SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

IN RE DROPBOX, INC. SECURITIES LITIGATION

This Document Relates To:

ALL ACTIONS

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

CLASS ACTION

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS BASED UPON FORUM NON CONVENIENS

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

Hearing Date: October 15, 2020

I. INTRODUCTION

The Dropbox Defendants (Dropbox, Inc. and the officer and director defendants) have brought a motion to dismiss for forum non conveniens based primarily on the argument that a recent ruling by the Delaware Supreme Court in *Salzberg v. Sciabacucchi* (Del. 2020) 227 A.3d 102 ("*Salzberg*"), which upheld a federal forum selection clause, should be followed by this Court in dismissing Plaintiff's action. The motion was joined by the Underwriter Defendants and the Sequoia Capital Defendants. Plaintiffs oppose the motion.

There has been substantial briefing on the motion, including briefs by amici curiae, one supporting Defendant and one supporting Plaintiff, and supplemental briefing after my colleague, the Hon. Marie S. Weiner, issued a ruling in *Wong v. Restoration Robotics, Inc.*, San Mateo Superior Court Master File No. 18CIV02609 (Sept. 1, 2020).[1] The Court heard oral argument on October 15, 2020. Then the parties submitted suggested revisions to the Court's tentative ruling and objections to the other sides' suggested revisions.

The Court appreciates the briefing and oral argument by all parties.[2] Unless stated otherwise, reference to arguments made by Defendants include the arguments made by the amicus supporting their position, and references to arguments made by Plaintiffs include the arguments made by the amicus supporting their position.

After reviewing all the briefing, listening to oral argument, and conducting its own legal research and analysis, the Court issues the following order:

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[1] This Court notes that the Dropbox Defendants state that Plaintiffs in this case are represented by the same plaintiffs' counsel as in *Restoration Robotics*. Dropbox Defendants Submission Regarding *Restoration Robotics* Dismissal Order filed October 1, 2020. While there is overlap between the counsel, not all plaintiff's counsel in *Restoration Robotics*, *e.g.*, Cotchett, Pitre & McCarthy LLP, are counsel for Plaintiffs in this case. Further, such overlap is irrelevant. *See Gregg v. Superior Court* (1987) 194 Cal.App.3d 134, 138.

[2] The Court notes that Plaintiffs have cited unpublished California cases. The Court does not rely on any unpublished California cases in reaching its decision. California Rule of Court 8.1115(a).

II. FACTUAL BACKGROUND

This case involves four class actions coordinated before this Court. There is no consolidated complaint, pursuant to the agreement of the parties. There are no material differences between the substantive allegations of the complaints.

Dropbox is incorporated in Delaware with its principal place of business in California. Plaintiffs bring putative class actions on behalf of themselves and all persons who purchased certain Dropbox stock pursuant to a March 23, 2018 Registration Statement issued in connection with Dropbox's initial public offering. The Complaints allege a claim for violation of Section 11 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77k, against all defendants except the Sequoia Capital Defendants and a claim for violation of Section 15 of the Securities Act, 15 U.S.C. § 77k, against the Sequoia Capital Defendants. There are no allegations in any of the complaints about the citizenship or residency of any of the named Plaintiffs or the putative class.

In 2018, before Dropbox became a public company, Dropbox's Board of Directors amended the company's bylaws to include a provision that designated federal district courts as the "exclusive forum" for Securities Act claims. This Federal Forum Provision ("FFP") provides in relevant part:

> 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.

Declaration of Nina F. Locker in Support of Dropbox Defendants' Motion to Dismiss for Forum Non Conveniens filed May 11, 2020, Ex. 2, p. 23. The provision is part of a 23 page Amended and Restated Bylaws, which amended bylaws were attached as an exhibit to the Registration Statement. The Registration Statement also set forth in bold font the FFP in its entirety in a section entitled "Risks Related to Ownership of [Dropbox's] Class A Common Stock" and stated that any person who purchased or acquired Dropbox stock "shall be deemed to have notice and consented" to the provision. Locker Decl., Ex. 1, p. 38, 43-44.

It appears undisputed that corporations started inserting these types of federal forum provisions in light of the decision of the United States Supreme Court in *Cyan, Inc. v. Beaver*

County Employees Retirement Fund (2018) 138 S.Ct. 1061 ("*Cyan*"), which reaffirmed that state courts have concurrent jurisdiction for claims brought under the Securities Act, *i.e.*, the claims that Plaintiffs bring in this lawsuit. No party submitted any evidence to quantify the number of corporations inserting this provision, but they appear to agree that corporations often insert a forum selection provision.

In *Salzberg*, the Delaware Supreme Court upheld a federal forum provision in a company's charter finding that the provision was *facially* valid under the Delaware statute governing contents of certification of incorporation, 8 Del. Code § 101 *et seq.* The court emphasized that it was only addressing the "facial challenge" of the federal forum provision under Delaware corporate law and not its substantive application. *Salzberg*, 227 A.3d at 113.

The Dropbox Defendants argue this Court should uphold the FFP following *Salzberg* and Judge Weiner's decision in *Restoration Robotics*.[3] Plaintiffs argue that the provision is not valid in this California state court for a myriad of reasons.

III. PROCEDURE FOR ENFORCING A FORUM SELECTION CLAUSE

Defendants properly bring a motion to dismiss based upon forum non conveniens to enforce a forum selection clause. *Berg v. MTC Electronics Technologies* (1998) 61 Cal.App.4th 349, 358. This Court uses its discretion[4] to determine whether it should decline to exercise its jurisdiction over a cause of action that it believes may be more appropriately and justly tried elsewhere. *Bushansky v. Soon-Shiong* (2018) 23 Cal.App.5th 1000, 1005, n.2. "[T]he 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."

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[3] *Restoration Robotics* is not precedent. California Rule of Court 8.1115(a). However, that decision appears to be the first decision outside of Delaware to have decided this issue, and this Court appreciates and respects Judge Weiner's analysis.

[4] Even though the Court uses its discretion in determining whether to grant a motion to dismiss or stay for forum non conveniens, that discretion is limited. "Although not even a 'mandatory' forum selection clause can completely eliminate a court's discretion to make appropriate rulings regarding choice of forum, the modern trend is to enforce mandatory forum selection clauses unless they are unfair or unreasonable." *Berg*, 61 Cal.App.4th at 358; see also *Drulias v. 1st Century Bancshares, Inc.* (2018) 30 Cal.App.5th 696, 703, 709, review denied (Mar. 20, 2019); *Bushansky*, 23 Cal.App.5th at 1011.

Berg, 61 Cal.App.4th at 358. "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*, 30 Cal.App.5th at 703 (citations and internal quotations and some grammar omitted).

IV. ANALYSIS

A. This Court Reaches the Same Conclusion Under Both California and Delaware Law

The parties dispute whether California law, which Plaintiffs say controls, or Delaware law, which Defendants say controls, applies in this motion. If Delaware law applies, then this Court must follow *Salzberg* in determining whether the FFP is valid. See 9 Witkin, *California Procedure*, 5th Appeal § 504 (2020) ("When a question arises in the courts of this state as to the construction or effect of a statute of another state, our courts will follow the interpretation placed upon such statute by the court of last resort of the enacting state." (citations omitted)). This Court would still determine whether the clause is unfair or unreasonable.

Under both California and Delaware, if the issue involves the internal affairs of Dropbox, Delaware law applies. *Lidow v. Superior Court* (2012) 206 Cal.App.4th 351, 358; *Vaughn v. LJ Internat., Inc.* (2009) 174 Cal.App.4th 213, 223. In *Salzberg*, the Delaware Supreme Court explained that the scope of Delaware's enabling statute permits Delaware corporations to adopt charter provisions that involve subject matters beyond internal affairs claims that are "neither 'external' nor 'internal affairs' claims" but instead involve subject matters that "are in-between in what might be called Section 102(b)(1)'s 'Outer Band,' . . ." *Salzberg*, 227 A.3d at 130. The Delaware Supreme Court further explained that the subject matter of FFPs—that is, claims under the Securities Act of 1933—are intra-corporate claims that fall within the "Outer Band." *Id.* No California appellate court has analyzed an "Outer Band" provision.

This Court analyzes the motion under California and applicable federal law to see whether a conflict of laws issue arises. The Court concludes that it does not need to decide whether *Salzberg*

should control its decision because it grants the motion under California and United States Supreme Court authority.

B. A Shareholder May Waive the Right to Litigate Securities Act Claims in a California State Court

Plaintiffs claim that they have an absolute right to bring these actions in a California state court under the holding of *Cyan* and the anti-waiver provisions of the Securities Act, 15 U.S.C. § 77n. Defendants claim that shareholders can agree to litigate their Securities Act claims in federal court.

The United States Supreme Court in *Cyan* was unequivocal in reaffirming that federal and state courts have concurrent jurisdiction over Securities Act claims. But no precedential authority has decided the precise issue presented in this action. The *Cyan* court did not address the issue of whether the anti-waiver statute of 15 U.S.C. § 77n was waivable by private parties pre-litigation.

Defendants rely on an arbitration case decided by the United States Supreme Court in *Rodriguez de Quijas v. Shearson/American Exp., Inc.* (1989) 490 U.S. 477. Defendants argue that this decision squarely addressed the issue presented here. The Court finds *Rodriguez* controlling, but disagrees that the decision squarely addresses the issue. The *Rodriguez* Court determined the issue of waiver in the arbitration context rather than between state and federal court. The *Rodriguez* Court held that stockholders could waive the right to bring Securities Act claims in court and agree to arbitrate their claims. In so holding, the United States Supreme Court expressly found that the Securities Act's provision conferring concurrent state court jurisdiction without the possibility of removal was a procedural provision that was not critical to protect the complainant's substantive rights and, therefore, did not implicate the anti-waiver provision:

> Once 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 [the Securities Act's antiwaiver provision] is properly construed to bar any waiver of these provisions.* Nor are they so critical that they cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers. *Wilko* [*v. Swan* (1953) 346 U.S. 427] identified two different kinds of provisions in the Securities Act that would advance this objective. Some are substantive, such as the provision placing on the seller the burden of proving lack of scienter when a buyer alleges fraud. Others are procedural. *The specific procedural improvements highlighted in Wilko are . . . the grant of concurrent jurisdiction in the state and federal courts without the possibility of removal.*

> *There is no sound basis for construing the prohibition in [the Securities Act's anti-waiver provision] on waiving "compliance with any provision" of the Securities Act to apply to these procedural provisions.*

Rodriguez, 490 U.S. at 481-82 (emphasis added).

The analysis in *Rodriguez* compels a conclusion in this context that a party may waive the right to have an action decided in state court and instead may agree to have cases decided exclusively in federal court. The analysis in *Rodriguez* regarding arbitration applies to this FFP. The federal forum will allow the same substantive claims and remedies as the state court and federal courts have expertise in handling securities matters; for some claims, federal courts have exclusive jurisdiction. As in *Rodriguez*, there is no sound basis here for construing the prohibitions and the anti-waiver provision of the Securities Act to apply to the procedural selection of a state versus federal forum.

Plaintiffs attempt to limit *Rodriguez* to arbitration cases and argue that *Rodriguez* overruled *Wilko* "only to the extent that the Federal Arbitration Act ("FAA") conflicts with § 14 of the 1933 Act in the context of international agreements." Plaintiffs Opposition filed June 10, 2020 at 21:14-16. Plaintiffs also argue that any holding beyond the specific holding is dicta. *Id.* at 21:10-14. First, this Court does not read *Rodriguez* to be as limiting as Plaintiffs contend. Second, even if dicta, a conclusion with which the Court disagrees, "dicta are often followed" and "may nevertheless be considered highly persuasive. . ." 9 Witkin, *California Procedure*, Appeal § 511 (5th ed. 2020).[5]

Plaintiffs contend that *Wilko* is still good law and is cited by California courts. The Court disagrees. First, *Rodriguez* reversed *Wilko*. "We now conclude that *Wilko* was incorrectly decided

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[5] At the hearing on this motion, Plaintiffs' counsel stated that *Rodriguez* involved a "bilateral" agreement and argued that distinguishes *Rodriguez* from this case. However, the arbitration clause in *Rodriguez* was neither bilateral nor freely negotiated; it was contained in a non-negotiated form brokerage agreement, *i.e.*, a contract of adhesion. *Rodriguez*, 490 U.S. at 478 (petitioners "signed a standard customer agreement with the broker"); see also Daniel J. Morrissey, Will Arbitration End Securities Litigation?, 40 No. 2 *Sec. Reg. L. J. Art.* 2 (Summer 2012) (noting that the provisions at issue in *Rodriguez* "were presented to [customers] in a take-it-or-leave contract which they had to sign to open accounts with their stockbroker."). California law does not require forum selection clauses to be freely negotiated. See *Drulias*, 30 Cal.App.5th at 707-708 ("neither California nor Delaware law requires forum selection clauses to be freely negotiated to be enforceable")

and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions." *Rodriguez*, 490 U.S. at 484; *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 155, n. 4. Further, 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. Lastly, none of the cases relied upon by Plaintiffs involve the waiver of a Securities Act claim, and some of their cases are not citable.

One of Plaintiffs' cases, *Verdugo v. Alliantgroup,* 237 Cal.App.4th at 154 (a wage and hour case) relies on *Hall v. Superior Court* (1983) 150 Cal.App.3d 411, 418 which relied on *Wilko. Verdugo*, 237 Cal.App.4th at 155. The Court finds *Hall* instructive. *Hall* involved an issue of first impression of whether a choice of forum provision in a private California securities agreement was enforceable. *Id.* at 413. The *Hall* case did not involve an arbitration clause. Nevertheless, the *Hall* court, in resolving the securities question, referred to *Wilko* as holding that "a similar nonwaiver provision, section 14 of the federal Securities Act (15 U.S.C. § 77n) prohibits enforcement of agreements to arbitrate contained in securities transactions." *Hall*, 150 Cal.App.3d at 418 (citing *Wilko*, 346 U.S. at 435-36). The *Hall* court held the forum provision unenforceable. Since that decision, *Rodriquez* has overruled *Wilko* and is the precedential authority. The Court finds *Hall* analogous to the issues raised in Defendants' motion. As *Hall* followed and applied *Wilko* to determine the enforceability of a choice of forum provision, this Court applies *Rodriguez* and holds that a party can waive a forum selection clause in a Securities Act case.

The Court's conclusion is supported by California law upholding forum selection clauses (albeit not involving Securities Act claims).

Defendants cite, but Plaintiffs do not even mention, *Korman v. Princess Cruise Lines, Ltd.* (2019) 32 Cal.App.5th 206. *Korman* involved an injury on a cruise ship. *Id.* at 210. Both the federal and state court had jurisdiction over the claims, which involved maritime law. *Id.* at 215. 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 210. Both the trial court and appellate court upheld the forum selection clause and rejected the plaintiff's argument that the

forum selection clause unfairly deprives California state courts from hearing the matter. *Id.* at 221-222.

> While it is true that the parties may not deprive courts of their jurisdiction over causes by private agreement, it is readily apparent that courts possess discretion to decline to exercise jurisdiction in recognition of the parties' free and voluntary choice of a different forum. The forum selection clause does 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 221-22 (citations and quotations omitted).[6]

The Court of Appeal in *Bushansky* also upheld a forum selection provision. In *Bushansky*, shareholders brought a derivative action against a corporation's directors and officers for breach of fiduciary duty. Defendants brought a motion to dismiss based on forum non conveniens arguing that a forum selection clause gave the Delaware Chancery Court exclusive jurisdiction over derivative suits. The trial court granted the motion and the Court of Appeal affirmed. As with *Korman,* the Court of Appeal found that "the enforcement of forum selection clauses stems from courts' discretion to decline to exercise jurisdiction in recognition of the parties' free and voluntary choice of a different forum. Here, we say merely that a court properly declines to exercise jurisdiction based on a contractual forum selection clause like this one when consent to jurisdiction in the alternate forum is provided within a reasonable period of time." 23 Cal.App.5th at 1010-11 (citation and internal quotation omitted). Similarly, the Court of Appeal upheld a Delaware forum selection clause in *Drulias*, 30 Cal.App.5th at 696. While the case involved the internal affairs doctrine, so that Delaware law applied to the analysis, the case is instructive. The Court rejected the plaintiffs' argument that Corporations Code § 2116 gave California shareholders the right to sue directors of foreign corporations for misconduct in California. *Id.* at 706-07.

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6 Notably, the forum selection provision that was enforced in *Korman* was found in a cruise ship passage contract, *i.e.*, a non-negotiated contract of adhesion. *Id.* at 210, 217 (citing *Carnival Cruise Lines, Inc. v. Shute* (1991) 499 U.S. 585, 593-95). In addition, the chosen forum in *Korman* was far more limiting than that chosen in Dropbox's FFP; the *Korman* provision required that all claims be brought in the Central District of California, whereas Dropbox's FFP selects *any* suitable federal court for Securities Act claims.

Plaintiffs rightfully point out that both *Drulias* and *Bushansky* involve internal affairs governed by Delaware law. The Court takes that distinction into account in its reliance on the cases. These cases though demonstrate a California policy towards upholding provisions that regulate where shareholders can bring suit. None of these cases accept Plaintiffs' arguments that the cases should be adjudicated in a California state court.

In *Pong v. American Capital Holdings, Inc.* (E.D. Cal. Feb. 28, 2007, No. CIV. S-06-2527 LKK/DAD) 2007 WL 657790, which is not binding on this Court, but persuasive, the Hon. Lawrence K. Karlton, analyzed whether the plaintiffs could waive the "anti-waiver" statutes in California Corporations Code § 25701, which applies to offers to sell or buy securities in California. Finding no state authority on point, Judge Karlton performed a survey of cases under the federal anti-waiver language in the Securities Act of 1933 and the Securities Exchange Act of 1934 before concluding: "Together, these cases reflect a trend: Federal courts have increasingly enforced private stipulations in securities fraud litigation, despite the antiwaiver provisions of the federal securities laws." *Id.* at *6-7 (internal citations, quotations and some grammar omitted).

Plaintiffs also rely on *Cyan* to establish their right to remain in state court. However, *Cyan* did not address the issue of whether a shareholder could waive that right at the time it entered into the relationship with the corporation. The opinion only addressed whether a corporation could remove a Securities Act case to federal court once a shareholder had filed in state court. That issue is different from the one presented here on whether the corporation can insist as a condition of purchasing stock that the shareholder agree to litigate in a federal forum.

At the hearing, Plaintiffs explained that they were not arguing that parties to a fully negotiated, bilateral agreement could not agree to a forum selection provision designating federal courts for Securities Act claims. Rather, Plaintiffs argue that the Securities Act's antiremoval provision is so "unusual" that it necessarily reflects congressional intent to prohibit potential defendants in Securities Act cases from unilaterally requiring claims to proceed in federal court. No party has provided the Court with any case law, legislative history, or other evidence regarding

the legislative intent of the antiremoval provision of the Securities Act.[7] Thus, this Court does not have the benefit of any legislative intent to guide its analysis. Plaintiffs provide no authority requiring this Court to analyze this statute any differently than any other statute. *Rodriguez* provides the proper analytical framework here.

During the hearing, Plaintiffs identified two decisions to support their argument that the FFP violates federal law. The Court does not find these decisions instructive because they were decided before the United States Supreme Court's decision in *Cyan* and before the Delaware Supreme Court's decision in *Salzberg* and are factually different. *Iuso v. Snap, Inc.* (C.D. Cal. Nov. 21, 2018, No. 17-cv-7176-VAP-RAO) 2017 WL 10410800, was premised on a finding that no Delaware authority supported the validity of FFPs. *See id.* at *4. In light of *Salzberg*, *Iuso* provides no assistance to this Court for the resolution of the question now pending before this Court. The second decision, *Clayton v. Tintri, Inc.* (N.D. Cal. Oct. 30, 2017, No. 17-cv-05683-YGR) 2017 WL 4876517 involved no meaningful discussion or analysis of the FFP at issue. It did not, for example, consider *Rodriguez* or its progeny, or the increasing trend of enforcing forum selection provisions. *Id.* at *3-4. *Clayton*'s lack of meaningful analysis makes sense given the procedural posture of that action. There, the defendants had improperly removed the Securities Act claims to federal court rather than seeking to enforce the FFP through the proper procedure, *i.e.*, a forum non conveniens motion in California state court. *Id.* at *1, 5. Therefore, the federal court did not need to give serious consideration to the validity of the FFP in order to properly remand the action under the Securities Act's antiremoval provision.

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[7] The only argument regarding legislative history in the parties' papers is a single footnote in the amicus brief submitted on Plaintiffs' behalf, which cites to a 1981 academic article by Professor Hazen. *See* 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 ("Plaintiffs' Amicus") at 12 n.4 (citing Thomas Lee Hazen, *Allocation of Jurisdiction Between the State and Federal Courts For Private Remedies Under the Federal Securities Laws*, 60 N.C. L. Rev. 707, 741-42 (1981), https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=2852&context=nclr). However, Professor Hazen's article does not support Plaintiffs' arguments regarding congressional intent; to the contrary, he concludes that "[t]here is no evidence in the legislative history as to what Congress had in mind when it drafted [the Securities Act's antiremoval provision]." Hazen, 60 N.C. L. Rev. 707 at 741.

Accordingly, this Court concludes that Plaintiffs in this case may waive their right to have their Securities Act cases adjudicated in state court. That conclusion does not end the inquiry. The Court must next determine whether "application of the clause is unfair or unreasonable." *Berg*, 61 Cal.App.4th at 358. If there is an unwaivable right, Defendants must show that the contractually-designated forum will not diminish Plaintiffs' rights under California law. *Drulias*, 30 Cal.App.5th at 703.

C. Plaintiffs Do Not Meet Their Burden to Demonstrate that the FFP Is Unfair or Unreasonable

Since the Court finds that Plaintiffs may waive having their Securities Act claims heard in this California state court, they have the burden to demonstrate that the FFP is unfair or unreasonable. The case does not involve any California laws; the actions are brought exclusively under federal law. Both *Drulias*, 30 Cal.App.5th at 696 and *Verdugo*, 237 Cal.App.4th at 144 hold that the unwaivable right must be declared by the California Legislature in California statutes. In this case, there is no California statute at issue. Accordingly, there is no unwaivable right under California law that the Court must consider. Even if the Court were to find that Defendant has the burden, as discussed below, there are no facts to demonstrate that the federal courts will diminish Plaintiffs' substantive rights.

D. By Purchasing the Stock, Plaintiffs Agreed to the FFP In the Bylaws[8]

Plaintiffs claim that the Dropbox Defendants must prove assent (the amicus discuss all elements of contract formation).[9] Plaintiffs state: "No ordinary investor had any reason to expect

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[8] In *In re Sonim Technologies, Inc. Securities Litigation*, Lead Case No. 19CIV05564, where the parties have deferred to the arguments made in this case, the federal forum provision is in Sonim's charter. This Court finds the same law applies to a charter as to a bylaw.

[9] The amicus who support Plaintiffs' position presume that all Plaintiffs are California stockholders. Amicus Brief in Support of Opposition at 18:15 ("Where California residents. . . "); 19:21-22 ("They arise from securities purchases in California. . . "). These actions, however, are brought on behalf of all Dropbox shareholders and there has not been, and probably cannot be, any showing that all shareholders are California residents.

to be bound by a Grundfest [FFP] clause." Opposition at 17:14 (brackets added). Plaintiffs' argument appears to focus on each individual shareholder's assent. None of the cases cited by Plaintiffs on assent pertains to shareholders purchasing on a national exchange. The fact that a forum selection clause is not negotiable does not mean that it is unreasonable and it is Plaintiffs' burden to demonstrate that the provision was outside their reasonable expectations. *Korman*, 32 Cal.App.5th at 216-17; *Drulias*, 30 Cal.App.5th at 707-08.[10] The Amended Bylaws and Registration inform shareholders of this provision. Plaintiffs introduce no evidence, as is their burden, to demonstrate that this clause is unexpected or unreasonable. Thus, they fail to meet their burden.

Defendants rely on the language in the Registration Statement that everyone who purchased Dropbox stock shall be deemed to have notice and consented to the provision (Locker Decl., Ex. 1, p. 43) and the law that Bylaws are binding on shareholders.

This Court concludes that when Plaintiffs acquired their shares, their purchases were subject to the Dropbox Bylaws and they assented to the FFP. See *Edgar v. MITE Corp.* (1982) 457 U.S. 624, 645; *McFadden v. Board of Los Angeles County Sup'rs* (1888) 74 Cal. 571; *Drulias*, 30 Cal.App.5th at 708; *State Farm Mutual Automobile Ins. Co. v. Superior Court* (2003) 114 Cal.App.4th 434, 444; *Tu-Vu Drive-In Corp. v. Ashkins* (1964) 61 Cal.2d 283, 288; *Supreme Lodge of Fraternal Brotherhood v. Price* (1915) 27 Cal.App. 607, 616; 9 Witkin, *Summary of California Law*, Corporations § 163 (11th ed. 2020). Any other conclusion would mean that a court in a class action might have to apply up to 50 different state laws in deciding any shareholder's case. Such a requirement would be impractical, contrary to the efficient operation of national exchanges, and preclude class action treatment of these cases. *State Farm*, 114 Cal.App.4th at 443.

10 In *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, the California Supreme Court held that a contractual forum selection clause was enforceable when negotiated at arm's length between two corporations. Court of Appeal cases following *Smith* have expanded that holding to agreements where the provision has not been negotiated.

E. The Clause Is Not Unlawful or Unenforceable under California law

Plaintiffs claim that the FFP is unlawful under California law. Their argument is that the FFP directly contradicts the antiwaiver provisions in the Securities Act. The Court has already rejected that argument. For the same reasons, the FFP is not unenforceable and this Court may decline to exercise jurisdiction.

F. Enforcement of the FFP Is Not Unconscionable

Since Plaintiffs separately, in their written submissions, raise the issue of unconscionability, the Court, although it does not find it necessary to rule on this motion, analyzes whether the provision is unconscionable. Plaintiff has the burden to demonstrate unconscionability. *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.

Unconscionability has both a procedural and substantive element, and both must be found in order for a court to exercise its discretion to refuse to enforce a contract or clause based on unconscionability. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. Procedural unconscionability looks at the process surrounding the contract formation, and focuses on "oppression" or "surprise" due to unequal bargaining power. *Id.* at 124. Substantive unconscionability applies such that even if a contract or provision is consistent with the reasonable expectations of the parties, the contract or provision will not be enforced if it is "overly harsh" or has "one-sided" results. *Id.* Although both procedural and substantive unconscionability must be found, they need not be present in the same degree. *Id.* Unconscionability turns not only on a one-sided result, but also on an absence of justification for it. *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1532 (cited *by Armendariz*, 24 Cal.4th at 118). The Court uses a sliding scale analysis to determine unconscionability. "The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree. Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves. In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is

required to come to the conclusion that the term is unenforceable, and vice versa." *Armendariz*, 24 Cal.4th at 114 (bracketed material in original; citations and internal quotations omitted).

The fact that a contract is one of adhesion does not automatically lead to the conclusion that the contract is unconscionable, but does establish some degree of procedural unconscionability. *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 915; see also *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1245. The Court finds that the FFP contains some procedural unconscionability. It was drafted by Dropbox, presented on a-take-it-or-leave it basis, and only applies to Securities Act claims. The provision, however, is in both the Bylaws (a 23-page document) and Under the Risks Related to Ownership section, with the provision highlighted. Locker Decl., Ex. 1 at 43; Ex. 2 at p. 23.

The Court then turns to substantive unconscionability. As discussed above, Plaintiffs have failed to meet their burden that the fact that the clause was not negotiated makes it unfair or unreasonable. *Korman*, 32 Cal.App.5th at 216-17; *Drulias*, 30 Cal.App.5th at 708. Plaintiffs fail to introduce any evidence that the FFP was outside their reasonable expectations. They fail to show that it is unusual or surprising that a federal Securities Act claim would be litigated in federal court. They also fail to show that they did not have a meaningful choice of a reasonably available alternative investment. *See Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1320 (upholding arbitration agreement when plaintiff failed to show he did not have meaningful choice of reasonably available sources of employment).

The Court does not find the FPP substantively unconscionable. While the provision is one-sided, only dealing with Securities Acts claims, this Court believes that the provision must be analyzed in context. Federal courts are courts of limited jurisdiction and the parties cannot agree to federal jurisdiction where none exists. *Janakes v. U.S. Postal Service* (9th Cir. 1985) 768 F.2d 1091, 1095 ("parties cannot by stipulation or waiver grant or deny federal subject matter jurisdiction. (Citations).") Federal courts have jurisdiction over Securities Act claims, but may not have jurisdiction over other claims that the parties might bring. The Dropbox Defendants provide a legitimate business need to support the FFP: they want to be "able to avoid the unnecessary costs and burden of defending multiple cases simultaneously in both state and federal courts and the

possibility of inconsistent judgments and rulings." Dropbox Defendants' Motion to Dismiss at 15:21-23; *see Baltazar*, 62 Cal.4th at 1250.

Most importantly, the FFP provides that Plaintiffs can file in any federal court, which is broader than the provision in *Korman*, 32 Cal.App.5th at 206, which limited venue to the Central District of California. Unlike arbitration clauses, the FFP does not take away the right to discovery, jury trial or appeal. There cannot be any doubt that federal courts have the expertise, ability and excellent judges, such as the Hon. Beth Freeman, formerly of this Court, who is presiding over the federal Dropbox cases. While Plaintiffs point out differences between federal and state courts, they cannot seriously be arguing that federal courts cannot fairly and efficiently handle these cases or that they cannot obtain justice in a federal court. The federal court can provide efficiencies of coordination through the Panel on Multidistrict Litigation, which are not possible if cases are filed in state court.[11] Plaintiffs have failed to demonstrate and could not demonstrate that they will lose substantive rights if these federal claims are litigated in federal court.

Thus, weighing on a sliding scale all the factors regarding unconscionability and applying them to the facts of this case, the Court concludes that the FFP is not unconscionable.

G. Plaintiffs Have Failed to Prove a Constitutional Violation

Plaintiffs also attack the FFP on constitutional grounds, *i.e.*, on the basis that the FFP violates the Commerce Clause and Supremacy Clause. Plaintiffs only attack the FFP, which are always adopted by private parties. For the same reasons that the Court found that *Rodriguez* allowed the FFP and *Cyan* did not forbid it, Plaintiffs' constitutional arguments fail because there is no conflict between the FFP and federal law.

V. ORDER

For these reasons, the Court GRANTS the Dropbox Defendants' motion to dismiss. At the hearing, both parties stated that if the Court granted the Dropbox Defendants' motion, they wanted the Court to dismiss, rather than stay, the action. The Court therefore dismisses this action.

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[11] This Court does endorse cooperation between state and federal cases under the proper circumstances. Here, since there appears to be complete overlap with the federal case and no state law claims, this Court believes that parallel actions would be inefficient and unnecessary.

The Court does not reach the substantive arguments of the Defendants who joined this motion. Instead, using its discretion after analyzing all the facts, the Court also dismisses the action on the grounds of economy and efficiency.

IT IS SO ORDERED.

Dated: December 4, 2020

HONORABLE NANCY L. FINEMAN
SUPERIOR COURT JUDGE