SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART

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DONALD HOOK,

Plaintiff,

- v -

CASA SYSTEMS, INC.,WEIDONG CHEN, LUCY XIE, JOE TIBBETTS, BILL STYSLINGER, BRUCE EVANS, GARY HALL, JERRY GUO, MORGAN STANLEY & CO. LLC,MACQUARIE CAPITAL (USA) INC.,BARCLAYS CAPITAL INC.,STIFEL, NICOLAUS & COMPANY, INCORPORATED, WILLIAM BLAIR & CO. L.L.C., RAYMOND JAMES & ASSOCIATES, INC.,NORTHLAND SECURITIES, INC, SUMMIT PARTNERS PRIVATE EQUITY FUND VII-A, L.P., SUMMIT PARTNERS PRIVATE EQUITY FUND VII-B, L.P., SUMMIT INVESTORS I, LLC,SUMMIT INVESTORS I (UK), L.P., SUMMIT PARTNERS, L.P.

Defendant.

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INDEX NO. 654548/2019

MOTION DATE _____

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

HON. : MARGARET CHAN

The following e-filed documents, listed by NYSCEF document number (Motion 001) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 81, 82, 83, 84, 88, 90, 91, 92, 98, 99, 100, 101, 103, 104, 105, 106, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 69, 70, 71, 72, 73, 93, 94, 95, 120

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 85, 89, 121

were read on this motion to/for DISMISS.

Defendant Casa Systems, Inc. (Casa) is a global communications technology company – specifically, a cable industry broadband service provider – that is incorporated in Delaware and has its only American office in Andover, Massachusetts. On December 15, 2017, Casa had its initial public stock offering ("IPO") trading on the NASDAQ in New York under the ticker symbol "CASA" and plaintiff Donald Hook then purchased shares of Casa's common stock. In August 2018, Casa's stocks plummeted, which caused plaintiff to sustain damages.

Consequently, plaintiff brings suit against defendants, individually and on behalf of all others similarly situated, under sections 11 and 15 of the Securities Act of 1933.

This decision addresses defendants' three separate motions to dismiss. Motion sequence (MS) 001 is by Casa and its executives and board members[1] (collectively, the "Casa defendants"); MS 002 is by the financial services companies[2] that acted as underwriters for the IPO (the Underwriter defendants); and MS 003 is by the Summit entities[3] (the "Summit defendants"). Plaintiff opposes all three motions in one memorandum of law (NYSCEF # 81); defendants reply, plaintiff sur-replies, and defendants sur-sur reply.

BACKGROUND

The gist of plaintiff's grievances is that Casa sold seven million shares of Casa stock without informing the class and omitting from its SEC filings in violation of Securities Act of 1933 that Casa would go through a recurring "digestion period" where Casa's core customers stop buying Casa's products while newer technology is adapted (NYSCEF # 43 – Amended Complaint, ¶ 9). Plaintiff alleges that the investors learned about Casa's digestion period on August 14, 2018, when defendant Jerry Guo, Casa's President and Chief Executive Officer, admitted that "Casa was 'currently in [a] digestion phase,' . . . [and] [u]ltimately, this was going to 'create a softening in our cable segment for the remainder of 2018'" (*id.*, ¶ 10). The next day, Casa's stock dropped more than 22%, which according to plaintiff was "$.92 per share lower than the IPO price" (*id.*, ¶ 11). By the time plaintiff commenced this lawsuit, Casa's stocks dropped to $6.95, almost half the IPO price of $13.00 (*id.*, ¶ 14).

Plaintiff's Amended Complaint asserts causes of action under: (1) Section 11 of the Securities Act against Casa, the Casa defendants and the Underwriter defendants for their participation in issuing the Registration Statement; and (2) Section 15 of the Securities Act against the Casa defendants and the Summit defendants for their control of the company. Plaintiff also sees certification of this class action; appointing plaintiff as Class Representative; and Berstein Liebhard LLP and Thornton Law Firm LLP as Class Counsel.

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[1] The Casa defendants are Weidong Chen, Lucy Xie, Joseph S. Tibbetts, Jr., William Styslinger, Bruce R. Evans, Gary D. Hall, and Jerry Guo.

[2] The Underwriter defendants are Morgan Stanley & Co., LLC; Barclays Capital Inc.; Raymond James & Associates, Inc.; Macquarie Capital (USA), Inc.; Northland Securities, Inc.; William Blair & Co. LLC; and Stifel, Nicolaus & Co., Inc.

[3] The Summit defendants are Summit Partners Private Equity Fund VII-A, L.P.; Summit Partners Private Equity Fund VII-B, L.P.; Summit Investors I, LLC; Summit Investors I (UK), L.P.; and Summit Partners, L.P.

In opposition, defendants proffer several grounds on which plaintiffs' complaint is dismissible including the existence of two cases[4] against Casa and co-defendants filed in Massachusetts Superior Court prior to the instant case. Both cases, which were subsequently consolidated, alleged violations of Sections 11, 12, and 15 of the Securities Act.

Aside from judicial economy, defendants argue that this case should be brought in Massachusetts under CPLR 327(a) inconvenient forum grounds as Casa's only North American office is in Massachusetts, and the Casa defendants either reside in, commute to, or consented to the jurisdiction of Massachusetts By letter dated February 2, 2021 (NYSCEF # 107), and at oral argument held on August 12, 2021 (NYSCEF # 123), defendants informed that during the pendency of these motions, the complaints in the consolidated cases against Casa in the Massachusetts Superior Court were dismissed by Order dated January 11, 2020 (NYSCEF # 107).

Another development during the pendency of these three motions is the Delaware Supreme Court's decision which reversed the Chancery Court and held that a federal forum provision ("FFP") is valid and effective as a matter of Delaware corporate law (*Salzberg v Sciabacucchi,* 227 A3d 102 [Del. 2020]). Casa's corporate charter contains an FFP which provides that:

> Unless the Corporation consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall, to the fullest extent permitted by law, be the sole and exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring or holding any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to [this provision].

(NYSCEF # 92,at 10).

Defendants argue that *Salzberg* applies here and urges this court to likewise find Casa's FFP valid and effective. Defendants also continue their opposition arguing that plaintiff's complaint is also dismissible as it is barred by the Private Securities Litigation Reform Act ("PSLRA"), which was enacted to prevent stock-drop "strike suit" like this suit (NYSCEF # 50 at 7). Defendants claim that plaintiff seeks to hold defendants responsible for the entire industry's downturn a year after Casa's IPO (*id.*).

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[4] *Shen v Chen, Casa Systems, et. al.*, No. 1977-CV-00787B (Mass Super Ct, filed 5/29/19) and *Baig v Chen, Casa Systems, et. al.*, No. 1977-CV-00961C (Mass Super Ct, filed 7/3/19) (NYSCEF #50 at 3-4 referring to NYSCEF ## 51-53).

DISCUSSION

Whether the holding by the Supreme Court of Delaware in *Salzberg*, should be applied to the present matter will be addressed first. In *Salzberg*, the shareholder bought shares in three Delaware corporations. Each of these corporations had a FFP in their respective charters that required suits brought under the federal Securities Act of 1933 be filed in a federal court[5] (*Salzberg,* 227 A3d at 109). The *Salzberg* Court not only found the FFPs are facially valid and effective but also that FFPs are not violative of federal law or policy (citing *Matchshita Electric Industrial Co. v Epstein*, 516 US 367, 377, 382 [1996]) (*id.* at 133 ["the United States Supreme Court held that Delaware courts can settle claims subject to exclusive federal jurisdiction without violating federal law or policy."]).

The *Salzberg* Court also addressed what it considered the "most difficult" question of whether the validity of FFPs "will be respected and enforced by our sister states." (*id.* at 133). In answering yes, the Salzberg Court reasoned that FFPs are contractual items in corporate charters and, as such, they are viewed as contracts between the corporations and their shareholders (*id.* at 135). Thus, when FFPs are otherwise facially valid, the party seeking to avoid enforcement of an FFP provision bears the burden of establishing that enforcement would be unreasonable (*id.*). The court noted that sister states could find FFP's invalid in the event that their enforcement would be "'unreasonable and unjust'" or would "'contravene[] a strong public policy of the forum where the suit is brought'" (*id.*).

Plaintiff argues that the FFP should not be enforced because defendants first sought to dismiss based on the FFP in reply, and that the statute of repose has expired on his federal claims. Additionally, plaintiff argues that applying Delaware precedent in this court would disregard New York's interest in this action including in enforcing securities laws in this state.

With regard to whether this court should follow the holding in *Salzberg*, regarding the facial validity of the FFP, it is noted that the issues of internal corporate governance are determined by the law Delaware as the state where Casa is chartered (*Hart v Gen. Motors Corp*, 129 AD2d 179, 182 [1st Dept], *appeal denied* 70 NY2d 608 [1987]). In addition, to the extent it can be argued that the issue of the validity of the FFP in this securities litigation does not concern the internal affairs of the corporation,[6] the application of New York law would not result in a different

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[5] The FFP in Casa's charter is identical to one of the forum selection provisions upheld in *Salzberg* (*Salzberg*, 227 A3d at 112).

[6] In this connection, the *Salzberg* Court found that while that FFP's do not fall within the "traditional realm of 'internal affairs'" as they concern "internal" or "intracorporate" matters they are subject to, and valid under, Delaware General Corporation Law ("DGCL"), which governs certificates of incorporation (227 A3d at 131-132).

outcome. Under New York law, forum selection clauses are "prima facie valid unless shown by the resisting party to be unreasonable" (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996] [internal citations omitted]). New York's policy favoring enforcement of forum selection clauses is based on recognition that such clauses "provide certainty and predictability in the resolution of disputes" (*id.*; *see also Boss v American Express Financial Advisors*, 6 NY3d 246, 24 [2006]).

Thus, a forum selection clause "will not be set aside unless a party demonstrates that the enforcement of such 'would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that the trial in the contractual forum would be gravely difficult and inconvenient that the challenging party would be deprived of their day in court'" (*Sterling National Bank v Eastern Shipping Worldwide, Inc.,* 35 AD3d 222, 222 [1st Dept 2006], quoting *British West Indies Guaranty Trust Co. v Banque Internationale A Luxembourg,* 172 AD2d 234, 234 [1st Dept 1991]*; see also Lischinskaya v Carnival Corp.*, 56 AD3d 116 [2d Dept 2008], *aff'd* 12 NY3d 716 [2009][the discretionary factors considered in the forum non conveniens analysis under CPLR 327 are inapplicable to enforcement of a forum selection clause]).

Under these principles, the FFP is enforceable. First, as the decision of the Delaware Supreme Court in *Salzberg* altered the law regarding the validity of FFP's in Delaware corporate charters and was decided subsequent to the submission of defendants' dismissal motions, defendants were permitted to raise the decision for the first time in reply (*Held v Kaufman*, 91 NY2d 425, 430 [1998] [additional grounds for dismissal raised in reply "did not violate single motion rule where arguments could not have been submitted at an earlier juncture"]). Moreover, *Salzberg* was decided on March 18, 2020, and defendants' reply was efiled on May 26, 2020, or approximately two months later so that it cannot be said that defendants unreasonably delayed in raising the argument. In addition, as plaintiff was permitted to file, and the court considered, plaintiff's sur-reply in response to defendants' reply, as well as case law supporting its position, and oral argument was also held, plaintiff was not prejudiced by defendants seeking dismissal based on the FFP in reply (*id.,* at 430 [argument raised in reply was not prejudicial as plaintiff was given an opportunity to respond]; *Pizarro v Dennis James Boyle, Inc.*, 180 AD3d 596, 596 [1st Dept 2020][finding that motion court was within its discretion in considering arguments raised for the first time in reply papers where opposing party had an opportunity to respond]).

As to plaintiff's argument that enforcement of the FFP is unreasonable and unjust since any federal action would now be untimely, the court notes that it is undisputed that the statute of repose did not expire until December 2020 (NYSCEF # 123 - Oral Argument Tr. at 27), which is approximately nine months after the issuance of *Salzberg* and seven months after defendants raised the argument as to the FFP in their reply. However, during that period plaintiff failed to file an action

in federal court. Accordingly, the expiration of the statute of repose does not warrant the setting aside of the FFP (*see e.g., Boss v. American Express Financial Advisors*, 15 AD3d 306, 308 [1st Dept 2005], *aff'd* 6 NY3d 242 [2006][enforcing forum selection clause in employment agreement even though statute of limitations in forum specified in agreement had expired]).[7]

Next, contrary to plaintiff's position the documentary evidence, and in particular, the Casa corporate charter containing the FFP, establishes that plaintiff, as a shareholder, agreed to the federal forum. Nor does plaintiff's argument that Casa' forum selection clause does not apply to as to defendants Summit Partner Defendants and Underwriter defendants which were not parties to the corporate contract containing the FFP, since under both Delaware and New York law, non-signatories may be bound by or enforce a forum selection clause (See, e.g., *Lexington Servs. Ltd. v. U.S. Patent No. 8019807 Delegate, LLC*, 2018 WL 5310261, at *5 [Del Ch Oct. 26, 2018]; *Pegasus Strategic Partners, LLC v. Stroden*, 2016 WL 3386980, at *3 [NY Sup Ct June 20, 2016]). In any event, the language of the FFP applies to any complaint asserting a cause of action arising under the Securities Act, including as against non-signatories.

As for plaintiff's arguments that the enforcement of the FFP violates the Commerce Clause and the Supremacy Clause, such arguments are unavailing. Regarding the Supremacy Clause argument, provisions like the FFP which waive the sections of the Securities Act providing right to select the judicial forum have been upheld by the U.S. Supreme Court (*Rodriguez de Quijas v Shearson/Am Exp., Inc.*, 490 US 477, 481 [1989][holding that provisions of the Securities Act regarding choice of judicial forums are "not such essential features of the Securities Act" so as to bar their waiver]). Additionally, since forum selection provisions like the FFP are "process-oriented and not substantive," they do not implicate the Commerce Clause "which exists to prevent a valid state law from have extraterritorial application" (*Salzberg*, 227 A3d at 136 [internal citation and quotation omitted]).

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[7] *In re: Tintri, Inc. Securities*, 17CIV04312 [Superior Court California, December 3, 2020])(NYSCEF # 112)("Tintri"), on which plaintiff relies, is not dispositive here. In *Tintri*, the Superior Court of California found that defendants waived their right to enforce the FFP in the corporate charter of a Delaware corporation. Notably, however, the court's conclusion was based on California law which, unlike New York law, requires that "a party must bring a motion to dismiss based on a contractual forum selection clause within a reasonable amount of time" (*id.*, at 8 [internal citations and quotations omitted]). Moreover, the facts in *Tintri* are distinguishable from those in the instant case since the defendants here timely sought to enforce the FFP. In contrast, in *Tintri*, the defendants were found to have unreasonably delayed for two-and-a-half years in moving to dismiss based on the FFP, even though they previously raised the issue in opposition to remanding of the action from federal court (*id.*) And, significantly, unlike the instant case, *Tintri* was commenced in 2017, which was before the Chancery Court decision in *Salzberg* in December 2018 holding that FFP's were invalid (*id.*, at 9-10).

Because this action is subject to dismissal based on the FFP, the court need not reach the defendants' additional arguments for dismissal.

In view of the above, it is

ORDERED that defendants' respective motions to dismiss in Motion Sequences 001, 002, and 003 are granted and the Amended Complaint is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

8/30/2021
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE