SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 613

IN RE UBER TECHNOLOGIES, INC. SECURITIES LITIGATION This Document Relates to: ALL ACTIONS.	Lead Case No. CGC-19-579544 ORDER GRANTING DEFENDANTS' MOTION TO DISMISS ON THE GROUNDS OF INCONVENIENT FORUM PURSUANT TO C.C.P. § 418.10(A)(2) AND C.C.P. § 410.30

INTRODUCTION

This matter came on regularly for hearing on November 5, 2020 in Department 613, the Honorable Andrew Y.S. Cheng, presiding. Mark C. Molumphy and James I. Jaconette appeared for Plaintiffs David Messinger, Gerald Ashford, Irving S. and Judith Braun, Ellie Marie Toronto ESA, Varghese Pallathu, Joseph Cianci, Johnny Ramey, and Virgil Jayce Jennings Rapada (collectively "Plaintiffs"). Emily Griffen appeared for Defendants Uber Technologies, Inc., Dara Khosrowshahi, Nelson Chai, Glen Ceremony, Ronald Sugar, Ursula Burns, Garrett Camp, Matt Cohler, Ryan Graves, Arianna Huffington, Travis Kalanick, Wan Ling Martello, H.E. Yasir Al-Rumayyan, John Thain, and David Trujillo (collectively "Uber Defendants"). Todd Cosenza appeared on behalf of defendants Morgan Stanley & Co. LLC, Goldman Sachs & Co. LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Barclays Capital Inc., Citigroup Global Markets, Inc., Allen & Company LLC, RBC Capital Markets, LLC, SunTrust Robinson Humphrey, Inc., Deutsche Bank Securities Inc., HSBC Securities (USA) Inc., SMBC Nikko Securities America, Inc., Mizuho Securities USA LLC, Needham &

Company, LLC, Loop Capital Markets LLC, Siebert Cisneros Shank & Co., L.L.C. , Academy Securities, Inc., BTIG, LLC, Canaccord Genuity LLC, CastleOak Securities, L.P., Cowen and Company, LLC, Evercore Group L.L.C., JMP Securities LLC, Macquarie Capital (USA) Inc., Mischler Financial Group, Inc., Oppenheimer & Co. Inc., Raymond James & Associates, Inc., William Blair & Company, L.L.C., The Williams Capital Group, L.P., and TPG Capital BD, LLC (the "Underwriter Defendants" and, together with the Uber Defendants, "Defendants").

Having reviewed and considered the arguments, pleadings, and written submissions of all parties, the Court **GRANTS** Defendants' motion to dismiss.

REQUEST FOR JUDICIAL NOTICE

As a preliminary matter, the Court **GRANTS** the following requests for judicial notice pursuant to California Evidence Code § 452(d), (h):

- Plaintiffs' RJN, Ex. 1 (Amicus Brief of Former SEC Chairman Harvey L. Pitt and Twenty Law Professors in Support of Opposition to Motion to Dismiss for *Forum Non Conveniens* in *In re Dropbox, Inc. Securities Litigation*, No. 19-CIV-05089);
- Defendants' RJN, Exs. A (Uber's amended Registration Statement), B (Complaint filed on March 3, 2020 in *Stirratt v. Uber Technologies, Inc. et al.*, No. 3:19-cv-06361-RS (N.D. Cal.) (ECF No. 80) [the "Federal Uber Complaint"]), C (Uber's Amended and Restated Certificate of Incorporation, as filed with the Delaware Secretary of State on May 14, 2019 ["Charter"]) and D (Exhibit 3.2 to Uber's initial Registration Statement, as filed with the SEC on Form S-1 on April 11, 2019 ["RS Exhibit 3.2"]); and
- Defendants' Supplemental RJN, Ex. F to the Supplemental Declaration of Emily V. Griffen (Amicus Brief of the Honorable Joseph A. Grundfest and five former members of the Delaware state judiciary in Support of the Defendants' Motion to Dismiss for *Forum Non Conveniens* in *In re Dropbox, Inc. Securities Litigation*, No. 19-CIV-05089).

BACKGROUND

The Consolidated Class Action Complaint filed on February 11, 2020 ("Complaint") is brought on behalf of a putative class of shareholders who purchased Uber's common stock pursuant to the Offering Documents for Uber's May 2019 IPO. (See Compl. ¶ 191.) Plaintiffs assert claims under Sections 11,

12(a)(2), and 15 of the Securities Act of 1933 ("Securities Act"); 15 U.S.C. §§ 77k, 77l(a)(2); and 77o on the basis that Uber's Offering Documents allegedly omitted material facts necessary to make other statements not misleading. (See *id.* at ¶¶ 2, 4, 198, 209, 218.) An identical putative class has asserted the same claims and allegations in federal court. (Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss on the Grounds of Inconvenient Forum Pursuant to C.C.P. 418.10(A)(2) and 410.30 ["Motion"], 7; see also *Stirrratt v. Uber Techs., Inc. et al.*, No. 3:19-cv-06361-RS (N.D. Cal.) (ECF No. 80) [the "Federal Action"].)

Uber is a Delaware corporation headquartered in San Francisco. (See Compl. ¶ 64.) Its Charter, filed with the Delaware Secretary of State on May 14, 2019, provides: "[t]he 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 1993." (See Declaration of Emily V. Griffen in Support of Defendants' Motion to Dismiss on the Grounds of Inconvenient Forum Pursuant to C.C.P. 418.10(A)(2) and 410.30 ["Griffen Decl."], Ex. C § VII.)

The Charter "was approved by the holders of the requisite number of shares of the Company" and was "duly adopted . . . by the stockholders of the Company." (*Id.* at 5.) It was attached as Exhibit 3.2 to Uber's initial registration statement filed April 11, 2019 (see *id.* at Ex. D) and was incorporated by reference in the amended Registration Statement (see *id.* at Ex. A [amended Registration Statement].) The effect of the federal forum selection provision ("FFP") was disclosed in Uber's Offering Documents. (See *id.* at 81 [disclosing "[o]ur amended and restated certificate of incorporation will provide that the federal district courts of United States of America will be the exclusive forum for resolving any complaint asserting a cause of action arising under the Securities Act, subject to and contingent upon a final adjudication in the State of Delaware of the enforceability of such exclusive forum provision" and that the Charter's "exclusive-forum provisions may limit a stockholder's ability to bring a claim in a judicial forum that it finds favorable for disputes with us or our directors, officers, or other employees, which may discourage lawsuits against us and our directors, officers, and other employees"].)

Uber's FFP was subject to and contingent upon the approval of such clauses in the State of Delaware by the Delaware Supreme Court because, at the time of the IPO, the Delaware Court of Chancery had ruled that such provisions in certificates of incorporation were invalid under Delaware law.

(See Motion, 8 [citing *Sciabacucchi v. Salzberg* (Del. Ch. Dec. 19, 2018) C.A. No. 2017-0931-JTL, 2018 WL 6719718, at *6, reversed by *Salzberg v. Sciabaccucchi* (2020) 227 A.3d 102, 132].) This was disclosed in the Offering Documents. (See Griffen Decl., Ex. C § VII; see also Ex. A, 81.) On March 18, 2020, the Delaware Supreme Court ruled that provisions like Uber's, providing that U.S. federal district courts will be the exclusive forum for resolving any complaint asserting Securities Act claims, are valid under Delaware law. (See *Sciabacucchi v. Salzberg* (Dec. 19, 2018) C.A. No. 2017-0931-JTL, 2018 WL 6719718 *1.)

LEGAL STANDARDS

I. California Code of Civil Procedure Section 418.10

"A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion . . . to stay or dismiss the action on the ground of inconvenient forum." (Cal. Code Civ. Proc. § 418.10, subd. (a)(2).)

II. California Code of Civil Procedure Section 410.30

"When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." (Cal. Code Civ. Proc. § 410.30, subd. (a).)

"The proper procedure for enforcing a contractual forum selection clause in California is a motion pursuant to section 410.30. That provision codifies the forum non conveniens doctrine, under which a trial court has discretion to decline to exercise its jurisdiction over a cause of action that it believes may be more appropriately and justly tried elsewhere. Where a section 410.30 motion is based on a forum selection clause[,] . . . factors that apply generally to a forum non conveniens motion do not control . . . Instead, the test is simply whether application of the clause is unfair or unreasonable[; if not,] the clause is usually given effect. Claims that the previously chosen forum is unfair or inconvenient are generally rejected." (*Drulias v. 1st Century Bancshares, Inc.* (2018) 30 Cal.App.5th 696, 703 [internal quotations and citations omitted].)

III. The 1933 Securities Act

The Securities Act provides, "[t]he 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. . . . 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." (15 U.S.C. § 77v(a).)

Section 14 of the Securities Act provides "[a]ny 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." (*Id.* at § 77n.)

DISCUSSION AND ANALYSIS

I. Whether the Validity of Uber's FFP is a Matter of California or Delaware Law

a. Background Law – the Internal Affairs Doctrine

"The term 'internal affairs' refers to matters that involve the relations inter se of the corporation, its shareholders, directors, officers or agents. A conflict of laws principle known as the 'internal affairs doctrine' posits that only one state—usually the state of incorporation—should have the authority to regulate a corporation's internal affairs." (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1106 n.2 [internal quotations and citations omitted].) Corporations Code section 2116 requires the application of the law of the state of incorporation in certain actions against directors of a foreign corporation involving the corporation's internal affairs.

In *Sciabaccucchi* v. *Salzberg*, the Delaware Chancery Court held that a shareholder's claim for violation of the Securities Act is not an "internal affair." (*Sciabacucchi, supra*, 2018 WL 6719718 *1.) In *Salzberg*, the Delaware Supreme Court also held that such a claim is not an "internal affair". Rather, the Delaware Supreme Court held that it was an "intra-corporate affair" – something more than an internal affair but something less than an external affair. (*Salzberg, supra,* 227 A.3d at 131.) The court recognized it is well-established that "matters more traditionally defined as 'internal affairs' or 'internal corporate claims' are clearly within the protective boundaries of the United States Supreme Court's and the Delaware Supreme Court's decisions, where only one State has the authority to regulate a corporation's internal affairs—the state of incorporation," but held there are matters that are not "internal

affairs," but are nevertheless, 'internal' or "intracorporate" and still within the scope of Delaware law. (See *id.*) Yet, the *Salzberg* court analyzed the forum provision as if it was an internal affair of the corporation.

b. Application

The Court finds that federal securities claims brought by a shareholder are not an internal affair. Shareholders' Securities Act claims are not peculiar to the relationship among or between the corporation and its current officers, directors, and shareholders. (*Cf. State Farm Mutual Automobile Ins. Co. v. Sup. Ct.* (2003) 114 Cal.App.4th 434, ["'internal affairs' include steps taken in the course of the original incorporation, ... the adoption of by-laws, the issuance of corporate shares, the holding of directors' and shareholders' meetings, ... *the declaration and payment of dividends* and other distributions, charter amendments, mergers, consolidations, and reorganizations, the reclassification of shares and the purchase and redemption by the corporation of outstanding shares of its own stock."] [internal quotations and citations omitted] [emphasis in original].) The federal securities claims at issue here do not arise from Uber's corporate governance. (See *Salzberg, supra,* 227 A.3d at 130.) They arise from securities purchased by Plaintiffs and concern the purchasers' rights as holders of corporate stock. No binding precedent holds that the internal affairs doctrine applies to "intracorporate" affairs. Because the internal affairs doctrine is inapplicable, the Court applies California law to determine whether Uber's FFP is valid.

II. Whether the FFP Is Valid

a. Assent

Under California law, "whether a set of bylaws constitutes a contract turns on whether the elements of a contract are present." (*O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 808.) Plaintiffs argue that assent to the FFP clause is lacking, thus no valid contract with respect to the FFP clause exists. However, California law does not require forum selection clauses to be freely negotiated. (See *Drulias, supra,* 30 Cal.App.5th at 707-708 ["neither California nor Delaware law requires forum selection clauses to be freely negotiated to be enforceable"].) "[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." (*Id.* at 708 [internal quotations and citations omitted]; see also 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 . . . ."].) Each Plaintiffs' assent is not required for the FFP to be valid.

b. Lawful Object

Under Cal. Civ. Code § 1550 "a lawful object" is "essential to the existence of a contract." A contract is unlawful if it is "[c]ontrary to an express provision of law", contrary to "the policy of express law", or otherwise "contrary to good morals". (Cal. Civ. Code § 1667.) Plaintiffs argue that the FFP is unlawful because it directly contravenes the Securities Act's concurrent jurisdiction and anti-removal protections, as well as the Supreme Court's decision in *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund* (2018) _ U.S. _, 138 S. Ct. 1061.[1] Defendants claim that the FFP is not unlawful because shareholders can agree to litigate their Securities Act claims in federal court.

i. Removal Bar

Plaintiffs contend that Uber's FFP is contrary to, and therefore prohibited by, the Securities Act's removal bar, which prohibits the removal of Securities Act claims from state court to federal court. (See 15 U.S.C. § 77v(a).) ["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"].) Here, Defendants have not attempted to remove the case, thus the removal bar is not directly implicated. Moreover, the Securities Act's prohibition on removal of state court actions to federal court does not address the question at issue in this case, i.e., whether the parties may agree in a company's corporate charter that Securities Act claims will be filed exclusively in federal court.

ii. Concurrent Jurisdiction

Plaintiffs argue because state and federal courts have concurrent jurisdiction over Securities Act claims, as confirmed by the United States Supreme Court in *Cyan*, Uber's FFP cannot require such claims

[1] Plaintiffs also argue that the FFP violates the Commerce Clause and Supremacy Clause. The cases cited by Plaintiffs in support of their argument all pertain to attacks on the constitutionality of a statute, not the terms of an agreement. The constitutionality of DGCL § 102 is not properly before this Court on a forum non conveniens motion.

be filed only in federal court. While *Cyan* stands for the proposition that state and federal courts have concurrent jurisdiction over Securities Act Claims, it does not address whether corporations can select the federal courts as the exclusive forum for Securities Act claims as a matter of corporate governance. (See *Cyan, supra,* 138 S. Ct. at 1069.) No case has decided this exact question.

Defendants rely on *Korman v. Princess Cruise Lines, Ltd.* (2019) 32 Cal.App.5th 206, 221. In *Korman*, as here, both state and federal courts had concurrent jurisdiction over the claims. (See *id.* at 210.) The defendants sought to enforce a forum selection clause that required the lawsuit to be litigated in the United States District Court for the Central District of California. (*Id.* at 221.) Both the trial court and appellate court upheld the forum selection clause rejecting the plaintiff's argument that the forum selection clause unfairly deprived California state courts from hearing the matter. (*Id.*) Specifically, the Court of Appeal held "[t]he forum selection clause d[id] not '*deprive*' the Los Angeles Superior Court of jurisdiction. Instead, the superior court exercised its 'discretion to *decline* to exercise jurisdiction in recognition of' the forum selection clause contained in the passage contract." (*Id.* at 222 [citing *Smith, Valentino & Smith, Inc. v. Sup. Ct.* (1976) 17 Cal.3d 491, 495] [emphasis in original].) The state and federal courts' concurrent jurisdiction does not preclude the parties from agreeing in advance to select either state or federal court to be the exclusive forum to resolve claims arising under the Securities Act. As in *Korman*, the Court may apply its discretion here to decline to exercise jurisdiction in recognition of Uber's FFP.

iii. Anti-Waiver Provision

Plaintiffs assert they have an unwaivable right to have their federal Securities Act claims heard in state court under Section 14 of the Securities Act, which is the anti-waiver provision. Section 14 provides that "[a]ny 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.) To refute Plaintiffs' argument, Defendants rely on *Rodriguez de Quijas v. Shearson/American Exp., Inc.* (1989) 490 U.S. 477, 481-482. In *Rodriguez*, an arbitration case, the Supreme Court held that "[o]nce the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear 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." (*Id.* at 481.) Plaintiffs argue *Rodriguez* is not binding outside the arbitration context. The Court is not persuaded that *Rodriguez* is as limited as Plaintiffs contend.

In *Wilko v. Swan* (1953) 346 U.S. 427, 435, the United States Supreme Court previously held that the right to select a judicial forum cannot validly be waived pursuant to the express terms of the Securities Act. Plaintiffs assert that *Wilko* is still good law and that its continuing vitality is consistently recognized by California appellate courts. Plaintiffs' argument is contrary to the principle that "[w]here there is a conflict between opinions of the same court on a given principle of law the latest thereof should be given preference." (*Jones v. Jones* (1960) 182 Cal.App.2d 80, 83.) Further, none of the cases relied upon by Plaintiffs involve the waiver of a Securities Act claim and some of the cited cases are unreported or superseded. Only two of the cases Plaintiffs rely on are current reported decisions: One is *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 154 and the other is *Countrywide Financial Corp. v. Bundy* (2010) 187 Cal.App.4th 234, 250-251. *Verdugo*, a case dealing with unwaivable rights created by California statutes, relied on *Hall v. Sup. Ct.* (1983) 150 Cal.App.3d 411, which relied on *Wilko*. (See *Verdugo, supra,* 237 Cal.App.4th at 155.) However, *Verdugo* notes that the United States Supreme Court reversed its *Wilko* decision in R*odriguez*. (See *id.* at 155 n.4.) 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. (*Countrywide, supra,* 187 Cal.App.4th at 250.)

The issue in *Rodriguez* was whether a predispute agreement to arbitrate claims under the Securities Act was enforceable, which is not the issue before the Court here. However, *Rodriguez* overruled *Wilko*, explicitly referring to it as "overruled", "incorrectly decided", and "not obviously correct". (*Rodriguez, supra,* 490 U.S. at 477, 480.) The Court determined "[t]here is no sound basis for construing the prohibition in § 14 on waiving 'compliance with any provision' of the Securities Act to apply to [the Securities Act's] procedural provisions [including the grant of concurrent jurisdiction in the state and federal courts without the possibility of removal]." (*Id.* at 482.) Furthermore, the *Rodriguez* Court noted that "arbitration agreements, which are in effect, *a specialized kind of forum-selection clause*, 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." (*Id.* at 483 [internal quotations and

citations omitted] [emphasis supplied]; see also *Salzberg, supra,* 227 A.3d at 132 ["The holding in *Rodriguez* provides forceful support for the notion that FFPs do not violate federal policy by narrowing the forum alternatives available under the Securities Act."].) Thus, applying *Rodriguez*, this Court holds that the FFP does not contravene the 1933 Act's concurrent jurisdiction and anti-removal protections or the Supreme Court's decision in *Cyan.* The FFP is lawful and valid under California law.

II. Enforceability

a. Background Law

"Ordinarily, the party seeking to avoid enforcement of a forum selection clause bears the burden of establishing that [its] enforcement . . . would be unreasonable. That burden, however, is reversed when the claims at issue are based on unwaivable rights created by California statutes. In that situation, the party seeking to enforce the forum selection clause bears the burden to show litigating the claims in the contractually-designated forum will not diminish in any way the substantive rights afforded ... under California law." (*Drulias, supra,* 30 Cal.App.5th at 703 [internal quotations and citations omitted].)

The burden to show enforcement is unreasonable or unfair is reversed when the underlying claims are based on statutory rights the California Legislature has declared to be unwaivable. (See *Verdugo, supra,* 237 Cal.App.4th at 144-145.) "In this instance, the party seeking to enforce the forum selection clause has the burden to show enforcement would not diminish unwaivable California statutory rights, *otherwise a forum selection clause could be used to force a plaintiff to litigate in another forum that may not apply California law.*" (See *id.* [emphasis supplied].)

b. Application

In *Verdugo*, where the court held the burden was shifted, all of the plaintiff's claims were based on California Labor Code provisions that proscribed employer requirements and specific remedies, which the Labor Code declared could not be waived by agreement. (See *id.* at 145.) Here, Plaintiffs' claims are based on federal law, not California law. No California unwaivable statutory rights are implicated. Plaintiffs argue that the burden should be reversed where unwaivable federal statutory rights are diminished because "California law includes federal law." (Plaintiffs' Opposition to Defendants Motion to Dismiss on the Grounds of Inconvenient Forum Pursuant to C.C.P. 418.10(A)(2) and 410.30 ["Opp."], 19 n.17 [citing *Kashani v. Tsann Kuen China Enter Co.* (2004) 118 Cal.App.4th 531, 543].) Although

federal law is incorporated into state law, the burden-shifting framework is unnecessary here because there is no California statutory right in jeopardy, nor is there a concern that Plaintiffs could be forced to litigate in a forum that may not apply California law. Regardless of whether Plaintiffs' claims are adjudicated in federal or state court, the court will apply federal law and Plaintiffs will be afforded the same rights.

Plaintiffs retain their burden to show enforcement is unreasonable. Thus, the Court turns to whether the terms of the FFP are (1) outside Plaintiffs' reasonable expectations or (2) unconscionable, and thus unenforceable.

ii. Plaintiffs' Reasonable Expectations

It is Plaintiffs' burden to demonstrate that the FFP was outside their reasonable expectations. (See *Korman, supra,* 32 Cal.App.5th at 216-217; see also *Drulias, supra,* 30 Cal.App.5th at 707.) The fact that the forum selection clause is non-negotiable does not mean it is unreasonable. (See *Drulias, supra,* 30 Cal.App.5th at 707.) The FFP is consistent with Plaintiffs' reasonable expectations at the time they chose to purchase Uber stock. At that time, Plaintiffs knew or should have known that Uber was a Delaware corporation and that, consistent with Delaware law, its certificate of incorporation was binding on shareholders. (See *id.* at 708.) Relying on the Offering Documents, Plaintiffs should have expected to litigate in federal court if FFPs were upheld by the Delaware Supreme Court. (See Registration Statement, 81; Ex. C [Charter] § VII ["Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Company shall be deemed to have notice of and to have consented to the provisions of this Article VII."].) Moreover, Uber's FFP is contained in its charter, which was approved by a majority of its shareholders. (See *id.*) Plaintiffs were on notice, and presumptively agreed to the terms of Uber's Charter by purchasing the securities. (See *Drulias, supra,* 30 Cal.App.5th at 707-708.) Plaintiffs offer no evidence to show that the FFP was unexpected or unreasonable. Plaintiffs fail to meet their burden.

iii. Unconscionability

"Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the

contract or reject it. If the contract is adhesive, the court must then determine whether 'other factors are present which, under established legal rules—legislative or judicial—operate to render in [unenforceable]." (*Armendariz v. Foundation health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113 [internal quotations and citations omitted].) "An evaluation of unconscionability is highly dependent on context. The doctrine often requires inquiry into the commercial setting, purpose, and effect of the contract." (*Sanchez v. Valencia Holding, Co., LLC* (2015) 61 Cal.4th 899, 911 [internal quotations and citation omitted].) "Though courts refuse to enforce only those agreements that are both procedurally and substantively unconscionable, the two factors need not each exist to the same degree." (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 88.) Because the FFP is contained in a contract of adhesion, the Court turns to procedural and substantive unconscionability.

A. Procedural Unconscionability

"[P]rocedural unconscionability focuses on the elements of oppression and surprise. 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." (*Davis v. TWC Dealer Group, Inc.* (2019) 41 Cal.App.5th 662, 671 [internal quotations and citations omitted].)

Plaintiffs assert that they had no opportunity to negotiate the terms of the FFP clause, nor did they have any power to do so, demonstrating oppression. The Court agrees. The Offering Documents were not subject to negotiation or arm's length dealings between Uber and Plaintiffs, but rather drafted by the corporation for the benefit of the corporation and its existing shareholders. Plaintiffs had no choice but to purchase shares subject to the FFP clause.

The Court also finds that there is a degree of surprise. Although the Charter was approved by Uber's existing shareholders, attached to the initial registration statement and incorporated by reference in the amended Registration Statement, its terms were buried in a prolix printed form drafted by Defendants. The amended Registration Statement is attached as Exhibit A to the Griffen Declaration. That document is 295 pages plus exhibits. The FFP is discussed on pages 81 and 273 of the document. The Amended and Restated Certificate of Incorporation is attached as Exhibit D to the Griffen Declaration. That document is six pages. The FFP is disclosed on the bottom of page four. Everything is in small print.

Page 81 of the amended Registration Statement discloses the FFP in bold and italic text. However, the bold and italic text regarding the FFP does not explicitly reference federal Securities claims. (See Griffen Decl., Ex. A, 81 ["***Our amended and restated certificate of incorporation that will be in effect at the closing of this offering will provide that the Court of Chancery of the State of Delaware and, to the extent enforceable, the federal district courts of the United States of America will be the exclusive forums for substantially all disputes between us and our stockholders, which could limit our stockholders' ability to obtain a favorable judicial forum for disputes with us or our directors, officers, or employees.***"].) Further, page 81 provides that the Court of Chancery *and*, to the extent enforceable, the federal district courts will be the exclusive *forums* for substantially all disputes between Uber and its stockholders. (See *id.*) Thus, the only bold and italic text in the Offering Documents regarding the FFP makes it appear that the Delaware Court of Chancery and the federal district courts have concurrent jurisdiction over federal securities claims.

The oppressive nature of the FFP coupled with the element of surprise constitute procedural unconscionability.

B. Substantive Unconscionability

"Substantive unconscionability examines the fairness of a contract's terms. This analysis ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided. All of these formulations point to the central idea that the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain, but with terms that are unreasonably favorable to the more powerful party. Unconscionable terms impair the integrity of the bargaining process or otherwise contravene the public interest or public policy or attempt to impermissibly alter the fundamental legal duties." (*Davis*, *supra*, 41 Cal.App.5th at 673-674 [internal quotations and citations omitted].)

The Court finds insufficient substantive unconscionability to conclude the FFP is unconscionable. The FFP is one-sided, as it is not mutual and only applies to claims under the Securities Act of 1933 – claims that shareholders would likely bring. (See Griffen Decl., Ex. D at 4.) However, the amended Registration Statement provides, and the Delaware Supreme Court asserts, that the purpose of an FFP is to protect the corporation and its officers and directors from spending time, money and effort in dealing

with competing shareholder lawsuits pending in state and federal court. (See Griffen Decl., Ex. A at 81; see also *Salzberg, supra,* 227 A.3d at 137.) While FFP does limit the filing of Plaintiffs' action to federal court, it does not eliminate the substantive protections provided by the Securities Act itself. The FFP does not take away the rights to discovery, jury trial or appeal. The FFP provides that Plaintiffs can file in any federal court; thus, it does not particularly create any additional expense or inconvenience. The federal courts are available and able to accomplish substantial justice in Plaintiffs' Securities Act cases.

Having weighed all the factors regarding unconscionability, the Court concludes that the FFP is not unconscionable.

III. Plaintiffs' Entire Action Falls Within the Scope of the FFP

The FFP broadly applies to "***any complaint*** asserting a cause of action arising under the Securities Act of 1993." (See Griffen Decl., Ex. C § VII [emphasis supplied].) Plaintiffs, shareholders bound by the certificate of incorporation, bring Securities Act claims against Uber. By its own terms, the FFP mandates the entire complaint must proceed in the federal district court, including Plaintiffs' claims against the non-signatory Underwriter Defendants. "To hold otherwise would be to permit a plaintiff to sidestep a valid forum selection clause[.]" (*Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1494.)

CONCLUSION

The Court **GRANTS** Defendants' motion to dismiss or stay the action on the basis of inconvenient forum. The Complaint is dismissed in its entirety. The Court vacates the December 9, 2020 hearing on the demurrers without prejudice to the Defendants' re-filing in the district court.

IT IS SO ORDERED.

Dated: November 16, 2020

ANDREW Y.S. CHENG
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, KEITH TOM, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On November 16, 2020, I electronically served the ATTACHED DOCUMENT(S) via File&ServeXpress on the recipients designated on the Transaction Receipt located on the File&ServeXpress website.

Dated: November 16, 2020

T. Michael Yuen, Clerk

By: _____
KEITH TOM, Deputy Clerk