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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Groen Plaintiff/Petitioner(s) VS. Safeway Inc. Defendant/Respondent(s) (Abbreviated Title)	No. RG14716641 Order Motion to Dismiss Granted

The Motion to Dismiss was set for hearing on 05/14/2014 at 08:30 AM in Department 21 before the Honorable Wynne Carvill. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Motion of defendant Safeway, Inc. ("Safeway") To Dismiss, Or In The Alternative Motion To Stay ("Safeway's Motion"), joined by defendants Cerberus Capital Management L.P. ("Cerberus"), AB Acquisition LLC, Albertson's Holdings LLC and Albertson's LLC (collectively "Albertson's") and defendants Robert Edwards, T. Gary Rogers, Janet E. Grove, Mohan Gyani, Frank C. Herringer, George J. Morrow, Kenneth W. Oder, Arun Sarin and William Y. Tauscher (collectively "Individual Defendants"); and the Motion of Cerberus To Dismiss Or, In The Alternative, Motion To Stay ("Cerberus' Motion") are ruled on as follows:

PROCEDURAL POSTURE:

On May 6, 2014, this court issued an order consolidating four cases arising from the announcement by Safeway on March 6, 2014 that it had entered into an agreement whereby defendant AB Acquisition LLC will acquire all outstanding Safeway shares, Groen v. Safeway, et al., RG14716641 ("Groen"), Lopez v. Safeway, et al., HG14716651, Ettinger v. Safeway, et al., RG14716842 ("Ettinger"), and Brockton Retirement Board v. Safeway, Inc., et al., RG14720450 ("Brockton"). Groen is the lead case. All of the consolidated actions are pled as class actions and assert the same causes of action against the Individual Defendants for Breach of Fiduciary Duty and against the other defendants for Aiding and Abetting Breaches of Fiduciary Duty.

At the time of consolidation, a motion by Safeway virtually identical to the instant Safeway Motion was pending in Lopez, along with the joinder in that motion of defendant AB Acquisition LLC. After the consolidation order was entered the motion and joinder filed in Lopez were dropped from calendar as duplicative. The court has, however, considered the opposition filed by counsel for Lopez.

The Cerberus Motion does not expand the scope of issues raised in the Safeway Motion. Accordingly, the instant combined order will address both motions and will be dispositive of the included issues as they apply to all four cases. That is to say, an order of dismissal entered in the lead Groen case will serve to dismiss all four consolidated cases.

SAFEWAY MOTION AND CERBERUS MOTION:

Safeway and Cerberus, joined by all other defendants (except Saturn Acquisition Merger Sub, Inc. who has not entered an appearance) (collectively, "Defendants") argue that these consolidated cases should be dismissed, or at least stayed pending final resolution of the seven nearly identical class action lawsuits pending before the Delaware Court of Chancery. Included in Article VIII of Safeway's publicly filed bylaws is a forum selection clause that designates the Delaware Court of Chancery as "the sole and exclusive forum" for "any action asserting a claim for breach of fiduciary duty owed by, or other wrongdoing by, any director or officer of the corporation ... to the corporation's shareholders." Plaintiffs are contractually bound by this provision.

Defendants' primary support for this argument is Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del.Ch. 2013)("Boilermakers").

Alternatively, Defendants assert that these consolidated actions can and should be dismissed pursuant to California Code of Civil Procedure §418.10(a)(2) [inconvenient forum].

PLAINTIFFS' OPPOSITION:

Plaintiffs argue in opposition that the forum selection clause in Safeway's bylaws is unenforceable because it was adopted unilaterally without mutual consent of the parties and only after misconduct took place. In Plaintiffs' view, Boilermakers establishes nothing more than that forum selection provisions in corporate governance instruments are permissible under Delaware law as a general matter, and under California law the bylaw forum selection clause is unenforceable. In support of this argument, Plaintiffs rely primarily on Galaviz v. Berg, 763 F.Supp.2d 1170 (N.D.Cal. 2011), a case that was decided before Boilermakers and that involved forum selection bylaws that were adopted after the majority of alleged wrongdoing had already occurred. (Id, at 1174.)

Plaintiffs further argue that enforcement of the forum selection clause would also result in the loss of Plaintiffs' right to a jury trial, amounting to an impermissible "predispute jury waiver." (Citing Grafton Partners v. Sup.Ct. (2005) 36 Cal.4th 944, 967 ("Grafton").)

Plaintiff goes on to refute Defendants' inconvenient forum arguments.

DISCUSSION:

The court agrees with Plaintiffs that Defendants' inconvenient forum arguments do not find support in California decisional authorities. However, Defendants' arguments regarding the forum selection clause in the Safeway bylaws are well taken.

Notwithstanding Plaintiffs' contrary characterizations, the Boilermakers decision was not limited to an analysis of whether a corporate board has the power to adopt and amend bylaws unilaterally under "Delaware's corporate framework." Rather, the Boilermaker court included a detailed discussion of the contractual principles at play. (Boilermakers, at 957-958.) Furthermore, as Safeway correctly points out in its reply, Plaintiffs' arguments effectively ignore the internal affairs doctrine.

The court recognized that the procedural posture of Boilermakers was different, in that a facial challenge to the forum selection bylaws was at issue, where the instant motions present an as-applied challenge. However, while the Boilermakers court acknowledged that its decision did not preclude court scrutiny under the test set forth in Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (Boilermakers, at 958-959), Plaintiffs have failed to demonstrate that application of the forum selection bylaws would be unreasonable in this situation. Their argument that the forum selection bylaws were adopted after wrongdoing had already occurred is not supported by the record, and their reliance on Grafton is misplaced since these consolidated cases are suits in equity.

CONCLUSION AND RULING:

The court finds that Delaware law applies, and that Plaintiffs are contractually obligated to bring their claims against Defendants only in the Delaware Court of Chancery. Accordingly, the Motions to Dismiss are GRANTED.

These consolidated cases are HEREBY DISMISSED.

Dated: 05/14/2014

Facsimile

Judge Wynne Carvill

SHORT TITLE:	CASE NUMBER:
Groen VS Safeway Inc.	RG14716641

ADDITIONAL ADDRESSEES

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