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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 Case Nos. 19-CIV-05217, 19-CIV-05417, and 19-CIV-05865) CLASS ACTION **AMICUS BRIEF OF FORMER DELAWARE JUSTICES, CHANCELLORS, AND VICE CHANCELLORS AND PROFESSOR JOSEPH A. GRUNDFEST IN SUPPORT OF MOTION TO DISMISS FOR FORUM NON CONVENIENS** **Assigned for All Purposes to:** Dept.: 4 Judge: Nancy L. Fineman Trial Date: Not Yet Set Date Action Filed: August 30, 2019

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INTEREST OF AMICI

The Honorable Grover C. Brown served as Vice Chancellor of the Delaware Court of Chancery from 1973 to 1982 and as Chancellor from 1982 until 1985, where he authored seminal decisions on Delaware corporate law. He has since been in private practice, with a focus on corporate and fiduciary law.

The Honorable Joseph A. Grundfest served as Commissioner of the U.S. Securities and Exchange Commission ("SEC") from 1985 to 1990 and is the W.A. Franke Professor of Law and Business at Stanford Law School. He is a nationally renowned expert on securities regulation and corporate law, and has written extensively regarding federal forum provisions ("FFPs").

The Honorable Jack B. Jacobs served on the Delaware Supreme Court from 2003 until 2014 and, before that, as Vice Chancellor of the Delaware Court of Chancery from 1985 until 2003. He now practices law, with a focus on Delaware-law issues, and teaches as an Adjunct Professor of Law at the New York University Law School, Columbia University Law School, Vanderbilt University Law School, and the University of Pennsylvania Law School.

The Honorable Stephen P. Lamb served as Vice Chancellor of the Delaware Court of Chancery from 1997 until 2009, where he decided key questions of Delaware corporate law. He is now in private practice, with a focus on mediating and arbitrating, and has served as an Adjunct Professor at the New York University School of Law and the University of Pennsylvania School of Law.

The Honorable Henry duPont Ridgely served for more than 30 years as a jurist in the Delaware judiciary, including more than a decade as a Justice of the Delaware Supreme Court. He participated in more than 700 published opinions, including many major decisions involving corporate law and governance. He also has written law review articles and lectured throughout the world on corporate-law topics.

The Honorable Myron T. Steele served as Chief Justice of the Delaware Supreme Court, as a Judge of the Delaware Superior Court, and as Vice Chancellor of the Delaware Court of Chancery. During his judicial career, he published more than 400 opinions addressing issues of Delaware corporate law. He speaks and writes frequently on corporate-law issues and has served

as an Adjunct Professor Law at the University of Pennsylvania Law School, University of Virginia Law School, and Pepperdine University Law School.

The Honorable E. Norman Veasey served as Chief Justice of the Delaware Supreme Court, completing a 12-year term in May of 2004. He is now in private practice and has served as an Adjunct Professor at the University of Pennsylvania Law School, New York University School of Law, the University of Virginia School of Law, and several other institutions. He also is a frequent writer and speaker on issues regarding corporate governance.

All amici join in the portions of this brief regarding Delaware law. All other portions of this brief reflect the views of Professor Grundfest.

ARGUMENT

I. The FFP At Issue In This Case Is Covered by the Internal Affairs Doctrine

Under the "internal affairs doctrine," only the state of incorporation has the authority to regulate a corporation's internal affairs. (See, e.g., *Edgar v. MITE Corp.* (1982) 457 U.S. 624, 645-646 (*Edgar*); *McDermott Inc. v. Lewis* (Del. 1987) 531 A.2d 206, 216.) That doctrine clearly holds that only the state of incorporation can regulate "matters peculiar to the relationship among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." (*Edgar*, 457 U.S. at p. 645.)[1]

In *Salzberg v. Sciabacucchi* (Del. 2020) 227 A.3d 102 (*Schiabacucchi*), Delaware's Supreme Court considered a facial challenge to the validity of FPPs. That court was not addressing an "as applied" challenge of the sort now pending before this Court. *Sciabacucchi* concluded that "FFPs, as a facial matter, do not violate principles of horizontal sovereignty" (*Sciabacucchi*, 227 A.3d at p. 137)—that is, principles reserving authority to each state to apply its own law to its own chartered corporations as described by the internal affairs doctrine. Applying Delaware law to FPPs therefore does not, on a facial claim, necessarily impinge on the authority of

[1] Dropbox's briefs explain that a bylaw is by necessity a matter of internal affairs and that its validity is therefore governed by Delaware law. The argument set forth here provides an alternative basis for reaching the same conclusion.

any other state, and the FPP of a Delaware corporation is, on a facial challenge, governed by Delaware law. (See *id.* at pp. 134-137.)

Plaintiffs misread *Sciabacucchi*'s analysis of FPPs "as a facial matter," *Schiabacucchi*, *supra*, 227 A.2d at p. 137, and critically ignore the as-applied question altogether. (See Opp., pp. 9-12.) Indeed, Plaintiffs even resort to misquotation in their campaign to stand *Sciabacucchi* on its head. They describe *Sciabacucchi* as "recognizing that "[federal forum provisions] are not 'internal affairs' matters within the traditional *Edgar/McDermott* sense." (Opp., p. 11, fn.10.) But that quote is extracted from the following full sentence: "*If* FFPs are not 'internal affairs' matters within the traditional *Edgar/McDermott* sense, and are not 'internal corporate claims' within the meaning of [Delaware law], then *does that suggest that* Edgar*'s protective boundaries may not fully encompass FFPs*?" (*Sciabacucchi*, *supra*, 227 A.3d at pp.133-134, italics added, fn. omitted.) The sentence poses a neutral question designed to animate the court's own analysis. It does not represent the court's conclusion about the outcome of its analysis. This is not a simple transcription error.

In any event, on an as-applied basis, the allegations in Plaintiffs' complaints compel the conclusion that the internal affairs doctrine must apply. The complaints allege that Plaintiffs purchased shares in connection with Dropbox's initial public offering of stock and that the registration statement regarding that offering contained false or misleading statements. (E.g., Steinhaus Compl., pp. 10-22.) At least one complaint specifically alleges that corporate "insiders" sold stock to Plaintiffs in the IPO. (*Id.*, p. 10.) The registration statement at issue was reviewed and signed by Dropbox's Board and its senior executives. (See Locker Decl., Ex. 1, p. 178.) As such, the complaints arise from "internal" corporate conduct on the part of Dropbox's directors and officers and the plaintiffs' status as stockholders. Those are all internal matters "peculiar to the relationship among or between the corporation and its current officers, directors, and shareholders." (*Edgar*, *supra*, 457 U.S. at p. 645.) The complaints allege nothing else.

Because those matters are all internal, the question of which law governs the validity of a provision about how those matters should be resolved—here, the FFP—is equally internal. Accordingly, the FPP at issue in these complaints must be covered by the internal affairs doctrine,

and Delaware law must govern its validity, "because otherwise a corporation could be faced with conflicting demands." (*Edgar*, *supra*, 457 U.S. at p. 645.) Indeed, litigation under the Securities Act of 1933 ("Securities Act") is all about alleged misrepresentations "peculiar to the relationship among or between the corporation and its current officers, directors, and shareholders." (*Ibid.*; see Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and* Sciabacucchi (2020) 75 Bus. Law. 1319, 1328-1329, 1366.)

That approach makes sense. Nothing in *Sciabacucchi*, or in similar Delaware precedent, represents an attempt by Delaware to reach out beyond the proper purview of that state's law. Rather, that decision gives Delaware corporations a tool, authorized under Delaware law, for ensuring that claims fundamentally based on a plaintiff's status as an owner of company stock are litigated in a single, efficient forum, thus avoiding the kind of duplicative litigation that imposes unnecessary costs on the company, its investors, and its other stakeholders.[2] The FFP at issue in *Sciabacucchi*, like the FFP at issue here, directed federal claims by shareholders to a federal court. Delaware courts have likewise upheld bylaws directing state-law claims by shareholders to a state court. (See *Boilermakers*, 73 A.3d at pp. 942, 951-952 ; see also Locker Decl., Ex. 2, p. 23 [provision at issue in this case contains not only FFP but also language directing derivative claims and certain other state-law claims to state court].)

There is no basis for displacing in this case the Delaware ruling that "FFPs, as a facial matter, do not violate principles of horizontal sovereignty." (*Sciabacucchi*, *supra*, 227 A.3d at p. 137; see *id.* at p. 136.) This Court should reject claims that Delaware law here does not govern the validity of an FFP in the bylaws of a Delaware corporation. (See *id.* at pp.132, 134, 137.)

[2] By contrast, Delaware courts have rejected attempts to bring tort claims unrelated to Delaware in a Delaware forum. (See, e.g., *Genuine Parts Co. v. Cepec* (Del. 2016) 137 A.3d 123, 125; see also *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* (Del. Ch. 2013) 73 A.3d 934, 951-952 (*Boilermakers*), original italics [bylaws seeking to regulate forum for tort claims "would not deal with the rights and powers of the plaintiff-stockholder *as a stockholder*"].)

II. The SEC Accelerated the Dropbox Registration Statement and Raised No Objection to the FFP

Plaintiffs assert that the FFP is not a lawful object of contract formation because it "contravenes the 1933 Act's concurrent jurisdiction and anti-removal protections, as well as the Supreme Court's decision in *Cyan*." (Opp., p. 18.)

The Dropbox registration statement explains that the company's "amended and restated bylaws" will provide that federal district courts "will be the exclusive forum for resolving any complaint asserting a cause of action arising under the Securities Act." (Locker Decl., Ex. 1, Reg. Statement 177.) The SEC was fully aware of the FFP, and its decision to accelerate the Dropbox registration statement, with no objection to the FFP,[3] supports the conclusion that the FFP is legal and is entirely inconsistent with the suggestion that the Dropbox FFP violates the law in any manner. The SEC is authorized to prevent registration of any security if it concludes that the registration is against "the public interest" or inimical to the "protection of investors." (15 U.S.C. § 77h.) The SEC will not even allow proxy proposals that are "improper under state law." (Rule 14a-8, Question 9.) Shares covered by FFPs would not be registered if the SEC concluded that FFPs violated federal securities laws, the dormant commerce clause, or state law; were contrary to the public interest; or were adverse to the protection of investors.

Indeed, the SEC has approved the registration of dozens of securities subject to FFPs,[4] and has never expressed the view that FFPs are inconsistent with the Securities Act, against the public interest, or adverse to the "protection of investors." In contrast, the SEC has refused to approve securities registration statements that would make shareholder claims subject to mandatory

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[3] *See* DropBox, Inc. Letter to SEC Requesting Acceleration, File No. 333-223182 (Mar. 19, 2018) (requesting effectiveness by Mar. 22, 2018); Goldman Sachs & Co, J.P. Morgan Securities Letter to SEC Requesting Acceleration, File No. 333-223182 (Mar. 19, 2018) (same); Notice of Effectiveness, File No. 333-223182 (SEC Mar. 22, 2018).

[4] *See* Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and* Sciabacucchi (SSRN 2019) Working Paper No. 241, p. 23 <https://ssrn.com/abstract=3448651> ["[A]s of March 27, 2019, at least 58 initial public offerings were of issuers with [FFPs] in their charters or bylaws."]; Aggarwal et al., *Federal Forum Provisions and the Internal Affairs Doctrine* (SSRN 2020), at Table 1 <https://ssrn.com/abstract=3439078 and forthcoming in the *Harvard Business Law Review*> [identifying 91 instances of initial public offerings subject to FFPs as of December 19, 2018].)

arbitration.[5] The Commission regularly evaluates forum selection clauses based on legality and public policy considerations, and disallows those that are objectionable.

The unavoidable implication of Plaintiffs' argument is that, by permitting registration of securities subject to an FFP, the SEC has blessed a violation of the Securities Act and has failed in its obligation to protect investors. Plaintiffs are asking this court to conclude that they understand the federal securities laws better than the SEC. They do not. Their arguments regarding illegality should be rejected for the same reason that the SEC accelerated registration of the Dropbox securities subject to an FFP: FFPs do not violate the law.

III. Adopting Plaintiffs' Reading of the Law Would Render Corporations Ungovernable

Plaintiffs assert that the Dropbox FFP is unenforceable on the ground that it was too "inconspicuous[ly]" placed. (Opp., p. 17.) In their view, mutual assent was lacking, and "no valid contract with respect to" the FFP exists, because they did not receive "sufficient notice of the forum selection clause prior to entering into the purported contract." (*Id.*, pp. 17-18.)

But FFPs are no more or less "inconspicuous" than charter or bylaw provisions governing the election of directors, the calling of stockholder meetings, the rules governing stockholder votes, the indemnification of officers and directors, and myriad other essential corporate functions. (See, e.g., Locker Decl., Ex. 2.) Those provisions are regularly enforced even though they are "buried in an exhibit" or "several hundred pages into one of several amendments to [a] Registration Statement." (Opp., p. 17.)[6] Dropbox's disclosures are standard corporate practice and comply fully with SEC disclosure requirements. (See SEC Form S-1 <https://www.sec.gov/files/forms-1.pdf>; 17 C.F.R. Part 229.)

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[5] See, e.g., Scott & Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes* (2013) 36 Harv. J.L. & Pub. Pol'y 1187, 1221-1222.

[6] See, e.g., *Drulias v. 1st Century Bancshares, Inc.* (2018) 30 Cal.App.5th 696, 699 [enforcing bylaw], review denied Mar. 20, 2019; *Tu-Vu Drive-In Corp. v. Ashkins* (1964) 61 Cal.2d 283, 284 [enforcing bylaw]; *ATP Tour, Inc. v. Deutscher Tennis Bund* (Del. 2014) 91 A.3d 554, 555 [bylaw enforceable]; *Stifel Fin. Corp. v. Cochran* (Del. 2002) 809 A.2d 555, 560 [enforcing bylaw].

Plaintiffs' position is irreconcilable with established California and Delaware precedent and, if followed, would prevent the ordinary operation of every publicly traded corporation in the United States, as millions of stockholders could complain that relevant governing provisions were "buried in an exhibit" and that there was a failure of mutual assent. The result would be boardroom chaos throughout corporate America.[7]

Plaintiffs also contend that no consideration supports contract formation because Dropbox, "as a Delaware chartered corporation, was obligated to adopt corporate bylaws." (Opp., p. 19 [citing DGCL §§ 102, 109].) Plaintiffs misstate Delaware law. No Delaware corporation is "obligated to adopt bylaws." Delaware General Corporation Law section 109 permits but does not require the adoption of bylaws, and section 102, subdivision (b)(1) provides that "any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation." Delaware corporations thus can function with a certificate of incorporation alone.

Plaintiffs' misstatement of law is compounded by the omission of an obvious material fact. As is apparent on the face of the registration statement (see Locker Decl. Ex. 1), and from plaintiffs' own complaints (e.g., Steinhaus Compl., p. 3), money was paid for Dropbox's shares. Money is valid consideration under any state's law.

IV. It is Reasonable to Require That Plaintiffs Litigate a Federal Claim In Federal Court

Plaintiffs have not demonstrated, and cannot demonstrate, that a federal forum is not fully adequate for litigation of their claims under the Securities Act. Indeed, corporate boards have very good reason to adopt FFPs, which minimize duplicative litigation that wastes corporate resources and thereby directly harms the corporation's shareholders.

First, Congress expressly specified that federal district courts have jurisdiction over claims under the Securities Act. (See 15 U.S.C. § 77v.) Had Congress believed that there was some

[7] As noted above, Plaintiffs' position on choice of law issues would only intensify the problem. If multiple states can impose multiple and sometimes conflicting requirements with respect to issues like the validity of a corporation's bylaws, the corporation's ability to operate would be severely affected. *See* pp. 2-4, *supra.*

meaningful disadvantage associated with litigation in a federal venue, it presumably would have written the jurisdictional provision differently—or would have amended the jurisdictional provision after enactment if and when any such disadvantage became apparent. Congress's choice to select and retain federal court as an available venue for Securities Act litigation necessarily indicates that such a venue is an acceptable one. And enforcement of a reasonable forum selection clause sending Securities Act claims to federal court is required by *The Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, and its progeny, under which such enforcement may be avoided only if it is "unreasonable and unjust" or the clause itself is "invalid for such reasons as fraud or overreaching." (*Ibid.* at p. 15.)

Second, there is no reason to believe that plaintiffs' securities-law rights (if any) cannot be vindicated in federal court. Securities Act claims have been successfully litigated in federal court for decades. (See Grundfest, *supra*, 75 Bus. Law. at pp. 1319, 1379; Grundfest, *Federal Forum Provisions: Historical Development and Future Evolution* (SSRN 2019) *1, 3-4, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3497126>.) The U.S. District Court for the Northern District of California, in which overlapping Securities Act claims on behalf of the same class of plaintiffs who brought this case are pending, is located not far from this Court, and is as accessible to counsel and to witnesses as is this Court. Plaintiffs forgo no "substantive rights afforded by the statute" by litigating in federal court. (*Rodriguez de Quijas v. Shearson/American Exp., Inc.* (1989) 490 U.S. 477, 481 [quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 628].) And such litigation is, by any measure, both fair and efficient.

Third, it is perfectly rational for a corporation to specify a federal forum for the resolution of a federal claim. That approach minimizes duplicative litigation that is costly and wasteful for the corporation and, by extension, for its shareholders. Absent an FFP, corporations are exposed to wasteful jurisdictional jockeying as competing bands of plaintiffs' counsel vie in state and federal court for control of the litigation. Consider this case, in which Securities Act complaints are pending in *both* state court and federal court, all alleging the same wrong arising from the same nucleus of operative facts. That wasteful pattern is hardly unique to this case. (See Cornerstone Research, *Securities Class Action Filings—2019 Year in Review* 4 (hereafter

Cornerstone Report) [noting that "[a]bout 45 percent of all state [Securities] Act filings in 2019 had a parallel action in federal court"] <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review>.)

Federal court is the only choice of forum that eliminates the problem. Plaintiffs often couple Securities Act claims with other federal securities-law claims over which federal courts have *exclusive* jurisdiction. In particular, claims under Rule 10b-5, a regulation promulgated pursuant to the Securities and Exchange Act of 1934, are subject to exclusive federal jurisdiction and are frequently pled in conjunction with Securities Act claims. (See 17 C.F.R. § 240.10b-5 (Rule 10b-5) [proscribing fraud in connection with securities transactions]; 15 U.S.C. § 78aa [giving federal courts "exclusive" jurisdiction over Rule 10b-5 claims]; see also, e.g., *Schueneman v. Arena Pharmaceuticals, Inc.* (S.D. Cal. June 12, 2020, No. 3:10-CV-01959-CAB-(BLM)) 2020 WL 3129566, at *1 [litigation involving both Securities Act claim and Rule 10b-5 claim]; Cornerstone Report, *supra*, at pp. 8-9.) A complaint in such a case cannot be brought in state court, and a forum provision in corporate bylaws could not legally require it to be brought there.

Federal court is therefore the only forum that adequately addresses the possibility of simultaneous state- and federal-court litigation of federal securities-law claims. By avoiding such duplicative litigation while providing plaintiffs a reasonable, statutorily authorized federal forum for Securities Act claims, FFPs serve the interests of all of the corporation's shareholders.

CONCLUSION

The motion to dismiss should be granted. To the extent that the Court were to deny the motion to dismiss, the Court should permit an immediate appeal so that the important issues raised in this case can be considered expeditiously by the California Court of Appeal and, if needed, the California Supreme Court.

DATED: July 10, 2020

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