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Transaction ID 62038797
Case No. 2017-0931-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MATTHEW SCIABACUCCHI, on behalf of himself and all others similarly situated,	:	
Plaintiff,	:	
v.	:	C.A. No. 2017-0931-JTL
MATTHEW B. SALZBERG, JULIE M.B. BRADLEY, TRACY BRITT COOL, KENNETH A. FOX, ROBERT P. GOODMAN, GARY R. HIRSHBERG, BRIAN P. KELLEY, KATRINA LAKE, STEVEN ANDERSON, J. WILLIAM GURLEY, MARKA HANSEN, SHARON MCCOLLAM, ANTHONY WOOD, RAVI AHUJA, SHAWN CAROLAN, JEFFREY HASTINGS, ALAN HENRICKS, NEIL HUNT, DANIEL LEFF, and RAY ROTHROCK,	:	
Defendants,	:	
and	:	
BLUE APRON HOLDINGS, INC. STITCH FIX, INC. and ROKU, INC.,	:	
Nominal Defendants.	:	

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Sixty-five years ago, Congress said that plaintiffs asserting claims under the Securities Act of 1933 could choose to file suit in state court and that such claims could not be removed to federal court.[1] Two months ago, the Supreme Court of the United States unanimously affirmed that rule.[2]

Defendants invite Delaware to vitiate this bedrock principle of the federal securities scheme. Blue Apron Holdings, Inc. ("Blue Apron"), Stitch Fix, Inc. ("Stitch Fix"), and Roku, Inc. ("Roku") recently went public with substantially identical charter provisions, identifying federal courts as the exclusive forum for any complaint under the Securities Act (the "Federal Forum Provisions").

Plaintiff moves for a summary declaratory judgment that each of the Federal Forum Provisions is invalid under Delaware law. He relies on a simple syllogism:

First, Sections 102 and 109 of the DGCL broadly authorize charter and bylaw provisions, so long as those provisions govern the internal affairs of the corporation.[3]

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1 Securities Act of 1933 § 22(a), 48 Stat. 86–87.

2 *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, No. 15-1439, 2018 WL 1384564 (U.S. Mar. 20, 2018).

3 *See* 8 *Del. C.* § 102(b)(1) ("the certificate of incorporation may also contain … [a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members … if such provisions are not contrary to the laws of this State"); 8 *Del. C.* § 109(b) ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation,

Consistent with that rule, Section 115 specifies that exclusive-forum provisions are authorized, but only for internal corporate claims.[4]

Second, Securities Act claims are not internal claims. Section 115's definition of "internal corporate claims" does not reach Securities Act claims.[5] And with good reason. As this Court recognized in *Activision*, a "claim under the federal securities laws is a personal claim akin to a tort claim for fraud."[6]

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relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."); *see also* James D. Cox and Thomas Lee Hazen, TREATISE ON THE LAW OF CORPORATIONS (2010) ("The bylaws establish rules for the internal governance of the corporation. Bylaws deal with such matters as how the corporation's internal affairs are to be conducted by its officers, directors, and stockholders."); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1607 (2005) ("The scope of Delaware's corporate law includes the regulation of the internal affairs of the corporation and concerns the powers, rights, and duties of the corporation, its shareholders, officers, and directors. Delaware's corporate law, however, largely does not address matters beyond the internal affairs of the corporation."); *id.* at 1615 ("Delaware's corporate law … is largely confined to the regulation of the internal affairs of the corporation.").

[4] 8 *Del. C.* § 115 ("The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State.").

[5] *See* 8 *Del. C.* § 115 ("'Internal corporate claims' means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.").

[6] *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1056 (Del. Ch. 2015) ("The personal nature of federal securities claims manifests itself in the fact that class certification generally must be obtained under Rule 23(b)(3). By

Third, the Federal Forum Provisions are, thus, invalid under Delaware law.

This conclusion is supported by then-Chancellor Strine's decision in *Chevron*. That decision repeatedly emphasized that the exclusive-forum provisions it approved were limited to internal claims. *Chevron*'s logic compels the opposite result in this case.

Invalidating the Federal Forum Provisions is also consistent with decisions of federal courts and learned commentators. Both have concluded that charter or bylaw provisions limiting a plaintiff's choice of forum for claims other than internal claims are unauthorized by Delaware law.

In the alternative, even if Securities Act claims *are* internal claims, the Federal Forum Provisions would still be invalid. Section 115 provides that "no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State." By requiring Securities Act claims to be brought in federal court, the Federal Forum Provisions prohibit plaintiffs "from bringing such claims in the courts of this State."

Either way, granting Plaintiff's motion is consistent with important principles of statutory interpretation and will also serve critical public policy goals. Delaware has a compelling interest in keeping the federal government in its lane when it comes

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contrast, because Delaware corporate law claims are tied to the shares themselves, they are certified under Rules 23(b)(1) and (b)(2).").

to the regulation of corporate governance. To promote that interest, Delaware has a strong public policy against interference with the federal securities regime. If Delaware allows the Federal Forum Provisions to stand, it will vitiate an express mandate of the Congress, a unanimous decision of the Supreme Court, and a longstanding policy of the SEC.

For all the reasons and those set forth below, the Court should grant Plaintiff's motion and enter a judgment declaring each of the Federal Forum Provisions invalid.

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff filed suit on December 29, 2017 while *Cyan* was still pending before the Supreme Court. The parties agree that this Action presents a pure question of law and agreed to a briefing schedule for cross-motions for summary judgment.[7] This is Plaintiff's opening brief in support of his motion for summary judgment. Defendants are, simultaneously, filing their cross-motions for summary judgment and opening briefs in support thereof. The parties will file answering briefs on July 2, 2018 and have waived any replies.

[7] The parties agreed that Defendants and Nominal Defendants shall not submit an answer unless both motions for summary judgment are denied.

STATEMENT OF FACTS AND RELEVANT FEDERAL LAW BACKGROUND

A. The Securities Act of 1933 Grants State Courts Concurrent Jurisdiction Over Securities Act Claims And Provides That Securities Act Claims Brought In State Court Are Non-Removable

Section 11 of the Securities Act of 1933 creates a cause of action against any issuer that makes an untrue statement of material fact (or omits a material fact required to be stated) in any registration statement as well as against anyone who signs the registration statement (which will include all of the directors at the time of the offering).[8] This is an extraordinarily powerful statute. A Securities Act plaintiff does not need to prove scienter, reliance, or loss causation. "If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his *prima facie* case. Liability against the issuer of a security is virtually absolute, even for innocent misstatements."[9]

The Securities Act also provides stockholders with a significant degree of procedural flexibility. At the time the Securities Act was adopted, Section 22 of the Act gave federal and state courts concurrent jurisdiction over Securities Act claims

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[8] 15 U.S.C. § 77k. Registration statements are typically issued in connection with initial public offerings, secondary offerings, and certain stock-for-stock mergers.

[9] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983).

and, unusually, provided that Securities Act claims filed in state court could not be removed.[10]

In 1995, Congress adopted the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), which imposes an automatic discovery stay and other procedural hurdles on plaintiffs bringing securities claims in federal courts.[11] In response, a number of stockholders began filing claims in state court that asserted securities-fraud-style claims under state law theories.[12]

So, in 1998, Congress adopted the Securities Litigation Uniform Standards Act ("SLUSA"), which established a process for removing and then precluding class actions[13] that asserted claims "based upon the statutory or common law of any State … alleging … an untrue statement or omission of a material fact in connection with

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[10] 15 U.S.C. § 77v(a) (1933); *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, No. 15-1439, 2018 WL 1384564, at *4 (U.S. Mar. 20, 2018) ("More unusually, Congress also barred the removal of such actions from state to federal court. So if a plaintiff chose to bring a 1933 Act suit in state court, the defendant could not change the forum.") (internal citation omitted).

[11] 15 U.S.C. § 78u–4; 15 U.S.C. § 77z–1.

[12] *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006) ("Rather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives began bringing class actions under state law, often in state court."); *In re Lord Abbett Mut. Funds Fee Litig.*, 553 F.3d 248, 250 (3d Cir. 2009) ("In reaction to the rigors of the PSLRA, plaintiffs began filing cases in state courts under less strict state securities laws.").

[13] There has never been any question that *individual* actions alleging Securities Act claims could be filed in state court and were non-removable.

the purchase or sale of a covered security."[14] SLUSA also made two "conforming" amendments to Section 22 of the Securities Act, recognizing (1) an exception to state courts' concurrent jurisdiction "as provided in section 77p of this title with respect to covered class actions" and (2) an exception to the non-removability of Securities Act claims "as provided in section 77p(c)."[15]

These conforming amendments generated uncertainty about whether class actions alleging only claims under the Securities Act of 1933 could be removed. Section 77p(f)(2) of SLUSA provides a definition of "covered class actions" that does **not** include any reference to state-law claims, while Section 77p(b) and (c)'s references to "covered class actions" encompass **only** actions alleging state-law claims.[16] As a result, the federal district courts split over the question of whether a class action that alleged only claims under the Securities Act could be filed in state court and, if so, whether it could be removed.

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[14] *See* 15 U.S.C. § 77p(b)-(c). A covered security is, generally speaking, a security traded on the NYSE, NASDAQ, or other national exchange. *See* 15 U.S.C. § 77p(f)(3); 15 U.S.C. § 77r(b).

SLUSA famously includes two "Delaware carve-outs": (1) "an 'exclusively derivative action brought by one or more shareholders on behalf of a corporation' is not preempted;" and (2) SLUSA "preserves the availability of state court class actions, where state law already provides that corporate directors have fiduciary disclosure obligations to shareholders." *Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998) .

[15] *See* 15 U.S.C. § 77v(a) (1998).

[16] *See generally Kircher v. Putnam Funds Tr.*, 547 U.S. 633 (2006).

B. The Grundfest Solution

From the time that SLUSA was adopted through 2018, the vast majority of courts refused to allow removal of Securities Act class actions filed in state court. Federal courts in California—and elsewhere in the Ninth Circuit—were particularly hostile. In district courts in the Ninth Circuit, defendants lost the removal argument at least thirty-three times in a row from late 2012 through late 2017.[17]

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[17] *Clayton v. Tintri, Inc.*, No. 17-CV-05683-YGR, 2017 WL 4876517, at *2 (N.D. Cal. Oct. 30, 2017); *Nurlybayev v. Tintri, Inc.*, NO.17-cv-05684-YGR, Docket No. 16 at 4 (N.D. Cal. Oct. 30, 2017); *Golosiy v. Tintri, Inc.*, No. 17-CV-05876-YGR, 2017 WL 5560652, at *2 (N.D. Cal. Nov. 20, 2017); *Iuso v. Snap, Inc.*, 17-cv-7176-VAP-RAO, Docket No. 50 (C.D. Cal. Nov. 21, 2017); *Hsieh v. Snap Inc.*, 2:17-cv-05569-SVW-AGR, Dkt. 48 (C.D. Cal. Aug. 29, 2017); *Olberding v. Avinger, Inc., et al.*, 17-CV-03398-CW, 2017 WL 3141889, at *3 (N.D. Cal. July 21, 2017); *Bucks Cty. Employees Ret. Fund v. NantHealth, Inc. et al.*, 2:17-CV-03964-SVW-SS, 2017 WL 3579889, at *3 (C.D. Cal. Aug. 18, 2017); *Book v. ProNAi Therapeutics, Inc.*, 5:16-CV-07408-EJD, 2017 WL 2533664 (N.D. Cal. June 12, 2017); *Nathan v. Matta, et al.*, No. 3:16-cv-02127-MO, Dkt. No. 71 (D. Or. Mar. 14, 2017); *Westmoreland Cty. Employee Ret. Fund v. Inventure Foods Inc.*, CV-16-01410-PHX-SMM, 2016 WL 7654657, at *3 (D. Ariz. Aug. 11, 2016); *Rivera v. Fitbit, Inc.*, 16-CV-02890-SI, 2016 WL 4013504, at *3 (N.D. Cal. July 27, 2016); *Pytel v. Sunrun, Inc.*, No. 16-cv-2566-CRB, Dkt. No. 27 (N.D. Cal. July 12, 2016); *Elec. Workers Local #357 Pension v. Clovis Oncology, Inc.*, 185 F. Supp. 3d 1172 (N.D. Cal. 2016); *Iron Workers Mid-S. Pension Fund v. TerraForm Glob., Inc.*, No. 15-CV-6328-BLF, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016); *Patel v. TerraForm Glob., Inc.*, No. 16-CV-00073-BLF, 2016 WL 827375, at *1 (N.D. Cal. Mar. 3, 2016); *Badri v. TerraForm Glob., Inc.*, No. 15-CV-06323-BLF, 2016 WL 827372 (N.D. Cal. Mar. 3, 2016); *Fraser v. Wuebbels*, No. 15-CV-06326-BLF, 2016 WL 827373, at *5 (N.D. Cal. Mar. 3, 2016); *Buelow v. Alibaba Grp. Holding Ltd.*, No. 15-CV-05179-BLF, 2016 WL 234159 (N.D. Cal. Jan. 20, 2016); *Kerley v. MobileIron, Inc.*, No. 15-cv-4416-VC, Dkt. No. 34 (N.D. Cal. Nov. 30, 2015); *Cervantes v. Dickerson*, 15-CV-3825-PJH, 2015 WL 6163573 (N.D. Cal. Oct. 21, 2015); *City of Warren Police & Fire Ret. Sys. v. Revance Therapeutics, Inc.*, 125 F. Supp. 3d 917 (N.D. Cal. 2015); *Liu v. Xoom Corp.*, No. 15-CV-00602-LHK, 2015

In a May 6, 2016 presentation at the Rock Center for Corporate Governance, Professor Joseph Grundfest of Stanford Law School proposed a solution:[18]

> [A] by-law or charter provision with the following language:
>
> > Unless the Corporation consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933[or? any of the federal securities laws]. Any person or entity purchasing or otherwise acquiring any interest in any security of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw].[19]

In the months that followed, a number of Delaware corporations leapt at the suggestion, including Blue Apron, Stitch Fix, and Roku.

WL 3920074 (N.D. Cal. June 25, 2015); *Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp., Inc.*, SA CV 15-0687-DOC, 2015 WL 3631833 (C.D. Cal. June 10, 2015); *Plymouth Cty. Ret. Sys. v. Model N, Inc.*, No. 14-CV-04516-WHO, 2015 WL 65110 (N.D. Cal. Jan. 5, 2015); *Rajasekaran v. CytRx Corp.*, CV 14-3406-GHK PJWX, 2014 WL 4330787 (C.D. Cal. Aug. 21, 2014); *Desmarais v. Johnson*, No. C 13-03666 WHA, 2013 WL 5735154 (N.D. Cal. Oct. 22, 2013); *Toth v. Envivo, Inc.*, No. C 12-5636 CW, 2013 WL 5596965 (N.D. Cal. Oct. 11, 2013); *Reyes v. Zynga Inc*, No. C 12-05065 JSW, 2013 WL 5529754 (N.D. Cal. Jan. 23, 2013); *Harper v. Smart Techs. Inc.*, No. C 11-5232 SBA, 2012 WL 12505217 (N.D. Cal. Sept. 28, 2012).

[18] Affidavit of Melissa Donimirski ("Donimirski Aff."), Ex. A at 7.

[19] Interestingly, Professor Grundfest previously took a different view and recognized that a provision limiting plaintiff's ability to bring securities claims "would not be seeking to regulate the stockholder's rights as a stockholder" and, so, "would be extended beyond the contract that defines and governs the stockholders' rights." *See* Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra–Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 370 (2013).

C. Blue Apron

On July 5, 2017, Blue Apron filed a restated certificate of incorporation with the Secretary of State of the State of Delaware in connection with the closing of its IPO.[20] Article Thirteenth of that charter, which is Blue Apron's operative charter, provides that "Unless the Corporation consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall, to the fullest extent permitted by law, be the sole and exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring or holding any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Article THIRTEENTH."[21] This is the "Blue Apron Federal Forum Provision."[22]

On August 17, 2017, a Blue Apron investor filed suit in the United States District Court for the Eastern District of New York against Blue Apron, the Blue

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[20] Donimirski Aff., Ex. B.

[21] *Id.*

[22] Defendants Matthew B. Salzberg, Julie M.B. Bradley, Tracy Britt Cool, Kenneth A. Fox, Robert P. Goodman, Gary R. Hirshberg, and Brian P. Kelley (collectively, the "Blue Apron Directors") were Blue Apron's directors at the time of the IPO, approved the Blue Apron Federal Forum Provision and remain on its board today. Donimirski Aff., Ex. C at 129. Non-defendant Bradley Dickerson joined Blue Apron's Board of Directors after its initial public offering and, so, is not named here.

Apron Directors, and various underwriters, asserting claims under the Securities Act of 1933.[23] Several similar actions have been consolidated under the caption *In re: Blue Apron Holdings, Inc. Securities Litigation*, No. 17-cv-04846-WFK-PK.[24]

D. Stitch Fix

On November 21, 2017, Stitch Fix filed an Amended and Restated Certificate of Incorporation with the Secretary of State of the State of Delaware in connection with the closing of its IPO on November 17, 2017.[25] Section VI.E of that charter, which is Stitch Fix's operative charter, provides that "Unless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of the Company shall be deemed to have notice of and consented to the provisions of this Section VI.E."[26] This is the "Stitch Fix Federal Forum Provision."[27]

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23 *Nurlybayev v. Blue Apron Holdings, Inc.*, No. 1:17-cv-04846, Docket No. 1 (E.D.N.Y. Aug. 17, 2017).

24 Plaintiffs in that action filed a consolidated amended complaint alleging Securities Act claims on February 27, 2018 (*id.*, Docket No. 55) and the parties are briefing the motions to dismiss.

25 Donimirski Aff., Ex. D.

26 *Id.*

27 Defendants Katrina Lake, Steven Anderson, J. William Gurley, Marka Hansen, and Sharon McCollam (collectively, the "Stitch Fix Directors") were Stitch Fix's directors at the time of the IPO, approved the Stitch Fix Federal Forum

E. Roku

On October 2, 2017, Roku, Inc. filed an amended and restated certificate of incorporation with the Secretary of State of the State of Delaware in connection with the closing of its IPO on September 28, 2017.[28] Section VI.E of that certificate of incorporation, which is Roku's operative charter, provides that "Unless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of the Corporation shall be deemed to have notice of and consented to the provisions of this Amended and Restated Certificate of Incorporation."[29] This is the "Roku Federal Forum Provision."[30]

F. Plaintiff Bought IPO Shares Of Each Company And Would Have Standing To Bring A Securities Act Claim Against The Defendants

A plaintiff has standing to sue under Section 11 of the Securities Act, where, as here, he can "'trace' [his] shares to the allegedly defective registration

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Provision and remain on its board today. Donimirski Aff., Ex. E at 89.

28 Donimirski Aff., Ex. F.

29 *Id*.

30 Defendants Anthony Wood, Ravi Ahuja, Shawn Carolan, Jeffrey Hastings, Alan Henricks, Neil Hunt, Daniel Leff, and Ray Rothrock (the "Roku Directors") were Roku's directors at the time of the IPO, approved the Roku Federal Forum Provision and remain on its board today. Donimirski Aff., Ex. G at 109.

statement."[31] Here, all three companies had a standard, 180-day lock-up period, during which time only IPO shares were available to the public.[32] Plaintiff purchased 250 shares of Blue Apron common stock on June 29, 2017, the day of its IPO.[33] Plaintiff purchased 25 shares of Stitch Fix common stock on December 4, 2017, approximately two weeks after its IPO.[34] Plaintiff purchased 200 shares of Roku common stock on November 14, 2017, approximately six weeks after its IPO.[35]

In all three instances, Plaintiff purchased his shares before the expiration of the lock-up period.[36] Thus, he plainly would have Section 11 standing to bring a claim against any of the Defendants.[37] "In a case such as this one, where there has

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[31] *DeMaria v. Andersen*, 318 F.3d 170, 176 (2d Cir. 2003) (internal citations and quotations omitted).

[32] Donimirski Aff., Exs. C at 166, E at 121, G at 149.

[33] Donimirski Aff., Ex. H.

[34] Donimirski Aff., Ex. I.

[35] Donimirski Aff., Ex. J.

[36] Plaintiff continues to own stock in each company today. Donimirski Aff., Ex. K.

[37] Boris Feldman (Wilson Sonsini Goodrich & Rosati), *A Modest Strategy for Combatting Frivolous IPO Lawsuits*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Mar. 13, 2015), https://corpgov.law.harvard.edu/2015/03/13/a-modest-strategy-for-combatting-frivolous-ipo-lawsuits/ ("A standard feature of most IPO's is a lock-up agreement. The underwriters require management and other shareholders to agree not to sell any of their shares on the public market for a specified period—usually, until 180 days after the IPO. … An unintended consequence of the lock-up agreements is to help Section 11 plaintiffs establish their standing by facilitating tracing. By definition, no shares entered the market prior to the IPO. At the time of the IPO, a large number of shares enter the market, all issued pursuant to the registration statement that forms

been only one [public] stock offering, any person who acquires the security may sue under § 11, regardless of whether he bought in the initial offering, a week later, or a month after that."[38]

G. In *Cyan*, The Supreme Court Of The United States Confirmed That Securities Act Class Actions Can Be Filed In State Court And Are Non-Removable

On March 20, 2018, the Supreme Court of the United States resolved the long-running dispute over whether SLUSA eliminated state courts' jurisdiction over Securities Act class actions. In *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, the Court considered "two questions about [SLUSA]. First, did SLUSA strip state courts of jurisdiction over class actions alleging violations of only the Securities Act of 1933 … And second, even if not, did SLUSA empower defendants to remove such actions from state to federal court?"[39] The Court answered "both questions no."[40] State courts have subject-matter jurisdiction over actions, including class actions,

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the basis of the lawsuit. If a person buys stock on the open market a month or two later, she normally will have no problem tracing those shares to the registration statement, because the only shares that are trading were those issued in the IPO. No other shares have entered the market. In many cases, this means that every person who bought the company's shares on the open market, for 180 days after the IPO, can assert a Section 11 claim and be part of a Section 11 class.").

38 *Andersen*, 318 F.3d at 176

39 2018 WL 1384564, at *4 (U.S. Mar. 20, 2018).

40 *Id.*

alleging violations of only the Securities Act and SLUSA does not empower defendants to remove such actions to federal court.[41]

ARGUMENT

A. Plaintiff's Claims Are Ripe

As a threshold question, all of Plaintiff's claims are ripe.

Section 111(a)(1) of the DGCL grants this Court jurisdiction to "determine the validity of the provisions of ... the bylaws of a corporation." "Under 10 Del. C. § 6501, this Court may issue a declaratory judgment to determine the validity of a bylaw, provided that there is an 'actual controversy' between the parties."[42] "Generally, a dispute will be deemed ripe if litigation sooner or later appears to be unavoidable and where," as here, "the material facts are static."[43]

There will likely be no dispute that the claims against Blue Apron and the Blue Apron Directors are ripe. Other investors have already brought a Securities Act class action against the Blue Apron Defendants in federal court and in the wake of *Cyan*, it seems inevitable that similar suits will be filed in state court.

No Securities Act class actions have yet been filed against Roku, the Roku Directors, Stitch Fix, or the Stitch Fix Directors, but the claims against them are ripe

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41 *Id.*

42 *Solak v. Sarowitz*, 2016 WL 7468070, at *4 (Del. Ch. Dec. 27, 2016)

43 *XI Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1217–18 (Del. 2014) (internal quotations omitted).

too. "Facial challenges to the legality of provisions in corporate instruments are regularly resolved by this Court."[44] In the recent decision in *Frechter v. Zier*, for example, Vice Chancellor Glasscock considered a facial challenge to a bylaw provision, which stated "that the stockholders of the company may remove directors, but only upon the vote of 'not less than 66 and two-thirds percent ... of the voting power of all outstanding shares' of company stock."[45] There was no evidence that any stockholders were planning a challenge to any director. Nonetheless, the Court reached the merits, concluding that the bylaw ran "afoul of 8 Del. C. § 141(k), under which directors may be removed by a majority vote of corporate shares."[46] This

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44 *Lions Gate Entm't Corp. v. Image Entm't Inc.*, 2006 WL 1668051, at *6 (Del. Ch. June 5, 2006).

45 2017 WL 345142, at *1 (Del. Ch. Jan. 24, 2017)

46 *Id.*; *see also Chester Cty. Employees' Ret. Fund v. New Residential Inv. Corp.*, 2016 WL 5865004, at *13 (Del. Ch. Oct. 7, 2016) ("it appears that Plaintiff has pled both a facial challenge to the statutory validity of article twelfth and an as applied challenge to the application of article twelfth in the context of the HLSS transactions. The statutory validity claim is ripe for judicial review[.]"); *Siegman v. Tri-Star Pictures, Inc.*, 1989 WL 48746, at *5 (Del. Ch. May 5, 1989) ("At issue under Count III is the facial validity of Articles Fifth, Sixth, and Seventh of the newly adopted Certificate amendments. ... Given the nature of these declaratory claims, their determination would not be affected by 'future factual developments,' Moreover, the declaratory claims implicate fundamental policies, *i.e.*, the accountability of directors to shareholders for breaches of fiduciary duty and the shareholders' inherent power to elect directors. The importance of those policies and the practicalities of the situation, counsel that the Certificate amendment claims be decided promptly.").

Court has regularly found that challenges to other types of entrenching provisions are ripe even in the absence of an imminent or threatened challenge to the Board.[47]

Facial challenges are particularly ripe where, as here, "stockholders challenge measures that have a substantial deterrent effect."[48] This includes challenges to provisions affecting a stockholder-plaintiff's choice of forum for a particular type of lawsuit—even where no such suit has yet been filed. In *Sarowitz,* the board of Paylocity adopted an exclusive forum bylaw requiring internal corporate claims to be brought in Delaware and a fee-shifting bylaw purporting to shift attorneys' fees to a stockholder who filed an unsuccessful internal corporate claim outside of Delaware.[49] No stockholder of Paylocity had filed an action outside of Delaware that would trigger the fee-shifting bylaw, and the plaintiff did not plead any intention to bring such an action.[50] Nonetheless, Chancellor Bouchard held that a challenge to

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47 *See, e.g.*, *Carmody v. Toll Bros.*, 723 A.2d 1180, 1188 (Del. Ch. 1998 (rejecting argument "that the adoption of a facially invalid rights plan, on a 'clear day' where there is no specific hostile takeover proposal, can never be the subject of a legal challenge;" argument was "easily disposed of,"; defendants "cite[d] no authority which supports that proposition, nor could they, since the case law holds to the contrary."); *Pontiac General Employees Retirement System v. Ballantine*, C.A. No. 9789–VCL, at 78 (Del. Ch. Oct. 14, 2014) (TRANSCRIPT) (challenge to proxy put was "ripe as a practical matter because," among other things, "the stockholders of the company are presently suffering a distinct injury in the form of the deterrent effect").

48 *Sarowitz,* 2016 WL 7468070 at *5 (collecting cases).

49 *Id.*

50 *Id.* at *5.

the fee-shifting bylaw was ripe because (1) the bylaw had a substantial deterrent effect, and (2) deciding the legal questions presented by the complaint would provide efficiency benefits to not only the defendants and their stockholders, but also to other corporations and their investors.[51] Similarly, in *Chevron*,[52] the plaintiffs challenged bylaw provisions requiring that internal corporate claims be brought in Delaware. They had not attempted to file any internal corporate claims against the defendants outside of Delaware nor identified any such potential claims, but then-Chancellor Strine considered their facial challenge to be ripe.[53]

The Court should reach the same conclusion here. The Federal Forum Provisions have a substantial deterrent effect. Plaintiffs contemplating a state court suit against any of the Defendants know that they will have to deal with either an attempt at removal or an immediate motion to dismiss predicated on the Federal Forum Provisions. Even if these attempts are unsuccessful, litigating the impact of the Federal Forum Provisions will inflict significant additional costs and cause

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[51] *Id.* at *5–6.

[52] *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

[53] *Id.* at 946 (concluding that the Court had the authority "to address the ripe legal issues—the facial statutory and contractual validity and enforceability of the forum selection bylaws adopted by Chevron's and FedEx's board of directors under the DGCL."); *id.* at 938 ("A decision as to the basic legal questions presented by the plaintiffs' complaints will provide efficiency benefits to not only the defendants and their stockholders, but to other corporations and their investors.").

significant delays—potentially putting a state-court class action months behind an overlapping federal action—making it vulnerable to a motion to stay.

There is also some risk that federal courts or the courts of another state would misapply Delaware law or reach inconsistent decisions about the validity of the Federal Forum Provisions. As the Wilson Sonsini firm (counsel to the Stitch Fix Defendants and the Roku Defendants) has written, "[m]any companies that went public during the pendency of *Cyan* did not adopt [Federal Forum] clauses, perhaps because they expected that the Supreme Court would rule that Section 11 claims could not be brought in state court. Now that *Cyan* has green-lighted such suits, one can expect that many companies will adopt the Grundfest clause prior to going public. The next battle in the forum war, post-*Cyan*, will be the validity of such clauses. … In all likelihood, definitive resolution of these issues will take a few years. During that time, many state Section 11 suits are likely to face motions to dismiss based on the Grundfest clause."[54] Thus, there are significant efficiency gains to be realized from having Delaware courts resolve these important questions of Delaware law now.

[54] Boris Feldman and Ignacio Salceda, *After Cyan: Some Prognostications*, LAW360 (Mar. 23, 2018), https://www.law360.com/articles/1025703/after-cyan-some-prognostications.

B. Delaware Law Does Not Authorize Charter Or Bylaw Provisions Limiting A Plaintiff's Choice Of Forum For External Or Personal Claims

On the merits, the Court should declare that the Federal Forum Provisions are invalid. The broad enabling authority of Sections 102 and 109 is limited to provisions that govern the internal affairs of the corporation.[55] This is confirmed by Section 115, which limits its express authorization of forum-selection clauses to provisions requiring that internal corporate claims be brought in Delaware.[56] As the Court recognized in *Activision* and as the text of Section 115 makes clear, Securities Act claims are not internal claims.[57] Thus, the Federal Forum Provisions are invalid.

This simple logic is confirmed by *Chevron*, the reasoning of federal courts and learned commentators, principles of statutory interpretation, and strong principles of Delaware's public policy.

1) *Chevron Supports Limiting Forum Provisions To Internal Corporate Claims*

The parties will almost certainly agree that *Chevron*, now codified in Section 115, is the most pertinent authority. *Chevron*, of course, approved exclusive-forum provisions for internal corporate claims. But *Chevron* does not support the validity

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55 *See* 8 *Del. C.* § 102(b)(1); 8 *Del. C.* § 109(b); *see also* Cox and Hazen, *supra* note 3; Kahan & Rock, *supra* note 3, at 1607, 1615.

56 8 *Del. C.* § 115.

57 *See* 8 *Del. C.* § 115; *Activision*, 124 A.3d at 1056.

of the Federal Forum Provisions.

To the contrary, then-Chancellor Strine reasoned that the forum-selection bylaws at issue in *Chevron* were authorized by the DGCL *because* they governed only internal corporate claims.[58] The opening paragraph of *Chevron* emphasizes six times that the provisions at issue relate solely to internal corporate affairs governed by Delaware law:

> The board of Chevron, the oil and gas major, has adopted a bylaw providing that litigation relating to Chevron's **internal affairs** should be conducted in **Delaware**, the state where Chevron is incorporated and whose **substantive law** Chevron's stockholders know governs the corporation's **internal affairs**. The board of the logistics company FedEx, which is also incorporated in Delaware and whose **internal affairs** are also therefore governed by **Delaware law**, has adopted a similar bylaw providing that the forum for litigation related to FedEx's **internal affairs** should be the Delaware Court of Chancery. The boards of both companies have been empowered in their certificates of incorporation to adopt bylaws under 8 Del. C. § 109(a).[59]

In total, the phrase "internal affairs" appears thirty-seven times in the *Chevron* opinion. There can be little doubt that it marks a dividing line.

The *Chevron* Court suggested that if the bylaws were "regulating external matters," they "would be beyond the statutory language of 8 Del. C. § 109(b)"

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[58] *Chevron*, 73 A.3d at 939 ("the bylaws only regulate suits brought by stockholders as stockholders in cases governed by the internal affairs doctrine. Thus, the bylaws, by establishing these procedural rules for the operation of the corporation, plainly relate to the 'business of the corporation[s],' the 'conduct of [their] affairs,' and regulate the 'rights or powers of [their] stockholders.'").

[59] *Id.* at 937.

because "the bylaws would not deal with the rights and powers of the plaintiff-stockholder as a stockholder."[60] Later in that same decision, the Court emphasized that "neither of the forum selection bylaws purports in any way to foreclose a plaintiff from exercising any statutory right of action created by the federal government. Rather, the forum selection bylaws plainly focus on claims governed by the internal affairs doctrine and thus the law of the state of incorporation."[61] And the Court approvingly quoted a law review article (ironically by Professor Grundfest), stating that "[Forum selection] provisions **do not purport to regulate a stockholder's ability to bring a securities fraud claim** or any other claim that is **not an intra-corporate matter**."[62] Near the end of the opinion, the Court repeated "that Chevron's and FedEx's stated reasons for the bylaws have nothing to do with foreclosing anyone from exercising any substantive federal rights, but only with channeling internal affairs cases governed by state law to the state of incorporation's courts."[63]

2) Federal Courts and Commentators Agree

Exclusive-forum provisions are a relatively new innovation for Delaware

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60 *Id.* at 952.

61 *Id.* at 962.

62 *Id.* at 962 (quoting Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra–Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 370 (2013)) (emphasis added).

63 *Id.* at 963.

corporations. Consequently, no Delaware court has yet had the opportunity to consider a Federal Forum Provision like the ones challenged here. At least two federal courts, however, have considered essentially identical provisions and both granted motions to remand to state court.[64] In the three *Tintri* decisions and the first *Snap* decision (*Hsieh v. Snap*), the court simply found that a corporate bylaw or charter provision could not create federal subject-matter jurisdiction and did not evaluate the validity of the provisions under Delaware law. In *Iuso v. Snap*, the court reached the same conclusion but it also determined, correctly, that Snap's Federal Forum Provision was invalid under Delaware law.[65]

A number of commentators have also considered the issue and have widely concluded that Federal Forum Provisions are invalid. Former Vice Chancellor Lamb has stated that "[a]n effective, enforceable forum selection clause should be drafted to apply only to disputes arising out of the company's governance and internal affairs, of the sort governed by the law of the state in which the company is incorporated."[66] As noted above, before developing the Grundfest Solution,

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64 *Hsieh v. Snap Inc.*, 2:17-cv-05569-SVW-AGR, Dkt. 48 (C.D. Cal. Aug. 29, 2017); *Clayton v. Tintri, Inc.*, No. 17-CV-05683-YGR, 2017 WL 4876517, at *2 (N.D. Cal. Oct. 30, 2017); *Nurlybayev v. Tintri, Inc.*, NO.17-cv-05684-YGR, Docket No. 16 at 4 (N.D. Cal. Oct. 30, 2017); *Golosiy v. Tintri, Inc.*, No. 17-CV-05876-YGR, 2017 WL 5560652, at *2 (N.D. Cal. Nov. 20, 2017); *Iuso v. Snap, Inc.*, 17-cv-7176-VAP-RAO, Docket No. 50 (C.D. Cal. Nov. 21, 2017).

65 *Iuso*, Docket No. 50 at 6.

66 Richard A. Rosen & Stephen P. Lamb, *Adopting and Enforcing Effective*

Professor Grundfest had previously written that the "contractual" nature of the certificate of incorporation does not extend beyond intra-corporate claims.[67] Corporate law scholars—including Professor Coffee of Columbia who is routinely cited by this Court—have reached similar conclusions.[68]

Forum Selection Provisions in Corporate Charters and Bylaws, PAUL WEISS (Jan. 8, 2015), *available at* http://www.paulweiss.com/media/2756381/fsc_article.pdf.

67 Grundfest and Savelle, *supra* note 18, at 369–70.

68 *See* John C. Coffee, Jr., *What Happens Next?*, BANK & CORPORATE GOVERNANCE LAW REPORTER 11 n.2 (2015), *available at* http://www.lawreporters.com/jun15b&c.pdf ("In *In re Activision* ... Vice Chancellor Travis Laster suggested that a [federal securities] claim 'is a personal claim akin to a tort claim for fraud' and 'not a property right associated with shares.' ... This could be a hint that such 'personal' claims cannot be regulated by bylaws adopted pursuant to DGCL § 109."); John C. Coffee, Jr., *Delaware Throws A Curveball*, THE CLS BLUE SKY BLOG n.3 (Mar. 16, 2015), http://clsbluesky.law.columbia.edu/2015/03/16/delaware-throws-a-curveball/ ("Section 5 of the proposed legislation … would add a new Section 115 ('Forum selection provisions') expressly to authorize bylaws making Delaware the exclusive forum for 'intracorporate claims.' One reason this provision defines 'intracorporate claims' narrowly may have been a desire to avoid requiring federal securities claims to be brought only in Delaware federal court—a provision that federal courts would not easily tolerate."); Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters & Bylaws*, 104 GEO. L.J. 583, 598 (2016) ("[T]here is no reason to believe that corporate governance documents, regulated by the law of the state of incorporation, can dictate mechanisms for bringing claims that do not concern corporate internal affairs, such as claims alleging fraud in connection with a securities sale."); J. Robert Brown, Jr., *Staying in the Delaware Corporate Governance Lane: Fee Shifting Bylaws and a Legislative Reaffirmation of the Rules of the Road*, 54 BANK AND CORPORATE GOVERNANCE LAW REPORTER 4, 13 & n.9 (2015) ("The authority granted to corporations in Sections 102 and 109 of the DGCL was not intended to, and does not reach beyond, 'internal corporate claims.' … As the courts in Delaware have recognized, actions under the antifraud provisions of the federal securities laws are very different from internal corporate claims."); Verity Winship, *Contracting Around Securities Litigation: Some Thoughts on the Scope of*

3) Under Delaware's Statutory Interpretation Principles, Section 115's Silence On Federal Forum Provisions Implies Prohibition

Section 115's express authorization of exclusive-forum provisions is limited to internal corporate claims.[69] This was not an accident. Professor Hamermesh and one of his colleagues on the Corporation Law Council—which drafted Section 115 of the DGCL—have stated that Delaware law does not authorize Federal Forum Provisions.[70]

Defendants will undoubtedly respond that Section 115 does not expressly prohibit Federal Forum Provisions and Section 102(b)(1) authorizes any provision

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Litigation Bylaws, 68 SMU L. REV. 913, 921-22 (2015) (finding "support for the idea" that certificates of incorporation are "contracts about the shareholder as a holder of corporate stock and a constituent of the corporate entity but not about the shareholder as a purchaser or seller," suggesting that "contracting about federal securities litigation is beyond their scope.") (internal quotations omitted).

[69] 8 *Del. C.* § 115 ("The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State.").

[70] *See* Lawrence A. Hamermesh & Norman M. Monhait, *Fee-Shifting Bylaws: A Study in Federalism*, THE INSTITUTE OF DELAWARE CORPORATE AND BUSINESS LAW (June 29, 2015)[70] ("[T]he subject matter scope of Sections 102(b)(1) and 109(b) is broad. But it is not limitless, as *FedEx/Chevron* expressly teaches. And in our view, it does not extend so far as to permit the charter or the bylaws to create a power to bind stockholders in regard to fee-shifting in, or the venue for, federal securities class actions."). As noted in Winship, *supra* note 68 at 923, Professor Hamermesh and Mr. Monhait were "involved in drafting the initial legislation" (*i.e.*, were members of the Council of the Corporation Law Section of the Delaware State Bar Association).

that is not expressly forbidden.[71] But *expressio unius est exclusio alterius*—the expression of one thing implies the exclusion of others—is a vibrant doctrine of statutory interpretation in Delaware.[72] Section 115's silence is not an implicit endorsement of Federal Forum Provisions; it is an implicit prohibition (or, at least, an implicit acknowledgement that Federal Forum Provisions are not authorized by Section 102(b)(1) in the first instance).

To understand why Defendants' silence-means-endorsement theory must fail, it is illuminating to consider the way that Delaware courts interpret Section 102(b)(7). Section 102(b)(7) expressly authorizes provisions exculpating directors from monetary liability for, among other things, breaches of the duty of care. It expressly prohibits provisions exculpating directors for, among other things, breaches of the duty of loyalty. It is silent about provisions exculpating officers or aider-abettors (what we will call "Non-Director Exculpation Provisions").

If silence meant endorsement, Delaware corporations would be allowed to adopt Non-Director Exculpation Provisions. Indeed, the textual argument for

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[71] In the *Iuso* case, discussed above, the defendants were represented by Wilson Sonsini, the same law firm that represents the Stitch Fix Defendants and the Roku Defendants here. The *Iuso* defendants argued, unsuccessfully, that "Section 115 addresses only one specific kind of clause and leaves it to the Delaware courts, in case-by-case adjudication, to assess the validity of the other kinds." Docket No. 27 at 5.

[72] *Brown v. State*, 36 A.3d 321, 325 (Del. 2012); *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007); *Walt v. State*, 727 A.2d 836, 840 (Del. 1999).

allowing Non-Director Exculpation Provisions is significantly stronger than the argument for allowing Federal Forum Provisions in two key respects. *First*, there is no dispute that claims against officers or aider-abettors relate to the corporation's internal affairs.[73] So Non-Director Exculpation Provisions would, at first blush, seem to fall within Section 102(b)(1)'s generic enabling authority. *Second*, Section 102(b)(7)'s express prohibition of certain types of exculpatory provisions (*e.g.*, provisions exculpating duty-of-loyalty claims against directors) could be read as implicit authorization of any exculpatory provision other than those expressly prohibited.

But that is not the law. The Supreme Court and this Court have repeatedly held that Section 102(b)(7)'s silence on Non-Director Exculpation Provisions means that Delaware corporations cannot exculpate officers or aider-abettors.[74] The same logic applies with even greater force here. Section 115's silence on Federal Forum Provisions implies either prohibition or an acknowledgement that Federal Forum Provisions are not authorized by Section 102(b)(1) in the first instance.

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[73] *See, e.g.*, *Hamilton Partners, L.P. v. Highland Capital Mgmt., L.P.*, 2014 WL 1813340, at *9 n.101 (Del. Ch. May 7, 2014) (collecting cases).

[74] *See, e.g.*, *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 874 (Del. 2015); *Gantler v. Stephens*, 965 A.2d 695, 709 n.37 (Del. 2009); *In re Rural Metro Corp.*, 88 A.3d 54, 87 (Del. Ch. 2014); *In re Del Monte Foods Co. Shareholders Litig.*, 25 A.3d 813, 838 (Del. Ch. 2011).

4) There Are Compelling Policy Reasons To Hold That Delaware Law Does Not Authorize Federal Forum Provisions

Finally, a charter may not contain a provision that "transgress[es] a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself."[75] Here, the Federal Forum Provisions contravene the longstanding and highly significant Delaware public policy of avoiding conflicts with the federal securities regime.

The history of American corporate law is, in many ways, a history of "a delicately balanced 'ecosystem' within our unique brand of federalism."[76] Delaware believes (correctly) that "[k]eeping the fragile Delaware franchise healthy is in the best interests of business lawyers and investors everywhere," and it has recognized that "[t]he Delaware franchise is fragile largely because of encroaching federalization."[77] "Delaware may say the words, but it gets to do so only when the

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75 *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. Ch. 1952); *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 848 (Del. Ch. 2004) ("the court must determine, based on a careful, context-specific review in keeping with *Sterling*, whether a particular certificate provision contravenes Delaware public policy, *i.e.*, our law, whether it be in the form of statutory or common law.").

76 E. Norman Veasey & Christine Di Guglielmo, *History Informs American Corporate Law: The Necessity of Maintaining A Delicate Balance in the Federal 'Ecosystem'*, 1 VA. L. & BUS. REV. 201, 202 (2006).

77 E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1503 (2005); *see also* Kahan & Rock, *supra* note 3, at 1609 ("Delaware operates in a federal system in which its regulatory powers co-exist with and can be constrained by the powers of the federal

federal authorities do not take away the microphone."[78] Thus, keeping the federal government "in its [l]ane" is a public policy principle of overriding importance.[79]

Delaware encourages the federal government to stay in its lane by appealing to reciprocity. Generally speaking, "the division between the two governmental authorities [*i.e.*, the federal and state governments] has given primary responsibility for fair disclosure and securities market regulation to the federal government … State law has retained the substantive regulation of corporate transactions and board conduct."[80] Delaware is extraordinarily careful to respect that "complementary," "symbiotic relationship"[81] by avoiding decisions that would tread on federal policies.

There are many examples,[82] but perhaps the most pertinent one is *Chevron*. In considering a hypothetical provision limiting a plaintiff's choice of forum for a

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government and the various other states. In this system, Delaware is faced with an omnipresent, albeit not imminent, specter of a federal takeover.").

78 Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 644–45 (2003) ("Delaware players have reason to fear that if they misstep, federal authorities (Congress, the courts, or the SEC) will enter the picture. … A great deal of the corporate law that is important to the corporation is federal, not state, law. What remains with the states is the corporate law that the federal players tolerate, and what gets reversed is that which they do not.").

79 Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 684 (2005).

80 William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 973 (2003).

81 *Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998).

82 *See, e.g.*, *In re Oracle Corp.*, 867 A.2d 904, 928 (Del. Ch. 2004) ("this court

federal securities claim, then-Chancellor Strine explained that a defendant would "have trouble" enforcing such a clause because "the plaintiff could argue that if the board took the position that the bylaw waived the stockholder's rights under the Securities Exchange Act, such a waiver would be inconsistent with the antiwaiver provisions of that Act, codified at 15 U.S.C. § 78cc."[83] This is a broad reading of the antiwaiver provisions of the Securities Exchange Act, which have traditionally been interpreted to apply only to waivers of substantive rights.

Here, the conflict between enforcement of the Federal Forum Provisions and federal law is even more direct. Approving the Federal Forum Provisions would vitiate an express Congressional mandate[84] and a unanimous decision by the Supreme Court of the United States.[85] It would also disregard the SEC's

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has been reluctant to have equity fill non-existent gaps in the federal regulation of securities markets"), *aff'd sub nom. In re Oracle Corp. Derivative Litig.*, 872 A.2d 960 (Del. 2005); *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 29 (Del. Ch. 2009) ("Delaware's common law fraud remedy does not provide investors with expansive, market-wide relief. That is a domain appropriately left to the federal securities laws, the SEC, and the federal courts."); *Frank v. Arnelle*, 1998 WL 668649, at *8 (Del. Ch. Sept. 16, 1998), ("I am hesitant … to impose additional disclosure obligations where federal securities law quite plainly does not") *aff'd*, 725 A.2d 441 (Del. 1999).

83 *Id.* at 962.

84 15 U.S.C. § 77v(a) ("Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.").

85 *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, 2018 WL 1384564, at *9 (U.S. Mar. 20, 2018) ("When Congress passed SLUSA, state courts had for 65 years adjudicated all manner of 1933 Act cases, including class actions. Indeed, defendants could not even remove those cases to federal court, as schemes of concurrent

longstanding hostility to charter provisions limiting securities plaintiffs' choice of forum (albeit in the arbitral context).[86] In short, the Federal Forum Provisions seek to push Delaware far out of its lane, thereby contravening a significant Delaware public policy.[87]

C. The Remaining Potential Arguments Do Not Compel A Different Result

Defendants may assert a couple of additional arguments that can be addressed

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jurisdiction almost always allow. State courts thus had as much or more power over the 1933 Act's enforcement as over any federal statute's. To think Cyan right, we would have to believe that Congress upended that entrenched practice not by any direct means, but instead by way of a conforming amendment to § 77v(a) (linked, in its view, with only a definition). But Congress does not make radical—but entirely implicit—change[s] through technical and conforming amendments.") (internal quotations omitted).

86 Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187, 1220–22 (2013) ("the SEC recently granted no-action relief to two corporations seeking to exclude stockholder proposals of binding by-law amendments providing for mandatory individual arbitration under certain circumstances, stating that there was 'some basis' for the view that the proposals would violate the federal securities laws. … In addition, the SEC has twice considered issuer-stockholder arbitration provisions in an IPO issuer's constituent instruments in connection with reviewing the issuer's IPO registration statement, and in both instances refused to declare the registration statement effective.").

87 There is no tension with the more generic federal policy in favor of traditional, contractual, forum-selection clauses. If sophisticated stockholders want to bind themselves to a federal forum via a stockholders' agreement, they can. *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *16 (Del. Ch. July 21, 2000) ("stockholders can bind themselves contractually in a stockholders agreement in a manner that cannot be permissibly accomplished through a certificate of incorporation").

quickly.

First, it is possible that Defendants will argue that Securities Act claims are internal corporate claims. But Section 115 defines internal corporate claims as claims "(i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery." Securities Act claims are neither.[88]

Moreover, Blue Apron, Roku, and Stitch Fix all have a separate exclusive-forum provision selecting this Court as the exclusive forum for internal corporate claims.[89] Thus, by requiring Securities Act claims to be filed in federal court, the Federal Forum Provisions implicitly recognize that these claims are not internal corporate claims.

Finally, even if Securities Act claims were internal corporate claims, the

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[88] *See also Activision*, 124 A.3d at 1056 (a claim "under the federal securities laws is a personal claim akin to a tort claim for fraud.").

[89] Donimirski Aff., Ex. B, Article Thirteenth (Blue Apron) ("Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall, to the fullest extent permitted by law, be the sole and exclusive forum for: (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer, other employee or stockholder of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the General Corporation Law or as to which the General Corporation Law confers jurisdiction on the Court of Chancery of the State of Delaware, or (iv) any action asserting a claim governed by the internal affairs doctrine."); Donimirski Aff., Ex. D § VI.E (Stitch Fix; substantially the same); Donimirski Aff., Ex. F § VI.E (Roku; substantially the same).

Federal Forum Provisions would still be invalid. Section 115 provides that "no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State." By requiring Securities Act claims to be brought in federal court, the Federal Forum Provisions prohibit plaintiffs "from bringing such claims in the courts of this State."

Second, the Blue Apron Defendants may seize on the savings clause of their Federal Forum Provision, which provides for an exclusive federal forum "**to the fullest extent permitted by law**."[90] But this is no answer to a facial challenge. "For a savings clause to negate a facial challenge to the validity of a bylaw, there logically must be something left in the challenged provision for the savings clause to save. Here, there is not."[91]

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90 Donimirski Aff., Ex. B, Article Thirteenth.

91 *Solak*, 2016 WL 7468070, at *9 ("Finally, defendants assert that Count I fails to state a claim for relief because the Fee–Shifting Bylaw contains a savings clause that makes it 'enforceable only [t]o the fullest extent permitted by law,' and thus it 'carves out all interpretations inconsistent with Delaware law.' The problem with this argument is that the Fee–Shifting Bylaw is wholly invalid, as explained above, because Section 109(b) prohibits any provision that would shift fees to a stockholder in connection with internal corporate claims without regard to where such a claim is filed.").

CONCLUSION

For all the foregoing reasons, the Court should grant Plaintiff's motion for summary judgment and declare the Federal Forum Provisions invalid as a matter of Delaware law.

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