has the power "to stay a suit by a California resident even when it lacks the power to dismiss that suit"].)

E. Conclusion and Order

Defendants' motion is GRANTED IN PART. The entire action is stayed on the ground that Delaware is a more appropriate and just forum for this action in light of 1st Century's bylaws. The motion is DENIED to the extent defendants seek an immediate dismissal of the action.

IT IS SO ORDERED.

Dated: 6-19-17

Honorable Brian C. Walsh
Judge of the Superior Court