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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

In re DROPBOX, INC. SECURITIES LITIGATION	Lead Case No. 19-CIV-05089 (Consolidated with Nos. 19-CIV-05217, 19-CIV-05417 and 19-CIV-05865)
This Document Relates To: ALL ACTIONS.	CLASS ACTION
	PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR FORUM NON CONVENIENS
	Assigned for all purposes to Dept. 4 Honorable Nancy L. Fineman Date Action Filed: August 30, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

Page

STATUTES, RULES AND REGULATIONS

I. INTRODUCTION

Defendants assert that the Delaware Supreme Court's decision in *Salzberg v. Sciabacucchi*, No. 316, 2019, 2020 WL 1280785 (Del. Mar. 18, 2020) permits Dropbox, Inc. ("Dropbox" or the "Company") (a California-headquartered company) to limit a shareholder's choice of forum to bring claims arising from a stock purchase merely because the Company is incorporated in Delaware. Mtn. at 12.[1] Allowing Delaware law to regulate whether a California court may exercise jurisdiction expressly protected by Congress (15 U.S.C. §77v(a)) over a claim arising under federal law would violate the Constitution of the United States and the Securities Act of 1933 ("1933 Act"), and it is impermissible under California law. Defendants' Motion should be denied.

Sciabacucchi, 2020 WL 1280785, at *18, held that Grundfest clauses "are facially valid under Delaware law because they are within the statutory scope of Section 102(b)(1)" of the Delaware General Corporation Law. As clear from the decision, *Sciabacucchi* resolved only a facial challenge based on Delaware statutory law. It did not (and could not) resolve "the most difficult aspect of this dispute" and a "powerful concern": the "'down the road' question of whether [federal forum provisions] will be respected and enforced by [Delaware's] sister states."[2] *Id.* at *20. As the defense bar acknowledges, "it remains to be seen whether courts in other states will recognize the enforceability of [federal] forum selection bylaws or charter provisions." Ex. 1 at 3.[3] In fact, the decision has been broadly met with skepticism. *See infra* §II.A.

As Judge Weiner held, the Grundfest clause "is directly contrary to the explicit provisions of the 1933 Act, providing state court and federal court jurisdiction, which concurrent jurisdiction was affirmed in an unanimous decision of the United States Supreme Court in *Cyan*." Ex. 2 at 3-4. As shown herein, that holding retains its vitality. We also hope to buttress that assertion with Judge

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[1] References to Dropbox Defendants' Notice of Motion and Motion to Dismiss for Forum Non Conveniens; Memorandum of Points and Authorities are stated herein as "Motion" or "Mtn."

[2] All citations and footnotes are omitted and emphasis is added unless otherwise noted.

[3] All "Ex.__" citations are to Exhibits attached to the Declaration of James I. Jaconette in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss for Forum Non Conveniens ("Jaconette Decl."), filed concurrently herewith.

Weiner's forthcoming ruling in *Wong v. Restoration Robotics, Inc., et al.*, No. 18CIV02609 (Cal. Super Ct. San Mateo Cty. 2019). Furthermore, no longer is there a question as to whether Grundfest clauses extend Delaware's reach beyond the constitutional boundaries of internal affairs – the Delaware Supreme Court all but answered that question in the affirmative.

Delaware's admitted intent and purpose in *Sciabacucchi* greatly supports the conclusion that Grundfest clauses are invalid and unenforceable under both California law and the law of the land. Grundfest clauses violate the Commerce Clause, for now Delaware is regulating (eliminating) state court jurisdiction protected by Congress. *See infra* §II.B. Grundfest clauses also violate the Supremacy Clause for at least two independent reasons. *See infra* §II.C. ***First***, if enforced, the Grundfest clause negates 15 U.S.C. §77v(a). ***Second***, under the Grundfest clause, Delaware is discriminating ***against*** federal law as it applies ***differentially*** to federal and state causes of action. And not only does it fail to protect any legitimate Delaware interest, it applies ***only*** to claims ***against*** the Company rather than ***by*** it.

For all of those reasons (and more) Grundfest clauses are unenforceable under California law. First of all, no contract was formed. *See infra* §III. And even ***if*** California were to recognize the fiction of a contract (it should not) as against all shareholders merely on the basis of purchasing stock in a Company with a Grundfest clause buried in its charter or bylaws, the Grundfest clause would be unenforceable for being void under California and federal law prohibitions against waivers of rights protected by the securities laws. *See infra* §IV.A. Furthermore, defendants do not (and cannot) show enforcement will not diminish plaintiffs' rights. *See id.* Lastly, the Grundfest clause is unconscionable, as demonstrated herein. *See infra* §IV.B.

The Court should find the Grundfest clause is void for being unlawful and unconstitutional, and unenforceable for diminishing unwaivable rights and for being unconscionable

II. THE GRUNDFEST CLAUSE IS UNCONSTITUTIONAL

Defendants wishfully conflate the Grundfest clause with internal affairs matters and suggest the enforceability of the clause is determined by *Sciabacucchi*'s finding that it is "facially valid." Mtn. at 11. As *Sciabacucchi* acknowledges, "facial validity" under Delaware's General Corporations Law ("DGCL") does not address whether the Grundfest clause is enforceable under the laws of "sister

states." 2020 WL 1280785, at *20. And *Sciabacucchi* itself states the Grundfest clause implicates matters ***outside*** internal affairs. *See infra* §II.A. Thus, as shown herein, the cases defendants cite involving other forum selection clauses do ***not*** apply here, for those cases involved classic claims implicating the internal affairs doctrine – derivative actions alleging breaches of fiduciary duty.

A. *Sciabacucchi* Departed from Conventional Wisdom that the DGCL Does Not Extend Beyond the Bounds of Internal Affairs

A corporation "can exist only by permission of the state."[4] In Delaware, the enabling statute is DGCL. For decades it was widely believed that the DGCL's authority tracked the boundaries of the internal affairs doctrine, which "recognizes that only one State should have the authority to regulate . . . matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders . . . because otherwise a corporation could be faced with conflicting demands." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); *see also State Farm Mut. Auto. Ins. Co. v. Superior Court*, 114 Cal. App. 4th 434, 442 (2003) (discussing California's application of the internal affairs doctrine). Former Delaware Chief Justice Leo Strine wrote that "Delaware corporation law govern[ed] only the internal affairs of the corporation."[5] Twenty-one leading corporate law professors agreed.[6] So did the United States District Court for the Central District of California.[7]

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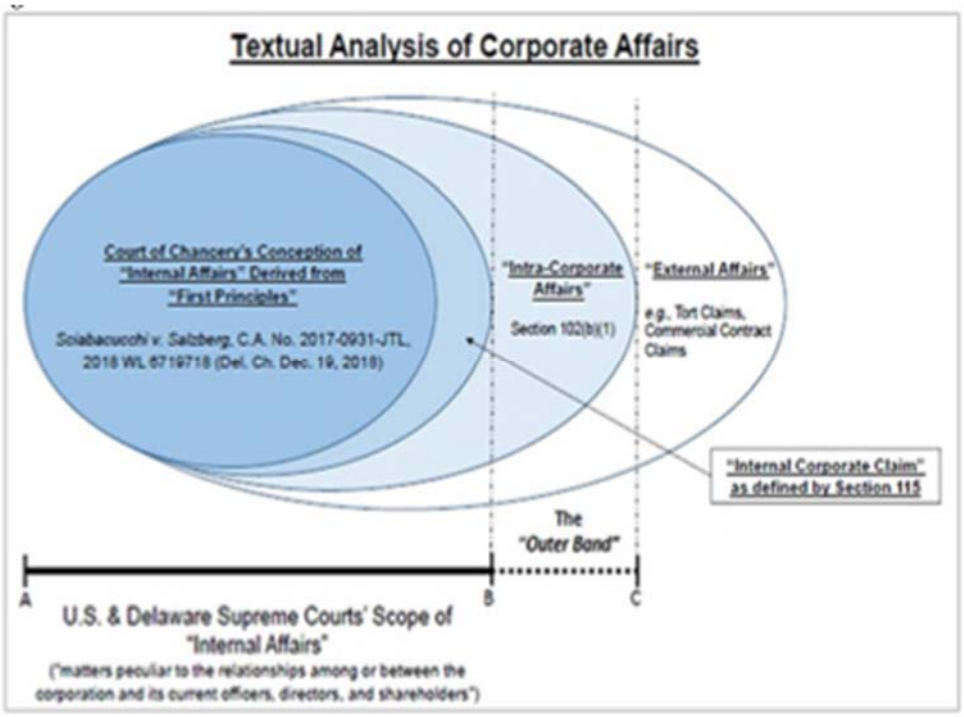
[4] *Boca Mill Co. v. Curry*, 154 Cal. 326, 333 (1908); *see also Cort v. Ash*, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law . . . ."); *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.").

[5] Jaconette Decl., Ex. 3 at 2.

[6] Jaconette Decl., Ex. 4 at 1, 2 ("Delaware law does not permit bylaws to restrict the forum for federal securities actions, because the right to bring such actions is not a property right associated with shares of corporate stock, and it thus falls outside of the scope of what Delaware law permits the corporate charter and bylaws to regulate.").

[7] *Iuso v. Snap, Inc.*, No. 17-cv-7176-VAP-RAO, 2017 WL 10410800, at *4 (C.D. Cal. Nov. 21, 2017) ("Delaware's General Corporation Law ('DGCL') authorizes corporations to adopt provisions relating to the internal affairs of the corporation. Plaintiff does not assert a claim based on Snap's internal workings, however, and the bylaws of Snap's corporate charter cannot overcome federal securities statutes and regulations.").

Sciabacucchi departed from conventional wisdom.[8] It held that the DGCL extended beyond internal affairs to authorize charter or bylaw provisions regulating federal-law claims brought under the 1933 Act (which indisputably are ***not*** internal affairs claims).[9] Drawing a Venn diagram the court explained that Grundfest clauses fall within a nebulous "'[o]uter [b]and'" of matters that are outside the "[s]cope of 'internal affairs'" as defined by the United States Supreme Court, and the Delaware Supreme Court, but are nonetheless authorized, on their face, by the Delaware enabling statute:[10]



[8] *See* Jaconette Decl., Ex. 5 at 1 ("I still believe I was right in my account of existing law, and *Salzberg v. Sciabacucchi* actually changed the law.")

[9] *Edgar*, 457 U.S. at 645 ("transfers of stock by stockholders to a third party . . . do not themselves implicate the internal affairs of the target company"); *Williams v. Gaylord*, 186 U.S. 157, 165 (1902) ("when a corporation . . . gives securities, it does business, and a statute regulating such transactions does not regulate the internal affairs of the corporation"); *Vaughn v. LJ Int'l, Inc.*, 174 Cal. App. 4th 213, 223 (2009) ("securities regulations designed to protect participants in California's securities marketplace are not limited by the internal affairs doctrine"); Jaconette Decl., Ex. 6 at 1 (former SEC commissioner: "The federal securities laws generally have been considered full disclosure statutes, as opposed to . . . laws governing the internal affairs of corporations.").

[10] *Sciabacucchi*, 2020 WL 1280785 at *18 ("There are matters that are not 'internal affairs,' but are, nevertheless, 'internal' or 'intracorporate' and still within the scope of Section 102(b)(1) and the 'Outer Band,' represented in Figure 1 between points B to C. [Federal forum provisions] are in this Outer Band, and are facially valid under Delaware law because they are within the statutory scope of Section 102(b)(1) . . . ."); *Id.* at *20 (recognizing that "[federal forum provisions] are not 'internal affairs' matters within the traditional *Edgar/McDermott* sense").

The aggressive expansion of Delaware's asserted authority has been broadly met with skepticism, as "the newly announced 'outer band' between internal affairs and external matters sure looks like an attempt by Delaware to stave [off] horizontal regulatory competition."[11] Even the *Sciabacucchi* court hedged, stating there could be a legislative fix to "narrow," or clarify that, the DGCL does not extend beyond internal affairs. *See Sciabacucchi*, 2020 WL 1280785, at *13.

B. Grundfest Clauses Violate the Commerce Clause

It's no wonder *Sciabacucchi* acknowledges Grundfest clauses "may not" be in "*Edgar*'s protective boundaries." *Id.* at *20. The "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar*, 457 U.S. at 642-43. Because Grundfest clauses now have "extraterritorial reach" under Delaware law they violate the commerce clause. *See id.*; *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) ("a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority"). In *Edgar*, an Illinois statute authorizing regulation of tender offers for Illinois corporations was held invalid by the Supreme Court under the Commerce Clause for its "sweeping extraterritorial effect." 457 U.S. at 642. As in *Edgar*, here the state's law does "not . . . implicate the internal affairs" of the Company. *Id.* at 645.

[11] Manesh, Mohsen, (March 20, 2020), https://perma.cc/3BJL-AVVW; *see also* Mohsen, Manesh, (March 20, 2020), https://perma.cc/HTH7-NCHZ ("how was I supposed to know about the 'outer band' between internal affairs and external matters before the Delaware Supreme Court invented it?!?"). *See also* Jaconette Decl., Ex. 5 at 2 ("I found the opinion itself kind of . . . elliptical in its reasoning. . . . [I]t's going to be really interesting to find out what the court does, and does not, believe can be governed by corporate charters – and even more interesting to see if any other states (hello, California) push back."); Jaconette Decl., Ex. 7 at 2 (quoting corporate law professor Minor Myers: "The Supreme Court here, I think, reaches kind of a bizarre outcome in saying corporations can regulate the behavior of stockholders on matters that arise under federal law." "This opinion is the Supreme Court trying to have it both ways, giving the corporate constituency what they have been jumping up and down for and at the same time trying not to open a Pandora's box to every stupid idea some board of directors or adviser has to drafting a new bylaw." "[It is] kind of rolling the dice with the credibility of Delaware."); *Id*. (quoting corporate law professor Lawrence Hamermesh: "I thought we were in a predictable room, but the door has opened up into very uncertain challenges and positions . . . . There's a nice Venn diagram there, and concepts like outer bands. If anybody can tell me what's inside those abstract sets, they're a better person than I am."); Jaconette Decl., Ex. 8 at 2 ("the analysis is not the cleanest that TCD has seen from the Supreme Court").

Plaintiffs, including a California resident, purchased shares of Dropbox (a California-headquartered company) on the National Association of Securities Dealers Automated Quotations (the ("NASDAQ"). The DGCL cannot create a corporate power limiting plaintiffs' choice of forum for claims arising from that transaction merely because the Company is incorporated in Delaware. Allowing a Delaware statute to regulate whether a California court may exercise jurisdiction expressly given to it by Congress (15 U.S.C. §77v(a)) over a claim arising under federal law is invalid under the Commerce Clause. *See Healy*, 491 U.S. at 336. *Sciabacucchi* acknowledges that "a well-developed body of law, including Commerce Clause precedent . . . exists to prevent a valid state law from having extraterritorial application." 2020 WL 1280785, at *22. *Sciabacucchi*, however, states Grundfest clauses do not "offend these constitutional principles" because they are "procedural mechanisms" and not "substantive." *Id.*

That erroneous interpretation of federal constitutional law is neither binding nor persuasive. *Edgar* does ***not*** hold it is acceptable to have extraterritorial application of "procedural" laws. In *Nat'l Collegiate Athletic Ass'n v Miller*, 10 F.3d 633, 637 (9th Cir. 1993) ("*NCAA*"), for example, the Ninth Circuit invalidated a Nevada statute that sought to ensure "certain procedural due process protections during an[y] [*NCAA*] enforcement proceeding in which sanctions [could] be imposed" because of its extraterritorial effect. *Id.*[12] Nor does *Sciabacucchi*'s "procedural" distinction make any sense. What could be more "offen[sive to] sister [s]tates" (*Edgar*, 457 U.S. at 643) than applying Delaware law to divest other states' courts of jurisdiction over 1933 Act claims expressly protected by Congress. *See* 15 U.S.C. §77v(a); *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, __ U.S. __, 138 S. Ct. 1061, 1066 (2018) ("if a plaintiff chose to bring a 1933 Act suit in state court, the defendant could not change the forum"). And if forum selection clauses are merely "procedural" (*Sciabacucci*, 2020 WL 1280785, at *22), then under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), Delaware law would not apply in the first instance.

[12] *See also Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 616 (9th Cir. 2018) (explaining that in *Miller*, "the State of Nevada sought to impose rules of procedure that would in effect control proceedings in other states, even if those states did not impose the same restrictions on procedures and could even prescribe other rules. As we then declared: 'the Statute could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside Nevada's borders. That sort of extraterritorial effect is forbidden by the Commerce Clause.'").

C. Grundfest Clauses Violate the Supremacy Clause

Sciabacucchi characterizes Grundfest clauses as mere "Post-*Cyan* Efficiencies" that "nothing in *Cyan* prohibits." 2020 WL 1280785, at *4, *19. That is an oversimplification at best. As Judge Weiner held in *Restoration Robotics*, the Grundfest clause "is directly contrary to the explicit provisions of the Securities Act of 1933, providing state court and federal court jurisdiction, which concurrent jurisdiction was affirmed in an unanimous decision of the United States Supreme Court in *Cyan*." Ex. 2 at 3-4. That holding retains its vitality.

First, the Grundfest clause cannot be reconciled with the Supremacy Clause because, if it were enforced, it would negate 15 U.S.C. §77v(a). Protection of the state court forum against defendants unilaterally electing to litigate in federal court has remained in 15 U.S.C. §77v(a)'s concurrent jurisdiction and anti-removal provisions from enactment through the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the Securities Litigation Uniform Standards Act of 1998, in line with the "long and unusually pronounced tradition of according authority to state courts over 1933 Act litigation." *Cyan*, 138 S. Ct. at 1073. Evading that would constitute a "dramatic change . . . in the 1933 Act's jurisdictional framework." *Id.* at 1065. But Delaware's law rejects Congress' (and the United States Supreme Court's) judgment in favor of Delaware's desire to "provide" corporations the power to "manag[e] the procedural aspects of securities litigation following the United States Supreme Court's decision in *Cyan*." *Sciabacucchi*, 2020 WL 1280785, at *5. Furthermore, the ruling's express goal is that even if "*Edgar's* protective boundaries may not fully encompass" Grundfest clauses the clauses should "nevertheless, be enforced" "by our sister states." *Id.* at *20. A policy with such cross-state (effectively, federal) reach is in Congress' domain.

Second, the Grundfest clause discriminates against federal law and is therefore invalid under the Supremacy Clause. As *Sciabacucchi* squarely holds, Delaware law permits a corporate charter to eliminate state court jurisdiction over federal law claims, but not parallel state-law claims. 2020 WL 1280785, at *20 n.146. That discrimination violates the Supremacy Clause. Where Congress has expressly conferred concurrent jurisdiction under a federal statute by which "state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights," states "lack

authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood v. Drown*, 556 U.S. 729, 735-36 (2009). In *Haywood*, a New York policy nullified 42 U.S.C. §1983 ("§1983") suits in state court to relieve court congestion and shield correction officers from liability. The Supreme Court held that although New York's rule was "denominated jurisdictional," it foreclosed federal remedies and thus violated the Supremacy Clause.

> Both state and federal courts have jurisdiction over § 1983 suits. So strong is the presumption of concurrency that it is defeated only when Congress expressly ousts state courts of jurisdiction. . . . States retain substantial leeway to establish the contours of their judicial systems, but lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.

Id. at 729, 739. Furthermore, a state law or local policy is especially improper where, like Delaware's rule here, it applies ***differentially*** to federal and state causes of action. *See Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 375 (1990). In *Howlett*, the Supreme Court held that a state law defense to §1983 actions, which would preclude all state court suits for certain defendants under §1983, violated the Supremacy Clause. The "'existence of the [state court] jurisdiction'" to enforce a federal right "'creates an implication of duty to exercise it.'" *Id.* at 370, 373. "[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id.* at 350.

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.

Id. at 347.

The rationale above applies with more force here. There is no legitimate state interest because the Delaware law protects only Delaware companies, not Delaware's judiciary. Furthermore, the Grundfest clause is one-sided: it applies only to claims brought ***against*** the Company rather than ***by*** it; and it grants the Company the exclusive power to decide whether to require litigation in federal court. Lastly, federal law does not even recognize the Delaware fiction that bylaws or charter provisions

constitute contracts – in all of its decisions involving forum selection clauses, the United States Supreme Court has only found classic bilateral contracts give rise to forum selection.[13]

The Grundfest clause is unconstitutional for all the reasons stated.

III. NO CONTRACT WAS FORMED UNDER CALIFORNIA LAW

Recently, Delaware courts have dispensed with the fact-specific analysis of determining whether bylaws or charter provisions form contracts and simply hold that the charter and bylaws are contracts with (against) shareholders. But Delaware law does ***not*** apply here because Grundfest clauses do ***not*** govern internal affairs. Under California law, whether or not bylaws or charters constitute a valid contract "'turns on whether the elements of a contract are present.'" *O'Byrne v. Santa Monica-UCLA Med. Ctr.*, 94 Cal. App. 4th 797, 808 (2001) (citing *Scott v. Lee*, 208 Cal. App. 2d 12, 15 (1962)).[14] Under black-letter California law, as held by the First District's Court of Appeal in *Lopez v. Charles Schwab & Co.*, 118 Cal. App. 4th 1224, 1229-30 (2004) in "consider[ing] whether [parties] formed a contract," the "essential elements" are: (1) "parties capable of contracting"; (2) the parties "consent"; (3) a "lawful object"; and (4) "sufficient cause or consideration." *Id.*; *see also* Cal. Civ. Code §1550 (same); *Carnival Cruise Lines v. Superior Court*, 234 Cal. App. 3d 1019, 1026-27 (1991) (same).

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[13] *See Atl. Marine Constr. Co., Inc. v. United States Dist. Ct.*, 571 U.S. 49 (2013) (forum-selection clause in parties' construction contract); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89 (2010) (forum-selection clause in bill of lading); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (arbitration provision in standard bill of lading); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (form contract that passengers were free to reject provided that acceptance of the ticket constituted acceptance of forum-selection provision of which respondents conceded they were aware); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (forum-selection provision in dealership agreement); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (arbitration clause in distributor agreement); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (arbitration provision in contract for purchase of businesses).

[14] "Although dicta in some older cases had indicated that, under their particular facts, provisions of bylaws may potentially create contractual rights or obligations," subsequent decisions explain that the "'true holding'" of such cases was simply that where "'by-laws fixed the rights and duties of the corporation against and to its shareholders,'" they may be interpreted by the same canons and precedent used to interpret contracts. *See, e.g.*, *Lucas v. Bakersfield Green Thumb Garden Club*, No. F072136, 2017 WL 395115, at *7, *7 n.10 (Cal. Ct. App. Jan. 30, 2017) (citing *Scott*, 208 Cal. App. 2d at 14). None of that decades-old dicta, however, stands for the sweeping proposition that bylaws somehow always constitute valid contracts without regard to the standard elements of formation.

The complete failure of defendants to demonstrate any essential element of contract formation warrants denial of the Motion. *See id.* (if party invoking forum selection clause fails to establish each element of Cal. Civ. Code. §1550, "no valid contract with respect to such clause thus exists").

A. Defendants Do Not (and Cannot) Demonstrate Assent

"Contract formation requires mutual consent, which cannot exist unless the parties 'agree upon the same thing in the same sense.'" *Bustamante v. Intuit, Inc.*, 141 Cal. App. 4th 199, 208 (2006). *See also Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811 (1998). Because mutual assent requires "adequate notice," "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious." *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 988, 993 (1972). *See also Marin Storage & Trucking, Inc v. Benco Contracting & Eng'g, Inc.*, 89 Cal. App. 4th 1042, 1049-50 (2001) (party not bound if there "does not appear to be a contract and the terms are not called to the attention of the recipient").

No ordinary investor had any reason to expect to be bound by a Grundfest clause. To the contrary, state court jurisdiction is protected under the 1933 Act, and investors had every reason to expect their claims may proceed in state court under the 1933 Act, as has been allowed and protected for decades. The Grundfest clause was buried in an exhibit, and in turn buried several hundred pages into one of several amendments to the Registration Statement.[15] Its "inconspicuous" existence does not establish mutual assent. *See Windsor Mills*, 25 Cal. App. 3d at 993.[16] Because defendants do not (they cannot) establish plaintiffs received "sufficient notice of the forum-selection clause prior to entering

[15] On February 23, 2018, Dropbox filed a registration statement for the initial public offering on SEC Form S-1, which, after several amendments was declared effective on March 22, 2018 (the "Registration Statement").

[16] Nor do the 1933 Act claims alleged require plaintiffs read the Registration Statement's hundreds of pages of exhibits. *See, e.g.*, *In re WorldCom, Inc., Sec. Litig.*, 219 F.R.D. 267, 294 (S.D.N.Y. 2003) (explaining that the 1933 Act "makes explicit" that plaintiff has "no burden" to show she "actually read the registration statement"). And it is well established that registration statements are not contracts. *See, e.g., McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1091-92 (9th Cir. 2003) (prospectus and merger agreement not a contract); *In re Charles Schwab Corp. Sec. Litig.*, No. C 08-01510 WHA, 2009 WL 1371409, at *5 (N.D. Cal. May 15, 2009) ("offering documents under the securities laws are generally different than contract 'offers' (a far narrower concept), and bare allegations will not equate the two").

into the [purported] contract," "the requisite mutual consent to that contractual term is lacking and no valid contract with respect to such clause thus exists." *Carnival Cruise*, 234 Cal. App. 3d at 1027.

B. The Grundfest Clause Is Not Lawful

Equally if not more damning, is that defendants do not (and cannot) satisfy the lawful object element of contract formation. *See* Cal. Civ. Code §1550 (codifying "a lawful object" as "essential to the existence of a contract"); *ASP Props. Grp., L.P. v. Fard, Inc.*, 133 Cal. App. 4th 1257, 1268-69 (2005) ("Formation of a contract requires . . . a lawful object . . . ."); (citing Cal. Civ. Code §1550); *Hetman v. Harm*, No. G044633, 2012 WL 345027, at *5 (Cal. Ct. App. Feb. 3, 2012) (holding "no contract had been formed" because defendant had "made no attempt to show that there was a lawful object to the contract" and thus "had not met his initial burden to demonstrate contract formation"). Under California law, the object of a purported contractual provision is unlawful if it is "[c]ontrary to an express provision of law," contrary to "the policy of express law," or otherwise "contrary to good morals." Cal. Civ. Code §1667. Because the Grundfest clause is unlawful in several respects, it is void. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 124 (2000) (purported contract void if it contains "multiple defects" or if its "central purpose" is "tainted with illegality").[17]

The Grundfest clause directly contravenes the 1933 Act's concurrent jurisdiction and anti-removal protections, as well as the Supreme Court's decision in *Cyan*. *See supra* at 13-15 (discussing how *Sciabacucchi* nullifies *Cyan*); *infra* §IV.A (the Grundfest clause diminishes unwaivable statutory rights). It one-sidedly eliminates state court jurisdiction, discriminates against federal law and negates federal prerogatives reflected in the 1933 Act and *Cyan*. *See supra* §II.C. That is precisely why this clause was adopted into the Company's charter. *See, e.g.*, Jaconette Decl., Ex. 9 at 7 ("a straightforward (and low-cost) mechanism for companies to skirt the unpredictable nature of a state court suit"); *Id.*, Ex. 10 at 4 (pitching the "Grundfest Solution": "If you want to be serious about avoiding state court litigation in connection with your IPO, . . . talk to your outside counsel sooner than

[17] Bylaws are void if they "contravene[] any provision of the federal or state constitution" or are "repugnant to, or inconsistent with, any federal or state statute." 8 Fletcher Cyc. Corp. §4185. Indeed, it has been long held as a matter of California law that corporate bylaws that violate the Constitution and state law are void. *Wells v. Black*, 117 Cal. 157, 1092 (1897).

later about adopting federal choice of forum provisions indoor corporate bylaws."). Because "California law includes federal law," Defendant's "violation of federal law is a violation of law for purposes of determining whether or not [its purported] contract" has a lawful object. *Kashani v. Tsann Kuen China Enter. Co.*, 118 Cal. App. 4th 531, 543 (2004). Defendants' forum-selection clause is also contrary to the public policy clearly evident in California's Blue Sky laws. *See infra* at 20. It is also plainly unconstitutional under the Dormant Commerce Clause. *See supra* §II.B.

C. Defendants Do Not (and Cannot) Demonstrate Consideration

Under California law, a statutory or legal obligation to perform an act may not constitute consideration for a contract. *See, e.g.*, *Mission Oaks Ranch, Ltd. v. Cty. of Santa Barbara*, 65 Cal. App. 4th 713, 723 (1998). The Company, as a Delaware chartered corporation, was obligated to adopt corporate bylaws. *See* DGCL §§102, 109. As the bylaws were obligated by law, they cannot constitute consideration under controlling California contract law. *See O'Byrne*, 94 Cal. App. 4th at 808. Nor is there otherwise consideration demonstrated by defendants that in any way supports contract formation here.

IV. THE CLAUSE IS UNENFORCEABLE UNDER CALIFORNIA LAW

A. Enforcement Would Diminish Unwaivable Statutory Rights

Citing traditional bilateral contract cases, defendants assert it is "a 'heavy burden' to show that enforcement of Dropbox's Federal Forum Provision would be unreasonable." Mtn. at 15.[18] The burden is on defendants to establish that enforcement of their forum-selection clause would not contravene §14 of the 1933 Act or the public policy codified therein.

> Although a party opposing enforcement of a forum selection clause ordinarily bears the burden to show enforcement would be unreasonable or unfair, the burden is reversed when the underlying claims are based on statutory rights the Legislature has declared to be unwaivable. In that instance, the party seeking to enforce the forum selection clause has the burden to show enforcement would not diminish unwaivable California statutory rights . . . .

[18] *See Lu v. Dryclean-U.S.A. of Cal., Inc.*, 11 Cal. App. 4th 1490, 1492 (1992) ("franchise agreement"); *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 493-494 (1976) (insurance agency contract); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972) ("international towage contract"). *See also Animal Film, LLC v. D.E.J. Prod., Inc.*, 193 Cal. App. 4th 466, 469 (2011) ("production agreement") (Mtn. at 13-14); *Intershop Commc'ns AG v. Superior Court*, 104 Cal. App. 4th 191, 195 (2002) (employee "stock options exchange agreement") (Mtn. at 14).

Verdugo v. Alliantgroup, L.P., 237 Cal. App. 4th 141, 144-45 (2015). Defendants do not (and cannot) carry their burden.[19]

Defendants assert plaintiffs' "claims are not based on unwaivable rights created by a California statute." Mtn. at 16. But that is a red herring – and it is incorrect. *Verdugo* speaks to the burden shift when there is an anti-waiver policy per "California law," but under the Supremacy Clause, "California law includes federal law." *Kashani*, 118 Cal. App. 4th at 543; *see also Haywood*, 556 U.S. at 734-35 ("[F]ederal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law 'together form one system of jurisprudence, which constitutes the law of the land for the State . . . .'"). Defendants also contend they are "not aware of any fundamental policy of California that would be violated by a forum selection provision that selects federal court for Securities Act claims" (Mtn. at 16) but that weak assertion neither carries their burden nor rebuts plaintiffs' showing herein. In fact, the very same policy is codified under analogous California law, leaving little question as to where California stands on this point. *See* Cal. Corp. Code §25701 ("Any condition, stipulation or provision purporting to bind any person acquiring any security to waive compliance with any provision of this law or any rule or order hereunder is void."); *Hall v. Superior Court*, 150 Cal. App. 3d 411, 418 (1983) (explaining that "California's policy to protect securities investors," akin to the "similar nonwaiver provision" codified in §14, of the 1933 Act, "compels denial of enforcement" of similar forum-selection clauses).[20]

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[19] Defendants, without support, assert "plaintiffs . . . should, at a minimum, provide evidence to show that this action involves a California resident with standing." Mtn. at 16 n.6. The complaints consolidated under this caption adequately plead standing, and defendants know at least one California resident bring claims in this action. *See* Jaconette Decl., Ex. 11 (Declaration of Plaintiff Stephen Rieman in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss).

[20] There are additional rights the Grundfest clause would effectively waive. For example, while plaintiffs here are entitled to discovery under the Civil Discovery Act and the Tenth Amendment, the PSLRA would impose a mandatory stay of discovery in federal court. *See* 15 U.S.C. §77z-1(b)(1). And whereas here plaintiffs in California court are free to pursue any and all 1933 Act class claims they may have as they arise, the PSLRA strictly limits the same plaintiff to no more than five such class claims in any three-year period. 15 U.S.C. §77z-1(a)(3)(B)(vi). All on penalty of mandatory sanctions no less. 15 U.S.C. §77z-1(c)(2). Plaintiffs are also entitled to a non-unanimous jury verdict in state court, while in federal court a unanimous jury verdict would be required to prevail in this case. These differences (and others) materially affect which, when and how plaintiffs' claims can (or cannot) be asserted and resolved, and thus they are """intimately bound up""" with California's """substantive

Moreover, even if the burden were not shifted, it is clear that enforcement would be unreasonable or unfair. *See infra* §IV.B.2; *supra* §II.C. Section 14 of the 1933 Act voids any "condition, stipulation, or provision . . . to waive compliance with any provision of [the 1933 Act]." 15 U.S.C. §77n. The United States Supreme Court has held that the "the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14." *Wilko v. Swan*, 346 U.S. 427, 434-35 (1953). *Sciabacucchi* neither mentions *Wilko* nor §14. It merely decided whether Grundfest clauses are facially valid under 8 Del. C. §102(b)(1). *See Sciabacucchi*, 2020 WL 1280785, at *4. Any discussion beyond that and whether other courts should allow Delaware's "power grab" (*Id.* at *20) is neither persuasive nor binding on this Court's interpretation of federal and California law.

Defendants expend three pages of their Motion discussing *Rodriguez* while ignoring the holding of *Wilko*. *See* Mtn. at 16-18. As apparent from defendants' discussion, *Rodriguez*'s holding concerns arbitration – any language beyond that holding is dicta and "therefore binding on no one." *Contreras v. Dowling*, 5 Cal. App. 5th 394, 407 (2016) ("'Incidental statements or conclusions not necessary to the decision are not to be regarded as authority.'"). Indeed, *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. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 478 (1989) ("The question here is whether a predispute agreement to arbitrate claims under the Securities Act of 1933 is unenforceable . . . ."). *Rodriguez* "stressed the strong language of the Arbitration Act, which declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,'" and that petitioners "ha[d] not carried their burden of showing that arbitration agreements are not enforceable under the Securities Act." *Id*. at 483. Here, the FAA has no application whatsoever, and thus *Wilko*'s interpretation of §14 remains controlling and dispositive. *See also infra* n.21 (case law showing *Wilko* remains vital). Defendants also assert "*Cyan* did not mention *Rodriguez*" (Mtn. at 18) but that is another red herring and indeed, the *Cyan* Court did not need to discuss *Rodriguez* with *Wilko*

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decision making"'" and likely to impact "'interest[s] the California Constitution zealously guards.'" *See Handoush v. Lease Fin. Grp., LLC*, 41 Cal. App. 5th 729, 739 (2019).

on the books. It is thus no surprise that California appellate courts (and the Ninth Circuit) have consistently recognized the arbitration-specific holding of *Rodriguez* and endorsed the continuing vitality of *Wilko* notwithstanding the holding in *Rodriguez*.[21]

Defendants also expend great effort asserting the Sixth District's decision in *Drulias v. 1st Century Bancshares, Inc*., 30 Cal. App. 5th 696, 703 (2018) supports enforceability. *See generally* Mtn. (citing *Drulias* eight times). But in *Drulias*, the plaintiffs brought a derivative action asserting breach of fiduciary duty claims under Delaware law. 30 Cal. App. 5th at 700. Every rationale of the court pointed to by defendants is based on Delaware case law arising out of internal affairs matters – ***not*** the gravamen here. Indeed, the basis of the court's ruling that a forum selection bylaw (not a Grundfest clause) steering internal affairs claims to Delaware did not conflict with California law or public policy was that there was no conflict under the "internal affairs doctrine," which required the "application of the law of the state of incorporation in certain actions . . . involving the corporation's internal affairs." *Id.* at 706. The court held "we agree . . . there is 'no unfairness in a requirement that claims against a Delaware corporation ***under Delaware law*** be brought in a Delaware court.'" *Id.* at 709. Grundfest clauses are far outside the orbit of *Drulias* not only because they regulate ***federal law***, but also because

[21] *See, e.g*., *Verdugo*, 237 Cal. App. 4th at 155 n.4 (explaining *Rodriguez* partial overruling of *Wilko* was "based on the Federal Arbitration Act's . . . public policy favoring arbitration"); *West v. Lloyd's*, No. B095440, 1997 WL 1114662, at *6-*7, *9 (Cal. Ct. App. Oct. 23, 1997) (favorably citing *Wilko*, finding forum selection provision "void" and stating "subsequent history" of Wilko had no effect on the reasoning of *Hall* because *Rodriguez* only "overrul[ed] *Wilko* . . . [to] reconcil[e] two competing federal legislative policies, one embodied in the Arbitration Act, which strongly favors the enforcement of agreements to arbitrate, and the protections afforded by [§14 of the 1933 Act]"); *Countrywide Fin. Corp. v. Bundy*, 187 Cal. App. 4th 234, 250-51 (2010) (*Rodriguez*'s overruling of *Wilko* was limited to "whether [S]ection 14 of the Securities Act of 1933. . . voided an agreement to arbitrate."); *Franco v. Arakelian Enters., Inc*., 149 Cal Rptr. 3d 530, 547 (Ct. App. 2012) (*Rodriguez* overruled *Wilko* insofar as it "exempted claims under the Securities Act of 1933 . . . from arbitration."). So too, the Ninth Circuit has recognized that *Rodriguez* only overruled *Wilko* to the extent it upheld an arbitration clause "by virtue of the Arbitration Act," and with "two federal statutes in conflict, the considerations of international commerce tipped the balance," and thus that where, as here, "'the provisions of the Arbitration Act'" are not implicated, forum-selection clauses remain "void because they violate the 1933 Act." *Richards v. Lloyd's of London*, 107 F.3d 1422, 1424, 1426-27 (9th Cir. 1997), *superseded on other grounds by Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998) (en banc). Thus, while defendants discuss *Richards* at length, in truth *Richards* does not support them here. This case does ***not*** involve a traditional bilateral international arbitration agreement. Defendants assert that because Grundfest clauses are domestic in nature, their erroneous interpretation applies with more force, but that is simply nonsense. *See* Mtn. at 18-19 ("If litigants can be bound to a forum selection clause that would send them to England . . . plaintiffs here cannot claim an inviolate right under federal law to bring their claims in state court as opposed to an easily available federal forum. . . .").

they discriminately exert an extraterritorial impact upon the jurisdiction of states outside Delaware and upon personal rights that are indisputably ***not*** internal affairs matters.[22]

Because defendants' forum-selection clause is void under §14 of the 1933 Act, it is unenforceable as a matter of California contract law, and thus defendants' Motion should be denied. *See Verdugo*, 237 Cal. App. 4th at 157 (forum selection clause unenforceable due to statutory anti-waiver provision); *Hall*, 150 Cal. App. 3d at 418 (same). Furthermore, defendants do not (and cannot) show enforcement will not diminish plaintiffs' rights.

B. Enforcement Would Be Unconscionable

This Court has the discretion to refuse enforcement because the Grundfest clause is unconscionable. Cal. Civ. Code §1670.5. The "'unconscionability doctrine is concerned not with "a simple old-fashioned bad bargain," but with terms that are "unreasonably favorable to the more powerful party."'" *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 991 (2015). A forum selection clause may be unenforceable if it is shown that "it was outside the reasonable expectations of the weaker or adhering party or that enforcement would be unduly oppressive or unconscionable." *Furda v. Superior Court*, 161 Cal. App. 3d 418, 426 (1984). Unconscionability requires a showing of both procedural unconscionability and substantive unconscionability. *Armendariz*, 24 Cal. 4th at 114. Both components must be present, but not in the same degree; by the use of a sliding scale, a greater showing of procedural or substantive unconscionability will require less of a showing of the other to invalidate the claim. *Id*.

1. The Grundfest Clause Is Procedurally Unconscionable

Procedural unconscionability involves oppression or surprise due to unequal bargaining power between the parties. *Sanchez*, 61 Cal. 4th at 910. Plaintiffs had no opportunity to negotiate the terms of

[22] Defendants also cite *Bushansky v. Soon-Shiong*, 23 Cal. App. 5th 1000, 1005 (2018), another derivative case. Not only did that case involve indisputably internal affairs – claims for "breaches of fiduciary duty" (*id.* at 1004), there the "parties agree[d]" that the company's "certificate of incorporation constitute[d] a contractual agreement between the corporation and its shareholders." *Id.* at 1005. No such agreement exists here. Furthermore, plaintiffs assert the Grundfest clause is void for being unlawful and unconstitutional, and unenforceable for diminishing unwaivable rights and for being unconscionable. No case defendants cite addresses that. Moreover, *Bushansky*, *Drulias* and the cases cited therein all rest on the internal affairs doctrine, which is ***not*** applicable here.

the Grundfest clause, nor did they have any power to do so. Such unequal bargaining power, demonstrates a high degree of oppressiveness. *See Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 663 (2004). Even if they knew about the Grundfest clause buried in the Company's charter (and they did not) investors like plaintiffs had no choice but to purchase shares purportedly subject to the Grundfest clause. *See Lhotka v. Geographic Expeditions, Inc.*, 181 Cal. App. 4th 816, 821 (2010) (procedural unconscionability may be proven by showing that a party has no meaningful opportunity to negotiate terms or the contract is presented on a take it or leave it basis).

2. The Grundfest Clause Is Substantively Unconscionable

Substantively unconscionable terms may take various forms, but may generally be described as unfair or one-sided. *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1071 (2003). Grundfest clauses provide the Company alone has the right to control the forum of a lawsuit: "[u]nless ***the Corporation*** consents in writing to the selection of an alternate 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, as amended." Declaration of Nina F. Locker in Support of Dropbox Defendants' Motion to Dismiss for Forum Non Conveniens, Ex. 2 at 23. They therefore lack basic fairness. *See Abramson*, 115 Cal. App. 4th at 657 (agreements must contain at least "a modicum of bilaterality" to avoid unconscionability). Plaintiffs had the reasonable expectation they could choose this forum by a right protected for decades with an anti-removal bar buttressing the Court's concurrent jurisdiction. That right was vitiated by a unilateral waiver, further demonstrating the clause is unenforceable. *Smith, Valentino & Smith*, 17 Cal. 3d at 495-96 (contract not "entered into freely and voluntarily by parties who have negotiated at arm's length" can be unenforceable).

Defendants assert the Grundfest clause exists for a "rational basis" of consolidating claims in a single forum. Mtn. at 15. There is no evidence offered by defendants of the Company's basis in adopting the provision. It is pretty obvious what is the "basis" for the clause: avoiding state court jurisdiction protected by 15 U.S.C. §77v(a) and *Cyan.* Taking away a right to file 1933 Act cases in state court that has existed and been protected by an anti-removal bar for decades is hardly a basis that is fair or reasonable.

V. CONCLUSION

The Court should find the Grundfest clause is void for being unlawful and unconstitutional, and unenforceable for diminishing unwaivable rights and for being unconscionable.

DATED: June 10, 2020

Respectfully submitted,

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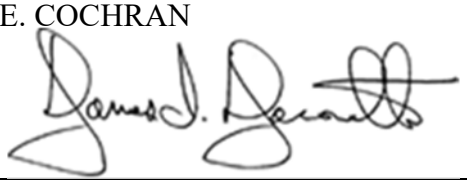

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DECLARATION OF SERVICE BY MAIL & EMAIL

I, Casey Reis, is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action, and have a business address of 655 West Broadway, Suite 1900, San Diego, California 92101.

I hereby declare that on June 10, 2020, I caused to be served PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR FORUM NON CONVENIENS for forum non conveniens on the parties in the within action by depositing a true and correct copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed below. I further certify that a copy was also e-mailed to the addresses below:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 10, 2020, at San Diego, California.

CASEY REIS