2018 WL 2322331 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

Matthew SCIABACUCCHI, on behalf of himself and all others similarly situated, Plaintiff,
v.
Matthew B. SALZBERG, Julie M.B. Bradley, Tracy Britt Cool, Kenneth A. Fox, Robert P. Goodman, Gary R. Hirshberg, Brian P. Kelley, Katrina Lake, Steven Anderson, J. William Urley, Marka Hansen, Sharon Mccollam, Anthony Wood, Ravi Ahuja, Shawn Carolan, Jeffrey Hastings, Alan Hendricks, Neil Hunt, Daniel Leff, and Ray Rothrock, Defendants,
and
Blue Apron Holdings, Inc., Stitch Fix, Inc. and Roku, Inc., Nominal Defendants.

No. 2017-0931-JTL.
May 16, 2018.

The Stitch Fix and Roku Defendants' Opening Brief in Support of Their Cross-Motion for Summary Judgment

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Defendants Stitch Fix, Inc. ("Stitch Fix") and its directors and Roku, Inc. ("Roku") and its directors (collectively, the "Stitch Fix and Roku Defendants") have cross-moved for summary judgment on Counts II and III of Plaintiffs Verified Class Action Complaint for Declaratory Judgment ("Complaint") that relate to them. This is the Stitch Fix and Roku Defendants' Opening Brief in support of their cross-motion for summary judgment.

PRELIMINARY STATEMENT

This case poses a simple question of law: can Delaware corporations adopt charter provisions designating the federal courts of the United States as the exclusive forum for claims arising under the federal Securities Act of 1933 (the "'33 Act")? The answer is equally simple: such forum selection provisions are facially valid and fully enforceable under well-established Delaware law. Defendants' cross-motion for summary judgment should therefore be granted.

A corporation's authority to privately order its affairs through the adoption of forum selection provisions has long been recognized by Delaware courts. Indeed, almost a decade ago, this Court explained that "if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes." *In re Revlon, Inc. S'holders Litig.,* 990 A.2d 940, 960 (Del. Ch. 2010). Since then, hundreds of Delaware corporations subsequently adopted forum selection provisions in their charters or bylaws.

Then-Chancellor Strine adopted and extended *Revlon's* reasoning in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.,* 73 A.3d 934 (Del. Ch. 2013) (*"Chevron"*), holding that forum-selection bylaws, as opposed to charter provisions, designating Delaware as the exclusive forum for disputes related to the "internal affairs" of a Delaware corporation are "facially valid." *Chevron* expressly recognized the general authority of a corporation to adopt forum selection provisions, concluding that "forum selection bylaws are part of a larger contract between the corporation and its stockholders." Then-Chancellor Strine ruled that because charters and bylaws were part of the contractual relationship between a company and its stockholders, forum selection provisions should be scrutinized using the principles set forth by the Supreme Court of the United States in *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972) and later adopted by the Delaware Supreme Court in *Ingres Corp. v. CA, Inc.,* 8 A.3d 1143 (Del. 2010). These precedents hold that " '[f]orum selection clauses are presumptively valid and should be specifically enforced unless the resisting party [] clearly show[s] that enforcement would be unreasonable and unjust or that the clause [is] invalid for such reasons as fraud and overreaching.' " *Ingres,* 8 A.3d at 1146 (internal quotations omitted).

The enforceability of forum selection charter and bylaw provisions is thus entirely consistent with Delaware law, because charters and bylaws of a "Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL," *Chevron,* 73 A.3d at 939, and "where

contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties' contract and enforce the clause[.]" *Ingres,* 8 A.3d at 1145.

Here, the '33 Act expressly provides that federal and state courts have concurrent jurisdiction over all '33 Act claims. Congress has thus designated two acceptable venues for '33 Act claims. The federal forum selection provision at issue in this case simply designates one of these two statutorily acceptable forums as the chosen forum for resolution of '33 Act claims. A forum selection provision that designates a forum that is statutorily approved by Congress cannot be contrary to Delaware law, nor can it be considered to be "unreasonable" or "unjust."

Section 115 of the Delaware General Corporate Law ("DGCL"), which "codified *Chevron"* in 2015, does not change this conclusion. Section 115 provides in relevant part that "[t]he certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State." Section 115 thus expressly authorizes charter and bylaw provisions designating a Delaware forum for internal corporate claims. Nothing in the text of Section 115, or its accompanying synopsis, indicates any intent to enumerate the exclusive scope of permissible forum selection charter or bylaw provisions or otherwise limit in any manner the type of forum selection clauses that Delaware corporations may adopt, except with respect to defined "internal corporate claims." The plain text of Section 115 addresses only one very specific species of forum selection clause: those purporting to govern internal corporate claims involving violations of a duty owed by directors, officers or stockholders or over which the DGCL confer jurisdiction upon the Court of Chancery. All other species of forum selection clauses are unaffected by Section 115. Inasmuch as the federal forum provisions adopted by defendants do not relate to defined "internal corporate claims," they cannot be implicated by Section 115. Forum selection provisions falling outside of the ambit of Section 115, like those at issue here, are instead reviewed under the test set forth by then-Chancellor Strine in *Chevron:* these provisions are "presumptively valid" but subject to a case-by-case adjudication to determine fairness.

Plaintiff's argument that Section 115 somehow restricts a corporation's ability to adopt a federal forum selection provision in a context entirely unrelated to intra-corporate disputes distorts critical principles of Delaware law. Delaware corporations have "the broadest grant of power in the English-speaking world to establish the most appropriate internal organization and structure for the enterprise." The proper inquiry prior to enactment of Section 115, and still applicable to any forum selection provision not specifically addressed by Section 115, is whether the provision is permitted either by Sections 102(b)(1) or 109(b) of the DGCL. These two sections are broad enabling provisions intended to provide great flexibility in a corporation's ordering of its affairs by means of charter and bylaw provisions. They empower boards of directors and a company's stockholders to adopt forum selection provisions in their charters so long as the provisions are not unreasonable or contrary to public policy.

The boards and stockholders of Stitch Fix and Roku determined that having '33 Act claims heard in federal courts provided "an efficient and value-promoting" forum for resolving these cases. After all, the federal courts have far more experience resolving '33 Act claims than do the state courts, and it makes sense to have a dispute adjudicated by a court with a comparative advantage in the application of the relevant law, particularly when that law can be quite complex, as is the case with Section 11 claims. Indeed, precisely the same logic underlies the preference for Delaware courts as the forum for the resolution of Delaware disputes: disputes should be resolved by the courts with a comparative advantage in the application of the relevant law to the relevant facts.

Nor is there any unfairness in this common-sense determination. Plaintiffs nowhere argue that the federal judiciary is biased against them or that litigating '33 Act claims in federal court imposes an unreasonable burden when those claims have been litigated in federal court for decades. Both defendant companies, consistent with their authority under Section 102(b)(1), adopted charter provisions designating the federal courts as the exclusive forum for the resolution of '33 Act

claims, unless the corporations consent to the selection of an alternative forum. Thus, plaintiff has no basis on which to object to the designation of any federal court as the exclusive forum for the resolution of a '33 Act claim.

Nor can plaintiff argue that the United States Supreme Court's recent decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund,* 138 S.Ct. 1061 (2018) (*"Cyan"*) forces a contrary conclusion. *Cyan* holds that federal law allows '33 Act claims to be brought in either federal or state court, and that claims filed in state court may not be removed to federal court. *Cyan* proceeds on the assumption that the case at issue is properly filed in state court and does not address the question of whether a forum selection provision requires dismissal of a claim filed in an inappropriate forum. Indeed, the law governing the enforcement of forum selection provisions, which is here at issue, differs dramatically from the law governing the operation of removal and remand in the federal courts, which is the question addressed in *Cyan.* In fact, *Cyan* does not refer in any way to Delaware law (or any other state law), and does not purport to restrict the ability of contracting parties to designate an appropriate forum via private ordering.

Accordingly, because the federal forum provisions do not prevent stockholders from filing '33 Act claims, but only designate *where* they may be filed, and because the designated forum is both reasonable and consistent with the federal securities laws and public policy, defendants respectfully request that the Court grant their motion for summary judgment.

STATEMENT OF FACTS[1]

A. *The Parties*

Plaintiff Sciabacucchi allegedly purchased shares of Stitch Fix and Roku stock pursuant to their respective 2017 registration statements. Compl. ¶ 13.

Defendant Stitch Fix is a Delaware corporation, based in San Francisco. Section VI.E of Stitch Fix's Amended and Restated Certificate of Incorporation provides that "[u]nless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of the Company shall be deemed to have notice of and consented to the provisions of this Section VI.E." *Id.* ¶ 15; Exhibit A.

Defendant Roku is a Delaware corporation headquartered in Los Gatos, California. Section VI.E. of Roku's Amended and Restated Certificate of Incorporation (collectively with Stitch Fix's federal forum provision, the "Federal Forum Provisions") states that "[u]nless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of the Corporation shall be deemed to have notice of and consented to the provisions of this Amended and Restated Certificate of Incorporation." Compl. ¶ 16; Exhibit B.[2]

B. *Litigation Under the '33 Act and Cvan*

In response to the 1929 stock market crash, Congress adopted the '33 Act to ensure accurate reporting by companies in their registration statements, among other matters.[3] Section 11 of the '33 Act ("Section 11") created a private remedy for a stockholder who purchased stock pursuant to a false or misleading statement contained in a registration statement. Section 11 liability is limited to issuers, directors, experts, and any person who signed the registration statement.[4] The '33 Act originally provided for concurrent federal and state jurisdiction over claims brought under the '33 Act. Certain amendments to the federal securities laws in 1998 created ambiguity as to the removability of '33 Act claims, as well

as whether federal courts had exclusive jurisdiction over these cases. *Cyan,* 138 S.Ct. at 1066-68. This dispute grew in significance in recent years with the growing number of Section 11 claims filed against newly public companies.

For example, between 2008 and 2014, plaintiffs filed a total of 15 Section 11 claims in California state court, an average of 2.5 per year. [5] But in 2015 alone, plaintiffs filed fourteen Section 11 complaints in California state court. [6] By 2015, the number of Section 11-only class actions filed in California state court exceeded the number filed in the entire federal court system. [7] This pattern continued in 2016. [8]

In 2017, the number of Section 11-only California class actions declined 61%, while the number of Section 11-only federal class action filings exceeded those in California. This decline coincided with the United States Supreme Court's decision in June 2017 to grant the petition for *certiorari* in *Cyan* to resolve the split among the federal district courts as to whether or not the recent amendments to the federal securities laws ended state court jurisdiction over Section 11-only class actions. [9]

In *Cyan,* the United States Supreme Court held that, under SLUSA and the '33 Act, (1) state courts have jurisdiction over class actions alleging only violations of the '33 Act, including Section 11 claims, and (2) defendants may not remove such actions from state court to federal court. *Cyan,* 138 S.Ct. at 1069-1078. In a unanimous ruling, the Supreme Court held that "SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations." *Id.* at 1078. *Cyan* says nothing about Delaware law or forum selection charter provisions, and in no way restricts any person's ability to designate available forums for '33 Act claims through private ordering.

C. *The Private Ordering Solution*

Prior to *Cyan,* in response to the growing number of Section 11 claims being brought in various courts, a number of companies adopted forum selection provisions in their charters and/or bylaws for '33 Act claims. Most, if not all, of these companies selected *any* federal court as the exclusive forum for such claims, subject to the company's ability to consent to an alternative forum. This decision is hardly surprising because (1) the '33 Act expressly contemplates federal courts as an available forum for such claims, (2) the forum selection clauses were limited to claims arising under the '33 Act, and (3) as explained above, federal courts have a comparative advantage in the resolution of these claims.

The registration statements of Stitch Fix and Roku clearly and expressly set forth the language of the forum selection clause provisions contained in their charters (which were also attached as exhibits to the filings), and also provided an explanation of the risks inherent with these clauses. For example, Stitch Fix's registration statement provided in relevant part:

Our amended and restated certificate of incorporation that will be in effect on the completion of this offering will provide that the Court of Chancery of the State of Delaware and the federal district courts of the United States 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.

Our amended and restated certificate of incorporation that will be in effect on the completion of this offering will provide that the Court of Chancery of the State of Delaware is the exclusive forum for:

• any derivative action or proceeding brought on our behalf;

• any action asserting a breach of fiduciary duty;

• any action asserting a claim against us arising under the Delaware General Corporation Law, our amended and restated certificate of incorporation or our amended and restated bylaws; and

• any action asserting a claim against us that is governed by the internal-affairs doctrine.

Our amended and restated certificate of incorporation that will be in effect on the completion of this offering will further provide that the federal district courts of the United States will be the exclusive forum for resolving any complaint asserting a cause of action arising under the Securities Act.

These 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. If a court were to find either exclusive-forum provision in our amended and restated certificate of incorporation that will be in effect on the completion of this offering to be inapplicable or unenforceable in an action, we may incur additional costs associated with resolving the dispute in other jurisdictions, which could seriously harm our business. [10]

An amendment to Roku's Registration Statement contained a similar disclosure. [11]

Plaintiff admits that he purchased his shares of Stitch Fix and Roku stock "pursuant" to their respective registration statements. Compl. ¶ 13. Plaintiff, and anyone else who bought shares in connection with the companies' public offerings, was thus on notice of the Federal Forum Provisions when he bought Stitch Fix and Roku stock.

ARGUMENT

I. *THE FEDERAL FORUM PROVISIONS ARE VALID UNDER DELAWARE LAW.*

A. *The Charter is a Contract Between the Company and Its Stockholders.*

The charter and bylaws of a Delaware corporation are contracts governed by the general rules of contract interpretation. *See Berlin v. Emerald Partners,* 552 A.2d 482, 488 (Del. 1988); *Hibbert v. Hollywood Park, Inc.,* 457 A.2d 339, 342-43 (Del. 1983); *Ellingwood v. Wolfs Head Oil Refining Co., Inc.,* 38 A.2d 743, 747 (Del. 1944). As contracts between the corporation and its stockholders, charters and bylaws enable the "private ordering" of the affairs of the corporation and its stockholders, subject to the constraints imposed by Delaware law. *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.,* 883 A.2d 837, 845 (Del. Ch. 2004); *Chevron,* 73 A.3d at 951 n.73, 956 n.100 (citations omitted).

Consistent with this approach, the DGCL broadly authorizes charters and bylaws to define the corporation's and the stockholders' powers and rights. A corporate charter may contain "any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders ... if such provisions are not contrary to the laws of this State." 8 *Del. C.* § 102(b)(1).

Because charters are "contract[s] between a Delaware corporation and its stockholders," forum selection clauses contained therein are construed "like any other contractual forum selection clause" and are presumptively valid. *Chevron,* 73 A.3d at 955, 957. When interpreting charter provisions, "[c]ourts must give effect to the intent of the parties as revealed by the language of the certificate and the circumstances surrounding its creation and adoption." *Waggoner v. Laster,* 581 A.2d 1127, 1134 (Del. 1990). The Federal Forum Provisions expressly provide that, by purchasing shares, the stockholder consents to litigate '33 Act claims exclusively in a federal court, unless the company consents to an alternative forum. Thus, stockholders "assent to be bound" by the provisions in the charter when they purchase the corporation's stock. *Chevron,* 73 A.3d at 958. Absent some limitation, the Federal Forum Provisions are presumptively valid.

The fundamental limitation imposed by Section 102(b)(1) of the DGCL is that the charter provision not be contrary to Delaware law. The Federal Forum Provisions, however, do not violate Delaware law, and Plaintiffs contention that the Federal Forum Provisions are prohibited by Section 115 of the DGCL is transparently incorrect.

B. *Section 115 Does Not Apply Because the Federal Forum Provisions Do Not Regulate "Internal Corporate Claims."*

Section 115, enacted in 2015, provides in relevant part that "[t]he certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State." 8 *Del. C.* § 115.

The first clause of Section 115 specifically authorizes charter provisions or bylaws designating a Delaware court as the exclusive forum for internal corporate claims. [12] Whereas the first clause is enabling, the second clause of Section 115 is constraining and provides that no charter provision or bylaw shall "prohibit bringing *such claims* in the courts of this State." (emphasis added).

The Federal Forum Provisions, however, do not implicate the second clause of Section 115, which only restricts corporations from excluding Delaware courts as an available forum for "internal corporate claims," defined in Section 115 as "claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery." Claims arising under the '33 Act are not based upon a violation of a duty by a current or former officer, director or stockholder in such capacity and the DGCL does confer jurisdiction upon the Court of Chancery over such claims.

Although Plaintiff contends that Section 115 precludes defendants from adopting the Federal Forum Provisions (*see* Compl. ¶ 50), Plaintiff admits that the Federal Forum Provisions govern claims "that do not assert internal corporate claims governed by Delaware law." Compl. ¶ 50. Indeed, defendants adopted the Federal Forum Provisions precisely because these claims under the '33 Act are beyond the scope of Section 115 and their respective forum provisions choosing the Delaware Court of Chancery for internal corporate claims. *Supra* note 12. Thus, Section 115 does not impose any restriction that is applicable to the Federal Forum Provisions.

Moreover, the fact that Section 115 is silent on the particular forum selection provisions at issue here does not make those provisions invalid. Delaware law is clear that "[m]erely because the General Corporation Law is silent as to a specific matter does not mean that it is prohibited." *Moran v. Household Int'l, Inc.,* 500 A.2d 1346, 1351 (Del. 1985) (citation omitted); *see also Chevron,* 73 A.3d at 953 ("[T]he Supreme Court long ago rejected the position that board action should be invalidated or enjoined simply because it involves a novel use of statutory authority."). Nothing in Section 115 states, or even suggests, that the section is the exclusive source of authority for *any* forum selection clauses contained in charters or bylaws. Rather, by its express terms, Section 115 addresses only one specific kind of forum selection clause (those that deal with defined "internal corporate claims") and leaves it to the Delaware courts, in case-by-case adjudication, to assess the validity of provisions that regulate the forum for bringing claims. [13]

The Court performed such an individualized assessment in *Chevron* and upheld the facial validity of forum selection bylaws for intracorporate claims under Delaware law. 73 A.3d at 950-58. *Chevron* did not hold that the only types of forum selection bylaws that are valid are those concerning claims governed by the internal affairs doctrine either. Rather, it concluded that such bylaws "easily" met the requirements of the DGCL. *Id.* at 939. The *Chevron* Court was not asked (and did not reach) whether other forum selection provisions are valid under Delaware law. *Id.* at 962-63. The Court in *Chevron* stated, however, that "a board's action might involve a new use of plain statutory authority does not make it

invalid under our law, and the boards of Delaware corporations have the flexibility to respond to changing dynamics in ways that are authorized by our statutory law." *Id.* at 953.

C. *The Broad Enabling DGCL Provides Full Authority for the Federal Forum Provisions.*

Because there are no barriers imposed by Delaware law on the adoption of the Federal Forum Provisions, such provisions are valid so long as they fall within the broad ambit of Section 102(b)(1), which enables a corporation to include in its charter "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders." 8 *Del. C.* § 102(b)(1). The relevant authority is entirely consistent with that conclusion.

Delaware courts considering Section 102(b), and its counterpart Section 109(b), have long recognized that Delaware corporations have "the broadest grant of power in the English-speaking world to establish the most appropriate internal organization and structure for the enterprise." *Jones Apparel Grp.,* 883 A.2d at 845 (citation omitted). That is because those provisions are broad, enabling statutes intended to provide flexibility in the corporation's ordering of its affairs by means of charter and bylaw provisions. *Id.; see also* David A. Drexler, Lewis S. Black Jr. and A. Gilchrist Sparks III, *Delaware Corporation Law and Practice,* § 6.02[1] (2016) ("This expansive provision [Section 102(b)(1)] permits great flexibility"). Section 102(b) "embod[ies] Delaware's commitment to private ordering in the charter" and is of "broad effect" and applies "to a myriad of issues involving the exercise of corporate power." *Jones Apparel Grp.,* 883 A.2d at 845; *see Sterling v. Mayflower Hotel Corp.,* 93 A.2d 107, 118 (Del. 1952) (similar) (construing predecessor of Section 102(b)(1)); *see also Frankel v. Donovan,* 120 A.2d 311, 316 (1956) ("Charter provisions which facilitate corporate action and to which a stockholder assents by becoming a stockholder are normally upheld by the court unless they contravene a principle implicit in statutory or settled decisional law governing corporate management"); *Sagusa, Inc. v. Magellan Petroleum Corp.,* 1993 WL 512487, at *2 (Del. Ch. Dec. 1, 1993), *aff'd,* 650 A.2d 1306 (Del. 1994) ("[T]he public policy applicable to Delaware's corporation law is expressed in 8 *Del. C.* § 102(b)(1), which authorizes companies to include in their charters any corporate governance provisions that do not violate Delaware law.").

As then-Chancellor Strine wrote about Section 109(b) [14] in *Chevron*-but that has equal force applied to Section 102(b)14-the broad enabling language of the statute "has long been understood to allow the corporation to set self-imposed rules and regulations that are deemed expedient for its convenient functioning." *Chevron,* 73 A.3d at 951 (citation omitted); *see also City of Providence v. First Citizens BancShares, Inc.,* 99 A.3d 229, 236 (Del. Ch. 2014) (adopting the reasoning of *Chevron* to find that a forum selection bylaw governing "internal affairs" claims but selecting North Carolina as the exclusive forum was valid). Like the provisions at issue in *Chevron,* the Federal Forum Provisions merely regulate *where* stockholder-related claims may be filed. *See Choupak v. Rivkin,* 2015 WL 1589610, at *19 n.3 (Del. Ch. Apr. 6, 2015) (recognizing that "a forum-selection bylaw easily falls on the procedural side of the divide" between permissible bylaws that establish procedures to regulate the exercise of corporate rights and those that impose substantive limitations on those rights). Nothing in Section 102(b) or Section 109(b) limits, either expressly or implicitly, such "regulating" or "limiting" forum selection provisions to those involving internal corporate claims. [15]

To the contrary, the Federal Forum Provisions clearly fall within the contemplated scope of Section 102(b)(1). Those provisions relate to the "conduct of the affairs of the corporation" by mandating where certain stockholder-related claims may be brought. As Stitch Fix's registration statement noted, the intent behind Stitch Fix's two forum provisions was so that "the Court of Chancery of the State of Delaware and the federal district courts of the United States will be the exclusive forums for substantially all disputes between us and our stockholders." Ex. A at 32.

In addition, claims arising under Section 11 of the '33 Act necessarily relate to "the rights and powers of [stockholders] as [] stockholder[s]" (*Chevron,* 73 A.3d at 952) insofar as such claims must be brought by current or former stockholders and must relate to the purchase of stock issued under a registration statement. *See DeMaria v. Andersen,* 318 F.3d 170,

178 (2d Cir. 2003); *Hertzberg v. Dignity Partners, Inc.,* 191 F.3d 1076, 1080 (9th Cir. 1999); 15 U.S.C. § 77k(a) (providing that "any person acquiring such security" pursuant to a registration statement may assert a claim under Section 11). The '33 Act enables stockholders to vindicate their rights to purchase and sell stock by ensuring that stockholders receive full and fair information before determining whether to purchase shares pursuant to a public offering. *See supra* note 3; *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 195 (1976) ("The ['33 Act] was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce"). Insofar as claims arising under Section 11 of the '33 Act pertain to the circumstances under which a stockholder becomes a stockholder, a forum selection clause governing such claims necessarily relates to the rights of stockholders.

Critically, claims arising under Section 11 of the '33 Act are not the sort of "external matters" that the *Chevron* Court suggested may exceed the scope of Section 109(b). *Chevron,* 73 A.3d at 952. The *Chevron* Court posited an example of a "bylaw that purported to bind a plaintiff, even a stockholder plaintiff, who sought to bring a tort claim against the company based on a personal injury she suffered that occurred on the company's premises or a contract claim based on a commercial contract with the corporation." *Id.* The Court expressed the view that such a bylaw "would be beyond the statutory language of [Section 109(b)]" because it "would not deal with the rights and powers of the plaintiff-stockholder as a stockholder." *Id.* at 952.

But Section 11 claims differ from the contract and tort claims referred to by the *Chevron* Court in many respects. As noted above, Section 11 claims may only be asserted against issuers, directors, experts and any individual who signed the registration statement. *See supra* note 4. Such claims necessarily involve the relationship between "those who manage the corporation and the corporation's stockholders" (*Chevron,* 73 A.2d at 952) insofar as they hold managers and directors accountable for the representations they make to stockholders pursuant to a registration statement. Thus, unlike the personal injury and commercial contract claims referenced in *Chevron,* Section 11 claims implicate the stockholders' relationship with the company's directors and officers insofar as they require managers to be truthful and forthright with stockholders. [16]

II. *THE FEDERAL FORUM PROVISIONS ARE VALID FORUM SELECTION PROVISIONS.*

Because forum selection charter provisions are part of a larger contract between the corporation and its stockholders, they are subject to the standards imposed by the Supreme Court of the United States in *The Bremen v. Zapata Off-Shore Co.* and adopted by the Delaware Supreme Court in *Ingres Corp. v. CA, Inc.,* 8 A.3d 1143 (Del. 2010).

The question in *Bremen* was whether a federal district court in Florida should give effect to a forum-selection clause that designated London as the exclusive forum for resolving certain maritime disputes. 407 U.S. 1, 15 (1972). The United States Supreme Court started from the proposition that forum selection agreements are presumptively valid and "should control absent a strong showing that [the forum-selection agreement] should be set aside." *Id. Bremen* established a three part test for enforcing forum selection provisions: a party challenging a forum-selection agreement must show (1) that enforcing the agreement would be "unreasonable;" (2) that the agreement was the product of "fraud, undue influence, or overwhelming bargaining power;" or (3) that "enforcement would contravene a strong public policy of the forum in which suit is brought[.]" *Id.* at 10, 12, 15.

Subsequent United States Supreme Court precedents reinforce the conclusion that forum selection provisions are contractually binding. In *Carnival Cruise Line v. Shute,* the respondent, a cruise ship passenger from Washington state, was injured during the ship's travel between Los Angeles and Mexico. 499 U.S. 585, 588 (1991). The plaintiff, Mrs. Shute, filed a lawsuit against the company in Washington. *Id.* But the print on her ticket contained a forum selection clause designating the courts of Florida as the exclusive forum for disputes. *Id.* The Supreme Court rejected "the Court of Appeals' determination that a non-negotiated forum selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining." *Id.* at 593. The Supreme Court then held that the forum selection provision

at issue in *Carnival* was reasonable and enforceable even though it was not subject to negotiation and was printed on the ticket Mrs. Shute received after she purchased the passage. *Id.*

Thus, under binding United States Supreme Court precedent, a forum selection provision is presumptively valid unless it is shown to be unreasonable, the product of fraud or undue influence, or contrary to public policy. Plaintiff has not alleged that the Federal Forum Provisions are the product of fraud or undue influence and, as set forth below, Plaintiff cannot show that the Federal Forum Provisions are unreasonable or that they violate public policy.

A. *Selecting the Federal Courts as the Forum for the Resolution of a Federal Claim Is Not Unreasonable.*

Plaintiff bears the burden of demonstrating that enforcing the forum selection agreement would be "unreasonable." *Bremen,* 407 U.S. at 15. Plaintiff must show that "the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18. This is an impossible burden for plaintiff to bear.

Indeed, the Federal Forum Provisions do not prevent stockholders from filing '33 Act claims but only provide *where* such claims may filed. Stockholders will not be deprived of full and fair relief in federal courts, as the same relief is available in federal courts as in state courts. Although stockholders who pursue securities claims in federal court must adhere to the requirements imposed by the PSLRA, those requirements do not prohibit stockholders from pursuing those claims or deprive them of relief, but are merely intended to "reduc[e] abusive litigation practices in federal securities class actions." *Cohen v. El Paso Corp.,* 2004 WL 2340046, at *3 (Del. Ch. Oct. 18, 2004); *In re Aetna, Inc. Sec. Litig.,* 617 F.3d 272, 277 (3d Cir. 2010). In addition, it is reasonable to permit a stockholder to file an action in federal court, particularly in view of the fact that the '33 Act expressly contemplates that federal courts are available forums for claims arising under that Act. Federal courts have significantly more experience resolving '33 Act claims than do the state courts. Moreover, because the Federal Forum Provisions provide that stockholders may bring '33 Act claims in *any* federal court, they will not be limited by considerations of personal jurisdiction or inconvenient forum.

B. *The Forum Selection Agreements Did Not Result From "Fraud, Undue Influence, or Overwhelming Bargaining Power."*

The forum selection provisions at issue here were fully disclosed in defendants' registration statements covering the shares purchased by plaintiff, and plaintiff had access to the full text of the corporate charter containing that provision. *Supra* at 11-13. Plaintiff thus agreed to be bound by that provision when he purchased the shares. Nor is there any allegation of fraud, undue influence or overwhelming bargaining power because there was none. *See, e.g., Carnival,* 499 U.S. at 593 (rejecting argument that a forum selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining).

C. *Enforcement of the Forum Selection Provision Would not Contravene a Strong Public Policy of the Forum in Which Suit Is Brought.*

As a technical matter, this aspect of the *Bremen* test cannot be applied until a court confronts a specific case or controversy in which it is possible to identify the state whose public policy is at issue. It is, however, possible to observe that any State that asserts a strong public policy interest in having federal '33 Act claims litigated exclusively in its state courts will confront serious supremacy and pre-emption challenges.

III. *THE FEDERAL FORUM PROVISIONS ARE PERMITTED BY THE '33 ACT.*

A. ***The Supreme Court Has Approved Forum Selection for '33 Act Claims.***

Nothing in the '33 Act purports to limit parties' abilities to designate federal courts as the exclusive forum for hearing claims arising under that Act. Indeed, the Supreme Court has enforced pre-dispute agreements to *arbitrate* '33 Act claims. *See Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 481 (1989). It follows, *a fortiori,* that agreements to bring these claims in federal court are enforceable.

Specifically, in *Rodriguez,* the United States Supreme Court held that mandatory arbitration of '33 Act claims did not violate the federal securities laws. In that case, plaintiffs argued that their agreement to arbitrate claims arising under the '33 Act was void under Section 14 of that Act, which prohibited waiver of "compliance with any provision of this title." *Id.* at 480. The Court rejected that argument, reasoning that the anti-waiver provision in Section 14 did not apply to "procedural" provisions. *Id.* at 482. The Court explained that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Rodriguez,* 490 U.S. at 481 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1987)).

Critically, in *Rodriguez,* the Supreme Court distinguished between *procedural* and *substantive* rights, and explained that a party does not forgo any of the substantive rights provided by the '33 Act when it consents to arbitration. Instead, the party merely agrees to resolve its disputes in one forum as opposed to another. *Id.* at 481. As the Supreme Court explained, "[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 Section 14 is properly construed to bar any waiver of these provisions." *Id.* In *Rodriguez,* the Supreme Court included "the grant of concurrent jurisdiction in the state and federal courts without possibility of removal" as one of "these procedural provisions" that was not subject to the anti-waiver provision. *Id.* at 482.

Following *Rodriguez,* appellate courts have consistently held that the '33 Act's anti-waiver provision does not void otherwise valid forum selection clauses because such provisions do not impact plaintiffs substantive rights.[17] These courts focused their analysis on whether enforcing a forum selection clause undermines or otherwise limits the policies underlying the federal securities laws.[18] Based upon this analysis courts have uniformly held that a forum selection provision that satisfies *Bremen* does not bar a plaintiff from exercising her substantive rights under the '33 Act.[19]

The same is true here. The forums selected by both Stitch Fix and Roku are expressly identified in the '33 Act as appropriate for the resolution of '33 Act litigation. Indeed, it would be preposterous for plaintiffs to contend that they lose any substantive rights by being required to litigate a federal '33 Act claim in a federal court when the statute expressly designates that forum as appropriate for the resolution of '33 Act claims.

It follows as a matter of simple logic that, if, as in *Rodriguez,* parties may designate arbitral forums for the resolution of '33 Act claims - forums that are not expressly recognized in the '33 Act - then the parties may of course designate federal courts as a forum when federal courts are *expressly recognized* by the statute as appropriate for the resolution of '33 Act claims.

B. ***Cyan Has No Effect on Delaware Corporation's Ability to Adopt Federal Forum Provision.***

The United States Supreme Court's recent decision in *Cyan* does not affect the validity of any forum selection provision under any circumstance. *Cyan* is a narrow, highly technical decision addressing whether federal securities laws preclude defendants from removing to federal court Section 11 claims that are properly before a state court. *Cyan,* 138 S.Ct. at 1066. Specifically, *Cyan* interprets provisions of SLUSA and of the '33 Act to hold that, in a case in which there is no forum selection provision, (1) state courts have jurisdiction over class actions alleging violations of only the '33 Act,

including Section 11 claims, and (2) defendants are not permitted to remove such actions from state court to federal court, assuming that those actions are properly filed in state court in the first instance. *Id.* at 1069-1078. The Court held that "SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations." *Id.* at 1078.

But nothing in *Cyan* addresses the ability of parties to constrain plaintiffs from *initially* filing their claims in state court through the operation of a binding contractual forum selection clause. Indeed, if a party violates a forum selection provision by filing in an inappropriate forum, the proper procedural response is to file a motion to dismiss and, upon grant of the motion, for the plaintiff to refile in the appropriate, agreed-upon forum. *See, e.g., City of Providence,* 99 A.3d at 242 (granting a motion to dismiss in favor of the agreed-upon forum). *Cyan* says nothing about this body of law, and the principles governing enforcement of forum selection provisions differ dramatically from those governing the law of removal and remand.

Cyan also did not disturb the holding in *Rodriguez* that the grant of concurrent jurisdiction to state courts is a *procedural* right that can be waived by a forum selection clause where, as here, all *substantive* rights can be vindicated. Indeed, *Cyan* and *Rodriguez* are entirely consistent with each other, and to read *Cyan* as somehow limiting the holding in *Rodriguez* is to concoct a non-existent conflict between those two opinions. As the Supreme Court in *Cyan* did not expressly or implicitly make any ruling that impacts Delaware corporate law, there is no basis to argue that *Cyan* limits a Delaware corporation from adopting a forum selection clause governing Section 11 claims in its charter.

CONCLUSION

For the reasons set forth above, the Stitch Fix and Roku Defendants respectfully request that their motion for summary judgment be granted.

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Footnotes

1 Pursuant to stipulation between the parties and ordered by the Court, Defendants have not answered the Complaint. Thus the facts for this motion are taken from the allegations in the Complaint.

2 The Complaint names the individual directors of Stitch Fix and Roku as defendants, but the only relief sought is an order declaring that the forum bylaws are facially invalid under Delaware law. *See* Compl. ¶¶ 66, 69. Plaintiff does not allege that the directors breached their fiduciary duties or otherwise engaged in any improper behavior, but simply brings a legal claim that the challenged charter provisions are invalid under Delaware law.

3 *See* 15 U.S.C. § 77k; S.Rep. No. 47, 73d Cong., 1st Sess. 1, at 1 (1933) ("The purpose of this bill is to protect the investing public and honest business. The basic policy is that of informing the investor of the facts concerning securities to be offered for sale in interstate and foreign commerce and providing protection against fraud and misrepresentation.").

4 *See generally* Allan Horwich, *Section 11 of the Securities Act: The Cornerstone Needs Some Tuckpointing,* 58 BUS. LAW. 1 (2002) (discussing history and parameters of Section 11).

5 Priya Huskins, Donna Moser, and Vysali Soundrarajan, *IPO Companies, Section 11 Suits and California State Court* (Woodruff-Sawyer, April 2016) ("Section 11 Suits"). This Court "may take judicial notice of publicly available facts not subject to reasonable dispute." *Jepsco, Ltd. v. B.F. Rich Co.,* 2013 WL 593664, at *1 (Del. Ch. Feb. 14, 2013).

6 *See* Section 11 Suits, *supra* note 5.

7 Joseph Grundfest, Sasha Aganin and Joseph Schertler, *"After Cyan: Potential Trends in Section 11 Litigation," Law 360* (March 27, 2018) (*"After Cyan"*).

8 *Id.; see also* Cornerstone Research, Securities Class Action Filings: 2016 Year in Review at 16-18 (discussing increase in Section 11 claims).

9 *After Cyan, supra* note 7. The petition was granted to resolve a split among state and federal courts about whether the Securities Litigation Uniform Standards Act ("SLUSA") deprived state courts of jurisdiction over '33 Act class actions. *Cyan,* 138 S.Ct. at 1068-69. The split was largely between courts on the different coasts, with the courts mainly on the East Coast holding that SLUSA did eliminate state court jurisdiction for these claims, while courts mainly on the West Coast took the opposite position. *See* Shayne Clinton and Britt Latham, *"Safeguards Against State, Parallel Proceedings Post-Cyan," Law 360* (May 8, 2018). The Supreme Court's ruling adopted the reasoning of the California (and other West Coast) jurisdictions.

10 Stitch Fix, Inc., October 19, 2017 Form S-1 (attached as Exhibit A) at 32.

11 Roku, Inc., September 18, 2017 Amendment No. 1 to Form S-1 (attached as Exhibit B) at 45.

12 In fact, both Stitch Fix and Roku also adopted forum selection provisions choosing the Delaware Court of Chancery as the appropriate forum for such internal corporate claims. *See* Ex. A at 32; Ex. B at 45.

13 The synopsis accompanying the adoption of Section 115 also undermines Plaintiffs claim that Section 115 was intended to be exclusive of any other charter or bylaw provision that regulates the forum for bringing claims. The synopsis is clear that it was intended only to "confirm" the holding in *Chevron* that the charter and bylaws "may effectively specify ... that claims arising under the DGCL, including claims of breach of fiduciary duty by current or former directors or officers or controlling stockholders of the corporation, or persons who aid and abet such a breach, must be brought only in the courts (including the federal court) in this State." Chapter 40, Laws of 2015, Synopsis of Section 115. Indeed, the Legislature was careful to

note in the very next sentence of the synopsis that Section 115 "does not address the validity" of a provision that selected another state as an additional forum for such intracorporate claims and only expressly invalidated a provision that precluded litigating such claims in the Delaware courts-i.e., the Legislature made clear that it was not expressly validating or invalidating anything that was not covered by the words of the statute.

14 Although there are subtle differences between the language of Sections 102(b)(1) and 109(b), the provisions are generally viewed as covering the same broad subject matter. *See, e.g.,* Drexler, Black & Sparks, § 9.03 (2016) ("The language of Section 109(b) dealing with the subject matter of bylaws parallels in large measure the language of Section 102(b)(1) dealing with what may be included in a certificate of incorporation"). If anything, Section 102(b)(1) is broader because it provides that "[a]ny provision which is required or permitted by any section of this chapter to be stated in the bylaws may be instead stated in the certificate of incorporation." 8 *Del. C.* § 102(b). Moreover, Section 102(b)(1) speaks in terms of provisions "limiting" the powers of the stockholders whereas Section 109(b) only speaks in terms of provisions "relating" to the powers of stockholders. Although defendants are unaware of any authority specifically addressing this distinction in the language, it seems almost *a fortiori* that if a form of restriction is permissible as a bylaw, which can be adopted by directors without stockholder approval, it should also be permissible as a charter provision that requires stockholder approval as a condition of adoption.

15 Plaintiff cites five actions in which federal courts have declined to uphold similar charter provisions adopted by Snap, Inc. and Tintri, Inc. Complaint ¶ 48 n. 24. As plaintiff acknowledges, however, four of those actions did not analyze the validity of those provisions under Delaware law and instead concluded the court lacked jurisdiction under the relevant securities laws. In the fifth action, *Iuso v Snap,* 17-cv-7176-VAP-RAO, Docket No. 50 (C.D. Cal. Nov. 21, 2017), the District Court concluded that Section 109(b) was limited to "provisions relating to the internal affairs of a corporation" - without undertaking any textual analysis of the language of 109(b) or, for that matter, appreciating that the charter provision at issue was governed by Section 102(b) - and relied principally on the fact that the defendants failed to point to Delaware authority enforcing a forum selection provision like the one at issue. *Id.* Respectfully, the *Iuso* Court's limited analysis is hardly instructive and, as noted above, Delaware law is clear that the fact a particular charter or bylaw provision is a novel use of statutory authority is not a basis to invalidate it. *Chevron,* 73 A.3d at 953.

16 Plaintiff cites this Court's decision in *In re Activision Blizzard, Inc. Stockholder Litig.,* 124 A.3d 1025 (Del. Ch. 2015) for the broad proposition that a federal securities law claim is a "personal claim" and "not a property right associated with shares," Compl. ¶ 10, to imply that forum selection provisions that govern federal securities law claims are simply a tort claim *unrelated* to the rights or powers of stockholders and therefore outside the scope of Section 102(b). But that conclusion does not follow from *Activision,* which only addressed the alienability of claims when shares are sold. *See I.A.T.S.E. Local No. One Pension Fund v. General Electric Company,* 2016 WL 7100493, at *5 (Del. Ch. Dec. 6, 2016) ("*[Activision]* states the unremarkable proposition that claims arising from the relationship among stockholder, stock and the company generally adhere to the stock, and are alienable."). The Court did *not* hold that claims arising under federal securities laws-which only arise through the purchase of securities and necessarily implicate directors' and officers' fundamental disclosure obligations in connection with those purchases-do not relate to the "rights and powers of [stockholders] as [] stockholder[s]." *Chevron,* 73 A.3d at 952.

17 *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 28 (U.S. 1991) (observing that claims arising under the '33 Act are appropriate for arbitration); *Richards v. Lloyd's of London,* 135 F.3d 1289 (9th Cir. 1998) (enforcing forum selection clause designating English courts where plaintiff had brought claims under the '33 Act (among others)); *Haynsworth v. The Corp.,* 121 F.3d 956 (5th Cir. 1997); *Allen v. Lloyd's of London,* 94 F.3d 923 (4th Cir. 1996); *Bonny v. Soc'y of Lloyd's,* 3 F.3d 156 (7th Cir. 1993); *Roby v. Corporation of Lloyd's,* 996 F.2d 1353 (2d. Cir. 1993); *Pong v. Am. Capital Holdings, Inc.,* 2007 WL 657790, at *7 (E.D. Cal. Feb. 28, 2007) (observing a "trend" that "Federal courts have increasingly enforced private stipulations in securities fraud litigation, despite antiwaiver provisions in federal securities laws.") (internal quotations omitted); *Young v. Valt.X Holdings, Inc.,* 336 S.W.3d 258 (Tex. App. 2010) (dismissing '33 Act claims and other claims where forum selection clause in shareholder agreement providing for Canadian courts to hear claims relating to stock).

18 *See, e.g., Allen v. Lloyd's of London, supra,* 94 F.3d at 929; *Haynsworth, supra,* 121 F.3d at 966.

19 *See, e.g., Huffington v. T.C. Grp., LLC,* 637 F.3d 18, 25 (1st Cir. 2011) (enforcing Delaware choice of forum clause; finding that a "chorus of authority" holds that anti-waiver provisions in federal securities laws do not categorically render forum selection clauses unenforceable) (citation omitted).

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