

Cattan v Vasella

2022 NY Slip Op 32814(U)

August 18, 2022

Supreme Court, New York County

Docket Number: Index No. 650463/2021

Judge: Margaret Chan

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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 EZRA CATTAN, DERIVATIVELY AS A SHAREHOLDER
 OF NOVARTIS AG ON BEHALF OF NOVARTIS AG,
 CHARLES BLACKBURN,

Plaintiff,

- v -

DANIEL VASELLA, JOERG REINHARDT, JOSEPH
 JIMENEZ, ENRICO VANNI, SRIKANT DATAR, ANN
 FUDGE, ANDREAS VON PLANTA, CHARLES
 SAWYERS, WILLIAM WINTERS, TON BUECHNER,
 NANCY ANDREWS, KEVIN BUEHLER, ELIZABETH
 DOHERTY, FRANS VON HOUTEN, PATRICE BULA,
 SIMON MORONEY, BRIDGETTE HELLER, DIMITRI
 AZAR, FELIX EHRAT, HARRY KIRSCH, VASANT
 NARASIMHAN, RICHARD FRANCIS, ROLF
 ZINKERNAGEL, WILLIAM BRODY, SIR JONATHAN
 SYMONDS, JEFFREY GEORGE, DAVID EPSTEIN,
 THOMAS WERLEN, ALLAN KASPAR, BRIAN KASPAR,
 HECTOR ARMANDO KELLUM, HELMUT SIHLER,
 WILLIAM GEORGE, SHANNON THYME KLINGER,
 NOVARTIS PHARMACEUTICALS CORPORATION,
 SANDOZ INC., NOVARTIS CAPITAL CORPORATION,
 NOVARTIS AG,

Defendant.

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INDEX NO. 650463/2021

MOTION DATE 06/09/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
 MOTION**

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 44, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91

were read on this motion to/for

DISMISSAL

This is a derivative action commenced by plaintiffs as shareholders of Novartis AG (Novartis) and on behalf of Novartis against certain present and former Novartis directors and officers and third parties for, among other things, breach of fiduciary duties. Defendants Novartis Capital Corporation (NCC), Novartis Pharmaceuticals Corporation (NPC), Sandoz, Inc. (Sandoz), Charles L. Sawyers and nominal defendant Novartis (together, the movants) move pursuant to CPLR 3211(a)(7) and CPLR 327 for an order dismissing plaintiffs' first amended verified shareholder derivative complaint (NYSCEF # 3, Amended Complaint) against them. Plaintiffs oppose the motion.

Background

Novartis is a publicly owned holding company organized under Swiss law, operating an integrated multinational pharmaceutical enterprise through its subsidiaries across the world (Amended Complaint, ¶¶ 3, 33). While its registered office and principal place of business is in Basel, Switzerland, Novartis has offices in New York and obtains billions of dollars of revenue from sales in New York (*id.*). Meanwhile, its stock trades on the New York Stock Exchange, with more than 25% of its shares owned by American investors (*id.*, ¶ 3). Plaintiffs Ezra Cattan and Charles R. Blackburn reside in New York and Pennsylvania, respectively, and own shares of Novartis common stock (*id.*, ¶ 32). In the Amended Complaint, plaintiffs name more than 30 individuals as defendants, who are former and/or current directors and officers of Novartis or its subsidiaries (*id.*, ¶¶ 40-71). Other defendants in this action are Novartis's wholly owned subsidiaries NCC, NPC, and Sandoz, and three individuals who took various roles at Novartis's controlled entities (*id.*, ¶¶ 36-39, 72-74).¹ Novartis is named as nominal defendant (*id.*, ¶ 33).

This case involves a series of Novartis's alleged wrongdoing and scandals, including kickbacks and bribes, criminal antitrust conspiracies, manufacturing violations, and compliance breaches, resulting in approximately \$ 3.5 billion loss in fines, penalties, and settlements and hundreds of millions in legal fees and expenses (*id.*, ¶ 4). Plaintiffs allege that the damage and losses suffered by Novartis and its shareholders resulted from defendants' misconduct and breaches, and the wrongs are still ongoing (*id.*, ¶¶ 2, 7-8, 80). Specifically, plaintiffs assert (i) a breach of fiduciary duties claim against the director and officer defendants, (ii) a claim against all defendants for participating in a common course of conduct and concerted action damaging Novartis, and (iii) a claim against all defendants for aiding and abetting breaches of one another's duties (*id.*, ¶¶ 348-366). All the substantive claims made are based on Swiss law (*id.*, ¶¶ 76, 83).

Of relevance here, Novartis's Articles of Incorporation contains a clause which provides that "[t]he place of jurisdiction for any disputes arising from or in connection with the shareholdership in the Company shall be at the registered office of the Company," that is, Basel, Switzerland, according to Article 1 of the same document (NYSCEF # 18—Articles of Incorporation, Article 39). Although the above quoted language is based on the official English version that appears on Novartis's website, the parties do not dispute that the original German text remains binding and have separately proposed slightly different translations of the clause based on their experts' opinions. The differences in the parties' proposed translations, however, are immaterial to the disposition of this motion.

¹ The movants do not contest personal jurisdiction. Pursuant to the parties' so-ordered stipulation dated November 8, 2021, the remaining defendants contest this court's jurisdiction over them and do not join this motion (NYSCEF # 14).

In this motion, the movants seek to dismiss the Amended Complaint against them on various grounds, including that (1) Novartis's Articles of Incorporation require this action to be brought in Switzerland; (2) plaintiffs lack standing under Swiss law as they have not adequately alleged their registered-shareholder status; (3) Novartis's shareholders released the individual defendants' liability by a resolution at Novartis's annual shareholder meeting; (4) NCC, NPC, and Sandoz are not proper defendants for this shareholder derivative action since they are not directors or officers of Novartis; (5) New York is not an appropriate forum; (6) plaintiffs do not allege facts to excuse pre-suit demand; and (7) plaintiffs have not pleaded breach of duties with the requisite particularity.

Discussion

As a threshold matter, the movants argue that this action must be dismissed because Article 39 of Novartis's Articles of Incorporation, the forum selection clause, requires that plaintiffs bring this action in Switzerland.

In opposition, plaintiffs argue that Article 39 does not apply to this action because the term "shareholdership," or "corporate relationship" as translated from the German text, is limited to matters between shareholders and the corporation and does not encompass disputes between the corporation (with shareholder plaintiffs as proxy) and a corporate officer or director. In a recent decision of the Commercial Division, Justice Jennifer Schecter rejected the same argument, holding that "[b]oth directors and shareholders have a 'corporate relationship' with [the company]" and the forum selection clause "necessarily covers disputes between the corporation and its directors arising out of acts taken in their fiduciary capacity because they stem from the corporate relationship" (*Cattan v Ermotti*, 2021 WL 6200975, *1 [Sup Ct, NY County, Dec. 30, 2021] [addressing a similar forum selection clause in a Swiss company's Articles of Incorporation that contains the phrase "any disputes arising out of the corporate relationship"]). Justice Schecter's reasoning is compelling—shareholder derivative actions necessarily arise from corporate relationship since internal corporate disputes against corporate directors and officers are predicated on their status as the company's governing bodies, and "the aggrieved party in such a dispute is usually a shareholder of the corporation" (*FDIC v RAFFA*, 882 F Supp 1236, 1246 [D Conn 1995]).

Plaintiffs also incorrectly argue that to fall within Article 39's ambit, the claims must arise from contract rights and cannot be premised on breaches of statutory fiduciary duties (NYSCEF # 53 at 12-13). *OTK Assocs., LLC v Friedman* (85 A3d 696, 720-721 [Del Ch 2014]), the out-of-state case plaintiffs rely on, is inapposite because the forum selection clause contained in a transaction document in that case explicitly refers to disputes "arising out of or relating to this Agreement." Here, the term used in Article 39, either it be "shareholdership" or "corporate relationship," includes a broad spectrum of internal corporate matters

that cover more than just contractual disputes (*see also Erie Ins. Co. of N.Y. v AE Design, Inc.*, 104 AD3d 1319, 1320 [4th Dept 2013] [rejecting plaintiff's argument that the forum selection clause does not apply to noncontractual claims, reasoning that "under its broad and unequivocal terms, the applicability of the subject forum section clause does not turn on the type or nature of the dispute between [the parties]"). As noted in *Ermotti*, "there is no authority supporting plaintiff[s] argument that internal corporate disputes are not included in [the forum selection clause's] ambit" (*Ermotti*, 2021 WL 6200975, *1).

To the extent Swiss law applies to the issue, it suggests the same result. The parties' experts agree that Article 23 of the Lugano Convention applies under Swiss law, which provides that the courts of a State where parties have agreed to settle any disputes "in connection with a particular legal relationship" shall have exclusive jurisdiction unless the parties have agreed otherwise (NYSCEF # 37 at 42).² Both parties' experts recognize *Powell Duffryn v Petereit*, a decision made by the European Court of Justice (ECJ), as the seminal case interpreting that provision (NYSCEF # 76). *Powell Duffryn* involves a dispute between a shareholder and the company, and the ECJ found that a clause conferring jurisdiction to "all disputes between [a shareholder] and the company or its organs" satisfies the requirement in Article 23 of the Lugano Convention that a dispute arise "in connection with a particular legal relationship" (*id.*, ¶¶ 30-34). However, the ECJ did not say that the scope of the clauses shall be necessarily limited to disputes between the company and its shareholders. On the contrary, the ECJ appears to keep the gate open for other forms of corporate disputes (*see e.g. id.*, ¶ 32 ["in connection with the relationship between the company and its shareholders *as such*"] [emphasis added]; *id.*, ¶ 16 ["each shareholder is assigned, *as regards other shareholders and the organs of the company*, rights and obligations set out in the company's statutes"] [emphasis added]). In any event, Article 39 sets the scope for a "particular legal relationship" and satisfies the requirement of Article 23 of the Lugano Convention.

As this action falls within the scope of Article 39 and the clause is valid, the next question is whether to enforce Article 39. Plaintiffs contend that Article 39 is

² Article 23 of the 2007 Lugano Convention states:

"If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. ..."

(NYSCEF # 37 at 42).

merely permissive and does not have to be enforced, and therefore this action is properly brought in New York.

Forum selection clauses are “presumed to be valid and enforceable unless unreasonable or unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court” (*Camacho v IO Practiceware, Inc.*, 136 AD3d 415, 416 [1st Dept 2016]). It is the well-settled policy of the courts of this State to enforce forum selection clauses for “certainty and predictability in the resolution of disputes” (*Boss v Am. Express Fin. Advisors, Inc.*, 6 NY3d 242, 247 [2006]; see also *Ermotti*, 2021 WL 6200975, *1 [enforcing the forum selection clause and finding that “[i]t would make little sense ... to allow for litigation of massive derivative suits across the globe”]). Here, the court finds Article 39 mandatory, requiring that this action be brought in Basel, Switzerland.

New York courts have repeatedly found that forum selection clauses employing words such as “shall” are mandatory (see e.g. *Spirits of St. Louis Basketball Club, L.P. v Denver Nuggets, Inc.*, 84 AD3d 454, 455–456 [1st Dept 2011] [“By utilizing the word ‘shall’, the ABA Agreement makes the forum mandatory.”]; *Micro Balanced Prod. Corp. v Hlavin Indus. Ltd.*, 238 AD2d 284, 284–285 [1st Dept 1997] [enforcing clause that “[t]he courts of Tel-Aviv shall have jurisdiction over any matter arising from or concerning this agreement” and noting that “language that court ‘shall have jurisdiction’ is mandatory”]). Plaintiffs’ reliance on federal cases to support their position that “shall” does not make the forum selection clauses mandatory is unavailing (NYSCEF # 53-Pltfs’ Opp at 30; see e.g. *Hartford Fire Ins. Co. v Novocargo USA Inc.*, 156 F Supp 2d 372, 375 [SD NY 2001] [“the use of word ‘shall’ only confers jurisdiction in the courts of Bremen, Germany without excluding jurisdiction elsewhere or employing mandatory venue language”]). Those cases were brought before federal courts and applied federal law (*Martinez v Bloomberg LP*, 740 F3d 211, 220 [2d Cir 2014] [for cases before federal courts, “[q]uestions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature, and therefore should be governed by federal law”] [internal quotation and citation omitted]; yet, this court is bound to apply New York law on this issue (*Amazing Home Care Servs., LLC v Applied Underwriters Captive Risk Assur. Co. Inc.*, 191 AD3d 516, 518 [1st Dept 2021] [New York law governs in determining the enforceability of a forum selection clause])).

The English version of Article 39, as appears on Novartis’s website, uses the word “shall” for “any disputes” (NYSCEF # 18). As such, this clause conveys the clear intent to make jurisdiction exclusive (*Denver Nuggets*, 84 AD3d at 455-456; *Micro Balanced*, 238 AD2d at 284-285). After all, plaintiffs would not be surprised

or unfairly prejudiced by the mandatory effect of the clause since they would reasonably have known to litigate internal corporate disputes in Switzerland.

Moreover, even if the court accepts what plaintiffs consider to be the correct translation of the original German text, which uses the word “is” instead of “shall,” the result would be no different (*see Rubens v UBS AG*, 126 AD3d 421, 421 [1st Dept 2015]). Under New York law, “there are no magic words [] that must appear in a contract to create an effective designation of an exclusive forum. Any language that reasonably conveys the parties’ intention to select an exclusive forum will do.” (*Babcock & Wilcox Co v Control Components, Inc.*, 161 Misc 2d 636, 643 [Sup Ct, NY County 1993] [internal quotation and citation omitted]). In *Rubens*, the First Department has found that a forum selection clause substantially similar to the one at issue here and containing the term “is” instead of “shall” is mandatory since it “uses clear, unconditional language to designate Zurich, Switzerland, as the parties’ forum of choice” (*Rubens*, 126 AD3d at 421).³ Just like the clause in *Rubens*, the language used in Article 39 is clear, all-encompassing and mandatory in nature especially when read as a whole in connection with the phrase “any dispute.”

Finally, as regards to public policy concern, plaintiffs have not shown that enforcing Article 39 would be “unreasonable and unjust or ... so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court” (*Camacho*, 136 AD3d at 416). Although plaintiffs allege that they would need to advance a considerable amount of court fees and a security deposit to file this case in Switzerland due to their non-Swiss residency, the differences in proceedings—inevitable between different jurisdictions—are insufficient to establish that plaintiffs would be deprived of their day in court, not to mention the Swiss constitutional protections against excessive litigation costs (NYSCEF # 87 – Baumgartner Reply Aff. ¶¶ 20-23; *Rubens*, 126 AD3d at 421-422 [rejecting the argument that the plaintiff will be denied his day in court if the forum selection clauses designating Zurich, Switzerland as the forum of choice are enforced]; *see also In re Alcon Shareholder Litig.*, 719 F Supp 2d 263, 272 [SD NY 2010] [rejecting plaintiffs’ argument that Swiss courts are inadequate under *forum*

³ While the Appellate Division decision does not include the language of the five forum selection clauses considered below, the trial court opinion contains the relevant clause which states that “place of jurisdiction for all disputes ... is Zurich” (*Rubens v UBS AG*, 2013 WL 6037315, *3 [Sup Ct, NY County 2013]). In addition, although this forum selection clause used the term “is” while the other four clauses used “shall,” the court wrote that when compared to the four clauses, the clause using “is” was “equally clear, unambiguously providing that any disputes decided in Switzerland” (*id.*). On appeal, plaintiff-appellant argued that the forum selection clause using “is,” together with another clause using “shall” but without the phrase “exclusive place of jurisdiction,” were merely permissive (*see* brief for plaintiff-appellant, available at 2014 WL 10018442, *8). Significantly, however, the First Department explicitly rejected that argument and held both clauses as mandatory (*Ruben*, 126 AD3d at 421-422).

non conveniens doctrine, holding that the alternate forum should be “adequate” but “not perfect, and not a mirror image of every substantive and procedural right, remedy and protection potentially available to Plaintiffs’ in the American forum of their choice”).

Accordingly, the action is dismissed without prejudice since it should be brought in Switzerland pursuant to the mandatory forum selection clause in Novartis’s Articles of Incorporation. In light of this dismissal, the court need not reach parties’ other arguments.

Conclusion

In view of the above, it is

ORDERED that the motion of defendants Novartis Capital Corporation, Novartis Pharmaceuticals Corporation, Sandoz, Inc., Charles L. Sawyers and nominal defendant Novartis AG to dismiss the first amended verified complaint is granted, and the complaint is dismissed in its entirety without prejudice, with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court.

8/18/2022
DATE


MARGARET CHAN, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: