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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

IN RE DROPBOX, INC. SECURITIES LITIGATION

Lead Case No. 19-CIV-05089
(Consolidated with Case Nos. 19-CIV-05217, 19-CIV-05417, and 19-CIV-05865)

CLASS ACTION

DROPBOX DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FOR FORUM NON CONVENIENS

Date: July 31, 2020
Time: 9:30 A.M.

Assigned for All Purposes to:
Dept: 4
Judge: Nancy L. Fineman
Trial Date: Not Yet Set
Date Action Filed: August 30, 2019

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INTRODUCTION

The Dropbox Defendants' Motion to Dismiss presents two questions: (i) is Dropbox's Federal Forum Provision valid? and (ii) if so, should the Court enforce it? The answer to both questions is "yes."

With respect to the first question, the Dropbox Defendants' opening brief ("Opening Brief" and "Mot.") showed that the Federal Forum Provision is valid. Corporate bylaws define and regulate the relationship between the corporation and its directors, officers, and shareholders, and are therefore, themselves, a matter of internal affairs. As a result, under the internal affairs doctrine, courts determine the validity of a bylaw, ***irrespective of its subject matter***, by looking to the law of the state of incorporation. Dropbox is a Delaware Corporation. The Delaware Supreme Court's decision in *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020), unequivocally establishes that federal forum provisions, like the one adopted by Dropbox, are valid under Delaware law. And because California embraces the internal affairs doctrine, that conclusively establishes the validity of the Federal Forum Provision.

In an effort to avoid this result, plaintiffs argue that California (rather than Delaware) law governs the validity of Dropbox's Federal Forum Provision and also that the provision violates the United States Constitution. Both arguments lack merit.

Although they claim that California law controls, plaintiffs have not cited a single case in which a court—in California or elsewhere—has *ever* held that the validity of a bylaw is governed by the law of a state other than the state of incorporation. That is wholly unsurprising. Plaintiffs' position is fundamentally at odds with the internal affairs doctrine—were the law governing the validity of a bylaw dependent on its subject matter (and where plaintiffs happen to file suit), bylaws could be valid in one state but invalid in another, exactly what the internal affairs doctrine seeks to avoid. Additionally, plaintiffs are simply wrong to suggest that applying California law here would make a difference. Even under California law, Dropbox's Federal Forum Provision is part of a valid contract between Dropbox and its shareholders. As this Court recently held in enforcing WageWorks' forum selection bylaw, it is "a fundamental principle of Delaware corporate law, ***which principle has been endorsed by California courts***: that bylaws

establish contractual obligations binding on shareholders." *In re WageWorks, Inc. Deriv. Litig.*, No. 18CIV03264, slip op. at 10 (San Mateo Cty. Super. Ct. June 24, 2020) (emphasis added) (Locker Decl. Ex. 4).

The Court can just as readily dispense with plaintiffs' federal constitutional arguments. Although plaintiffs claim that Dropbox's Federal Forum Provision violates both the Commerce and the Supremacy Clauses, nowhere do they address the prerequisite of *state action*. It is black letter law that an action undertaken by a private party that is merely authorized by a statute does not constitute state action. That is exactly the situation here: Dropbox adopted a Federal Forum Provision that is authorized, but not required, by the Delaware General Corporation Law ("DGCL"). While that alone disposes of plaintiffs' constitutional arguments, those arguments also fail because they are premised on the faulty assertion that the Federal Forum Provision "impermissibly eliminates state court jurisdiction over federal law claims." The Provision does no such thing. Indeed, as California appellate courts have held, the existence of concurrent jurisdiction does not create an unwaivable right that precludes a state court from declining to exercise its jurisdiction in recognition of a valid forum selection provision. Dropbox's Federal Forum Provision raises no issue under the Commerce or Supremacy Clauses.

With validity established, that leaves the second question—whether this Court should enforce Dropbox' Federal Forum Provision under California's forum non conveniens analysis. As shown in the Opening Brief, the Federal Forum Provision should be enforced unless plaintiffs satisfy their heavy burden of showing the diminishment of an unwaivable substantive right. Plaintiffs fall well short of sustaining that burden as no such rights are affected here. In response, plaintiffs point to a purported "right" to bring Securities Act claims in state court, claiming that the Supreme Court's decision in *Wilko v. Swan*, 346 U.S. 427, 434-35 (1953), which held that arbitration forum selection clauses violate the antiwaiver provision of the Securities Act, "remains controlling and dispositive." Plaintiffs' Opposition to Defendants' Motion to Dismiss for Forum Non Conveniens ("Opp.") at 21. That argument, however, is based on an erroneous interpretation of the Supreme Court's decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which overruled *Wilko* in clear and

unambiguous language: "The right to select the judicial forum ***and the wider choice of courts*** are not such essential features of the Securities Act that § 14 is properly construed to bar any waiver of these provisions." 490 U.S. at 481 (emphasis added). Plaintiffs also rely on a Ninth Circuit decision, *Richards v. Lloyd's of London*, 107 F.3d 1422 (9th Cir. 1997), which was later **reversed *in toto* and ordered withdrawn by the Ninth Circuit sitting *en banc***, and on flawed interpretations of a handful of California cases. As shown in the Dropbox Defendants' opening brief and below, *Rodriguez* and its progeny clearly establish that the antiwaiver provision of the Securities Act does not preclude enforcement of a forum selection provision electing a federal forum.

In sum, Dropbox's Federal Forum Provision is valid and enforceable. The Court should apply it and grant the Dropbox Defendants' Motion to Dismiss.

ARGUMENT

I. DROPBOX'S FEDERAL FORUM PROVISION IS VALID

In their Opening Brief, the Dropbox Defendants showed that Dropbox's Federal Forum Provision is facially valid under Delaware law, which controls this Court's validity inquiry under the internal affairs doctrine. Mot. at 11-12. None of plaintiffs' arguments in response, which are based on California contract law and the Supremacy and Commerce Clauses of the United States Constitution (Opp. at 11-15), has merit.

A. Delaware Law Controls the Validity of Dropbox's Bylaws

The Delaware Supreme Court spoke unequivocally in *Sciabacucchi*: federal forum provisions are facially valid under Delaware law. Mot. at 8-10.[1] In an effort to avoid that ruling, plaintiffs argue that California law, rather than Delaware law, governs the validity of Dropbox's Federal Forum Provision, claiming that the bylaw provision relates to intra-corporate affairs, not internal affairs. Opp. at 16, 21-22, 23 n.22. Plaintiffs are wrong.

[1] Plaintiffs claim that the *Sciabacucchi* decision "departed from conventional wisdom" based on pre-*Sciabacucchi* commentary, including from several law professors, that federal forum provisions were not permissible under Delaware law. Opp. at 10-12. Suffice it to say, such opinions are now irrelevant; while plaintiffs may disagree with the result, the Delaware Supreme Court's ruling in *Sciabacucchi* provides the final, definitive word regarding the validity of federal forum provisions under Delaware law.

As explained in the Opening Brief—and as plaintiffs concede (*see* Opp. at 10)—the internal affairs doctrine requires that the state of incorporation has the sole authority to "regulate . . . matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders . . . ." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); *see also* Mot. at 11-12 (citing authorities). By their very nature, corporate bylaws define and regulate the relationship between the "corporation and its current directors, officers, and shareholders," and are, accordingly, themselves matters of internal affairs. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 114 Cal. App. 4th 434, 446 (2003) (quoting *Edgar*, 457 U.S. at 645); *see also* Restatement (Second) of Conflict of Laws, § 302 cmt. a (1971) (defining "adoption of by-laws" and "by-law amendments" as "involv[ing] primarily a corporation's relationship to its shareholders"). Therefore, the first-order question of the validity of a Delaware corporation's bylaw—*i.e.*, whether it is authorized by Delaware's law—is necessarily a question of Delaware law ***irrespective of its subject matter***. *E.g.*, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 938 (Del. Ch. 2013) ("[A] foreign court that respects the internal affairs doctrine, as it must, when faced with a motion to enforce the bylaws will consider, as a first order issue, whether the bylaws are valid under the 'chartering jurisdiction's domestic law.'") (citation omitted); *Drulias v. 1st Century Bancshares, Inc.*, 30 Cal. App. 5th 696, 702 (2018) (same); *see also* 8 Fletcher Cyc. Corp. § 4185 (2019) ("The law governing a membership corporation's bylaws is the law of the state of incorporation, rather than the laws of the states of the various members' residences."). Thus, the law of the state of incorporation governs the validity of a bylaw whether its subject matter relates to intra-corporate affairs or internal affairs.

Plaintiffs do not cite ***any*** authority that supports their position that the law governing the validity of a corporate bylaw depends on the bylaw's subject matter.[2] This is unsurprising

[2] Plaintiffs cite several decisions for the proposition that the internal affairs doctrine does not apply to matters outside the internal affairs of a corporation. Opp. at 11 n.9. That proposition is irrelevant here because the adoption of bylaws is, itself, a matter of internal affairs. And, because none of the decisions plaintiffs cite considered the validity or effect of a corporate bylaw, they too are irrelevant. *Edgar*, 457 U.S. at 645 (acknowledging that transfers of stock between shareholders and third parties "do not themselves implicate the internal affairs" of a corporation); *Williams v. Gaylord*, 186 U.S. 157, 165 (1902) (rejecting argument that a California statute regulating the purchase or sale of mining property in California intruded on the

because, were that the case, a corporation's bylaws could be held valid in one state but invalid in another, and thus binding on some shareholders, but not on others, leaving corporations and shareholders to reconcile the conflicting demands of fifty states. That result would be fundamentally at odds with the internal affairs doctrine and, indeed, contrary to the interests of the State of California, which expects and benefits from sister states showing deference to California law when adjudicating matters involving California corporations. *State Farm*, 114 Cal. App. 4th at 443 ("[i]t would be impractical to have . . . ***a charter amendment*** . . . valid in one state and invalid in another"; "uniform treatment of the shareholders of a corporation is an important objective which can only be attained by having their rights and liabilities with respect to the corporation governed by a single law") (emphasis added) (citations omitted).[3] It is for this reason that courts, including in California, consistently apply the law of the state of incorporation when considering the validity of a charter provision or bylaw. *E.g.*, *Roberts v. TriQuint Semiconductor, Inc.*, 364 P.3d 328, 419 (Or. 2015) (Delaware corporation's adoption of a bylaw "is a question of Delaware law"); *Olincy v. Merle Norman Cosmetics, Inc.*, 200 Cal. App. 2d 260, 271 (1962) (the validity of bylaws of a Nevada corporation "determined according to the law of Nevada, the place of incorporation"); *Garrett v. Garrett*, 31 Cal. App. 173, 178 (1916) (the right of an Iowa corporation to adopt bylaws "is governed by the laws of Iowa, with which they must not be inconsistent"). Accordingly, whether the subject matter of the bylaw relates to intra-corporate affairs rather than internal affairs does not alter the conclusion.

Lacking in supporting authority, plaintiffs attempt to distinguish the binding precedent of *Drulias* on the ground that the forum selection bylaw there governed an internal affairs claim.

(...continued from previous page)

internal affairs of a foreign corporation that owned mining property in California); *Vaughn v. LJ Int'l, Inc.*, 174 Cal. App. 4th 213, 223-24 (2009) (applying British Virgin Islands law to a derivative action involving a corporation incorporated there under the internal affairs doctrine).

[3] *See also, e.g.*, *Clark v. Kelly*, C.A. No. 16780, 1999 WL 458625, at *4 (Del. Ch. June 24, 1999) (applying California law to claims regarding the equity ownership of a California corporation; "the internal affairs doctrine . . . requires this Court to look to the law of the state of incorporation to determine the relationships between the corporate entity and its directors, officers, and stockholders"); *Azure Dolphin, LLC v. Barton*, 821 S.E.2d 711, 724-25 (N.C. 2018) (applying California law to the derivative claims of a California limited partnership pursuant to the internal affairs doctrine).

Opp. at 22-23. But, again, that distinction is meaningless because ***all*** corporate bylaws are, by definition, internal affairs of the corporation. Accordingly, the *Drulias* court neither considered the substance of the forum selection bylaw at issue when holding that "of course, the validity inquiry is governed by Delaware law," nor did it in any way suggest that it would reach a different result regarding the governing law based on the substance of the bylaw. *Drulias*, 30 Cal. App. 5th at 702, 707. *Drulias* is directly applicable and controls the choice of law analysis here.

In short, plaintiffs' governing law argument is both unsupported and deeply flawed. Delaware law controls the validity of Dropbox's Federal Forum Provision.

B. Dropbox's Federal Forum Provision Is Binding

Plaintiffs concede that Dropbox's Federal Forum Provision bylaw creates a valid and binding contract between the Company and its shareholders under Delaware law (Opp. at 16), and the analysis should end there.[4] Instead, plaintiffs try to argue that the bylaw provision is not binding under California law. *Id*. at 16-24. Because Delaware law controls the question of the validity of Dropbox's bylaws, the Court need not consider plaintiffs' argument. But even if it did, plaintiffs' assertion that bylaws do not create a contractual relationship between a corporation and its shareholders under California law (*id.* at 9) is demonstrably incorrect.

Plaintiffs concede that, even under California law, bylaws "fix[] the rights and duties of the corporation against and to its shareholders." *Id.* at 9, 16 n.14. This is black-letter California law: "[t]he articles and bylaws of a California corporation and the provisions of California corporation law form a part of a 'contract' between a corporation and its shareholders." 2 Ballentine & Sterling California Corporation Laws § 231.04[2] (2020); *see also* 9 Witkin, Summary of California Law, Corporations § 163 (11th ed. 2020) ("Rights and powers of shareholders derive from the contractual nature of the shareholder-corporation relationship in

[4] That concession is appropriate. Under long-settled Delaware law, "bylaws, together with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders" to which stockholders "assent to be bound . . . when they buy stock in those corporations." *E.g.*, *Boilermakers*, 73 A.3d at 940; *see also Sciabacucchi*, 227 A.3d at 112.

which the charter, articles, bylaws, shareholder agreements, and the Corporations Code are embodied."). Nevertheless, plaintiffs inexplicably argue that Dropbox's Federal Forum Provision bylaw does not bind them because no contract was formed under California law through their purchase of Dropbox stock. Even setting aside the obvious contradiction between plaintiffs' concession and their position regarding Dropbox's bylaw, plaintiffs' argument is incorrect.

Under California law, shareholders in a corporation are presumed to have knowledge of the corporation's bylaws and are bound by them even where they do not assent. 15 Cal. Jur. 3d Corporations § 100 (2020) ("A shareholder is bound by the bylaws duly adopted and is held to strict notice of the contents of the bylaws as part of a contract with the corporation. This includes a nonassenting stockholder who likewise is bound by a bylaw that has been validly adopted . . . ."); *Tu-Vu Drive In Corp. v. Ashkins*, 61 Cal. 2d 283, 284, 288 (1964) (bylaw enforceable against shareholder absent assent); *see also* 8 Fletcher Cyc. Corp. § 4196 (2019) ("[S]hareholders or members of the corporation are charged with notice of the bylaws, and they remain ignorant of the bylaw provisions at their peril."). Plaintiffs' argument that Dropbox's Federal Forum Provision is not supported by consideration lacks merit. Opp. at 19. Dropbox's bylaws are supported by consideration: ***plaintiffs received shares of Dropbox stock***. In return, they accepted the attendant rights and obligations associated with that stock, as set forth in Dropbox's charter and bylaws.[5]

Plaintiffs' position should be rejected because it would lead to absurd results: if corporations had to confirm assent and support bylaws with consideration separate and distinct from the receipt of shares before the bylaws were binding on shareholders, as plaintiffs claim,

[5] Although Dropbox's shareholders are not required to have had advance notice of the Federal Forum Provision to be bound by it, nothing about that bylaw provision was "buried" or "inconspicuous" as plaintiffs claim. Opp. at 9, 17, 24. As shown in the Dropbox Defendants' opening brief, the Registration Statement (and its exhibits) clearly put potential investors on notice of the Federal Forum Provision. Mot. at 7; *see also, e.g.*, Locker Decl. Ex. 1 at 43 (specific risk factor in the Registration Statement providing that "***Our amended and restated bylaws will . . . provide that the federal district courts will be the exclusive forum for resolving any complaint asserting a cause of action arising under the Securities Act . . . .***") (emphasis in original).

the resulting impact on securities markets would be catastrophic. The NYSE and NASDAQ, which facilitate billions of share transactions every day, would grind to a halt as corporations and investors navigate the requirement that shareholders have knowledge of, and assent to, every provision of the corporate charter and bylaws when they buy shares. And corporations would be required to obtain the assent of each of its existing shareholders (and, according to plaintiffs, offer additional consideration) for any change to the bylaws or charter made after shareholders purchased stock. Moreover, the validity of charters and bylaws would be subject to the varying contract laws of the fifty states. Such a result would have profoundly negative effects on corporations and shareholders alike, and plaintiffs do not cite a single authority that supports it.[6]

C. The Federal Forum Provision Does Not Violate the U.S. Constitution

Plaintiffs' opposition argues that federal forum provisions are invalid because they violate the United States Constitution's Commerce and Supremacy Clauses. Opp. at 12-16. As an initial matter, plaintiffs' argument is fatally flawed because a violation of either the Commerce Clause or the Supremacy Clause requires state action. *E.g.*, *Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs.*, 608 F.3d 110, 123 (1st Cir. 2010) (dismissing commerce clause claims against a private actor because "[t]he dormant Commerce Clause is addressed to actions by states") (citing *Or. Waste Sys., Inc. v. Dep't of Env. Quality*, 511 U.S. 93, 98 (1994)); *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 229 (1993) ("The Supremacy Clause does not require pre-emption of private conduct."); *see also Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1200 (9th Cir. 1998) ("A threshold requirement of any constitutional claim is the presence of state action"), *overruled on other*

[6] Each of the cases upon which plaintiffs rely is inapposite because each involved the bylaws of specialized organizations under California law. *Lucas v. Bakersfield Green Thumb Garden Club*, No. F072136, 2017 WL 395115, at *7 (Cal. Ct. App. Jan. 30, 2017) (unpublished decision regarding bylaws of a voluntary non-profit gardening club); *O'Byrne v Santa Monica-UCLA Medical Center*, 94 Cal. App. 4th 797, 805, 810 (2001) (medical staff bylaws adopted by a hospital pursuant to California regulation). Both *Lucas* and *O'Byrne* relied on *Scott v. Lee*, 208 Cal. App. 2d 12 (1962), in which the court expressly recognized that corporate bylaws "fix[] the rights and duties of the corporation against and to its shareholders" but rejected the notion that bylaws can support a claim for breach of contract by one shareholder against another. *Scott*, 208 Cal. App. 2d at 14. Plaintiffs' remaining authorities regarding the elements of contract under California law (*see* Opp. at 17-19) do not involve corporate bylaws or charters and are, therefore, irrelevant.

grounds by E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003). Not surprisingly, plaintiffs cite to no decision finding that a private forum selection clause implicates either the Commerce or Supremacy Clause.

There is no state action here. This case involves the enforcement by a private party of a provision of its corporate bylaws in a private securities action. The State of Delaware has not required Dropbox to include this provision in its bylaws. The DGCL is nothing more than an enabling statute, and the *Sciabacucchi* court held only that corporations ***may elect*** to adopt federal forum provisions pursuant to it. That is insufficient to establish a state action. *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (private insurer's decision to withhold worker's compensation payment pursuant to an enabling statute that did not require the withholding was not state action); *Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 844-45 (9th Cir. 2017) (enforcement of private arbitration agreement authorized by federal statute was not state action); *Duffield*, 144 F.3d at 1202 (enforcement of private arbitration agreement between securities dealers and NYSE was not state action even though SEC approved the Exchange's mandatory arbitration requirement); *see also Real Estate Bar Ass'n*, 608 F.3d at 122 ("An action undertaken by a private party does not become state action merely because the action is authorized by state statute.") (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-66 (1978)). While the Court need go no further to reject plaintiffs' constitutional arguments, those arguments would fail even if state action were present.

1. The Federal Forum Provision Does Not Violate the Supremacy Clause

Invoking *Cyan*, Plaintiffs argue that federal forum provisions violate the Supremacy Clause by "impermissibly eliminat[ing] state court jurisdiction over federal law claims . . . ." Opp. at 14; *see also* Opp. at 8, 9. This argument misreads *Cyan*, is inconsistent with several California appellate decisions, and badly misunderstands the scope of the Supremacy Clause.[7]

[7] As plaintiffs noted in their Opposition Brief, in her December 1, 2019 Order in *Restoration Robotics*, Judge Weiner concluded that federal forum provisions are inconsistent with the Securities Act's grant of concurrent jurisdiction. Opp. at 14. That ruling was based solely on the Chancery Court's opinion in *Sciabacucchi*, which was overturned by the Delaware Supreme Court. Jaconnette Decl. Ex. 2 at 3-4. The ruling is not binding on this Court, and it should not be followed.

First, as shown in the Dropbox Defendants' opening brief, while *Cyan* confirmed concurrent state court jurisdiction over Securities Act lawsuits, nothing in *Cyan* suggests that the existence of concurrent jurisdiction creates an unwaivable right that prevents parties from agreeing *ex ante* to an exclusive federal forum. Mot. at 16-17.[8] That issue was not presented in *Cyan*, and plaintiffs cannot point to anything in the Supreme Court's decision or elsewhere suggesting that state court jurisdiction for Securities Act claims cannot be waived by contract.

Second, California appellate courts have rejected arguments similar to that advanced by plaintiffs here. In *Korman v. Princess Cruise Lines, Ltd.*, 32 Cal. App. 5th 206 (2019), a plaintiff sued a cruise line in California state court under maritime law, over which state courts have concurrent jurisdiction with federal courts. *Id.* at 215. The cruise line filed a motion to dismiss based on a forum selection clause in a form agreement which specified federal court as the exclusive forum for disputes. *Id.* at 210. The trial court granted the motion and plaintiff appealed, arguing, among other things, that "because California state courts have concurrent jurisdiction over the matter, the forum selection clause unfairly deprives California state courts from hearing the matter." *Id.* at 221. The Court of Appeals disagreed:

> The forum selection clause does not "*deprive*" [the state court] of jurisdiction. Instead, the superior court exercised its "discretion to *decline* to exercise jurisdiction in recognition of" the forum selection provision contained in the passage contract.

Id. (emphasis in original) (citation omitted).

Similarly, in *Drulias*, the court enforced a forum provision in a corporation's bylaws designating Delaware as the mandatory forum for internal affairs disputes. 30 Cal. App. 5th at 711. Among other things, plaintiffs there argued that the bylaw violated his "statutory" right to a California forum as codified in California Corporations Code Section 2116, which provides for jurisdiction in California state court over internal affairs disputes of foreign corporations. *Id*. at

[8] Indeed, plaintiffs' basic argument here proves far too much. If plaintiffs were correct that the existence of concurrent jurisdiction in more than one forum creates a substantive and immutable right to litigate in each of those fora, ***no*** contractual forum selection provision limiting the forum for disputes could ever be enforced. Such a result is nonsensical, particularly given California's stated policy of enforcing forum selection provisions. *E.g.*, *Lu v. Dryclean-U.S.A. of Cal., Inc.*, 11 Cal. App. 4th 1490, 1493 (1992).

704. The Court of Appeals rejected this argument, holding that nothing in Section 2116 created "substantive rights" on behalf of California shareholders which "deprive[s] a court of the discretion to decline to exercise its jurisdiction" by enforcing a forum selection clause. *Id.* at 706-07.[9] Thus, *Korman* and *Drulias* demonstrate that the fact that California courts have concurrent jurisdiction to hear certain kinds of claims does not create an unwaivable right that precludes enforcement of an otherwise valid forum selection provision electing a federal forum. *Cf. Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 3-4 (1950) (U.S. Constitution does not prevent state courts from dismissing cases, despite having concurrent jurisdiction, under the principle of forum non conveniens).

Finally, to the extent that Supremacy Clause precedent is relevant at all (and absent state action, it is not), the cases upon which plaintiffs rely are inapposite. Both cases involved states that "disassociate[d] themselves from federal law": the states enacted statutes that functionally divested state courts of their jurisdiction to hear certain federal claims because the states viewed the federal law as "inconsistent with local policies." *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 371 (1990) (Florida statute that nullified federal claim by conferring a blanket immunity on state governmental entities from civil rights actions under 42 U.S.C. § 1983 violated the Supremacy Clause); *see also Haywood v. Drown*, 556 U.S. 729, 729, 736 (2009) (New York statute that divested state courts of their jurisdiction over claims for damages by prisoners against corrections officers under 42 U.S.C. § 1983 violated the Supremacy Clause). Nothing remotely analogous has occurred here. As explained above, nothing in Dropbox's Federal Forum Provision *divests* any state court of jurisdiction over Securities Act claims; rather, it merely provides the Court a basis for declining to exercise that jurisdiction.

2. The Federal Forum Provision Does Not Violate the Commerce Clause

The crux of plaintiffs' Commerce Clause argument is that "[a]llowing a Delaware statute to regulate whether a California court may exercise jurisdiction expressly given to it by Congress

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[9] Contrary to plaintiffs' assertion (Opp. at 22), the *Drulias* court did not in any way suggest that the distinction it drew between a statutory grant of jurisdiction and an unwaivable right to sue in California was based on case law arising out of internal affairs. *See id.*

. . . over a claim arising under federal law is invalid . . . ." Opp. at 13. This argument is flawed. Delaware's enabling statutes do not "regulate whether a California court may exercise jurisdiction . . . ." *Id.* Instead, they permit corporations to adopt bylaws, if they choose, that operate as forum selection provisions for Securities Act claims. And the adoption of such bylaws does not deprive California courts of jurisdiction; as discussed above, California courts retain jurisdiction and discretion to hear claims even in the face of valid forum selection provisions. *Supra* at 15.

Moreover, the Commerce Clause is violated by directly regulating interstate commerce or placing excessive burdens on it. *E.g.*, *Edgar*, 457 U.S. at 643-45. Here, plaintiffs do not even identify what interstate commerce they believe to be at issue, much less explain how Delaware is directly regulating (or excessively burdening) such commerce by allowing private parties to direct federal Securities Act claims to federal court.[10]

II. DROPBOX'S FEDERAL FORUM PROVISION SHOULD BE ENFORCED

Because Dropbox's Federal Forum Provision is valid under controlling Delaware law, the only question this Court must answer is whether to enforce it under California's forum non conveniens analysis. The Opening Brief demonstrated that plaintiffs bear a "heavy burden" to show that enforcement of the provision would be unreasonable, and also that plaintiffs could not meet that burden by, among other things, pointing to the antiwaiver provision in Section 14 of the Securities Act or any California law or policy. Mot. at 16-18.

In response, plaintiffs argue that the Federal Forum Provision is unenforceable because (1) the Securities Act's antiwaiver clause precludes any provision that waives plaintiffs' purported "unwaivable statutory right[]" to select a judicial forum; and (2) the Federal Forum

[10] Plaintiffs' reliance on *National Collegiate Athletic Association v. Miller*, 10 F.3d 633, 637 (9th Cir. 1993) is entirely misplaced. There, the state of Nevada enacted a statute that directly regulated a business that operated nationwide, the NCAA, and purported to require the NCAA to adopt specialized and enhanced enforcement procedures for Nevada's institutions, employees, boosters, and student athletes. *Id.* at 637, 638-39. The Ninth Circuit held that Nevada's law would have a "profound effect" on the NCAA's uniform nationwide operations because it would "force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules." *Id.* at 639. There are no parallels presented here; the DGCL applies only to Delaware corporations, which are free to adopt federal forum provisions (or not), just as shareholders are free to purchase shares in those corporations (or not).

Provision is unconscionable as a matter of California contract law. Opp. at 19-24. Plaintiffs' first argument is based on an unsupportable interpretation of the Supreme Court's decision in *Rodriguez* as well as other federal decisions interpreting Section 14's antiwaiver provision. Plaintiffs' second argument is both flawed and foreclosed by the *Drulias* decision.[11]

A. The Anti-Waiver Provision of the Securities Act Does Not Create an Unwaivable Right to Litigate in State Court

The Dropbox Defendants have shown that *Rodriguez* establishes that forum selection clauses, such as Dropbox's Federal Forum Provision, do not violate the antiwaiver provision found in Section 14 of the Securities Act. Mot. at 17. In response, plaintiffs contend that *Rodriguez*'s overruling of *Wilko*, an earlier Supreme Court decision which held that the Securities Act's antiwaiver provision rendered an arbitration clause unenforceable, was limited to the context of arbitration agreements and therefore, *Rodriguez* is of no import here. Opp. at 21-22. This contention fails for several reasons.

Although the forum selection clause at issue in *Rodriguez* was an arbitration agreement, the Supreme Court's holding was not limited to that context. To the contrary, in overruling *Wilko*, the Supreme Court held that the grant of concurrent jurisdiction to state and federal courts can be waived ***entirely***. Specifically, the Court held that "the right to select the judicial forum ***and the wider choice of courts*** are not such essential features of the Securities Act that § 14 is properly construed to bar any waiver of these provisions." 346 U.S. at 481 (emphasis added). In so holding, the Court specifically reasoned that the Securities Act is comprised of both substantive and procedural provisions and held that "the grant of concurrent jurisdiction in the state and federal courts without possibility of removal" is procedural. *Id.* at 482. The Court

[11] At the outset, and contrary to Plaintiffs' assertion (Opp. at 19), the Dropbox Defendants do not bear the burden to show that Dropbox's Federal Forum Provision is enforceable. Courts only shift the burden to the party seeking enforcement where the party opposing enforcement has demonstrated the existence of an unwaivable California statutory right. *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141, 144-45 (2015). Irrespective of whether "California law includes federal law," (Opp. at 20), in light of the Supreme Court's decision in *Rodriguez* (*see* Mot. at 17-18; *infra* at 18), plaintiffs have not, and cannot, demonstrate that the grant of jurisdiction to state courts under the Securities Act is an unwaivable right. Therefore, they continue to bear the burden of showing that enforcement of Dropbox's Federal Forum Provision would be unreasonable.

concluded, "there is no sound basis for construing the prohibition in [the antiwaiver provision] . . . of the Securities Act to apply to these procedural provisions." *Id.* Given the Supreme Court's explicit reasoning that the concurrent jurisdiction provision of the Securities Act is procedural and its express holding that the antiwaiver provision does not bar waiver of the "right to select . . . the wider choice of courts," plaintiffs are simply wrong in claiming that the holding of *Rodriguez* was narrowly limited to arbitration or that some portion of the *Wilko* decision regarding Section 14 survived.[12] *See Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1362 (2d Cir. 1993) (acknowledging *Wilko* "has been squarely overruled" by *Rodriguez*).

Indeed, since *Rodriguez*, a "chorus of authority" has rejected precisely the argument that plaintiffs advance here—*i.e.*, that the Securities Act's antiwaiver provision categorically renders forum selection clauses unenforceable. *Huffington v. T.C. Group, LLC*, 637 F.3d 18, 25 (1st Cir. 2011) (citing authorities). In particular, and as explained in the Opening Brief, the Ninth Circuit in *Richards v. Lloyd's of London*, 135 F.3d 1289, 1293 (9th Cir. 1998) (*en banc*), rejected the argument that the antiwaiver provision barred enforcement of a forum selection provision. *See* Mot. at 18. In response, plaintiffs make two arguments to try to avoid the holding of *Richards*, both of which are specious.

First, plaintiffs cite the original Ninth Circuit panel decision *Richards v. Lloyd's of London*, 107 F.3d 1422 (9th Cir. 1997) in support of the proposition that, outside the context of arbitration, the antiwaver provision of the Securities Act voids forum selection provisions. Opp. at 22 n.21. Plaintiffs claim that the panel decision in *Richards* was merely "superseded on other grounds" by the subsequent *en banc* decision and, therefore, suggest some part of the panel's earlier decision survives. *Id*. That is clearly wrong. The Ninth Circuit's subsequent *en banc* decision ***did not*** "supersede" the earlier panel decision "on other grounds." **It reversed the**

[12] Indeed, plaintiffs' narrow reading of *Rodriguez* is illogical on its face. In *Rodriguez*, the Supreme Court confirmed that it would enforce forum selection provisions waiving ***any*** judicial forum for Securities Act claims. It is nonsensical to suggest that the antiwaiver provision of the Securities Act will yield to a forum selection provision selecting a forum that is not even mentioned in the Securities Act but would preclude enforcement of a provision selecting a federal court, one of the two forums expressly designated by the Securities Act's jurisdictional provisions.

panel decision *in toto* and ordered that it be "*withdrawn*." *Richards*, 135 F.3d at 1291 (emphasis added); *see also Batchelder v. Kawamoto*, 147 F.3d 915, 919 (9th Cir. 1998) (rejecting an attempt to rely on the *Richards* panel decision as "meritless" because the Ninth Circuit "overruled [the panel decision] sitting *en banc*").

Second, plaintiffs suggest that *Richards* is distinguishable because it involved an "international arbitration agreement." Opp. at 22 n.21. Not true. *Richards* involved a forum selection clause which designated the *courts* of England for the parties' dispute—there was no arbitration clause at issue. *Richards*, 135 F.3d at 1291-92. Moreover, the fact that *Richards* involved an *international* forum selection provision is of no consequence. The Ninth Circuit emphasized this point in *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018), where it considered whether to enforce a forum selection provision selecting California state courts as the exclusive jurisdiction for all disputes arising from a share purchase agreement. *Id.* at 1085. Plaintiffs brought their suit, alleging claims under Washington state's blue sky laws in federal court, and claimed that the antiwaiver provision in Washington's statute prevented enforcement of the California forum selection provision. *Id.* The *Sun* court discussed *Richards* at length and held that, "the strong federal policy in favor of enforcing forum-selection clauses would supersede antiwaiver provisions in state statutes as well as federal statutes, ***regardless whether the clause points to a state court, a foreign court or another federal court***." *Id.* at 1090 (emphasis added).

In footnote 21 of their Opposition brief, plaintiffs cite several California state authorities for the proposition that, other than with respect to arbitration agreements, *Wilko*'s holding that forum selection clauses violate the antiwaiver provision of the Securities Act "remains controlling and dispositive." Opp. at 22 n.21; *see also id.* at 21-22 (claiming courts "have consistently recognized . . . the continuing vitality of *Wilko* notwithstanding the holding in *Rodriguez*"). Plaintiffs' citation to these cases is, to say the least, disingenuous. Plaintiffs cite *Franco v. Arakelian Enterprises, Inc.*, 149 Cal. Rptr. 3d 530 (Cal. Ct. App. 2012), even though that decision was **vacated** by the California Supreme Court. *See Franco v. Arakelian Enters., Inc.*, 234 Cal. App. 4th 947, 951 (2015). And, contrary to plaintiffs' assertion, each of the

remaining cases expressly recognizes that *Rodriguez* overruled *Wilko*, and not one suggested the "continued vitality" of any portion of *Wilko*'s holding regarding the antiwaiver provision of the Securities Act. *See Verdugo*, 237 Cal. App. 4th at 155 n.4 (noting that *Rodriguez* reversed *Wilko* in a footnote without any analysis of the scope of the reversal); *Countrywide Fin. Corp. v. Bundy*, 187 Cal. App. 4th 234, 251 (2010) (expressly recognizing that *Rodriguez* overruled "the *Wilko* holding concerning the effect of section 14 of the Securities Act of 1933"); *West v. Lloyd's*, No. B095440, 1997 WL 1114662, at *6 (Cal. Ct. App. Oct. 23, 1997) (unpublished decision recognizing that *Rodriguez* overruled *Wilko* without analysis of the scope of reversal or any continued vitality of *Wilko* because court deemed both decisions irrelevant to the issues before it).

Finally, plaintiffs' reliance on the antiwaiver provision found in California Corporations Code section 25701 and *Hall v. Superior Court*, 150 Cal. App. 3d 411 (1983), to support their claim that they have an unwaivable right which precludes enforcement of Dropbox's Federal Forum Provision is equally meritless. Opp. at 20. As an initial matter, because plaintiffs are not asserting any claims under California's Corporate Securities Law, the antiwaiver provision in section 25701 is irrelevant. Moreover, the court in *Hall* declined to enforce a forum selection clause because the parties' agreement also included a *choice of law* provision requiring application of a different state's law that would inevitably result in forfeiture of plaintiffs' claims under the Corporate Securities Law, in violation of section 25701. *Hall*, 150 Cal. App. 3d at 418 ("[W]e hold the choice of Nevada law provision in this agreement violates section 25701 and the public policy of this state . . . and for that reason deny enforcement of the forum selection clause as unreasonable."). No such concerns exist here since requiring plaintiffs to litigate in federal court will not extinguish their Securities Act claims.

In short, there is no support for plaintiffs' position that *Wilko* prevents parties from waiving their right to bring Securities Act claims in state court. *Rodriguez*, *Richards*, and *Sun* are controlling and the antiwaiver provision of the Securities Act is no barrier to the enforcement of Dropbox's purely procedural Federal Forum Provision.

B. The Federal Forum Provision Is Not Unconscionable

Finally, plaintiffs argue that the Court should decline to enforce the provision under California law because it is procedurally and substantively unconscionable. As an initial matter, and as previously explained, Delaware law, not California law, controls the relevant analysis here. *See supra* at 8. In any event, plaintiffs' arguments are meritless. Plaintiffs argue that they "had no opportunity to negotiate" the Federal Forum Provision and had "the reasonable expectation" that the antiwaiver provision in Section 14 protected their purported "right" to bring Securities Act claims in state court. Opp. at 23-24. Plaintiffs' suggestion that the Federal Forum Provision is procedurally unconscionable because they lacked an opportunity to negotiate is foreclosed by *Drulias*, which expressly rejected that same argument, holding that "[a] forum selection clause need not be subject to negotiation to be enforceable." *Drulias*, 30 Cal. App. 5th at 707-08 (citing California, Delaware, and Supreme Court authorities). And, for the reasons explained in detail above, plaintiffs' suggestion that they had a "reasonable expectation" of a "right" protected by Section 14 of the Securities Act is unsupportable. *See supra* at 18, 12 n.5.

Moreover, plaintiffs do not, and cannot, make the requisite showing of unfairness in the Federal Forum Provision's selection of federal courts as the exclusive forum to litigate claims brought under federal law. Federal courts are, of course, capable of handling Securities Act claims. And, far from being unconscionable, the Federal Forum Provision actually inures to the benefit of all shareholders by eliminating unnecessary corporate expense resulting from duplicative parallel litigation while preserving the shareholders' ability to bring Securities Act Claims.[13] Although plaintiffs argue that various provisions for Securities Act claims—such as discovery, the lead plaintiff procedures, and the number and unanimity of jurors[14]—may differ

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[13] Plaintiffs' strident proclamation that the "obvious" purpose of the Federal Forum Provision is to avoid state court ignores that only federal court can be selected as the forum to avoid duplicative litigation as it is the only court that has jurisdiction over both Section 11 claims and Section 10(b) claims under the Securities Exchange Act of 1934.

[14] Plaintiffs' reliance on *Handoush v. Lease Fin. Grp., LLC*, 41 Cal. App. 5th 729 (2019), is entirely improper. The *Handoush* decision involved a complete pre-dispute waiver of a jury trial (*id.* at 732); here, there is no such waiver and there can be no dispute that, should plaintiffs' claims reach trial, plaintiffs are entitled to a jury in the federal court, which is the selected forum. Moreover, as this Court recently recognized, *Handoush* is on appeal and, therefore, has no precedential value. *WageWorks*, slip op. at 11.

between federal and state courts (Opp. at 20 n.20), these differences do not result in the loss of substantive rights nor are they sufficient grounds to refuse to enforce a valid forum selection provision. *E.g.*, *Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC*, 55 Cal. 4th 223, 246 (2012) (explaining that to be unconscionable, a contract term "must be 'so one-sided as to shock the conscience'") (internal quotations omitted) (citations omitted). *See CQL Original Prods., Inc. v. Nat'l Hockey League Players' Ass'n*, 39 Cal. App. 4th 1347, 1357 (1995) (enforcing forum selection clause despite procedural differences between jurisdictions); *Intershop Commc'ns v. Superior Court*, 104 Cal. App. 4th 191, 199-201 (2002) (upholding German forum selection clause, which country has no civil jury trials and no or limited discovery).

CONCLUSION

For these reasons, the Court should enforce Dropbox's Federal Forum Provision. Plaintiffs do not dispute, and therefore concede, that dismissal is the appropriate remedy. *See* Mot. at 19. The Court should therefore dismiss this action.

Dated: July 10, 2020

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