SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

COMPLEX CIVIL LITIGATION

SUNNY C. WONG, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

RESTORATION ROBOTICS, INC., et al.,

Defendants.

_____/

Master File No. 18CIV02609
(consolidated with 19CIV03173)
CLASS ACTION

Assigned for all purposes to Dept. 2
Hon. Marie S. Weiner

CASE MANAGEMENT ORDER #10 And ORDER RE: MOTIONS TO DISMISS

On June 12, 2020, Defendants' Motion for Reconsideration and Renewed Motion to Dismiss, and Defendants' Demurrers to the Consolidated Class Action Complaint came on for hearing in Department 2 of this Court before the Honorable Marie S. Weiner. James Jaconette of Robbins Geller Rudman & Dowd LLP and Mark Molumphy, Tyson Redenbarger and Noorjahan Rahman of Cotchett Pitre & McCarthy LLP appeared on behalf of Plaintiffs; John Luftus and Christine Ellice of Stroock & Stroock & Lavan LLP appeared on behalf of the Underwriter Defendants, Patrick Gibbs and Jeffery Lombard of Cooley LLP appeared on behalf of the Venture Capital Defendants; and Matt Rawlinson,

Daniel Gherardi, Gavin Masuda, and Jessie Simpson LaGoy of Latham & Watkins LLP appeared on behalf of Defendant Restoration Robotics and the Individual Defendants.

Upon due consideration of the briefs and evidence presented, and the oral argument of counsel for the parties, and having taken the matter under submission,

IT IS HEREBY ORDERED as follows:

1. Due to change in the law upon which this Court relied in its original ruling, the Individual Defendants' and Defendant Restoration Robotics' Motion for Reconsideration of their original motion to dismiss is GRANTED pursuant to Code of Civil Procedure Section 1008.

2. The Renewed Motion to Dismiss by the Individual Defendants and Defendant Restoration Robotics is GRANTED.

3. The Joinder of the Underwriter Defendants is GRANTED, i.e., that they can join in the motions. The Underwriter Defendants' Renewed Motion to Dismiss in which they joined is DENIED WITHOUT PREJUDICE as to the Underwriter Defendants. The Underwriter Defendants themselves did not file any substantive motion, and presented no legal authorities supporting the proposition that they – as an admittedly **non-party and non-signatory** to the subject Amended and Restated Certificate of Incorporation containing the jurisdictional provision – have the right or authority to enforce that provision. See Paracor Finance Inc. v. General Electric Capital Corp. (9th Cir. 1996) 96 F.3d 1151, 1164-1166; In re Henson (9th Cir. 2017) 869 F.3d 1052, 1059-1061. The Underwriter Defendants have failed to make a prima facie showing (or any showing) that they have a written agreement with Plaintiffs that includes a Federal Forum Provision or any other jurisdictional clause.

4. The Joinder of the Venture Capital Defendants is GRANTED, i.e., that they can join in the motions. The Venture Capital Defendants' Renewed Motion to Dismiss in which they joined is DENIED WITHOUT PREJUDICE as to the Venture Capital Defendants. The Venture Capital Defendants themselves did not file any substantive motion, and presented no legal authorities supporting the proposition that they – as an admittedly **non-party** and **non-signatory** to the subject Amended and Restated Certificate of Incorporation containing the jurisdictional provision – have the right or authority to enforce that provision. See Paracor Finance Inc. v. General Electric Capital Corp. (9th Cir. 1996) 96 F.3d 1151, 1164-1166; In re Henson (9th Cir. 2017) 869 F.3d 1052, 1059-1061. The Venture Capital Defendants have failed to make a prima facie showing (or any showing) that they have a written agreement with Plaintiffs that includes a Federal Forum Provision or any other jurisdictional clause.

5. Regarding the motion for reconsideration and the renewed motion to dismiss, Defendants' Requests for Judicial Notice are GRANTED.

6. The Demurrer of Restoration Robotics and Individual Defendants is MOOT.

THE COURT FINDS as follows:

The question presented is an issue of first impression in the United States.

Defendants Restorations Robotics, a Delaware corporation with its principal place of business in California, and its Officers and Directors assert application of a provision in its Amended and Restated Certification of Incorporation stating an exclusive forum selection of the U.S. federal district courts for all lawsuits asserting a cause of action arising under the Securities Act of 1933. This is directly contrary to the explicit provisions of the Securities Act of 1933, providing state court and federal court

jurisdiction, which concurrent jurisdiction was affirmed in an unanimous decision of the United States Supreme Court in Cyan Inc. v. Beaver County Employees Retirement Fund (2018) 583 U.S. ___, 138 S.Ct. 1061.

Background of the Efforts to Circumvent the Ability of Shareholders to Prosecute Claims under the Federal Securities Act of 1933 in State Court

Securities Act of 1933 and the U.S. Supreme Court Decision of Cyan

The concurrent jurisdiction provision in Section 22 of the Securities Act of 1933, 15 U.S.C. §77v(a), presently states:

> "The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter."

The anti-removal provision of the Securities Act of 1933, 15 U.S.C. §77v(a) presently states as follows: "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."

In Cyan Inc. v. Beaver County Employees Retirement Fund (2018) __ U.S. __; 138 S.Ct. 1061, the United States Supreme Court *unanimously* held that state court jurisdiction over claims for violation of the Securities Act of 1933 has been the law since

its inception and continues to this day. The U.S. Supreme Court further held that the provisions of the Securities Act of 1933 prohibit removal of such claims from state court to federal court. The U.S. Supreme Court specifically held that the Congressional enactment of the Private Securities Litigation Reform Act (PSLRA) and the Securities Litigation Uniform Standards Act (SLUSA) did not change or effect the right of shareholders to pursue lawsuits in state court for violation of the Securities Act of 1933 – those newer laws only abrogated state court jurisdiction over claims under the Securities Exchange Act of 1934, and generally preempted or limited the use of class actions under state corporations laws.

The Supreme Court in Cyan discusses in detail the history of the securities laws regarding the ability to bring and prosecute these federal law claims in state court. From its inception, the 1933 Act – enacted by Congress in the wake of the Great Depression and the stock market crash – provided for concurrent jurisdiction in state and federal court and specifically barred removal. Cyan, Opinion at pp. 1-4. The 1934 Act, on the other hand, provides exclusive federal jurisdiction.

Corporations succeeded in obtaining Congressional assistance in combatting state court securities class actions by the passage of PSLRA in 1995 and SLUSA in 1998:

> In 1995, the Private Securities Litigation Reform Act (Reform Act), 109 Stat. 737, amended both the 1933 and the 1934 statutes in mostly identical ways. Congress passed the Reform Act principally to stem "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 81 (2006). Some of the Reform Act's provisions made substantive changes to the 1933 and 1934 laws, and applied even

when a 1933 Act suit was brought in state court. . . . Other Reform Act provisions modified procedures used in litigating securities actions, and applied only when such a suit was brought in federal court. . . .

But the Reform Act fell prey to the law of "unintended consequence[s]." *Dabit*, 547 U. S., at 82. As this Court previously described the problem: "Rather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives began bringing class actions under state law." *Ibid.* That "phenomenon was a novel one"—and an unwelcome one as well. *Ibid.* To prevent plaintiffs from circumventing the Reform Act, Congress again undertook to modify both securities laws.

The result was SLUSA, whose amendments to the 1933 Act are at issue in this case. Those amendments include, as relevant here, two operative provisions, two associated definitions, and two "conforming amendments" to the 1933 law's jurisdictional section. 112 Stat. 3230. (SLUSA's amendments to the 1934 Act include essentially the same operative provisions and definitions. See *Dabit*, 547 U. S., at 82, n. 6. But Congress decided that the 1934 law's exclusive jurisdiction provision needed no conforming amendments.) . . .

. . . According to SLUSA's definitions, the term "covered class action" means a class action in which "damages are sought on behalf of more than 50 persons." §77p(f)(2). And the term "covered security" refers to a security listed on a national stock exchange. §77p(f)(3) (cross-referencing §77r(b)). So taken all in all, §77p(b) completely disallows (in both state and federal courts) sizable class actions that are founded on state law and

allege dishonest practices respecting a nationally traded security's purchase or sale.

Next, §77p(c) provides for the removal of certain class actions to federal court, as well as for their subsequent disposition . . . The final clause of the provision ("and shall be subject to subsection (b)") indicates what should happen to a barred class suit *after* it has been removed: The "proper course is to dismiss" the action. *Kircher* v. *Putnam Funds Trust*, 547 U. S. 633, 644 (2006). . . . The point of providing that option, everyone here agrees, was to ensure the dismissal of a prohibited state-law class action even when a state court "would not adequately enforce" §77p(b)'s bar.

Cyan, Opiniion at pp. 2-5.

Still not satisfied, in recent years, corporate defendants in state court securities class actions took a different approach by regularly removing those lawsuits to federal court, asserting that state courts no longer had subject matter jurisdiction over securities class action, even if solely asserting claims under the 1933 Act.[1] Unfortunately, this led to a split in the approach taken by federal courts; for example, generally district courts in California applied the express and unambiguous language of the 1933 Act (particularly the anti-removal provision) and remanded the cases back to state court; while generally district courts in New York denied remand. Because of this split, the U.S. Supreme Court accepted the dispute in Cyan (Opinion at p. 6 and fn 1) holding that state courts have (and have always had) jurisdiction over 1933 Act class actions:

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[1] This Complex Civil Litigation Department has certainly witnessed and experienced this procedural phenomenon over the past several years.

> By its terms, §77v(a)'s "except clause" does nothing to deprive state courts of their jurisdiction to decide class actions brought under the 1933 Act. And Cyan's various appeals to SLUSA's purposes and legislative history fail to overcome the clear statutory language. The statute says what it says—or perhaps better put here, does not say what it does not say. State-court jurisdiction over 1933 Act claims thus continues undisturbed.

Cyan, Opinion at p. 7.

The U.S. Supreme Court *rejected* the defendants' argument that Congress *meant to* abrogate state court jurisdiction when it enacted SLUSA; holding rather, that Congress made a "choice" *not* to make claims under the 1933 Act exclusively federal jurisdiction. Cyan, Opinion at pp. 10, 15. "If Congress had wanted to deprive state courts of jurisdiction over 1933 Act class actions, it had an easy way to do so: just insert into §77p an exclusive federal jurisdiction provision (like the 1934 Act's) for such suits." Cyan, Opinion at p. 10.

> At bottom, the Government makes the same mistake as Cyan: It distorts SLUSA's text because it thinks Congress simply must have wanted 1933 Act class actions to be litigated in federal court. But this Court has no license to "disregard clear language" based on an intuition that "Congress must have intended something broader." *Bay Mills*, 572 U. S., at ___ (slip op., at 11) (internal quotation marks omitted). SLUSA did quite a bit to "make good on the promise of the Reform Act" (as Cyan puts it). Brief for Petitioners 20; see *supra,* at 12– 13. If further steps are needed, they are up to Congress.

Cyan, Opinion at p. 24.

Federal Forum Provisions and Sciabacucchi Delaware Decisions

Disappointed in the unanimous decision of the United States Supreme Court, corporations apparently did *not* then go to Congress. Instead, some Delaware corporations decided to craft a unilateral, specifically-targetted provision, to be added to and buried in their corporate governing documents, to force all persons purchasing their corporate stock to give up their opportunity to pursue 1933 Act claims in *any* state court. In this fashion, they seek to circumvent the express language of the 1933 Act, circumvent the Supreme Court and its Cyan decision, and circumvent Congress.

The legality of this new procedural tactic was first addressed by the Delaware Chancery Court, in a case against three Delaware corporations that had enacted such a provision, seeking only declaratory relief as to whether or not such a provision was legal under the Delaware chartering statutes, i.e., whether such a provision could be included in corporate documents in the first place.

In the Delaware Chancery Court decision of Sciabacucchi v. Salzberg (Blue Apron) (December 19, 2018) 2018 Westlaw 6719718, the Delaware Chancery Court addressed this legal issue, and held that a corporate forum selection clause to require all Securities Act of 1933 claims to be brought in federal court (which it called a "Federal Forum Provision") is *not* an "internal affair", is unenforceable under Delaware law, violates Delaware public policy, is invalid, and may also be preempted under the Securities Act of 1933. The Court in Schiabacucchi relied, in part, upon the prior decision of Boilermakers Local 154 Ret. Fund v. Chevron Corp. (Del. Ch. 2013) 73 A.3d 934.

More specifically, in adjudicating the declaratory relief action on the issue of whether such a Federal Forum Provision can legally be included in the incorporating charter of a Delaware corporation *under Delaware corporate law*, the Chancery Court held that it was not legally enforceable because forum selection clauses can only apply to "internal affairs" not external affairs of the corporation:

> Before their initial public offerings, the three nominal defendants adopted provisions in their certificates of incorporation that require any claim under the 1933 Act to be filed in federal court (the "Federal Forum Provisions"). Contrary to the federal regime, the provisions preclude a plaintiff from asserting a 1933 Act claim in state court.
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> This decision concludes that the Federal Forum Provisions are ineffective. In *Boilermakers*, Chief Justice Strine held while serving on this court that a Delaware corporation can adopt a forum-selection bylaw for internal-affairs claims. In reaching this conclusion, he reasoned that Section 109(b) of the Delaware General Corporation Law (the "DGCL"), which specifies what subjects bylaws can address, authorizes the bylaws to regulate "internal affairs claims brought by stockholders *qua* stockholders." But he stressed that Section 109(b) does *not* authorize a Delaware corporation to regulate external relationships. The *Boilermakers* decision noted that a bylaw cannot dictate the forum for tort or contract claims against the company, even if the plaintiff happens to be a stockholder.

> Section 102(b)(1) of the DGCL specifies what charter provisions can address. Its scope parallels Section 109(b), so the reasoning in *Boilermakers* applies to charter-based provisions.
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> But Delaware's authority as the creator of the corporation does not extend to its creation's external relationships, particularly when the laws of other sovereigns govern those relationships. Other states exercise territorial jurisdiction over a Delaware corporation's external interactions. A Delaware corporation that operates in other states must abide by the labor, environmental, health and welfare, and securities law regimes (to name a few) that apply in those jurisdictions. When litigation arises out of those relationships, the DGCL cannot provide the necessary authority to regulate the claims.

Id., at *1 - *2.

The Delaware Supreme Court reversed, in Salzberg v. Sciabacucchi (2020) 227 A.3d 102. But its decision is circumscribed: "There are no material facts in dispute in this appeal, and the issues on which we decide this appeal concern the interpretation of the statutes governing the permissible contents of a Delaware corporation's certificate of incorporation. . . . The plaintiff must show that the federal-forum provisions do not address a proper subject matter of charter provisions under 8 Del. C. §102(b)(1)." Id., at p. 112. The Delaware Supreme Court emphasized that it was only addressing the "facial challenge" of the Federal Forum Provision under Delaware corporate law, and not its substantive application. E.g., Id., at p. 113.

Acknowledging that a shareholder's claim for violation of the Securities Act of 1933 is *not* an "internal affair",[2] the Delaware Supreme Court announced that a range of possible corporate "affairs" existed under the scope of Delaware corporation law Section 102. Complete with elliptical chart of gradations it invented (at p. 131) the Delaware Supreme Court stated that there was not "a binary world of only 'internal affairs' claims and 'external' claims" under Section 102 of its incorporation laws (id., at p. 125), but rather a "continuum" between the two (at pp. 125, 131) – and that a Federal Forum Provision regarding 1933 Act claims fell "outside of the 'internal affairs'" boundary, but did fall within the "Outer Band" of "intracorporate" claims. Id., at pp. 131-132.

The Delaware Supreme Court held that the Chancery Court erred in determining that something is either an internal affair or an external affair; and that instead there is a "continuum between the Boilermakers definition of 'internal affairs' and its description of purely 'external' claims." Id. In that regard, the Delaware Supreme Court held that the Federal Forum Provision was "not contrary to the laws of this State", i.e., Delaware Section 102 allowed corporate charters to go beyond matters of "internal affairs".

The Sciabacucchi Dicta Regarding Application

This California Superior Court originally denied Defendants' motion to dismiss based upon the Federal Forum Provision, and adopted the analysis and conclusion by the Delaware Chancery Court in Salzberg v. Sciabacucchi. As its holding was that the provision was illegal under Delaware corporate law, the decision was directly relevant since, as a Delaware corporation, Restoration Robotics could not adopt the provision in

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[2] "Section 11 claims are not 'internal corporate claims'". Id., at p. 120; see also discussion at pages 123-124 of the Sciabacucchi decision, that Section 11 claims are not "internal affairs".

the first place. Given reversal by the Delaware Supreme Court, reconsideration of the issues presented is appropriate and GRANTED.

On the other hand, the holding by the Delaware Supreme Court that the provision is allowable under Delaware law, is basically irrelevant to our case. Our issue is whether the Federal Forum Provision is legal and enforceable under California law and/or under Federal law.

Having held that an FFP is not contrary to Delaware law, and having already emphasized that its holding was limited to a "facial challenge" of FFP under Delaware corporate law, the Delaware Supreme Court then engaged in a discussion for the proposition that FFPs also "do not offend federal law and policy" and *suggests* that *other* state court should consider finding them enforceable under the laws of their own state. **This is dicta.** But the Court believes that it is important to consider its analysis, and whether it is instructive (although not binding) on this California court in this California state court action.

Although the Delaware Supreme Court asserts that "FFPS do not offend federal law and policy", in fact, that court provided no case law and legal analysis that an FFP is or is not contrary to federal **law**. The only analysis provided is reference to cases which they claim are "support for the notion that FFPS do not violate federal **policy** by narrowing the forum alternative available under the Securities Act." Id., at p. 132, bold added.

The Delaware Supreme Court specifically noted that these Federal Forum Provisions were designed to counter-act the Cyan decision, and to stop shareholders from filing 1933 Act class actions in state court. Id., at p. 136. [Indeed, it uses the term "post-*Cyan*" – which ignores the fact that the holding in Cyan affirmed that the law in regard to

concurrent state court jurisdiction over 1933 Act claims has not changed since its inception in 1933.]

Yet, the Delaware Supreme Court basically deemed Cyan as *irrelevant* to its analysis: "nothing in Cyan prohibits a forum-selection provision from designating federal court as the venue for litigating Securities Act claims." Id., at pp. 133-134.

So, in fact, the Delaware Supreme Court provided *no* actual analysis of whether or not the FFP was contrary to federal **law,** and specifically the Securities Act of 1933.

In regard to its assertion that FFPs do not violate federal **policy,** the Delaware Supreme Court jumbles together different cases on different topics, subject to different tests. They specifically cite three federal cases; namely Rodriguez de Quijas v. Shearson/American Express Inc. (1989) 490 U.S. 477; M/S Bremen v. Zapata Off-Shore Co. (1972) 407 U.S. 1; and Matsushita Electric Industrial Co. v. Epstein (1996) 516 U.S. 367.

Bremen – A Forum Selection Clause Case

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, adopted standards for enforcement of a forum selection clause in a voluntary, negotiated business contract. Bremen involved a forum selection clause contained within a written international towage contract between two business entities, which stated: "Any dispute arising must be treated before the London Court of Justice". One party Zapata was a Texas-based American corporation which contracted with Unterweser, a German corporation, to tow an oil drilling rig from Louisiana to Italy. While in international waters, the drilling rig was seriously damaged in a severe storm; and Zapata instructed that the damaged rig be towed to Florida as the nearest port. Zapata sued in admiralty in the Florida federal district court, not in London. In finding the forum selection clause to be enforceable, the

U.S. Supreme Court emphasized repeatedly that this was a pre-litigation contract freely negotiated between sophisticated parties:

> Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.
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> There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence or overweening bargaining power, such as that involved here, should be given full effect.

Bremen, at p. 12; see also p. 17.

The U.S. Supreme Court established the standard that the court should "enforce the forum clause specifically unless [a party can] clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Bremen, at p. 15. "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision. [Citation.]" Bremen, at p. 15

The Bremen decision is not particularly analogous to the FFP situation. The Bremen case did *not* involve a forum selection clause inconsistent with a federal statute, nor have anything to do with the Securities Act of 1933. It involved a commercial agreement negotiated prelitigation between sophisticated business – certainly not our

situation. Further, the Sciabacucchi court held that it did not need to address any of the factual enforceability issues raised in Bremen, such as whether it was unjust, unreasonable, or the result of overreaching. After referencing this standard, the Delaware Supreme Court concluded that "in this facial challenge, none of these potential 'as applied' challenges are implicated." Sciabacucchi, at p. 135.[3]

Rodriquez – An Arbitration Provision Case

In Rodriguez, 490 U.S. 477, the U.S. Supreme Court held that a binding arbitration provision in a pre-litigation agreement between an investor and his stockbroker was enforceable; and overturned the holding in the prior Supreme Court case of Wilko v. Swan (1953) 346 U.S. 427. In its 5-4 decision, the U.S. Supreme Court addressed the application of Section 14 of the Securities Act of 1933 – the non-waiver statute. The Majority held that the subsequently enacted **Federal** Arbitration Act trumped the non-waiver provisions of the federal Securities Act. Rodriguez, at p. 483. The Majority also found that its decisions in Wilko and in Shearson/Ameircan Express Inc. v. McMahon (1987) 482 U.S. 220 were "at odds", because Wilko held that Section 14 under the Securities Act of 1933 preserved the right to adjudication of such claims in court, and were not subject to arbitration, whereas McMahon held that arbitration provisions were enforceable as to claims under the Securities Exchange Act of 1934 (which did *not* contain a provision similar to Section 14). Rodriguez, at pp. 481-484. The Majority also specifically noted that the **federal** government, through the Securities

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[3] In the section of the Sciabacucchi decision regarding whether FFPs are consistent with federal policy, the only paragraph referencing Bremen contains quotations that are *not* from Bremen, but rather from prior decisions by the Delaware Supreme Court. (pp. 132-133) The reference to the actual Bremen test in Sciabacucchi occurs in the section of the decision regarding whether other states should enforce Delaware FFPs. (at pp. 135)

and Exchange Commission, were now (recently) authorized to oversee and regulate these same arbitration procedures between customer and broker. Rodriguez, at p. 483. The Dissent in Rodriguez held that if the clear language of Section 14 was to be eroded, it must be the decision of Congress (through new legislation), not the courts. Rodriguez, at pp. 486-487.

Neither Wilko nor McMahon nor Rodriguez involved an arbitration clause between a corporation and its shareholders. All of those cases involved a lawsuit between a customer and the stockbroker. Neither Wilko nor McMahon nor Rodriguez involved a completely one-sided limited provision that only applied to one of the parties and only applied to one type of claim – rather, each of those cases involved a neutral broad arbitration provision applying to all disputes between the parties. Here, Restorations Robotics drafted an FFP mandatory as to the shareholders only (but optional for the corporation) and only applying to claims under the Securities Act of 1933 (which claims would only realistically be brought by shareholders against the corporation, not the converse).

Unlike Rodriquez, our case involving Restoration Robotics does *not* involve the situation of one federal statute enacted by Congress versus another federal statute enacted by Congress. In Rodriguez, the U.S. Supreme Court sought uniformity and harmony between the Securities Act provision and the FAA – two federal statutes. Our case involves an established federal jurisdictional statute, recently reaffirmed by a unanimous U.S. Supreme Court decision, versus a jurisdiction clause placed in a Delaware corporate charter allowable under Delaware law.

The Delaware Supreme Court in Sciabacucchi stated its summary of the alleged holding in Rodriguez as follows: "We refer to Rodriguez [citation], where the United

States Supreme Court held that federal law has no objection to provisions that preclude state litigation of Securities Act claims. Specifically, the Supreme Court upheld an arbitration provision in a brokerage firm's standard customer agreement that precluded state court litigation of Securities Act claims." Id., at p. 132. This Court does *not* agree with this characterization.

The Rodriguez action was filed in *federal district court* in Texas. It alleged claims by securities investors against their stockbroker for violations of the Securities Act of 1933 and the Securities Exchange Act of 1934. Their customer agreement contained a simple binding arbitration provision. The district court held that the 1934 Act claims were subject to arbitration (following McMahon) but denied arbitration of the 1933 Act claims (following Wilko). The *federal* Court of Appeals reversed, refusing to follow Wilko, and U.S. Supreme Court affirmed. In Rodriguez, **there was no "state court litigation"**; there was no contractual provision specifically barring or waiving "state court litigation".

On the contrary, the U.S. Supreme Court in Rodriguez stated that allowing parties to agree to arbitration was *consistent* with Section 14 and *beneficial* to stock purchasers, because it gave them *even more* choices of where and how to adjudicate their claims under the Securities Act:

> . . . [T]he grant of concurrent jurisdiction constitutes explicit authorization for complainants to waive those [procedural] protections by filing suit in state court without possibility of removal to federal court. These measurers, moreover, are present in other federal statutes which have not been interpreted to prohibit enforcement of predispute agreements to arbitrate. [Citations.]

> . . . [I]t would suggest that arbitration agreements, which are "in effect, a specialized kind of forum-selection clause," [citation], should not be prohibited under the Securities Act since they, like the provision for concurrent jurisdiction, serve to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.

Rodriguez, at pp. 482-483. The Federal Forum Provision does not provide any "broader right to select the forum".

Matsushita – A Settlement Release Case

The Delaware Supreme Court also specifically referenced Matsushita Electric Industrial Co. Ltd. v. Epstein, 516 U.S. 367, as alleged support for its proposition that "FFPs do not violate federal law or policy." They state: "For example, in *Matsuchita Electric* [cite], the United States Supreme Court held that Delaware courts can settle claims subject to exclusive federal jurisdiction without violating federal law or policy". Schiabacucchi 227 A.3d at p. 133.

First, the term "federal policy" appears nowhere in the Matsushita decision. The only discussion of "policies" is the Supreme Court's finding that a state court settlement that releases all claims, including federal securities claims, was not contrary to the policies underlying any Congressional grant of exclusive federal jurisdiction – noting that was *no* legislative history as to why Congress gave exclusive federal jurisdiction under Section 27 of the Securities Exchange Act if 1933 in the first place. Matsushita, at p. 383,

Second, that shareholders in a class action voluntarily agree to release claims as part of a settlement of pending litigation is not the same thing as a mandatory, non-negotiated Federal Forum Provision pre-litigation.

Third, if anything, the decision in Matsushita is *contrary* to enforcement of mandatory FFPs. In making its decision, the U.S. Supreme Court emphasized that the statutory right under Section 27 to exclusive federal jurisdiction for adjudication of the Securities Exchange Act claims *was not involuntarily released* by the shareholders via the state court judgment – rather, those members of the class action were entitled to, and several did, opt-out of the settlement and prosecuted their individual claims in federal court instead. Matsushita, at p. 395. The FFPs presented here have no "opt out".

Fourth, the U.S. Supreme Court held that a judgment as part of a class action settlement in Delaware state court could include settlement of claims for violation of the Securities Exchange Act of 1934 pending in a California federal district class action. The Supreme Court held that the state court judgment was entitled to "full faith and credit" under the Full Faith Credit Act, 28 U.S.C. §1738, and could be res judicata of federal claims. In other words, because of a *federal* statute providing for full faith and credit, the state court judgment could be enforceable as to federal securities claims. The Delaware Supreme Court's decision in Sciabacucchi is not based upon any federal statute, but rather involved enforceability of FFPs under Delaware State law. So the decision in Matsushita does not appear to actually be analogous.

The Applicable Law is California Law – Not Delaware Law

In its original Motion to Dismiss, Defendant Restoration Robotics and the Individual Defendants relied upon Delaware law -- as Restoration Robotics is a Delaware

corporation -- for the proposition that corporate forum selection clauses are enforceable. Those cases involved application of Delaware corporation law allowing forum selection clauses pertaining to disputes involving the internal affairs of the corporation. Plaintiffs have asserted that a lawsuit for violation of the federal Securities Act of 1933 does not constitute "internal affairs" and cannot legally be subject to a unilaterally-imposed forum selection clause.

The Delaware Chancery Court in Sciabacucchi held that a shareholders' claim for violation of the federal Securities Act of 1933 is *not* an "internal affair". The Delaware Supreme Court in Schiabacucchi *also held* that it is *not* an "internal affair'. Rather, the Delaware Supreme Court held that is was something else that they called an "intra-corporate affair" – something more than an internal affair but something less than an external affair.

In making that determination, the Delaware Supreme Court acknowledged that its holding that FFP is enforceable under Delaware corporate law was *not* binding on courts in *other states* faced with the issue of whether an FFP is enforceable under their states' laws. Sciabacucchi, 227 A.3d at pp. 133-134. "The question of enforceability is a separate, subsequent analysis that should not drive the initial facial validity inquiry."

As securities claims by shareholders under the federal Securities Act of 1933 against the corporation and its officers and directors is undisputedly ***not*** an "internal affair", nor is the enforceability of a Federal Forum Provision specifically limited to only apply to claims under the 1933 Act, then Delaware law *does not apply*. In this California case, the applicable law would be California (or federal law).

As there is no case on point for the issue presented here, as set forth above, the Delaware Supreme Court suggested application of established standards for (i) forum

selection clauses, (ii) mandatory arbitration provision, or (ii) release such as in a settlement. The parties here argue regarding application of contractual waiver law versus the "anti-waiver" provision, Section 14 of the Securities Act. Per that suggestion, this Court considers analysis of the enforceability of the Federal Forum Provision under those various standards *under California law*.

Release and Settlement under California Law

In its *dicta* discussion for the proposition that FFPs do not violate federal policy, the Delaware Supreme Court referenced the federal case of Matsushita, and its own decision in Nottingham Partners v. Dana. That court indicated that a Federal Forum Provision was comparable to a release given as part of a settlement of federal claims in a state court action.

The Delaware Supreme Court erroneously considered a pre-litigation forum waiver as identical to a post-litigation settlement release – the law does *not* treat them the same. "In general, a **written release** extinguishes any obligation covered by the releases terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence. [Citations.]" Skrbina v. Fleming Companies (1996) 45 Cal.App.4th 1353, 1366, bold added.

"Waiver refers to the act, or the consequences of the act, of one side. Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only. Waiver does not require any act or conduct by the other party." DRG/Beverly Hills Ltd. v. Chopstix Dim Sum Café and Takeout III Ltd. (1994) 30 Cal.App.4th 54, 59. Waiver is based upon the conduct and intent of one side, specifically the party who allegedly waived.

A written release of claims pursuant to a settlement, such as in the Masushita case cited by the Delaware Supreme Court, is not properly compared to a Federal Forum Provision unilaterally imposed, buried in a multi-pages SEC filing. A release as part of a settlement invokes very different public policies than a waiver, as a settlement release is favored and an involuntary waiver is disfavored.

There is a public policy in favor of settlements of disputed claims. As discussed by the First Appellate District in Salmon Protection Watershed Network v. County of Marin (2012) 205 Cal.App.4th 195, 201:

> There is an equally strong public policy, however, recognized in just as many cases, to encourage the settlement of controversies in preference to litigation. Our Supreme Court "recognized a century ago that settlement agreements ' "are highly favored as productive of peace and good will in the community," ' as well as ' "reducing the expense and persistency of litigation." ' [Citation.] The need for settlements is greater than ever before. 'Without them our system of civil adjudication would quickly break down.' " (*Neary v. Regents of the University of California* (1992) 3 Cal.4th 273, 277, 10 Cal.Rptr.2d 859, 834 P.2d 119; see also, e.g., *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1166, 232 Cal.Rptr. 567, 728 P.2d 1202 ["Settlements of disputes have long been favored by the courts."].)

To find a waiver (not a written release) requires a much greater showing, particularly as a waiver generally arises from conduct of *one* party. Cathay Bank v. Lee (1993) 14 Cal.App.4th 1533, 1539; see also, Civil Code §3513. In regard to Section 3513, a law for public benefit cannot be waived; but our case does not involve the alleged

waiver of any California law or statute. See Lanigan, at p. 1030.Rather, the burden is on Plaintiffs to prove that the FFP is illegal under federal law.

This Court finds that laws regarding release of claims in the context of a settlement of a pending lawsuit is not comparable to the situation presented by the pre-litigation Federal Forum Provision. Further, analysis of any such comparison is not instructive or helpful to this Court.

Enforceability of Arbitration Provisions and Unconscionability Analysis under California Law

By its discussion of Rodriguez, the court in Sciabacucchi suggested that case law regarding the enforcement of arbitration provisions was analogous.

Standards

Under California law, the party seeking to impose mandatory arbitration has the burden of demonstrating the existence of a binding agreement to arbitrate the subject claims. C.C. §1281 *et seq.* The burden then shifts to the party opposing enforcement to demonstrate unconscionability, both procedural and substantive.

Procedural unconscionability focuses on oppression or surprise due to unequal bargaining power, and substantive unconscionability focuses on overly harsh or one-sided results. Davis v. TWC Dealer Group Inc. (2019) 41 Cal.App.5th 662, 669; Armendariz v. Foundation Health Psychcare Services Inc. (2000) 24 Cal.4th 83, 114. "[B]oth procedural and substatntive unconscionability must both be present in order for a court to refuse to enforce a contract under the doctrine of unconscionability. 'But they need not be present in the same degree. . . . In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is

required to come to the conclusion that the term is unenforceable and vice versa.'" Davis, at p. 669, quoting Armandariz, at p. 114. Similarly a high degree of procedural unconscionability then requires only a low degree of substantive unconscionabilit6y. Davis, at p. 674.

Procedural unconscionability looks at whether it is an adhesion contract, imposed and drafted by the party with superior bargaining power on a take-it-or-leave-it basis, and whether there are elements of oppression or surprise. Davis, at p. 671. "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by a party in a superior bargaining position. Id.

Substantive unconscionability looks at the fairness of the terms, and that they are not overly harsh, unduly oppressive, unfairly one-sided, or so one-sided as to shock the conscience.

"Even if consistent with the reasonable expectations of the parties", a term, such as an arbitration provision, in an adhesion contract that is unduly oppressive will be denied enforcement. Stirlen v. SuperCuts Inc. (1997) 51 Cal.App.4th 1519, 1534-1535; Graham v. Scissor-Tail Inc. (1981) 28 Cal.3d 807, 820.

As discussed and held by the California Supreme Court in Armendariz, a lack of mutuality, i.e., a unilateral obligation to arbitrate claims, supports a finding that an arbitration agreement is unconscionable and thus unenforceable.

> We conclude that *Stirlen* and *Kinney* are correct in requiring this "modicum of bilaterality" in an arbitration agreement. Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is

> unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on "business realities." As has been recognized "unconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it." [Citation.] . . .
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> * * *
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> This is not to say that an arbitration clause must mandate the arbitration of all claims between employer and employee in order to avoid invalidation on grounds of unconscionability. . . . But an arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences. . . .

Armendariz, at pp. 117-118, 120. "An arbitration agreement is substantively unconscionable it if requires the employee but not the employer to arbitrate claims. [Citations.]" Martinez v. Master Protection Corp. (2004) 118 Cal.App.4th 107, 114.

A "carve-out" provision, which excludes certain claims from arbitration, which is unilateral or otherwise lacks mutuality (because it unfairly pertains to the claims that one party would be likely to assert against the other, such as intellectual property rights) is substantively unconscionable. Abramson v. Juniper Networks, Inc. (2004) 115 Cal.App.4th 638, 665.

On the other hand, substantive unconscionability "turns not only on a 'one-sided' result, but also on an absence of 'justification' for it." Stirlen, 51 Cal.app.4th at p. 1532. A contract can provide a "margin of safety that provides the party with superior bargaining strength a type of extra protection for which is has a legitimate commercial need without being unconscionable." Baltazar v. Forever 21 Inc. (2016) 62 Cal.4th 1237, 1250.

Analysis

Preliminarily, this Court does not generally agree with the proposition that the issue of enforceability of the Federal Forum Provision, which seeks to nullify concurrent state jurisdiction under the Securities Act of 1933, is comparable to the issue of enforceability of an arbitration clause – as suggested by the Delaware Supreme Court.

For the sake of argument, and for purposes of analysis, if this Court applied the standards for enforceability of an arbitration agreement to the FFP, the Court finds that it is procedurally unconscionable. Indeed, glaringly so.

The Amended and Restated Certificate of Incorporation containing the FFP, which only would come into effect upon consummation of the subject initial public offering, is a type of adhesion "contract". It was not subject to negotiation or arm's length dealings between Restoration Robotics and its shareholders, but rather drafted solely by the corporation for its own benefit.

There is the element of oppression, in that there was no choice given, and the corporation obviously was in a superior bargaining position. In addition there was the element of surprise as the subject FFP was indeed buried in a prolix printed form drafted by Defendants. Defendants present as exhibits to the Declaration of Hilary Mattis the SEC filings of Restoration Robotics that Defendants claim disclosed the FFP to

prospective shareholders. Exhibit B is the Amendment No. 1 to Form S-1 Registration Statement filed on September 18, 2017 with the Securities and Exchange Commission. That document is 154 pages of text **plus** additional pages of exhibits reflecting its financial statements. The Federal Forum Provision is *not* contained or specifically reference *anywhere* in the 154 pages of text of the S-1/A. Indeed, the text of the FFP is not included on the document at all. Rather, one must go to the end of the document, see the list of multiple exhibits, and know to click on the hyperlink to Exhibit 3.3 called "Form of Amended and Restated Certificate of Incorporation, to be in effect at time of consummation of this offering". Upon clicking on the hyperlink to Exhibit 3.3, one must still page through to find Article VIII. Everything is in small print.

Similarly, Defendants point to the Form 8-K dated October 16, 2017, filed with the SEC. This is *after* the IPO became effective. The Form 8-K is only two pages with multiple exhibits, including Exhibit 3.1 containing the Amended and restated Certificate of Incorporation. Everything is in small print.

As for substantive unconscionability, initially it would appear to be so, as the FFP is not mutual and only applies to claims under Securities Act of 1933 – claims that only shareholders would likely bring, not the corporation or its directors or officers.

On the other hand, although there is no actual evidence presented of the intention or motivation of Defendants, Defendants argue and the Delaware Supreme Court asserts, that the purpose of the FFP is to protect the corporation and its officer and directors from spending time, money, and effort in dealing with competing shareholders lawsuits pending in state and federal court. Is this a "justification" for a "legitimate commercial need"? Perhaps. Does it "shock the conscience"? Not really.

Indeed, unlike an arbitration clause, the FFP does not take away the rights of the parties to litigate in court, or to have a jury trial, or to appeal, etc. It removed the opportunity to use the different *procedural* advantages of a state court forum, but does not take away the substantive protections provided by the Securities Act itself. It also does not particularly create any additional expense or inconvenience, as the FFP wisely permits the filing of a shareholders laws in *any* federal district court in the United States (presumably one that is the proper venue).

Enforceability of Forum Selection Provisions under California Law

At issue is a provision in the Amended and Restated Certification of Incorporation of Restoration Robotics, which was effective upon completion of the Initial Public Offering. The parties stated in oral argument that it is undisputed that the shareholders of Restoration Robotics had the opportunity to, and did, vote upon the Amended and Restated Certificate of Incorporation which included the new provision limiting the forum for Securities Act of 1933 claims.

Analytically, the subject Federal Forum Provision is most akin to a contractual forum selection clause. Restoration Robotics' FFP states as follows:

> 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, as amended. 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 this Article VIII.

This is a one-sided provision, selectively limited to only claims under the Securities Act of 1933 – claims that would only be brought by shareholders, not the corporation itself. The shareholders are limited to federal forum – despite the express provisions of the Securities Act providing both state and federal fora – while Restoration Robotics is given the "choice" to select an alternative forum.

Traditionally, shareholders' derivative lawsuit on behalf of a corporation, and individual and shareholder lawsuits against a director or officer for breach of fiduciary duties, are considered "internal affairs". Under the "internal affairs" doctrine, the law of the state of incorporation applies *substantively* to adjudication of the merits – but does not require that the lawsuit be adjudicated in the state of incorporation.

These days, it is commonplace for Delaware corporations – including Restoration Robotics itself[4] -- to include a Delaware forum selection clause requiring "internal affairs" claims to be adjudicated in Delaware.

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[4] Restoration Robotics Delaware forum selection clause for internal affairs disputes is also one-sided, as it requires all such claims *by its shareholders* to be adjudicated in Delaware Chancery Court, but allows the corporation the unilateral "select" a different forum:

> 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 (1) any derivative action or proceeding brought on behalf of the Corporation, (2) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (3) any action asserting a claim arising pursuant to any provision of the DGCL, this Amended and Restated Certificate of Incorporation or the Bylaws, or (4) any action asserting a claim governed by the internal affairs doctrine. 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 VIII.

(Masuda Decl., Ex. B, p. 14, Article VIII.)

Although our case does not involve claims subject to the Delaware forum selection clause, and our claim is not an internal affair, a review of California law on forum selection clause enforcement may be instructive regarding the enforceability of a forum limitation clause.

In Smith, Valentino & Smith Inc. v. Superior Court (1976) 17 Cal.3d 491, the California Supreme Court held that, in a breach of contract lawsuit, a contractual forum selection clause was enforceable, and that the trial court could exercise its discretion to stay the California action. Plaintiffs asserted that a forum selection clause designating Pennsylvania was unreasonable and unenforceable as contrary to California public policy.

First, the Supreme Court held that the burden of showing "unreasonableness" rests with the party contesting the enforcement of the forum selection clause. Smith, at p. 496.

Second, the Supreme Court emphasized that the contract was between two business corporations, negotiated freely prelitigation, with no issue of unconscionability:

> [A]lthough we have acknowledged a policy favoring access to California courts by resident plaintiffs [citation], we likewise conclude that the policy is satisfied in those cases where, as here, a plaintiff has freely and voluntarily negotiated away his right to a California forum. In so holding we are in accord with the modern trend which favors enforceability of such forum selection clauses. [Citations.]
>
> No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated

at arm's length. For the foregoing reasons, we conclude that forum selection clauses are valid and may be given effect, in the court's discretion and in the absence of a showing that enforcement of such a clause would be unreasonable.

Smith, at pp. 495-496. The Supreme Court also noted that the forum selection clause itself was "reciprocal" between the parties. Smith, at p. 496.

Third, the Supreme Court held that enforcement of a forum selection clause is not unreasonable solely on the bases that trial in another state (i) would be inconvenient, (ii) would be more expensive, (iii) that witnesses cannot be compelled to attend trial but rather only their depositions could be used at trial. Id. The Supreme Court also noted that the trial court had stayed the case, not dismissed it, and thus there was the added protection that plaintiff could "seek to reinstate its California action," "should the Pennsylvania courts become unavailable for some unforeseeable reason". Id.

As stated by the Second Appellate District in Berg v. MTC Electronics Technologies Co. (1998) 61 Cal.App.4th 349:

> Although not even a "mandatory" forum selection clause can completely eliminate a court's discretion to make appropriate rulings regarding choice of forum, the modern trend is to enforce mandatory forum selection clauses unless they are unfair or unreasonable. [Citations.] In California, the procedure for enforcing a forum selection clause is a motion to stay or dismiss for forum non conveniens pursuant to Code of Civil Procedure sections 410.30 and 418.10 [citation], but a motion based on a forum selection clause is a special type of forum non convenience motion. The factors that apply generally in a forum non

convenience motion do not control in a case involving a mandatory forum selection clause. [Citations.]

If there is no mandatory selection clause, a forum non conveniens motion "requires the weighing of a gamut of factors of public and private convenience . . ." [Citation.] However if there is a mandatory forum selection clause, the test is simply whether application of the clause is unfair or unreasonable, and the clause is usually given effect. Claims that the previously chosen forum is unfair or inconvenient are generally rejected. [Citation.] A court will usually honor a mandatory forum selection clause without extensive analysis of factors relating to convenience. [Citation] "Mere inconvenience or additional expense is not the test of unreasonableness" of a mandatory forum selection clause. [Citation.]

Berg, at pp. 358-359. [The court in Berg found that the clause in the prospectus was not a mandatory forum selection clause, only permissible, and thus used traditional forum non conveniens analysis.]

Plaintiffs reference Verdugo v. Alliantgroup LP (2015) 237 Cal.App.4th 141, where the Fourth Appellate District held that a Texas forum selection clause with a Texas choice of law clause were unenforceable, as they violated the statutory rights of a California employee under the California Labor Code, which rights the Legislature had already declared as unwaivable. The Court of Appeal held that the typical standard of placing the burden upon the party opposing a mandatory forum selection clause *was not* applicable. "California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's

public policy. [Citations.] The party opposing enforcement of a forum selection clause ordinarily 'bears the substantial burden of proving why it should not be enforced.' [Citations.] The burden, however, is reversed when the claims at issue are based on unwaivable rights created by California statutes." Verdugo, at p. 147. Under those circumstances, the party seeking to enforce the forum selection clause must demonstrate that it would *not* diminish the other party's statutory rights under California law. Id., at p. 154.

Verdugo is simply inapplicable here, as we are not dealing with "unwaivable rights created by California statutes." We are dealing with a federal law.

Plaintiffs here and the court in Verdugo relied upon Hall v. Superior Court (1983) 150 Cal.App3d 411. In Hall, the Fourth Appellate District held that, in a securities transactions by California residents, their California corporation, and their California limited partnerships with a Utah corporation whose principal place of business was in California, a Nevada contractual choice-of-law provision was unenforceable as contrary to California Corporations Code securities laws. The Court of Appeal found the California state securities laws to be unwaivable, and held that the choice of law provision was unenforceable and so also the related Nevada forum selection clause.

Again, there is no California law being subverted by FFPs, so Hall is not applicable. Ours is a Delaware corporation with its principal place of business in California being sued for solely federal law claims.

In Bushansky v. Soon-Shiong (2018) 23 Cal.App.5th 1000, cited by the parties herein, where the plaintiffs filed a shareholders' derivative action in California state court, the Fourth Appellate District addressed the enforceability of a forum selection clause contained in the certificate of incorporation of a Delaware corporation. Plaintiffs

in Bushansky specifically did *not* assert that the forum selection clause was unenforceable, or obtained by fraud or overreaching, or even that it was unjust or unreasonable. Id., at p. 1011 fn. 7. Rather, those plaintiffs argued that the conditions of the forum clause was not fulfilled, and thus it was inapplicable to their situation. The Court of Appeal upheld the trial court's exercise of discretion to grant dismissal.

For our purposes, the Court of Appeal in Bushansky provides discussion on two general standards: (1) the defendant must first demonstrate that a mandatory forum selection clause exists and applies to the circumstances, and then the burden of proof shifts to the plaintiff to show that enforcement of the clause is unreasonable (id., at pp. 1005-1006); and (2) that even if there is a mandatory forum selection clause, it does *not* deprive the California state court of its jurisdiction over the case and the parties, but rather it is within the court's exercise of *discretion* to enforce it and decline jurisdiction (id., at p. 1011).[5]

More recently is the Sixth Appellate District's decision in Drulias v. First Century Bancshares Inc. (2018) 30 Cal.App.5th 696. The trial court stayed a shareholders class action, alleging breach of fiduciary duty in the context of a merger, on the basis of a forum selection clause.[6] The issue on appeal was the enforceability in California of such a bylaw change adopted by a Delaware corporation *without* shareholder consent.

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[5] "'Parties may not *deprive* courts of their jurisdiction over causes by private agreement.' [Citation.] Rather, the enforcement of forum selection clauses stems from courts' 'discretion to *decline* to exercise jurisdiction in recognition of the parties' free and voluntary choice of a different forum'. [Citation.]" Bushansky, at p. 1011, emphasis original.

[6] The Delaware forum selection clause for internal affairs in Drulias is basically the same as the one used by Restoration Robotics. Drulias, at p. 700 fn. 2.

Plaintiffs asserted that it was contrary to California law and also was unreasonable under the circumstances.[7]

Relying upon Smith, Berg, and Bushansky, the Court of Appeal in Drulias held that mandatory forum selection clauses are generally enforceable, that the trial court has *discretion* whether to decline to exercise jurisdiction, and that the burden rests with the opposing party to show that application of the forum selection clause would be "unfair or unreasonable". Id., at p. 703.

Plaintiffs asserted that it would be contrary to California law and policy, pursuant to Corporations Code Section 2116, providing for the ability to sue directors of a foreign corporation doing business in California, and that "such liability may be enforced in the courts of this state." The Court of Appeal held that Section 2116 "codifies the internal affairs doctrine" and that it did not bar a California court from considering a motion for forum non conveniens and ruling to defer to another jurisdiction. Id., at pp. 705-706. The Sixth Appellate District went further in holding that Section 2116 **does not create substantive rights.** Id., at p. 707.

The Court of Appeal in Drulias upheld the trial court's decision, finding that it was not "unreasonable" or "unfair" to require lawsuits regarding internal affairs of a Delaware corporation, which were already subject to adjudication under Delaware law (regardless of forum), to be adjudicated in Delaware Chancery Court. Id., at p. 709. Even though the forum selection clause was adopted unilaterally by the corporation into its bylaws without shareholder approval, and adopted simultaneously with the subject

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[7] In making these assertions, those plaintiffs forgot to argue that unilaterally adopted forum selection bylaws should not be applied retroactively. That argument raised for the first time on appeal was deemed untimely, and thus rejected. Drulias, at p. 710.

merger agreement (id., at p. 707), the Court of Appeal held – contrary to the language by the Supreme Court in Smith – that "neither California nor Delaware law requires forum selection clauses be freely negotiated to be enforceable. A forum selection clause need not be subject to negotiation to be enforceable. [Citations.]" Drulias, at p. 707. Instead, the Court of Appeal held that the opposing plaintiff must make a showing of unconscionability to bar enforcement. Id., at p. 708.[8] Under that test, the Court of Appeal held that a shareholder of a Delaware corporation should reasonably expect that the Delaware corporation will adopt a bylaw allowing the corporation to unilaterally made changes to its bylaws to its own benefit, and that the corporation will use that power to adopt restrictive Delaware forum selection clauses. Id., at pp. 708-709. The Court of Appeal also blessed a Delaware corporation enacting a forum selection clause within merger agreements that would impact the choice of forum for any litigation regarding that same merger. Id., at p. 709.

Constitutional Challenges

Plaintiffs raise the very interesting argument that the FFP is unconstitutional under the Commerce Clause and under the Supremacy Clause of the U.S. Constitution.

Edgar

In the Sciabacucchi decision, the Delaware Supreme Court uniquely determined that the scope of Section 102 of its Delaware General Corporation Law goes *beyond* the

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[8] "Rather, a forum selection clause contained in a contract of adhesion, and thus not the subject of bargaining, is 'enforceable absent a showing that it was outside the reasonable expectations of the weaker or adhering party or that enforcement would be unduly oppressive or unconscionable.' [Citations.]" Id., at p. 708.

internal affairs of a Delaware corporation. That court also acknowledged that this broad statute may infringe upon the extra-territorial restrictions under the Commerce Clause as enunciated in Edgar v. Mite Corp. (1982) 457 U.S. 624. Sciabacucchi, at pp. 133-134. The Delaware Supreme Court chose *not* to address that issue, deeming that it was only addressing the facial challenge to FFP as to whether were legal under Delaware law.

Plaintiffs assert here that FFPs are unconstitutional under Edgar and the Commerce Clause. This Court finds that the issue and proper analysis is whether or not Section 102, as broadly interpreted and applied by the Delaware Supreme Court, is unconstitutional under Edgar and the Commerce Clause. The Federal Form Provision is merely a by-product of Section 102 – a "contract" term allowed to exist because of Section 102. The U.S. Supreme Court in Edgar addressed whether a state *statute* was impermissibly extra-territorial in its reach and effect, specifically on the sale and regulation of securities, and found there that it violated the Commerce Clause, and found that it was preempted by the Williams Act enacted by Congress as an amendment to the Securities Exchange Act of 1934. The Supreme Court discussed that state securities laws that only effect intrastate commerce may be acceptable, or only regulates interstate commerce indirectly, "the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute." Edgar, at p. 643.

This Court is asked to address a motion to dismiss for forum non conveniens on the basis of a mandatory forum limitation clause. This Court finds that it is not the proper avenue for adjudication of whether or not Section 102 of the Delaware law is or is not constitutional – which would be the inquiry under Edgar. A more appropriate procedural avenue might be a declaratory relief action in federal court specifically addressing the constitutionality of that Delaware statute. But it is not the proper subject of a California

court adjudication of a motion to dismiss for forum non conveniens. Accordingly, this Court declines the invitation.

Section 14 of the Securities Act

"It is well settled that parties cannot confer subject matter jurisdiction upon the court by consent, waiver or estoppel. [Citation.]" Housing Group v. United National Insurance Co. (2001) 90 Cal.App.4th 1106, 1113. "[T]he parties cannot by stipulation or waiver grant or deny federal subject matter jurisdiction." Janakes v. United States Postal Service (9th Cir. 1985) 768 F.2d 1091, 1095. "[A] federal court must assure itself of its own jurisdiction to entertain a claim regardless of the parties' arguments or concessions. [Citations.]" Terenkian v. Republic of Iraq (9th Cir. 2012) 694 F.3d 1122, 1137. "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties." American Fire & Casualty Co. v. Finn (1951) 341 U.S. 6, 18.

Although it would not be legal or enforceable if the forum limitation clause pertaining to Securities Act claims attempted to create jurisdiction or select jurisdiction where none would otherwise exist. But Section 22 of the Securities Act *does* allow federal jurisdiction over these claims, and the FFP does not attempt to limit the venue of any federal district action. So, at first glance, there is nothing inherently unlawful in regarding to the FFP.

Plaintiffs assert that state court jurisdiction, explicitly provided in Section 22 of the Securities Act, 15 U.S.C. §77v(a), is an unwaivable right under Section 14 of the Securities Act: "Any condition, stipulation, or provision binding any person acquiring

any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. §77n.

The issue presented in whether the Section 14 nonwaiver provision bars any waiver of Section 22 concurrent jurisdiction of state court. Plaintiffs rely upon Wilko v. Swan (1953) 346 U.S. 427, which held that is does – that the nonwaiver provision applies to both substantive and procedural terms of the Securities Act. Defendants rely upon Rodriguez v. Shearson, 490 U.S. 477, a 5-4 decision by the U.S. Supreme Court, specifically holding that Wilko is "overruled", "incorrectly decided," and "not obviously correct". Plaintiffs argue that it was only a "partial" overruling, and that this aspect of Wilko still survives. For this proposition, Plaintiffs list in a footnote some cases that are unreported or superseded. Only two are current reported decisions: One is Verdugo, and one is Countrywide Financial Corp. v. Bundy (2010) 187 Cal.App.4th 234, 250-251. In Countrywide, the Court of Appeal simply references several cases, including Wilko regarding the general standard under federal law for vacating an arbitrator's award.

1 As discussed above, Rodriguez was in the context of harmonizing the federal Securities Act with the Federal Arbitration Act, which is not our issue. Yet, this Court declines to ignore the fact that Rodriguez holds that Wilko is no longer good law, and that Section 22's "grant of concurrent jurisdiction constitutes explicit authorization for complainants to waive those protections" by filing in one court or the other. Id., at p. 482.

As the burden lies with Plaintiffs to demonstrate that state jurisdiction is "unwaivable" under the federal Securities Act, the Court finds that they have not met that burden.

The Commerce Clause and the Supremacy Clause

Given that the federal government has primary authority over securities nationally sold or traded, it may be a violation of the Commerce Clause or be preemption under the Supremacy Clause that the State of Delaware enforces Section 102 to allow a Delaware corporation to unilaterally require that purchasers of its common stock by a member of the public *is contingent upon and subject to* the putative shareholder giving up all statutory rights under Section 22 of the Securities Act of 1933 to sue in state court. If they do not agree, they cannot purchase the stock; and they must agree in order to purchase the stock.

Yet, the few cases cited by Plaintiffs in support of their argument all pertain to attacks on the constitutionality of a *statute*, not the term of an agreement. The question of the unconstitutionality of Section 102 is *not* properly before this California court on a forum non conveniens motion.

The closest case to the mark cited by Plaintiffs is Haywood v. Drown (2009) 556 U.S. 729, where the U.S. Supreme Court struck down a New York state law requiring civil rights claims against corrections officers to be brought only in a court of limited jurisdiction, contrary to the express provisions of Section 1983 of the Civil Rights Act providing for concurrent jurisdiction of federal courts and state court of general unlimited jurisdiction. The Supreme Court held that the change of jurisdiction violated the Supremacy Clause, and took away rights that the prisoner plaintiff would otherwise have such as jury trial, unlimited damages, the right to seek attorneys' fees, and the right to seek punitive damages and injunctive relief. Haywood, at pp. 734-735. The right to fully vindicate civil rights in state and federal courts of general jurisdiction was part of Section 1983.

> [S]tate courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law. [Citations.
>
> So strong is the presumption of concurrency that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction [citation]; and second, "when a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts." [Citation.]

Haywood, at p. 736. The Supreme Court viewed the New York jurisdictional law as shutting the doors of New York state general trial courts to the adjudication of federal civil rights claims – which was impermissible.

Comparatively, Plaintiffs assert that the FFPs shut the door of all state courts to hearing and determination of federal claims under the Securities Act of 1933. Yet, Haywood permits it "when a state court refuses jurisdiction because of a neutral state rules regarding the administration of the courts." In that regard, the Supreme Court points to examples which included general state jurisdictional and procedural laws *applying the forum non convenience doctrine*. Haywood, at p. 738.

That is our situation here. As stated above, a mandatory forum selection clause is *not* binding upon a California court, which is still allowed to exercise discretion of whether or not to abstain from jurisdiction over the action. Under California law deference is generally given to a mandatory forum selection clause, and the burden shifts to the opponent. Unlike Haywood, the FFP is cautiously and narrowly drafted to only address the choice of forum, but leave intact all of the substantive rights and remedies (and the right to a jury trial) provided to investors under the Securities Act of 1933.

Conclusion

This Court determines that the most-closely analogous law is that pertaining to forum selection clauses. Defendants have demonstrated the existence of a mandatory forum limitation clause, restricting all Securities Act claims to federal court, without limitation on venue. It is not mutual in its effect or application. The FFP was subject to shareholder vote and approval, and was not applied retroactively herein, i.e., it was effective before these lawsuits were filed. Accordingly, the burden of proof shifted to the Plaintiffs to demonstrate that the FFP is unenforceable, unconscionable, unjust or unreasonable.

In applying California law to the Federal Forum Provision, particularly the most recent appellate decision in Drulias, this Court determines that Plaintiffs have not met that burden of proof.

There is no disruption of the substantive rights of the shareholders to all protections provided by the Securities Act of 1933 – only the procedural aspect of state versus federal forum. There is no procedural loss of Due Process, as they can present their federal law claims to a federal court, in a state or province of a state close to their residence, have the opportunity for discovery, and trial by jury. There is even greater authority in federal court to obtain personal jurisdiction over defendants, and to subpoena witnesses to trial.

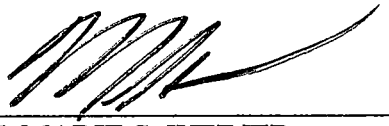
Further, all of the things that would make the imposition of the FFP seems unfair or unreasonable in our case were specifically held *not to be* unfair or unreasonable by the Court of Appeal in Drulias. Indeed, the situation in Drulias was even more "unfair" in natures, as the forum selection clause was not even submitted for shareholders' vote.

The FFP is not illegal under California law and does not violate any California statute or public policy – unless it was shown to be unconstitutional or illegal under federal law. If unconscionability standards were applied to the FFP, rather than the standards for mandatory forum selection clauses, the Court finds that the FFP is procedurally unconscionable but not substantively unconscionable – unless shown to be unconstitutional or illegal under federal law. Plaintiffs had a heavy burden; and Plaintiffs have no federal law actually holding that the forum selection clauses are unconstitutional or illegal under federal law.

The real culprit of Plaintiffs' dismay is the broad scope of Section 102 of the Delaware General Corporation Law, which the Delaware Supreme Court has held goes beyond the regulation of internal affairs of a corporation or of intrastate commerce. Whether or not Delaware law Section 102 is unconstitutional under federal law, or preempted by federal statute, is *not* subject to adjudication by this California state court on a motion for forum non conveniens.

This Court exercises its discretion and has decided decline jurisdiction over the claims alleged against Restoration Robotics and its officers and directors *only*, pursuant to the FFP.

DATED: September 1, 2020



HON. MARIE S. WEINER
JUDGE OF THE SUPERIOR COURT

SERVICE LIST
Wong v. Restoration Robotics, Class Action 18CIV02609
As of August 2020

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