



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. _____

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
URLEY, 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.

VERIFIED CLASS ACTION
COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Matthew Sciabacucchi (“Plaintiff”), by and through his undersigned
counsel, brings this stockholder class action on behalf of himself and three classes

of persons.¹ Plaintiff brings suit against the Companies as nominal defendants and against the “Individual Defendants” who comprise: members of Blue Apron’s Board of Directors (the “Blue Apron Directors”),² the members of Stitch Fix’s Board of Directors (the “Stitch Fix Directors”),³ and the members of Roku’s Board of Directors (the “Roku Directors”).⁴ Plaintiff seeks a judgment declaring invalid a provision included in each of the Companies’ respective certificates of incorporation, purporting to require any claim under the Securities Act of 1933 (the “Securities Act” or the “’33 Act”) to be brought in federal court.

NATURE OF THE ACTION

1. For the last nineteen years, there has been a lively debate in the federal district courts about whether class actions filed in state court and asserting only

¹ Those classes are (1) the “Blue Apron Class” consisting other persons who purchased stock of Blue Apron Holdings, Inc. (“Blue Apron”), a Delaware corporation, pursuant to any registration statement; (2) the “Stitch Fix Class” consisting of other persons who purchased stock of Stitch Fix, Inc. (“Stitch Fix”), a Delaware corporation, pursuant to any registration statement; and (3) the “Roku Class” consisting of other persons who purchased stock of Roku, Inc. (“Roku” and, collectively with Blue Apron and Stitch Fix, the “Companies”), a Delaware corporation, pursuant to any registration statement.

² The Blue Apron Directors are Matthew B. Salzberg, Julie M.B. Bradley, Tracy Britt Cool, Kenneth A. Fox, Robert P. Goodman, Gary R. Hirshberg, and Brian P. Kelley. Non-defendant Bradley Dickerson joined Blue Apron’s Board of Directors after its initial public offering and, so, is not named here.

³ The Stitch Fix Directors are Katrina Lake, Steven Anderson, J. William Gurley, Marka Hansen, and Sharon McCollam.

⁴ The Roku Directors are Anthony Wood, Ravi Ahuja, Shawn Carolan, Jeffrey Hastings, Alan Henricks, Neil Hunt, Daniel Leff, and Ray Rothrock.

claims under the Securities Act may be removed to federal court. Although the lower courts have not been unanimous, the vast majority of courts—including thirty-three in a row in the Ninth Circuit—have refused to allow removal.

2. In June 2017, the United States Supreme Court granted a petition for a writ of certiorari in *Cyan, Inc. v. Beaver County Employees' Retirement Fund*, No. 15-1439, a case that will likely resolve this question conclusively for **class** actions. No matter what happens in *Cyan*, however, there has been no dispute that stockholders have the right to file an **individual** action in state court, asserting claims under the Securities Act and that such an action could not be removed.

3. Until now.

4. In June 2017, Snap, Inc. (“Snap”), a Delaware corporation headquartered in California, went public with a certificate of incorporation that included a provision (a “Federal Forum Provision”) stating that “[u]nless 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.**” In the wake of the Snap initial public offering (“IPO”), several other Delaware corporations—including Blue Apron, Stitch Fix, and Roku—have gone public with substantively identical Federal Forum Provisions in their organizing documents.

5. The Federal Forum Provisions are invalid under Delaware law.

6. “The historic roles played by state and federal law in regulating corporate disclosures have been not only compatible but complementary.”⁵ Federal courts and Congress have resisted the “federaliz[ation of] the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.”⁶ And state legislatures and courts, including this one, have been “reluctant to have equity fill non-existent gaps in the federal regulation of securities markets.”⁷

7. Consistent with this well-established division of authority, the Delaware General Corporation Law (“DGCL”) authorizes Delaware corporations to adopt provisions in their charters or bylaws that govern the internal affairs of the corporation. *See* DGCL § 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

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

⁶ *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977).

⁷ *In re Oracle Corp.*, 867 A.2d 904, 928 n.111 (Del. Ch. 2004), *aff'd sub nom. In re Oracle Corp. Derivative Litig.*, 872 A.2d 960 (Del. 2005); *see also NACCO Indus., Inc. v. Applicia 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*, No. CIV. A. 15642, 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).

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.”); DGCL § 109(b) (“The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, 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.”).

8. In *Chevron*, then-Chancellor Strine famously approved forum selection bylaws adopted by Chevron and FedEx. *Chevron* rested heavily on the fact that the forum selection clauses at issue applied *only* to internal corporate claims governed by Delaware law.⁸ Chief Justice Strine emphasized that the forum selection bylaws did not purport to regulate claims under the federal securities laws and noted that “bylaws would be beyond the statutory language” if they did “not deal with the rights

⁸ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 937 (Del. Ch. 2013) (first two sentences: “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.”) (emphasis added).

and powers of the plaintiff-stockholder as a stockholder.”⁹

9. In 2015, the General Assembly codified *Chevron*. Section 115 of the DGCL provides that “[t]he 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.” It defines “internal corporate claims” as “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.”

10. The Federal Forum Provisions flaunt these careful compromises by purporting to regulate a stockholder’s choice of venue for a claim under the federal securities laws. A “claim under the federal securities laws” is not an internal corporate claim, it “is a personal claim akin to a tort claim for fraud.”¹⁰ It is “not a

⁹ *Id.* at 952; *see also id.* at 962 (“FedEx’s bylaw is consistent with what has been written about similar forum selection clauses addressing internal affairs cases: ‘[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.’”).

¹⁰ *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1056 (Del. Ch. 2015).

property right associated with shares, nor can it be invoked by those who simply hold shares of stock.”¹¹ And it is not governed by Delaware law. Nonetheless, the Federal Forum Provisions seek to regulate a plaintiff’s choice of venue for these claims.

11. If a Delaware corporation’s charter and bylaw provisions are not limited to internal corporate affairs, then there is no limiting principle at all. The Federal Forum Provisions are a thin edge that wedges open a door to provisions requiring arbitration of federal securities claims or even provisions exculpating fiduciaries from liability for securities violations.

12. Plaintiff brings suit seeking a judgment declaring that the Federal Forum Provisions contained in Blue Apron, Stitch Fix, and Roku’s charters are invalid.

PARTIES

13. Plaintiff Matthew Sciabacucchi (“Plaintiff”) is, and has been at all relevant times, a stockholder of Blue Apron common stock, Stitch Fix common stock, and Roku common stock. Sciabacucchi purchased shares of Blue Apron common stock on June 29, 2017 pursuant to its registration statement filed with the SEC on June 1, 2017 (as amended) (the “Blue Apron Registration Statement”). Sciabacucchi purchased shares of Stitch Fix common stock on December 4, 2017,

¹¹ *Id.*

pursuant to its registration statement filed with the SEC on October 19, 2017 (as amended) (the “Stitch Fix Registration Statement”). Sciabacucchi purchased shares of Roku common stock on November 14, 2017, pursuant to its registration statement filed with the SEC on September 1, 2017 (as amended) (the “Roku Registration Statement”).

14. Nominal Defendant Blue Apron is a Delaware corporation headquartered in New York, New York. Article Thirteenth of Blue Apron’s Restated Certificate of Incorporation (the “Blue Apron Federal Forum Provision”) provides, in relevant part, 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.”

15. Nominal Defendant Stitch Fix is a Delaware corporation headquartered in San Francisco, California. Section VI.E of Stitch Fix’s Amended and Restated Certificate of Incorporation (the “Stitch Fix Federal Forum Provision”) 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.”

16. Nominal Defendant Roku is a Delaware corporation headquartered in Los Gatos, California. Section E of Article VI of Roku’s Amended and Restated Certificate of Incorporation (the “Roku Federal Forum Provision”) 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.”

17. Defendant Matthew B. Salzberg is a member of Blue Apron’s board of directors and has been since its IPO.

18. Defendant Julie M.B. Bradley is a member of Blue Apron’s board of directors and has been since its IPO.

19. Defendant Tracy Britt Cool is a member of Blue Apron’s board of directors and has been since its IPO.

20. Defendant Kenneth A. Fox is a member of Blue Apron's board of directors and has been since its IPO.

21. Defendant Robert P. Goodman is a member of Blue Apron's board of directors and has been since its IPO.

22. Defendant Gary R. Hirshberg is a member of Blue Apron's board of directors and has been since its IPO.

23. Defendant Brian P. Kelley is a member of Blue Apron's board of directors and has been since its IPO.

24. Defendants Matthew B. Salzberg, Julie M.B. Bradley, Tracy Britt Cool, Kenneth A. Fox, Robert P. Goodman, Gary R. Hirshberg, and Brian P. Kelley are, collectively, the "Blue Apron Directors." Each of the Blue Apron Directors signed the Blue Apron Registration Statement. Blue Apron and each of the Blue Apron Directors is currently a named defendant in a consolidated class action alleging claims under the Securities Act: *In re Blue Apron Holdings, Inc. Securities Litigation*, No. 1:17-cv-04846 (E.D.N.Y.).

25. Defendant Katrina Lake is a member of Stitch Fix's board of directors and has been since its IPO.

26. Defendant Steven Anderson is a member of Stitch Fix's board of directors and has been since its IPO.

27. Defendant J. William Gurley is a member of Stitch Fix's board of directors and has been since its IPO.

28. Defendant Marka Hansen is a member of Stitch Fix's board of directors and has been since its IPO.

29. Defendant Sharon McCollam is a member of Stitch Fix's board of directors and has been since its IPO.

30. Defendants Katrina Lake, Steven Anderson, J. William Gurley, Marka Hansen, and Sharon McCollam are, collectively, the "Stitch Fix Directors." Each of the Stitch Fix Directors signed the Stitch Fix Registration Statement.

31. Defendant Anthony Wood is a member of Roku's board of directors and has been since its IPO.

32. Defendant Ravi Ahuja is a member of Roku's board of directors and has been since its IPO.

33. Defendant Shawn Carolan is a member of Roku's board of directors and has been since its IPO.

34. Defendant Jeffrey Hastings is a member of Roku's board of directors and has been since its IPO.

35. Defendant Alan Henricks is a member of Roku's board of directors and has been since its IPO.

36. Defendant Neil Hunt is a member of Roku's board of directors and has been since its IPO.

37. Defendant Daniel Leff is a member of Roku's board of directors and has been since its IPO.

38. Defendant Ray Rothrock is a member of Roku's board of directors and has been since its IPO.

39. Defendants Anthony Wood, Ravi Ahuja, Shawn Carolan, Jeffrey Hastings, Alan Henricks, Neil Hunt, Daniel Leff, and Ray Rothrock are, collectively, the "Roku Directors." Each of the Roku Directors signed the Roku Registration Statement.

SUBSTANTIVE ALLEGATIONS

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

40. 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.¹² This is an extraordinarily powerful statute. A Securities Act plaintiff does not need to prove scienter, reliance, or loss causation.

¹² Registration statements are typically issued in connection with initial public offerings, secondary offerings, and certain stock-for-stock mergers.

“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.”¹³

41. 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 and provided that Securities Act claims filed in state court could not be removed.¹⁴

42. 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. In response, a number of stockholders began filing Securities Act claims in state court. These include both class cases and individual actions (often filed by large institutional investors opting out of class cases). Immediately after the enactment of the PSLRA, other stockholders also began filing claims in state court that asserted securities-fraud-style claims under state law theories.

¹³ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983).

¹⁴ 15 U.S.C. § 77v(a) (1933).

43. In 1998, Congress adopted the Securities Litigation Uniform Standards Act (“SLUSA”), which established a process for removing and then precluding class actions 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 the purchase or sale of a covered security.”¹⁵ 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).” *See* 15 U.S.C. § 77v(a) (1998).

44. These conforming amendments generated considerable uncertainty because Section 77p(f)(2) 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 have split over the question of

¹⁵ *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).

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

whether a class action that alleges only claims under the Securities Act may be filed in state court and, if so, whether it may be removed.

B. The Grundfest Solution

45. The vast majority of courts have refused to allow removal of Securities Act class actions filed in state court. Federal courts in California—and elsewhere in the Ninth Circuit—have been particularly hostile. In district courts in the Ninth Circuit, defendants have lost this argument at least thirty-three times in a row.¹⁷

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,

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

[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[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].¹⁸

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 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 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).

47. In the months that followed, a number of Delaware corporations leapt at the suggestion, including Blue Apron, Stitch Fix, and Roku as well as Snap and Tintri, Inc. The precise text of each Federal Forum Provision follows:

Company	Text of Provision
Snap	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. ¹⁹
Blue Apron	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. ²⁰

¹⁹ Article VII of Snap’s Amended and Restated Certificate of Incorporation (filed with the SEC on February 2, 2017).

²⁰ Article Thirteenth of Blue Apron’s Restated Certificate of Incorporation (filed with the SEC on July 5, 2017).

Company	Text of Provision
Stitch Fix	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. ²¹
Roku	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. ²²
Tintri	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, or any successor thereto. 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 Article VIII. ²³

48. Snap and Tintri (in five separate actions) have already pointed to their respective Federal Forum Provisions in an attempt to sustain removal of Securities

²¹ Section VI.E of Stitch Fix’s Amended and Restated Certificate of Incorporation (filed with the SEC on November 21, 2017).

²² Section VI.E of Roku’s Amended and Restated Certificate of Incorporation (filed with the SEC on October 3, 2017).

²³ Article VII of Tintri’s Amended and Restated Bylaws (filed with the SEC on June 1, 2017).

Act class actions filed in state court. They lost each time.²⁴ Blue Apron and the Blue Apron Directors are currently defendants in a consolidated class action filed in federal court that asserts claims under the Securities Act.²⁵ To undersigned counsel's knowledge, no state court class action has yet been filed against Blue Apron.

49. To counsel's knowledge, Stitch Fix, the Stitch Fix Directors, Roku, and the Roku Directors are not currently defendants in any Securities Act actions but the Federal Forum Provisions are and will continue to act a significant deterrent to investors who might wish to bring such a claim in state court.

²⁴ *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).

In *Hsieh* and the three *Tintri* cases, the court simply found that a corporate bylaw or charter provision could not create federal jurisdiction and did not evaluate the validity of the provisions under Delaware law. In *Iuso*, the court reached the same conclusion but also determined, correctly, that Snap's Federal Forum Provision was invalid under Delaware law. *Iuso*, Docket No. 50 at 6 (“Defendants have provided no contrary authority from Delaware courts enforcing a forum-selection provision in a corporation's bylaws [*sic*] on claims that do not relate to the internal affairs of a corporation. ... As discussed at length in Plaintiff's Reply, the cases cited by Defendants pertain only to the internal governance of Delaware corporations and do not relate to federal jurisdiction over securities law. These cases cannot support the proposition that Snap's forum-selection provision enables the Court to exercise jurisdiction over this case.”).

²⁵ *See In re Blue Apron Holdings, Inc. Securities Litigation*, No. 1:17-cv-04846 (E.D.N.Y.).

50. The Federal Forum Provisions are invalid under Delaware law because they purport to regulate a plaintiff's choice of venue in actions that do not assert internal corporate claims governed by Delaware law. In the alternative, even if claims under the Securities Act are internal corporate claims, the Federal Forum Provisions are flatly inconsistent with Section 115 of the DGCL, which 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 bringing such claims in the courts of this State."

CLASS ALLEGATIONS

51. Plaintiff brings this action as a class action, pursuant to Court of Chancery Rule 23, on behalf of himself and all other persons who purchased stock of Blue Apron pursuant to any registration statement (the "Blue Apron Class"), on behalf of himself and all other persons who purchased stock of Stitch Fix pursuant to any registration statement (the "Stitch Fix Class"), and on behalf of himself and all other persons who purchased stock of Roku pursuant to any registration statement (the "Roku Class"). Excluded from each Class are Defendants and any person, firm, trust, corporation, or other entity related to or affiliated with any Defendant, and their successors in interest.

52. This action is properly maintainable as a class action.

53. The Blue Apron Class, the Stitch Fix Class, and the Roku Class are each so numerous that joinder of all members is impracticable. Blue Apron issued 30 million shares of Class A common stock in its IPO; Stitch Fix issued 8 million shares of Class A common stock in its IPO; and Roku issued 9 million shares of Class A common stock in its IPO.

54. There are questions of law and fact common to each Class, including, among others, whether the Companies' Federal Forum Provisions are valid under Delaware law and whether Plaintiff and the other members of each Class are entitled to declaratory relief.

55. A class action is superior to other available means for the fair and efficient adjudication of this controversy.

56. Plaintiff's claims are typical of the claims of the other members of each Class.

57. Plaintiff will fairly and adequately protect the interests of each Class and has no interests contrary to or in conflict with those of each Class. Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. Plaintiff anticipates that there will be no difficulties in the management of this litigation as a class action.

58. The prosecution of separate actions by individual members of each Class would create the risk of inconsistent or varying adjudications with respect to

individual members of each Class that would establish incompatible standards of conduct for the parties opposing each Class, or adjudications with respect to individual members of each Class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests.

59. Defendants have acted, or refused to act, on grounds generally applicable to each Class as a whole, thereby making appropriate the relief sought herein with respect to each Class as a whole.

DEMAND FUTILITY

60. Plaintiff alleges and believes the claim asserted here, which seeks to vindicate the rights of stockholders to bring personal, direct claims is direct. In the alternative, and only to the extent that the Court deems the claim to be derivative, Plaintiff also brings the claim as a derivative claim. Plaintiff has not made a demand on Blue Apron's Board, Stitch Fix's Board, or Roku's Board to assert these claims against the Defendants. Such a demand would be futile and useless, and is thereby excused, because the allegations contained herein, at a minimum, permit the inference that the directors lack the disinterest to determine fairly whether the claims should be pursued. The Individual Defendants constitute all of the members of each Companies' current Board (except for non-defendant Bradley Dickerson, a member of Blue Apron's Board who joined after its IPO). Because all of the Individual

Defendants signed their Companies' respective registration statements, they would all be potential defendants in any Securities Act claim (and, in the case of the Blue Apron Directors, already are). Accordingly, none of the Individual Defendants would willing or able to prosecute these claims vigorously, and thus, demand is futile.

COUNT I

(Declaratory Judgment Against Blue Apron and the Blue Apron Directors)

61. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein on behalf of himself and the Blue Apron Class.

62. Under the Delaware Declaratory Judgment Act, Delaware courts “have power to declare rights, status and other legal relations, whether or not further relief is or could be claimed.” 10 Del. C. § 6501. According to the Act, “[a] person ... whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.” *Id.* § 6502. The power of Delaware courts to grant declaratory relief is to “be liberally construed and administered.” *Id.* § 6512.

63. Plaintiff and the Blue Apron Class are entitled to an order declaring that the Blue Apron Federal Forum Provision is invalid under Delaware law.

COUNT II

(Declaratory Judgment Against Stitch Fix and the Stitch Fix Directors)

64. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein on behalf of himself and the Stitch Fix Class.

65. Under the Delaware Declaratory Judgment Act, Delaware courts “have power to declare rights, status and other legal relations, whether or not further relief is or could be claimed.” 10 Del. C. § 6501. According to the Act, “[a] person ... whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.” *Id.* § 6502. The power of Delaware courts to grant declaratory relief is to “be liberally construed and administered.” *Id.* § 6512.

66. Plaintiff and the Stitch Fix Class are entitled to an order declaring that the Stitch Fix Federal Forum Provision is invalid under Delaware law.

COUNT III

(Declaratory Judgment Against Roku and the Roku Directors)

67. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein on behalf of himself and the Roku Class.

68. Under the Delaware Declaratory Judgment Act, Delaware courts “have power to declare rights, status and other legal relations, whether or not further relief is or could be claimed.” 10 Del. C. § 6501. According to the Act, “[a] person ... whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.” *Id.* § 6502. The power of Delaware courts to grant declaratory relief is to “be liberally construed and administered.” *Id.* § 6512.

69. Plaintiff and the Roku Class are entitled to an order declaring that the Roku Federal Forum Provision is invalid under Delaware law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment as follows:

- a. Declaring that this action is properly maintainable as a class action;
- b. In the alternative, declaring that demand on the Companies’ Boards would be futile and is excused;
- c. Declaring that the Blue Apron Federal Forum Provision is invalid and unenforceable;
- d. Declaring that the Stitch Fix Federal Forum Provision is invalid and unenforceable;

e. Declaring that the Roku Federal Forum Provision is invalid and unenforceable;

f. Awarding Plaintiff the costs and disbursements of this action, including Plaintiff's attorneys' and experts' fees; and

g. Granting such other and further relief as this Court may deem to be just and proper.

HEYMAN ENERIO
GATTUSO & HIRZEL LLP

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