71420-1 71420-1

No. 71420-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

MICROSOFT CORPORATION,

Petitioner,

v.

BELLA ACHARYA,

Respondent.

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Rules

Other Authorities

INTRODUCTION

Plaintiff Bella Acharya is attempting to sue Microsoft Corporation in Washington State for discriminatory treatment that she allegedly suffered while working for a Swiss corporation in Europe. Before she moved to Europe to accept that job, she signed an employment contract in which she and her employer agreed to resolve any employment-related disputes in Swiss courts. She does not contend that her contract was invalid, but now, apparently regretting the bargain she struck, she seeks to avoid enforcement of the forum-selection clause to which she agreed.

The Superior Court denied Microsoft Corporation's motion to dismiss, and in doing so it erred in two respects. First, the court erred in refusing to give effect to the forum-selection clause in Acharya's employment contract. Such clauses have long been entitled to a presumption of validity in Washington State, and a recent, unanimous decision of the United States Supreme Court instructs that they are entitled to "controlling weight in all but the most exceptional cases." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581, 187 L. Ed. 2d 487 (2013) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988) (Kennedy, J., concurring)).

Acharya does not dispute that her claims are covered by the forum-selection clause in her contract, and she cannot overcome the presumption of validity to which that clause is entitled. Litigating in Switzerland may be less convenient for her now that she has moved back to the United States, but Washington courts have held that "inconvenience foreseeable by the parties at the time they entered the contract" is not a basis for refusing to enforce a forum-selection clause. *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn. App. 927, 934, 147 P.3d 610 (2006). It is hardly unreasonable or unjust to agree that disputes arising from employment in Europe will be resolved in Europe.

Second, even apart from the forum-selection clause, the Superior Court erred in failing to dismiss the case on the basis of forum non conveniens. Switzerland—a democratic country with an independent judiciary—is an adequate forum to resolve contract and tort claims arising from an employment relationship. And the balance of private and public interests overwhelmingly favors hearing Acharya's case in Switzerland. The events allegedly giving rise to her claims occurred in Europe, and the key witnesses are there, including Acharya's supervisor. The key documents (which Acharya has already requested in discovery) are also located in Europe, and their production will be governed by strict European data-privacy laws. For all of these reasons, this case would be

more efficiently tried in Switzerland. Conversely, Washington State has little or no interest in adjudicating a dispute involving an employee of a foreign corporation working in a foreign country.

ASSIGNMENT OF ERROR

The Superior Court erred in denying Microsoft Corporation's motion to dismiss.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the Superior Court erred in refusing to enforce the forum-selection clause in Acharya's employment contract, when Acharya did not attempt to show that the contract containing that clause is unconscionable or otherwise invalid.

2. Whether the Superior Court erred in denying Microsoft Corporation's motion to dismiss on forum non conveniens grounds, where the basis of Acharya's claim is discriminatory treatment she allegedly suffered while working for a Swiss corporation in the United Kingdom.

STATEMENT OF THE CASE

Until 2008, Acharya worked as an advertising sales manager for Microsoft Corporation in Redmond, Washington. (CP 79) In that year, she developed the idea of leading her own international sales team. (CP 79, 145, 162) To that end, she voluntarily resigned her employment with Microsoft Corporation and accepted a job in the United Kingdom, where

she was employed as an International Sales Manager by Microsoft Global Resources GmbH (MGR), a Swiss company. (CP 80) MGR assigned Acharya to work in the UK for Microsoft Ltd., a British company. (CP 80)

Before resigning her Microsoft Corporation employment and accepting the job with MGR in Europe, Acharya signed an employment contract with MGR. (CP 187-93) That contract was seven pages long, and Acharya reviewed it for a month before she signed. (*Id.*) It contained a choice-of-law provision specifying that the agreement is to be "governed in all respects by the laws of Switzerland." (CP 192) It also contained a forum-selection clause requiring the resolution of all disputes in Swiss courts. (*Id.*) That clause, identified by the boldface heading "Place of Jurisdiction" in the margin, stated: "Any dispute, controversy or claim arising under, out of or in relation to this Employment Agreement, its valid conclusion, binding effects, interpretation, including tort claims, shall be referred and finally determined by the ordinary courts at the domicile of MGR in Switzerland." (*Id.*)

The agreement contained an integration clause specifying that the contract reflects "the complete agreement between the parties," except that the "International Offer Letter of Assignment" constitutes "an integral part" of the agreement. (CP 191-92) That letter informed Acharya that her employment was "anticipated to be for two years," and that "[t]hroughout

the term of this agreement, you will remain an employee of MGR." (CP 195) The letter further stated that, upon the conclusion of the assignment, "[t]here is no guarantee that you will obtain another assignment with MGR or a new position with another Microsoft affiliate." (CP 197)

Acharya extended her MGR contract several times, and she worked for MGR in Europe until 2012. (CP 81) While at MGR, she held a highly compensated managerial position. (CP 182) Shortly before her MGR employment concluded, she applied for several jobs with Microsoft Corporation in the United States, but she was not hired for any of those positions. (CP 80)

In July 2013, Acharya brought this lawsuit against Microsoft Corporation, alleging that it had violated the Washington Law Against Discrimination (WLAD), Chapter 49.60 RCW. (CP 1-22) Specifically, she alleged that her London-based manager, Olivier van Duüren, who is assigned to work for Microsoft Ltd. in the United Kingdom, gave her unfairly low performance evaluations in 2011 and 2012 on account of her sex and age. (CP 5-12)

Acharya contended that van Duüren's supervisors, some of whom were based in Redmond, had failed to supervise him adequately or to monitor his activities, and that investigators employed by Microsoft Corporation had failed to conduct an adequate investigation of her

complaints. (CP 10-11) She did not allege, however, that any of those Microsoft Corporation employees themselves engaged in any discriminatory or retaliatory conduct. She also did not allege that Microsoft Corporation's failure to hire her in 2012 was based on discrimination or retaliation. Instead, she asserted that "there was virtually no chance that she was going to be able to find a suitable position" at Microsoft Corporation because van Duüren had "poison[ed] the well." (CP 11)

Microsoft Corporation moved to dismiss the lawsuit without prejudice so that Acharya could litigate in Switzerland. (CP 71-99) It offered two independent grounds for dismissal: the forum-selection clause and the doctrine of forum non conveniens. (CP 85-97) Acharya opposed the motion. (CP 248-78)

On the day that briefing on the motion was completed, the United States Supreme Court decided *Atlantic Marine*, holding unanimously that "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases." 134 S. Ct. at 581 (quoting *Stewart Org.*, 487 U.S. at 33 (Kennedy, J., concurring)) (brackets in original). Microsoft Corporation promptly filed a notice of supplemental authority with the Superior Court. (CP 710-11)

On December 6, 2013, the Superior Court held a hearing on the motion to dismiss. Later that day, it entered an order denying the motion without opinion. (CP 733-35) Microsoft Corporation filed a timely notice of discretionary review. (CP 746-47)

This Court granted discretionary review. Noting that a "forum selection clause is presumed valid and enforceable, and Acharya had a heavy burden of proving otherwise," the Commissioner observed that the Superior Court "made no finding or conclusion to explain why the clause is not enforceable." 4/3/14 Ruling Granting Discretionary Review 9. The opinion noted that "[t]he trial court's decision appears to be in error." *Id.*

STANDARD OF REVIEW

A trial court's decision on the enforceability of a forum-selection clause is reviewed for abuse of discretion. *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). A decision whether to dismiss on the basis of forum non conveniens is also reviewed for abuse of discretion. *Lisby v. PACCAR, Inc.*, 178 Wn. App. 516, 521, 316 P.3d 1097 (2013). A trial court abuses its discretion if its decision is based on an incorrect view of the law. *Dix*, 160 Wn.2d at 833; *Lisby*, 178 Wn. App. at 521.

ARGUMENT

A. The Superior Court erred in refusing to give effect to the forum-selection clause in Acharya's employment contract

1. A forum-selection clause contained in a valid contract must be given effect in all but the most exceptional cases

When the parties to a contract have agreed to resolve disputes in a particular forum, enforcing the terms of their bargain furthers important public policy goals by "serv[ing] the salutary purpose of enhancing contractual predictability." *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 617, 937 P.2d 1158 (1997). When the specified forum is in a foreign country, enforcing the agreement also promotes international comity by respecting the integrity and competence of the foreign tribunal. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). For those reasons, the Washington Supreme Court has held that "[f]orum selection clauses are prima facie valid." *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 834, 161 P.3d 1016 (2007).

Traditionally, Washington law has required the enforcement of forum-selection clauses unless they are "unreasonable and unjust." *Voicelink*, 86 Wn. App. at 617. The party challenging the enforceability of the clause has the burden of demonstrating its unreasonableness. *Id.*; *Dix*, 160 Wn.2d at 834-35. A party cannot carry that burden simply by showing

that the forum is distant or inconvenient. *Voicelink*, 86 Wn. App. at 618; *see M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972); *Keystone Masonry, Inc.*, 135 Wn. App. at 934. Instead, the party "bears a heavy burden of showing that trial in the chosen forum would be so seriously inconvenient as to deprive the party of a meaningful day in court." *Bank of Am., N.A. v. Miller*, 108 Wn. App. 745, 748, 33 P.3d 91 (2001).

Last year, the United States Supreme Court revisited the enforceability of forum-selection clauses, and it held that the presumption in favor of enforcement is so strong as to be almost irrebuttable. In *Atlantic Marine*, the Court held—unanimously—that "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases." 134 S. Ct. at 581 (quoting *Stewart Org.*, 487 U.S. at 33 (Kennedy, J., concurring)) (brackets in original). The Court explained that, when the parties have signed a "contractually valid forum selection clause," the "plaintiff's choice of forum merits no weight" because "the plaintiff has effectively exercised its 'venue privilege' before a dispute arises," and "[o]nly that initial choice deserves deference." *Id.* at 581 n.5, 581-82. The Court also observed that a court deciding whether to enforce a forum-selection clause "should not consider arguments about the parties' private interests"—including arguments that the selected forum is

inconvenient—because, "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Id.* at 582. Instead, a court "may consider arguments about public-interest factors only," and "those factors will rarely defeat" a motion to enforce a forum-selection clause. *Id.*

The Court explained that enforcing forum-selection clauses serves important interests of predictability and protection of "parties' settled expectations." *Atl. Marine*, 134 S. Ct. at 583. As the Court observed, a forum-selection clause "may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place." *Id.* For that reason, the Court concluded that "[i]n all but the most unusual cases, . . . 'the interest of justice' is served by holding parties to their bargain." *Id.*

The principles set out in *Atlantic Marine* are fully applicable to employment contracts. The Court described its holding as a general rule applicable to any "defendant in a civil case who seeks to enforce a forum selection clause." *Atl. Marine*, 134 S. Ct. at 575. And as the Ninth Circuit has observed, "[t]here is nothing in the case law . . . to suggest that a different analysis applies to forum selection clauses in employment

contracts than generally applies to commercial contracts." *Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865, 867 (9th Cir. 1991). Not surprisingly, in the short time since *Atlantic Marine* has been decided, courts have applied it to employment cases without suggesting that a different analysis would be required in that context. *See, e.g.*, *Monastiero v. appMobi, Inc.*, No. C 13-05711 SI, 2014 WL 1991564, at *5-6 (N.D. Cal. May 15, 2014) (enforcing forum-selection clause in employment agreement and dismissing employee's breach-of-contract claim); *Longo v. FlightSafety Int'l, Inc.*, No. 12-CV-2413 (WFK) (LB), 2014 WL 880410, at *2 (E.D.N.Y. Mar. 6, 2014) (enforcing forum-selection clause in employment agreement and dismissing employee's sex-discrimination claim).

Atlantic Marine also applies whether the contractually selected forum is foreign or domestic. Although *Atlantic Marine* itself involved the enforcement by a federal district court of a forum-selection clause that required a transfer to a different district, the Court stated that "the same standards should apply to motions to dismiss for *forum non conveniens* in cases involving valid forum-selection clauses pointing to state or foreign forums." 134 S. Ct. at 583 n.8; *see also id.* at 580.

Washington courts have generally followed federal law governing the enforcement of forum-selection clauses. *Voicelink*, 86 Wn. App. at 618

(noting that the Washington test "is consistent with the test set forth by the U.S. Supreme Court"); *see Russell v. Dep't of Human Rights*, 70 Wn. App. 408, 415, 854 P.2d 1087 (1993) (When a state law is similar to a parallel federal law, "Washington courts look to federal law" for guidance.). This Court should follow the reasoning of *Atlantic Marine* and hold that a party can avoid the enforcement of a contractually valid forum-selection clause only by demonstrating truly exceptional circumstances unrelated to the private interests of the parties. In any event, as explained below, the Superior Court's refusal to enforce the forum-selection clause in this case was also contrary to pre–*Atlantic Marine* case law because Acharya cannot show that the clause was unreasonable or unjust or that it would deprive her of a meaningful day in court—it was reasonable for the parties to agree that disputes arising from employment in Europe would be resolved in Europe, and the Swiss courts are available to hear Acharya's claims.[1]

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[1] Washington courts treat a motion to enforce a forum-selection clause as a motion to dismiss under CR 12(b)(3). *Voicelink*, 86 Wn. App. at 624. In *Atlantic Marine*, the Supreme Court suggested that such a motion is more appropriately treated as a motion to dismiss on the basis of forum non conveniens. 134 S. Ct. at 577-580, 583 n.8. This Court need not resolve the issue in this case because dismissal is warranted regardless of how the motion is characterized.

2. Acharya's claims are covered by the forum-selection clause to which she agreed when she accepted employment with MGR

In accepting employment with MGR in Europe, Acharya agreed to a forum-selection clause that applies to "[a]ny dispute, controversy or claim arising under, out of or in relation" to the contract *and* its "conclusion" or termination. (CP 192) The use of the word *any* before "dispute, controversy, or claim" confirms that the clause covers not just contract claims but also statutory and tort claims that "aris[e] under, out of or in relation to" Acharya's MGR employment. (*Id.*) *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991) (forum-selection clause applying to "all disputes and matters whatsoever arising under, in connection with or incident to" contract also applied to tort claims); *see also United States v. Gonzales*, 520 U.S. 1, 5 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)). It thus applies to all of Acharya's claims in this litigation.

In opposing discretionary review, Acharya suggested that at least some of her claims are against Microsoft Corporation, not MGR. Answer to Mot. for Discretionary Review 12. To the extent that she meant to argue that those claims are not covered by the forum-selection clause, the

argument is not properly before this Court because Acharya never presented it to the Superior Court. *See Jackson v. City of Seattle*, 158 Wn. App. 647, 660, 244 P.3d 425 (2010) (declining to consider an alternative ground for affirmance that was not raised below).

In any event, the argument fails on the merits for two reasons. First, even if some of Acharya's claims were against Microsoft Corporation, they would still "arise[e] under, out of, or in relation to" her MGR employment, which means that they would be covered by the forum-selection clause to which she agreed. (CP 192) Second, the facts alleged in the complaint do not state a claim for relief against Microsoft Corporation because Acharya was not employed by Microsoft Corporation at any time relevant to this case. Although Acharya unsuccessfully applied for a number of jobs at Microsoft Corporation in 2012, she does not allege that the decision not to hire her was a result of discrimination or retaliation by anyone at Microsoft Corporation. Indeed, she does not assert a failure-to-hire claim at all. Instead, she alleges that "there was virtually no chance that she was going to be able to find a suitable position" because van Duüren had "poison[ed] the well." (CP 11) For that reason, even if she had articulated a failure-to-hire claim against Microsoft Corporation, it would be derivative of her Europe-centered discrimination allegations.

Acharya contends that van Duüren's supervisors, some of whom were based in Redmond, did a poor job of supervising him and monitoring his activities, and that investigators employed by Microsoft Corporation failed to conduct an adequate investigation into her complaints. (CP 10-11) She does not allege, however, that any of those Microsoft Corporation employees engaged in discriminatory or retaliatory conduct. Her allegations do not state claims under the WLAD, and they do not shift the locus of her claims from London to Redmond. The WLAD makes it unlawful "[t]o discriminate against any person in compensation or in other terms or conditions of employment" on account of a prohibited ground. RCW § 49.60.180(3). It does not make it unlawful to fail to prevent someone else from discriminating. Nor does the WLAD create a requirement that internal human-resources investigations be conducted to some particular standard or that they always reach the "correct" result. Acharya's "failure to prevent" and "inadequate investigation" claims are not claims under Washington law, and she cites no authority to the contrary.

In an effort to avoid the reality that Microsoft Corporation did not employ either Acharya (who was employed by MGR) or van Duüren (who was employed by Microsoft NV), Acharya suggested below that Microsoft Corporation and its subsidiaries constitute a single employer under the

"integrated enterprise" theory. (CP 267-69) The "integrated enterprise" analysis, however, is used only to determine whether a defendant employs enough people to be subject to Title VII. *Anderson v. Pac. Maritime Ass'n*, 336 F.3d 924, 928-29 (9th Cir. 2003). It "does not determine joint *liability*" or whether a parent corporation can be treated as the employer of a subsidiary's employee. *Id.* at 928.

Instead, the liability of a parent corporation for the types of claims Acharya brings is governed by the test for piercing the corporate veil. "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 398, 47 P.3d 556 (2002) (internal quotation marks and citation omitted); *accord Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 503, 90 P.3d 42 (2004). That principle is no less true in the context of employment claims. In the Superior Court, Acharya questioned the separateness of Microsoft's subsidiaries (CP 266), but she made no effort to show that the subsidiaries should be treated as Microsoft's alter ego under the traditional veil-piercing test, which requires that the corporate form have "been intentionally used to violate or evade a duty owed to another." *Morgan v. Burks*, 93 Wn.2d 580, 585, 611 P.2d 751 (1980); *see Truckweld Equipment Co. v. Olson*, 26 Wn. App. 638, 644-45, 618 P.2d 1017 (1980)

("Typically, the injustice which dictates a piercing of the corporate veil is one involving fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and creditor's detriment."). She could not do so, as the establishment of subsidiaries to operate in foreign countries is a legitimate and commonplace business practice. (CP 140-41)

Because all of Acharya's claims arise out of her employment with MGR, they are covered by the forum-selection clause in her MGR employment agreement.

3. Acharya's employment contract is valid

Acharya has never suggested that her employment agreement—from which she benefited for four years—is not a valid contract. In particular, while she argued below that the forum-selection clause was the product of "overweening bargaining power," she did not argue that it was invalid on the basis of unconscionability—or any other theory. (CP 279) Even if she had made such an argument, the record would not support it. *See Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 898, 28 P.3d 823 (2001) ("The burden of proving that a contract or contract clause is unconscionable lies upon the party attacking it.").

Under Washington law, the doctrine of unconscionability has two components: procedural and substantive. *Adler v. Fred Lind Manor*, 153

Wn.2d 331, 344-45, 103 P.3d 773 (2004). To be procedurally unconscionable, a contract must have been agreed to under circumstances that failed to provide the party "a meaningful choice," taking account of "[t]he manner in which the contract was entered, whether the party had a reasonable opportunity to understand the terms of the contract, and whether the important terms [were] hidden in a maze of fine print." *Id.* at 345 (internal quotation marks and citations omitted; brackets in original). To be substantively unconscionable, it must have terms that are "[s]hocking to the conscience, monstrously harsh, and exceedingly calloused." *Id.* at 344-45 (internal quotation marks and citations omitted); *Torgerson v. One Lincoln Tower LLC*, 166 Wn.2d 510, 519, 210 P.3d 318 (2009) ("[S]uch unfairness must truly stand out."). The contract in this case does not come close to meeting either standard.

Acharya cannot show that the contract was procedurally unconscionable. As Acharya herself explained, she was the one who "came up with the idea to lead-up an International Sales Team." (CP 162). After forming her team, it was she who advocated for leading the team from Europe, and it was she who developed a business case to justify the move. (CP 145) Any suggestion that she lacked a "meaningful choice" whether to enter into the agreement to work for MGR in Europe is therefore unfounded. *Adler*, 153 Wn.2d at 345. Nor can she show that she

did not have "a reasonable opportunity to understand the terms of the contract" that she signed. *Id.* (internal quotation marks and citation omitted). Acharya has never disputed that she is a sophisticated managerial employee, that she had the employment contract to consider for a month before she signed it, that the contract is only seven pages long, and that the forum-selection clause is clearly indicated with boldface text in the margin reading "Place of Jurisdiction." (CP 192) *See Torgerson*, 166 Wn.2d at 520 (finding no procedural unconscionability where the challenged clause "was in the same size font as other key provisions" and was set off in a separate, labeled paragraph).

Similarly, Acharya cannot show that the forum-selection clause is substantively unconscionable. There is nothing "harsh" or "[s]hocking to the conscience" about an agreement that employees working in Europe for a European company will settle their disputes in a European forum. *Adler*, 153 Wn.2d at 344-45. Thus, even if Acharya had attempted to demonstrate that the contract was unconscionable, she would be unable to do so.

This case is therefore far different from *Petersen v. Boeing Co.*, 715 F.3d 276 (9th Cir. 2013), on which Acharya relied below. (CP 257-58, 275) In *Petersen*, the employee was forced to sign an employment agreement with a Saudi Arabian forum-selection clause *after* he arrived in Saudi Arabia. He was not given time to read the agreement before

accepting employment, and he was told that if did not sign it, he would be required to return to the United States immediately at his own expense. 715 F.3d at 278-79. Here, Acharya accepted employment by MGR and executed her employment contact with MGR not while she was in a vulnerable position abroad, but while she was still located in Washington State. (CP 195) Acharya actively pursued the opportunity for employment in Europe. (CP 79-80, 145, 162) She could have declined it—or refused to extend it multiple times—had she objected to the foreign forum-selection clause presented to her. *See Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1141 (9th Cir. 2004) (finding no overreaching or fraud where employee voluntarily renewed his employment agreement for four consecutive years under no undue influence aside from the need to find a new job if he refused to sign). But she did not. There is no basis for relieving her of the bargain she made.

4. Acharya cannot overcome the presumption in favor of enforcing the forum-selection clause

Nothing about this case makes it in any way "exceptional," such that enforcement of the forum-selection clause would be inappropriate. *Atlantic Marine*, 134 S. Ct. at 581. Acharya has not shown that this is one of the "rare[]" cases in which the public interest, unrelated to the private interests of the parties, can defeat enforcement of the parties' agreement.

Id. at 582. That fact is itself sufficient to decide this case. But even if—contrary to the teaching of *Atlantic Marine*—the Court were to take account of Acharya's private interests in litigating in Washington State, there still would be no basis for declining to enforce the clause. *Id.* at 582 (courts "should not consider arguments about the parties' private interests" because, "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation"). Acharya cannot show that holding her to her bargain would be in any way "unreasonable and unjust," *Voicelink*, 86 Wn. App. at 617, or that the inconvenience she would suffer would be so serious as to "deprive [her] of a meaningful day in court," *Bank of Am.*, 108 Wn. App. at 748. The Superior Court therefore erred in refusing to enforce the clause.

The forum-selection clause to which Acharya agreed is reasonable in light of the circumstances of her employment.[2] Under her employment contract with MGR, Acharya worked in London, and she managed a team of sales professionals employed by foreign entities and located throughout the European Union. (CP 25, 199-202, 230-31) Switzerland is centrally located in the EU; it is easily accessible from other EU countries; and its

[2] In assessing the enforceability of a forum-selection clause, the court need not accept the pleadings as true and may consider evidence outside of the complaint. *Bank of Am.*, 108 Wn. App. at 748; *Voicelink*, 86 Wn. App. at 624-25.

courts have a well-deserved reputation for neutrality and fairness. *See* U.S. Dep't of State, *Country Reports on Human Rights Practices for 2013: Switzerland* 7 (2014) ("There is an independent and impartial judiciary in civil matters."). Having employment disputes between MGR and its employees resolved in Switzerland ensures that all MGR employees have access to a fair forum, and it promotes consistent interpretation and application of MGR's employment contracts and obligations—a legitimate and important business objective when MGR employs individuals in multiple jurisdictions throughout the EU, including the UK, Germany, and France.

The clause is also just. Acharya lived and worked in Europe. There is nothing unjust about having disputes arising from her European employment resolved in a European forum, especially when she voluntarily agreed to that forum as a condition of employment by a Swiss company. Although litigation in a foreign forum may be less convenient for Acharya now that she has returned to the United States, those subsequent developments do not change the reality that she voluntarily accepted employment by a Swiss entity under the terms and conditions of employment offered by that entity in a written contract, and she worked in London on assignment to a UK company for four years. *Bank of Am.*, 108 Wn. App. at 748-49 ("[I]nconvenience contemplated by the parties at the

time they entered the contract should not render a forum selection clause unenforceable.").

In any event, Acharya greatly exaggerates the inconvenience of litigating in Switzerland. Swiss courts hear cases brought by employees alleging sex discrimination, and they award damages and injunctive relief. (CP 129-31) In the Superior Court, Acharya suggested that she would be unable afford a Swiss lawyer (CP 257), but Switzerland provides free legal representation for parties of limited means and also allows a "success fee" or "incentive payment" similar to a contingent-fee arrangement. (CP 442) Acharya also argued that her claims would be barred by the Swiss statute of limitations, but that is incorrect. In Switzerland, the statute of limitations for employment-related claims is five years. (CP 125). Because Acharya is fully able to litigate her claims in Switzerland, she has not come close to showing that enforcement of the forum-selection clause "would be so seriously inconvenient as to deprive [her] of a meaningful day in court." *Bank of Am.*, 108 Wn. App. at 748.

Finally, Acharya argued below that her forum-selection clause should be disregarded because of Washington's purported policy interest in applying Washington law to the events giving rise to this litigation. (CP 258) That argument overlooks the choice-of-law provision in Acharya's contract, which calls for the application of Swiss law. (CP 192) More

fundamentally, the argument fails because Washington has no interest in applying its law to employment claims made by an employee of a Swiss company for events occurring in Europe.[3]

In other words, even in the absence of the forum and choice-of-law provisions in Acharya's contract, Washington substantive law would not apply to this dispute. Under Washington choice-of-law principles, the governing law is decided "by determining which jurisdiction has the most significant relationship to a given issue." *Seizer v. Sessions*, 132 Wn.2d 642, 650, 940 P.2d 261 (1997) (internal quotation marks and citation omitted). Here, the allegedly unlawful conduct occurred in Europe, where both Acharya and her supervisor, van Duüren, were employed and domiciled. Moreover, Acharya and van Duüren worked for European companies, and their respective employers were at all relevant times located and doing business in Europe, not Washington. The relationship of the parties is therefore centered in Europe, and it is not governed by Washington law.

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[3] Unlike the Washington Law Against Discrimination, both Title VII and the Age Discrimination in Employment Act expressly cover United States employees working abroad so long as the application of United States law does not violate the laws of the home country. *See* 42 U.S.C. § 2000e-1; 29 U.S.C. § 623(h). Acharya has chosen not to proceed under those statutes.

B. The Superior Court erred in refusing to dismiss the complaint on the basis of forum non conveniens

Even if Acharya had not expressly agreed to a Swiss forum, the Superior Court should nevertheless have dismissed this action under the doctrine of forum non conveniens. Its failure to do so provides an independent basis for reversing the judgment below.

Washington courts have the "discretionary power to decline a proper assertion of [their] jurisdiction 'when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum.'" *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 20, 177 P.3d 1122 (2008) (quoting *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579, 555 P.2d 997 (1976)). In determining whether to exercise that power, a court must first determine that there is an available alternative forum that would be adequate to adjudicate the dispute. *Id.* at 20-21. It then must balance "private and public factors that determine the convenience of litigation in the alternative forum as opposed to the host forum." *Id.* at 20. Those considerations compel the dismissal of Acharya's claims on the basis of forum non conveniens.

1. Switzerland is an available and adequate alternative forum

Switzerland is an available alternative forum because the proper potential defendant in this case—Acharya's former employer, MGR—is

amenable to process in Switzerland. *See Myers v. Boeing Co.*, 115 Wn.2d 123, 128, 794 P.2d 1272 (1990) (explaining that an available forum must be one "in which the defendant is amenable to process"). And although Microsoft Corporation does not concede that it is a proper defendant to this action, it has stipulated that it would submit to process in a Swiss proceeding. (CP 92)

A Swiss forum is also adequate. This Court has held that "[a]n alternative forum is adequate if trial in the alternative forum would address 'the essential subject matter of the dispute.'" *Lisby v. PACCAR, Inc.*, 178 Wn. App. 516, 523, 316 P.3d 1097 (2013) (quoting *Hill v. Jawanda Trans., Ltd.*, 96 Wn. App. 537, 542, 983 P.2d 666 (1999)). Switzerland is an adequate forum because it recognizes claims for employment discrimination, retaliation, and breach of contract—claims analogous to those asserted here—and would allow Ms. Acharya to recover damages for unlawful employment actions. (CP 123-31) Other courts have found Switzerland to be an adequate forum for similar claims. *See, e.g., Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1177 (10th Cir. 2009) ("Swiss courts have routinely been held adequate for contract and tort claims . . . ."); *Alpine Atl. Asset Mgmt. AG v. Comstock*, 552 F. Supp. 2d 1268, 1276 (D. Kan. 2008); *Do Rosario Veiga v. World Meteorological Org.*, 486 F. Supp. 2d 297, 304-06 (S.D.N.Y. 2007).

Even if Switzerland would not allow the assertion of precisely the same claims as those advanced here, or even if it would not provide precisely the same procedures and remedies as a Washington court, that would not make it an inadequate forum. *Hill*, 96 Wn. App. at 543. Rather, an alternative forum is adequate "[s]o long as the plaintiff can litigate the essential subject matter of the case," and as long as "*any* recovery is available" to compensate the plaintiff for the alleged harmful act. *Klotz v. Dehkhoda*, 134 Wn. App. 261, 265-66, 141 P.3d 67 (2006) (emphasis added); *see id.* at 266 ("Even the fact that a suit would no longer be economically viable due to the limited damages available does not render an alternative forum inadequate for forum non conveniens purposes."); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981).

2. The balance of private and public interest factors supports dismissal

The balance of private and public interest factors overwhelmingly supports dismissal of this lawsuit in favor of the more appropriate Swiss forum. The private-interest factors relate primarily to the location of and access to the witnesses and evidence in the case. *Sales*, 163 Wn.2d at 20; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). Here, the principal factual dispute involves Acharya's allegations

that Olivier van Duüren, her manager during most of her last two years in London, "could not tolerate having a strong woman stand up to him," that he "bullied and intimidated her in a discriminatory and/or retaliatory manner in a variety of . . . ways," and that he gave her poor performance reviews in 2011 and 2012, thereby "destroy[ing] her long and exceptional career at Microsoft." (CP 7. 9) Acharya also maintains that other employees have complained about van Duüren and that other women left his work group as a result of his mistreatment of them. (*Id.*) For his part, van Duüren asserts that Acharya received appropriate performance evaluations that accounted for the fact that her team missed its sales quotas by more than 20% in 2011 and 2012 and that she received poor leadership feedback from her team. (CP 199-200)

Resolving that factual dispute will require testimony from the individuals who worked alongside Acharya and van Duüren, nearly all of whom are in Europe. Of Acharya's 13 direct reports during 2011 and 2012, all 13 are in Europe. (CP 230) Of van Duüren's 31 direct reports during that period (other than Acharya herself), all but one is in Europe. (CP 229-30) And Acharya's discovery requests are similarly focused on Europe. For example, Acharya has requested all documents that "refer or relate in any way" to van Duüren, as well as his computer hard drives and those of his former supervisor, who lives in France. (CP 449-50, 454-57)

She has also requested documents relating to at least seven other employees located in Europe. (*Id.*) Those requests confirm what is apparent from the complaint: this case is about alleged events in Europe, and resolving it will require witnesses and documents located in Europe.

Significantly, Acharya's document requests implicate Europe's complex data-privacy laws. In particular, the European documents that Acharya has already sought are protected by the different Data Protection Acts enacted in each of the EU countries where these documents are located. (CP 117-18, 131-32) Under those laws, the transfer of the documents to the United States is prohibited unless each person to whom the data pertains consents or unless the disclosure can be shown to be justified by a legitimate interest that outweighs the interests of the data subjects in protecting the information. (CP 131-32) What constitutes a "legitimate interest" depends on an application of European laws to the facts of this case. (*Id.*; *see also* CP 117-18) Whatever forum decides this dispute will therefore need to assess and apply complex privacy laws of various countries within Europe to ensure that any disclosures are lawful in the United States and Europe. A Swiss forum would be better suited to that task.

As the United States Supreme Court recognized in *Gulf Oil*, it is important to choose a forum that will minimize the cost of attendance for

willing witnesses and that can compel the attendance of unwilling witnesses. 330 U.S. at 511. With the vast majority of witnesses in Europe, a Washington forum would not satisfy either requirement. *See Myers*, 115 Wn.2d at 129 (Washington courts cannot compel attendance of foreign witnesses). The costs, inconvenience, and impracticalities of bringing witnesses to a trial in Washington would cause not only greater financial hardship but also significant delays in preparing the case for trial, and ultimately in adjudicating the merits of the dispute.

The public-interest factors also weigh in favor of Switzerland. *See Sales v. Weyerhaueser Co.*, 138 Wn. App. 222, 230, 156 P.3d 303 (2007) (identifying "(1) administrative difficulties in congested courts not at the origin of the litigation; (2) the burden of jury duty on a community that has no relation to the litigation; (3) the proximity between the trial's location and the people the case affects; (4) the interest in having local controversies decided locally; and (5) the desirability of trying the case in a jurisdiction familiar with the state law that governs the case" as factors to be considered in determining the public interest), *aff'd*, 163 Wn.2d 14 (2008). Of particular relevance here, Swiss courts are better equipped to apply Swiss law—the governing law under both the contract and Washington choice-of-law principles—as well as the data-privacy rules from the other European states where employee data may reside. (CP 131-

35) In *Piper*, the Supreme Court explained that "[t]he doctrine of *forum non conveniens* . . . is designed in part to help courts avoid conducting complex exercises in comparative law." 454 U.S. at 251. The public interest factors therefore point towards dismissal where, as here, the court would be required to "untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil*, 330 U.S. at 509. Conversely, Washington has little or no interest in adjudicating competing claims about precisely what happened in a European workplace between an employee and a supervisor both working in Europe.

CONCLUSION

This Court should reverse the Superior Court's decision denying Microsoft's motion to dismiss and direct entry of judgment for Microsoft.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify under the penalty of perjury under the laws of the State of Washington that on August 21, 2014, I caused the foregoing document to be served on the following counsel of record, via hand delivery:

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