SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** **IAS MOTION 54EFM**

Justice

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INDEX NO. 652270/2020

MOTION SEQ. NO. 001

EZRA CATTAN, DERIVATIVELY AS A SHAREHOLDER OF UBS GROUP AG ON BEHALF OF UBS GROUP AG,

Plaintiff,

- v -

SERGIO ERMOTTI, OSWALD GRUBEL, KASPAR VILLIGER, CARSTEN KENGETER, AXEL WEBER, DAVID SIDWELL, MARKUS DIETHELM, JOHN FRASER, LUKAS GAHWILER, PHILIP LOFTS, ROBERT MCCANN, THOMAS NARATIL, ROBERT KAROFSKY, ROBERT SCULLY, JEANETTE KAI JUAN WONG, DIETER WEMMER, ISABELLE ROMY, JEREMY ANDERSON, JULIE RICHARDSON, WILLIAM DUDLEY, BEATRICE WEBER DI MAURO, RETO FRANCIONI, CHRISTIAN BLUHM, KIRT GARDNER, SUNI HARFORD, MARKUS RONNER, WILLIAM PARRETT, AXEL LEHMANN, ANDREA ORCEL, UBS AG, UBS AMERICAS HOLDING LLC,UBS AMERICAS INC.,UBS AG GROUP (NOMINAL DEFENDANT),

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 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, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for DISMISSAL.

This is a derivative action brought by a shareholder of UBS Group AG (UBS), a Swiss corporation. Article 48 of UBS's Articles of Association provides: "Jurisdiction for any disputes arising out of **the corporate relationship** shall solely be at the registered office of the Corporation" (Dkt. 25 at 27 [emphasis added]). Plaintiff contends that "the corporate relationship" is limited to matters between shareholders and the corporation, and since a derivative claim is a dispute between the corporation (as prosecuted by a shareholder derivatively) and an officer or director, Article 48 does not apply. The court disagrees.

Both directors and shareholders have a "corporate relationship" with UBS. Article 48 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. The breadth of the clause compels the conclusion that such corporate-relationship claims are

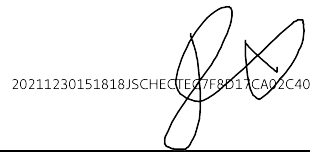
covered. In this context, "corporate relationship" is synonymous with matters related to corporate "internal affairs"-- that is, management and governance matters controlled by statutory and fiduciary duty laws (*see* Dkt. 123 at 5). While collateral contractual disputes involving the company stemming from separate legal relationships would not be included (*see id.* at 5-6), there is no authority supporting plaintiff's argument that internal corporate disputes are not included in Article 48's ambit.

After all, it is logical for a Swiss company, like many Delaware companies, to mandate that its internal-affairs disputes be adjudicated by a court with expertise in its corporate law. It would make little sense, however, to insist that discrete corporate disputes be litigated in Switzerland but at the same time to allow for litigation of massive derivative suits across the globe. Article 48's reasonable forum selection clause must be enforced (*see Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222 [1st Dept 2006]). Despite plaintiff's attempt to muddy the waters, a "sole jurisdiction" clause is indeed a mandatory forum selection clause (*Alvogen Group Holdings LLC v Bayer Pharma AG*, 176 AD3d 551 [1st Dept 2019]; *see Spirits of St. Louis Basketball Club, L.P. v Denver Nuggets, Inc.*, 84 AD3d 454, 455 [1st Dept 2011]). And while bylaw-forum-selection-clauses applicable to shareholder disputes beyond fiduciary duty matters are more controversial, there is nothing unreasonable about clauses mandating that shareholder derivative suits be brought in the jurisdiction of incorporation (*Massoumi v Ganju*, 2020 WL 7692211, at *1 [Sup Ct, NY County Dec. 23, 2020], citing *Intrepid Invs., LLC v Selling Source, LLC*, 159 AD3d 508, 509 [1st Dept 2018]; *see Salzberg v Sciabacucchi*, 227 A3d 102, 137 [Del 2020]; *see generally Boilermakers Loc. 154 Ret. Fund v Chevron Corp.*, 73 A3d 934, 955-57 [Del Ch 2013]). This is consistent with Swiss law (Dkt. 123 at 4 ["Forum selection agreements included in articles of association are expressly recognized as valid under (Swiss law). They apply even to shareholders who purchased their shares after the clause was adopted Articles of Association binding on shareholders under Swiss law"]).

After all, if the prospect of litigating derivative claims in a particular provided-for forum is unappealing, an investor can of course choose not to invest in that company. By choosing to invest in UBS, plaintiff agreed to be bound by Article 48 (*see Rubens v UBS AG*, 126 AD3d 421, 421-22 [1st Dept 2015] [enforcing "unconditional language to designate Zurich, Switzerland, as the parties' forum of choice" and rejecting "plaintiff's argument that he will be denied his day in court if the mandatory forum selection clauses, to which he assented, are enforced"]). "In short, no reason appears to depart from the well-settled policy of the courts of this State to enforce forum selection clauses" (*Sydney Attractions Group Pty Ltd. v Schulman*, 74 AD3d 476, 476 [1st Dept 2010]; *see Rubens* 126 AD3d at 421 ["as established by the defendant's expert affidavit, the agreements are valid and enforceable against plaintiff under Swiss law"]).

The parties' other arguments are academic.

Accordingly, it is ORDERED that the motion to dismiss is GRANTED and the Clerk is directed to enter judgment dismissing this action without prejudice.



12/30/2021
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] **CASE DISPOSED** [ ] **NON-FINAL DISPOSITION**

[X] **GRANTED** [ ] **DENIED** [ ] **GRANTED IN PART** [ ] **OTHER**