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Ronald D. Sugar, Carl Ware, John S. Watson,
10 and Nominal Party Chevron Corporation

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 STEPHEN BUSHANSKY, Derivatively on)
15 Behalf of CHEVRON CORPORATION,)
16 Plaintiff,)
17 v.)
18 SAMUEL H. ARMACOST, LINNET F. DEILY,)
ROBERT E. DENHAM, ROBERT J. EATON,)
19 CHUCK HAGEL, ENRIQUE HERNANDEZ,)
JR., FRANKLYN G. JENIFER, GEORGE L.)
20 KIRKLAND, SAM NUNN, DONALD B. RICE,)
KEVIN W. SHARER, CHARLES R.)
21 SHOEMATE, JOHN G. STUMPF, RONALD D.)
SUGAR, CARL WARE, and JOHN S.)
22 WATSON,)
23 Defendants,)
24 -and-)
25 CHEVRON CORPORATION, a Delaware)
Corporation,)
26 Nominal Party.)
27)
28)

Case No. 12-CV-01597-JST
**DEFENDANTS' NOTICE OF
MOTION, MOTION, AND
MEMORANDUM IN SUPPORT OF
MOTION TO CERTIFY QUESTION
OF STATE LAW TO DELAWARE
SUPREME COURT**

Date: March 13, 2014
Time: 2:00 p.m.
Judge: Honorable Jon S. Tigar
Ctrm: 9, 19th Floor

1 **NOTICE OF MOTION AND MOTION**

2 TO THE CLERK OF THE COURT AND ALL COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on March 13, 2014, at 2:00 p.m., before the Honorable
4 Jon S. Tigar of the United States District Court for the Northern District of California,
5 Courtroom 9, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, Defendants
6 Samuel H. Armacost, Linnet F. Deily, Robert E. Denham, Robert J. Eaton, Chuck Hagel,
7 Enrique Hernandez, Jr., Franklyn G. Jenifer, George L. Kirkland, Sam Nunn, Donald B. Rice,
8 Kevin W. Sharer, Charles R. Shoemate, John G. Stumpf, Ronald D. Sugar, Carl Ware, John S.
9 Watson, and Nominal Party Chevron Corporation (“Defendants”) will and hereby do move the
10 Court, pursuant to Civil Local Rule 7-2, Delaware Supreme Court Rule 41, and Delaware
11 Constitution § 11(8), to certify the following question to the Delaware Supreme Court:

12 Is the following bylaw valid under Delaware law:

13 Unless the Corporation consents in writing to the selection of an alternative
14 forum, the sole and exclusive forum for (i) any derivative action or proceeding
15 brought on behalf of the Corporation, (ii) any action asserting a claim of breach of
16 a fiduciary duty owed by any director, officer or other employee of the
17 Corporation to the Corporation or the Corporation’s stockholders, (iii) any action
18 asserting a claim arising pursuant to any provision of the Delaware General
19 Corporation Law, or (iv) any action asserting a claim governed by the internal
20 affairs doctrine shall be a state or federal court located within the state of
21 Delaware, in all cases subject to the court’s having personal jurisdiction over the
22 indispensable parties named as defendants. Any person or entity purchasing or
23 otherwise acquiring any interest in shares of capital stock of the Corporation shall
24 be deemed to have notice of and consented to the provisions of this [bylaw].

25 In *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 942, 963
26 (Del. Ch. 2013), the Delaware Court of Chancery held that this bylaw is “statutorily valid under 8
27 *Del. C.* § 109(b), and [is] contractually valid and enforceable as [a] forum selection clause[.]”
28 Defendants seek a final ruling on the legality of this bylaw by the Delaware Supreme Court.
Certification of this issue is appropriate because the facts concerning the bylaw are not in dispute
and there are important and urgent reasons for immediate determination, including an unsettled
question of law specifically recognized by the Delaware Court of Chancery before issuing its
decision for Defendants. The motion is based upon the supporting memorandum of points and

1 authorities, any argument of counsel, and all papers and records on file in this matter. Defendants
2 respectfully request that the Court enter the proposed order, submitted herewith.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **STATEMENT OF ISSUE TO BE DECIDED**

5 Pursuant to Civil Local Rule 7-4(a)(3), the sole issue to be decided on this motion is
6 whether the Court should certify the foregoing question to the Delaware Supreme Court.

7 **I. INTRODUCTION**

8 Defendants respectfully submit this memorandum in support of their motion to certify a
9 question of state law to the Delaware Supreme Court. This Court previously stayed the instant
10 case in favor of a first-filed action in the Delaware Court of Chancery that “contains substantially
11 similar parties and identical underlying issues.” Dkt. 25 at 6. Plaintiffs in both actions
12 challenged the validity of a bylaw of Defendant Chevron Corporation (“Chevron”) that provides
13 that, absent Chevron’s consent to a different forum, the federal and state courts of Delaware shall
14 be the exclusive venue for lawsuits concerning Chevron’s internal affairs. When it stayed this
15 action, this Court recognized that “the [Delaware] state court proceeding will resolve the issue
16 before the federal court, namely, the validity of the forum-selection bylaw [and its] enactment.”
17 *Id.* at 7-8, 10.

18 On June 25, 2013, Chancellor Strine of the Court of Chancery held that the “challenged
19 bylaws are statutorily valid under 8 *Del. C.* § 109(b), and are contractually valid and enforceable
20 as forum selection clauses.” *Boilermakers*, 73 A.3d at 963; Dkt. 30, Ex. A. In a conference with
21 the parties and during oral argument before issuing its opinion, however, Chancellor Strine also
22 recognized that “however I rule on this issue, our Supreme Court should have the opportunity to
23 address it promptly.” *See* Exhibit 1 to the Declaration of David J. Berger (“Berger Decl.”), at 17;
24 *see also id.* at 92 (court noting that “the basic question of the statutory validity under our law . . .
25 [is] an important issue that our Supreme Court ought to have a chance to speak to.”).

26 Based upon their expectation that the Court of Chancery’s opinion would be appealed,
27 the parties here stipulated to, and this Court granted, a further stay while the Delaware Supreme
28 Court decided Delaware plaintiffs’ “likely appeal” of the Court of Chancery’s decision. Dkt. 31-

1 32. Nevertheless, although the Delaware plaintiffs initially indicated to Chancellor Strine that
2 they would appeal the decision and filed a notice of appeal in the Delaware Supreme Court, they
3 ultimately withdrew their appeal and have sought to dismiss all of their remaining claims
4 pending in the Court of Chancery. *See* Berger Decl., Ex. 5. For this reason, the Delaware
5 Supreme Court was denied the opportunity to address and resolve this important issue of first
6 impression under Delaware’s corporate law.

7 The validity of the forum selection bylaw raises an important and urgent issue of
8 Delaware corporate law. That issue needs to be resolved definitively by the Delaware Supreme
9 Court to give Delaware companies conclusive guidance regarding this matter. Moreover, how
10 the Delaware Supreme Court resolves the validity of the forum selection bylaw issue will have a
11 significant – and perhaps dispositive – impact on this case, as well as on other cases nationwide.
12 Defendants therefore move this Court under Civil Local Rule 7-2 and Delaware Supreme Court
13 Rule 41 for entry of the proposed order, submitted herewith, certifying the foregoing question to
14 the Delaware Supreme Court.

15 **II. FACTUAL AND PROCEDURAL BACKGROUND**

16 On February 6, 2012, two Chevron stockholders filed suit in the Delaware Court of
17 Chancery (the “Delaware Action”) challenging the bylaw at issue.¹ On March 30, 2012, Plaintiff
18 Stephen Bushansky (“Plaintiff”) filed his mirror-image complaint in this Court. Dkt. 1. The
19 substantive allegations of Plaintiff’s complaint recite – essentially verbatim – the substantive
20 allegations of the Delaware Action. Both suits seek to test the statutory and contractual validity
21 of Article VII of Chevron’s bylaws.

22 After full briefing and a hearing, on August 9, 2012, this Court stayed the federal action
23 until August 8, 2013 in favor of the first-filed Delaware Action. Dkt. 25. In doing so, the Court
24

25 ¹ The board first adopted a forum selection bylaw on September 29, 2010 (the “2010
26 bylaw”). On March 28, 2012, the board amended the bylaw (the “2012 bylaw”). Though
27 Plaintiff filed his complaint two days after the board adopted the 2012 bylaw, his case challenges
28 the 2010 bylaw. It bears noting that the Delaware Action was determinative as to *either* version
of the bylaw. The Court of Chancery consolidated two actions: one against Chevron, which
amended its bylaw, and another against FedEx Corporation, which largely mirrored Chevron’s
2010 bylaw. The Court of Chancery’s opinion applied to *both* bylaws.

1 recognized that the Delaware Action involved an “issue . . . of Delaware state law” (*id.* at 6),
2 “contain[ed] substantially similar parties and identical underlying issues” (*id.*), and would
3 “resolve the issue before the federal court, namely, the validity of the forum-selection bylaw
4 enactment” (*id.* at 10) and the bylaw itself (*id.* at 8). The Court predicated its stay on Defendants’
5 promise not to object to Plaintiff’s intervention in the Delaware Action. *Id.* at 11. The Court did
6 not dismiss the action “in order to ensure[] that the federal forum will remain open if for some
7 unexpected reason the state forum does turn out to be inadequate,” to avoid the risk of “mak[ing]
8 premature and speculative legal findings about the preclusive effect of various possible state
9 judgments in choosing between a stay and a dismissal,” and to “conserve court resources.” *Id.*
10 (internal quotation marks and citations omitted).

11 On October 31, 2012, the Court of Chancery held an office conference with all parties to
12 the Delaware Action. *See* Berger Decl., Ex. 2. During the conference, the court ordered that the
13 parties first address “the core validity issue,” *i.e.*, the statutory and contractual validity of the
14 bylaw, and stayed discovery on plaintiffs’ equitable claims. *Id.* at 28. The Court recognized that
15 it could reach Delaware plaintiffs’ challenges to the manner in which the bylaw provision was
16 enacted only after the Delaware Supreme Court affirmed its decision, which would give the Court
17 of Chancery, Chevron, and many other companies² conclusive guidance regarding the bylaw’s
18 validity:

19 if I say [Defendants] can do it **and the Supreme Court affirms**, then it eliminates a cloud
20 on them and a lot of companies, and it allows you, then, to go forward on a fact-specific
21 way and say that the supermajority independent board at Chevron is in breach of *Schnell*
22 and this bylaw, even though it’s legally permissible, should be set aside because it’s
inequitable. . . . But it also allows you to reflect upon whatever the Court said here and
the Supreme Court says and determine what your angle of attack is.

23 Berger Decl., Ex. 2 at 32-33 (emphasis added); *id.* at 38 (“I would hope that you read the
24 Supreme Court decision carefully.”).

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27 ² Between the Court of Chancery’s decision, on June 25, 2013, and October 31, 2013, 112
28 Delaware corporations adopted or announced plans to adopt forum selection bylaws. *See* Berger
Decl., Ex. 3 (Claudia H. Allen, *Trends in Exclusive Forum Bylaws: They’re Valid, Now What?*,
Katten Munchin Rosenman LLP (Nov. 18, 2013)).

1 On November 19, 2012, Defendants in the Delaware Action moved for judgment on the
2 pleadings with respect to the statutory and contractual validity of the bylaw and its enactment.
3 The Court heard Defendants’ motion on April 10, 2013. At the hearing, the Court reiterated that
4 the Delaware Supreme Court must be able to “promptly” address this issue. Berger Decl., Ex. 1
5 at 17 (“I would assume, just for purposes of this, that [the parties] would agree that however I rule
6 on this issue, our Supreme Court should have the opportunity to address it promptly.”); *id.* at 18
7 (“[M]y sense is it’s . . . one that our Supreme Court ought to have a chance to speak to for all
8 parties concerned in this issue.”); *see also id.* at 77. The Court specifically requested
9 confirmation from all parties to the lawsuit that whoever lost in the Court of Chancery would
10 appeal that decision to the Delaware Supreme Court, and obtained each party’s representation that
11 “the basic question of the statutory validity under our law . . . [is] an important issue that our
12 Supreme Court ought to have a chance to speak to.” *Id.* at 92.

13 On June 25, 2013, the Court of Chancery granted judgment on the pleadings for
14 Defendants. Two days later, Defendants filed a Statement of Recent Decision in this Court. Dkt.
15 30. On August 16, the parties stipulated to – and this Court granted on August 20 – a further stay
16 of this action “until the Supreme Court of Delaware decides the likely appeal of the Delaware
17 Decision” and promised to “update the Court when the appeal of the Delaware Decision is
18 resolved.” Dkt. 31-32.

19 Delaware plaintiffs filed a notice of appeal on August 19, 2013, but dismissed that appeal
20 on October 15, 2013 – only three days before opening briefs were due. *See* Berger Decl., Ex. 5.
21 Thus, despite their representations to the Court of Chancery, it has now become clear that the
22 Delaware plaintiffs do not intend to appeal their loss to the Delaware Supreme Court. Instead, the
23 Delaware plaintiffs apparently intend to simply dismiss their remaining claims on an individual
24 basis without prejudice.

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1 **III. ARGUMENT**

2 **A. Legal Standard**

3 This Court has authority to certify questions of Delaware state law to the Delaware
4 Supreme Court pursuant to the Delaware State Constitution and the Delaware Supreme Court
5 Rules. *See* DEL. CONST. art. IV, § 11(8); Del. Supr. Ct. R. 41. Pursuant to Delaware Supreme
6 Court Rule 41, federal courts, *inter alia*, “may, on motion or *sua sponte*, certify to this Court for
7 decision a question . . . of law arising in any matter before it prior to the entry of final judgment
8 or decision if there is an important and urgent reason for an immediate determination of such
9 question . . . by this Court and the certifying court or entity has not decided the question . . . in the
10 matter.” Del. Supr. Ct. R. 41(a)(ii). The certificate must “state with particularity the important
11 and urgent reasons for an immediate determination.” Del. Supr. Ct. R. 41(b). “[F]acts material to
12 the issue certified [may not be] in dispute.” Del. Supr. Ct. R. 41(b).

13 In deciding whether to certify questions of law to the Delaware Supreme Court under Rule
14 41, the Ninth Circuit considers whether certification (1) arises prior to entry of final judgment or
15 decision; (2) involves facts not in dispute; and (3) is supported by an important and urgent reason
16 for immediate determination, e.g., because it involves an original question of law, conflicting
17 decisions, or an unsettled question of law. *Ark. Teacher Ret. Sys. v. Mozilo*, 705 F.3d 973, 974-75
18 (9th Cir. 2013); *see also* Del. Supr. Ct. R. 41(a)(ii), (b)(i)-(iii); DEL. CONST. art. IV, § 11(8).
19 Certification meets the third factor where “[a] ruling from the Supreme Court of Delaware on the
20 certified question . . . will facilitate the prompt and accurate disposition of [the] case and clarify
21 the law in an area that implicates important state interests and is likely to recur in the federal
22 Court of Appeals.” *Mozilo*, 705 F.3d at 975; *see also Kremen v. Cohen*, 325 F.3d 1035, 1037 n.1
23 (9th Cir. 2003) (requiring deference on “undecided or unclear issue[s]”) (internal quotation marks
24 and citation omitted).

25 More generally, the Ninth Circuit has recognized the importance of certification in that it
26 strengthens the primacy of the state supreme court in interpreting state law by giving it the
27 first opportunity to rule on an undecided or unclear issue. . . . Allowing federal courts to
28 defer to state courts in such cases reinforces the federal judiciary’s acknowledgment of
state sovereignty and fosters values of federalism and comity in a way beneficial to state
interests.

1 *Kremen*, 325 F.3d at 1038 n.1 (internal quotation marks and citation omitted); *see Mozilo*, 705
2 F.3d at 975 (holding that a “definitive ruling” from the Delaware Supreme Court “would resolve
3 [a] split of authority [among federal and state courts] and promote accurate application of
4 Delaware law in other jurisdictions.”).

5 **B. The Court Should Certify The State Law Question Regarding The Validity**
6 **of Chevron’s Forum-Selection Bylaw to The Delaware Supreme Court**

7 **1. Certification Arises Prior to Entry of Final Judgment or Decision**

8 In order for a federal court to certify questions of law to the Delaware Supreme Court, it
9 must first show that those questions “aris[e] . . . prior to the entry of final judgment or decision”
10 by that court, *i.e.*, where “the certifying court or entity has not decided the question.” Del. Supr.
11 Ct. R. 41(a)(ii); *see also Mozilo*, 705 F.3d at 974 (assessing first the “nature and stage of the
12 proceedings”). Here, the action remains pending before this Court, and it has specifically granted
13 a stay in order to allow the Delaware courts to decide the question at issue. *See* Dkt. 25, 32.

14 **2. Certification Involves Facts Not in Dispute**

15 Second, “certification will not be accepted if facts material to the issue certified are in
16 dispute.” Del. Supr. Ct. R. 41(b); *see also Mozilo*, 705 F.3d at 974-75 (noting that “[t]he
17 following facts are undisputed”). There are no disputed facts material to the proposed question.
18 All parties agree that the Chevron board adopted the forum selection bylaw at issue here.

19 **3. Certification Is Supported by Important and Urgent Reasons for**
20 **Immediate Determination and Involves An Unsettled Question of Law**

21 Finally, certification is appropriate because “there is an important and urgent reason for an
22 immediate determination of such question or questions by [the Supreme] Court.” Del. Supr. Ct.
23 R. 41(a)(ii); *see also* Del. Supr. Ct. R. 41(b); DEL. CONST. art. IV, § 11(8). A question will meet
24 this standard where the Delaware Supreme Court’s ruling “will facilitate the prompt and accurate
25 disposition of [the] case and clarify the law in an area that implicates important state interests and
26 is likely to recur in the federal Court of Appeals.” *Mozilo*, 705 F.3d at 975.

27 Here, as the Court of Chancery explained, “the basic question of the statutory validity
28 under our law [is] an important issue that our *Supreme Court* ought to have a chance to speak to.”

1 Berger Decl., Ex. 1 at 92 (emphasis added). The Court of Chancery recognized that the issue of
2 validity would remain unsettled until the Supreme Court addressed it: “[I]f the Supreme Court
3 says [bylaw forum selection provisions are] valid under state law, then . . . other states have to
4 give full faith and credit” to that decision. *Id.* at 77 (citing *M/S Bremen v. Zapata Offshore Co.*,
5 407 U.S. 1 (1972)); *see also* U.S. CONST. art. IV, § 1 (“Full faith and credit shall be given in each
6 state to the public acts, records, and judicial proceedings of every other state.”). Thus, this is a
7 matter that “implicates important state interests,” *i.e.*, “the primacy of the state supreme court in
8 interpreting state law” (*Kremen*, 325 F.3d at 1038 n.1) and the promotion of “accurate application
9 of Delaware law in other jurisdictions.” *Mozilo*, 705 F.3d at 975. Given the prevalence of multi-
10 forum litigation and forum selection bylaws and articles,³ certification is also supported by the
11 fact that the validity of bylaw forum selection provisions is likely to recur in the federal Court of
12 Appeals. *Id.* In fact, from the date of the Court of Chancery’s decision on June 25, 2013 through
13 October 31, 2013, “112 Delaware Corporations . . . adopted or announced plans to adopt
14 exclusive forum bylaws . . . and the pace of adoptions has not slowed since then.” Berger Decl.,
15 Ex. 3 at 3. Thus, definitive guidance from the Delaware Supreme Court on the validity of such
16 provisions is a matter of great importance not only to Chevron but also to many other Delaware
17 corporations.

18 Finally, certification here will enable the Delaware Supreme Court to promptly and
19 efficiently address a central issue in this litigation. If the Delaware Supreme Court holds that the
20 forum selection bylaw at issue is facially valid and enforceable, it will moot a significant portion
21 of this litigation. If, on the other hand, the Supreme Court holds that the provision is *not* facially
22 valid and enforceable, it will resolve the entire case making it unnecessary for this Court to
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25 ³ *See, e.g.*, Jennifer Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349,
26 374 (2012) (finding that 58% of merger and acquisition transactions in 2010 “were multiple
27 filings where plaintiffs sued both in Delaware and out of state”); Berger Decl., Ex. 4 at 3 (Joseph
28 A. Grundfest and Kristen Savelle, *The Brouhaha Over Intra-Corporate Forum Selection
Provisions: A Legal, Economic, and Political Analysis*, Rock Center for Corporate Governance
at Stanford University, Working Paper No. 125 (Nov. 20, 2012)) (calculating that as of
September 30, 2012, over 300 companies had adopted forum selection provisions in their
respective charters and bylaws). *See also supra* note 2.

1 address Plaintiff’s other claim here, *i.e.*, that the bylaw provision was improperly enacted by
2 Chevron.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Defendants respectfully request that the Court certify the
5 question to the Delaware Supreme Court by entering the Proposed Order, submitted herewith.

6
7 DATED: January 31, 2014

Respectfully Submitted,

8 WILSON SONSINI GOODRICH & ROSATI
9 Professional Corporation
10 DAVID J. BERGER
11 STEVEN D. GUGGENHEIM

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21 *Franklyn G. Jenifer, George L. Kirkland, Sam*
22 *Nunn, Donald B. Rice, Kevin W. Sharer,*
23 *Charles R. Shoemate, John G. Stumpf, Ronald*
24 *D. Sugar, Carl Ware, John S. Watson, and*
25 *Nominal Party Chevron Corporation*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STEPHEN BUSHANSKY, Derivatively on)
Behalf of CHEVRON CORPORATION,)
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Plaintiff,)
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v.)
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SAMUEL H. ARMACOST, LINNET F. DEILY,)
ROBERT E. DENHAM, ROBERT J. EATON,)
CHUCK HAGEL, ENRIQUE HERNANDEZ,)
JR., FRANKLYN G. JENIFER, GEORGE L.)
KIRKLAND, SAM NUNN, DONALD B. RICE,)
KEVIN W. SHARER, CHARLES R.)
SHOEMATE, JOHN G. STUMPF, RONALD D.)
SUGAR, CARL WARE, and JOHN S.)
WATSON,)
)
Defendants,)
)
-and-)
)
CHEVRON CORPORATION, a Delaware)
Corporation,)
)
Nominal Party.)
)
_____)

Case No. 12-CV-01597-JST
**[PROPOSED] ORDER
CERTIFYING QUESTION OF
STATE LAW TO DELAWARE
SUPREME COURT**

Judge: Honorable Jon S. Tigar
Action Filed: March 30, 2012

1 Defendants' Motion to Certify Question of State Law to Delaware Supreme Court came
2 on for hearing on March 13, 2014, at 2:00 p.m. Having considered the papers filed in connection
3 with the motion, the argument of counsel, and good cause appearing, the Court ORDERS as
4 follows:

5 1. The Motion to Certify Question of State Law to Delaware Supreme Court is
6 GRANTED. The Court certifies the following question to the Delaware Supreme Court:

7 Is the following bylaw valid under Delaware law:

8 "Unless the Corporation consents in writing to the selection of an alternative
9 forum, the sole and exclusive forum for (i) any derivative action or proceeding
10 brought on behalf of the Corporation, (ii) any action asserting a claim of breach of
11 a fiduciary duty owed by any director, officer or other employee of the
12 Corporation to the Corporation or the Corporation's stockholders, (iii) any action
13 asserting a claim arising pursuant to any provision of the Delaware General
14 Corporation Law, or (iv) any action asserting a claim governed by the internal
15 affairs doctrine shall be a state or federal court located within the state of
16 Delaware, in all cases subject to the court's having personal jurisdiction over the
17 indispensable parties named as defendants. Any person or entity purchasing or
18 otherwise acquiring any interest in shares of capital stock of the Corporation shall
19 be deemed to have notice of and consented to the provisions of this [bylaw]."

20 IT IS SO ORDERED.

21 DATED: _____

22 _____
23 The Honorable Jon S. Tigar
24 UNITED STATES DISTRICT JUDGE