EFiled: Oct 14 2019 10:59AM EDT
Filing ID 64312251
Case Number 346,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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 GURLEY, MARKA HANSEN, SHARON MCCOLLAM, ANTHONY WOOD, RAVI AHUJA, SHAWN CAROLAN, JEFFREY HASTINGS, ALAN HENDRICKS, NEIL HUNT, DANIEL LEFF, and RAY ROTHROCK, Defendants Below-Appellants, - and – BLUE APRON HOLDINGS, INC., STITCH FIX, INC. and ROKU, INC., Nominal Defendants Below-Appellants, v. MATTHEW SCIABACUCCHI, on behalf of himself and all others similarly situated, Plaintiff Below-Appellee.	No. 346, 2019 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2017-0931-JTL

BRIEF OF *AMICUS CURIAE* ARLO TECHNOLOGIES, INC., DOMO, INC., DROPBOX, INC., EQUILLIUM, INC., NEURONETICS, INC., REDFIN CORPORATION, RESTORATION ROBOTICS, INC. AND UPWORK, INC. IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF *AMICI CURIAE*

Amici Arlo Technologies, Inc., Domo, Inc., Dropbox, Inc., Equillium, Inc., Neuronetics, Inc., Redfin Corporation, Restoration Robotics, Inc. and Upwork, Inc., are eight of the more than 50 Delaware-chartered public companies that adopted charter or bylaw provisions that require stockholders to bring claims under the Securities Act of 1933 exclusively in federal court. Their interests will be directly impacted by the outcome of this appeal and they believe they are well positioned to represent the broader group of public companies with Federal Forum Provisions. *Indeed, one of the amici, Restoration Robotics, is currently facing a Securities Act claim in California state court that has been stayed pending this Court's decision in this matter*. *Amici* believe their brief will be helpful to the Court inasmuch as it addresses a range of concerns that are not raised by Appellants in their briefing and that relate directly to the merits of the Court of Chancery's decision below.

SUMMARY OF ARGUMENT

A growing number of corporations have adopted Federal Forum Provisions ("FFPs") in their charters and bylaws requiring that stockholders bring claims under the Securities Act of 1933 ("Securities Act") in federal court. The Court of Chancery's decision incorrectly overrides the plain text of the Delaware General Corporation Law ("DGCL") and grafts an unprecedented "internal affairs" limitation onto that statute. The decision conflicts with *Boilermakers* and *ATP*, and Sections 102(b)(1) and 115 of the DGCL. These authorities grant Delaware corporations broad flexibility to adopt "[a]ny provision for the management of the business," including stockholder litigation, and "any provision … limiting and regulating" the forums where stockholders can bring litigation arising from initial public offerings ("IPOs"). 8 Del. C. § 102(b)(1).

Rather than look to these authorities, the Court of Chancery engaged in an examination of "first principles" and hypothetical claims involving product liability and breach of contract, none of which has any bearing on the validity of FFPs, which by their terms, apply only to claims alleging that the corporation and its directors made material misstatements in offering materials issued pursuant to the core corporate activity of raising capital from investors. The same conduct can violate both Delaware and federal law, and Section 102(b)(1) does not limit a corporation's ability to manage stockholder litigation based on the source of the

underlying law. Nor are FFPs inconsistent with federal law, as the Court of Chancery suggests. The United States Supreme Court has held that Securities Act claims are subject to arbitration agreements that bypass *both* state and federal court entirely. Accordingly, the Securities Act does not bar less-restrictive provisions that require litigation of these federal claims in federal court.

The end result of the Court of Chancery's decision is to create confusion and complexity where the DGCL is clear. Left unchecked, the Court of Chancery's expansive language narrows the scope of Delaware law and weakens the ability of Delaware corporations to adapt to evolving business conditions. Corporations are likely to face an increasing trend of duplicative Securities Act litigation in multiple forums, with the risks of inconsistent decisions and added cost and disruption. Section 102(b)(1) grants corporations authority to reduce these risks through FFPs that efficiently channel Securities Act claims to federal court and ultimately benefit all corporate stakeholders.

ARGUMENT

I. The Plain Text of Section 102(b)(1) Authorizes Federal Forum Provisions

The "most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it." *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 950 (Del. Ch. 2013). It is "axiomatic that a statute . . . is to be interpreted according to its plain and ordinary meaning." *New Cingular Wireless PCS v. Sussex Cty. Bd. of Adjustment*, 65 A.3d 607, 611 (Del. 2013). Thus, "[w]here the language of the statute is unambiguous, no interpretation is required and the plain meaning of the words controls." *Del. Comp. Rating Bureau, Inc. v. Ins. Comm'r*, No. 4318-VCL, 2009 WL 2366009, at *4 (Del. Ch. July 24, 2009) (quoting *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000)).

Section 102(b)(1) grants corporations broad flexibility in drafting certificates of incorporation, *see, e.g., Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 845 (Del. Ch. 2004), and corporate charters "are presumed to be valid." *Cedarview Opportunities Master Fund, L.P. v. Spanish Broadcasting System, Inc.* C.A. No. 2017-0785-AGB, 2018 WL 4057012, at *20 (Del. Ch. Aug. 27, 2018). Accordingly, courts construe charters "in a manner consistent with the law rather than strike down the [charter provisions]." *Id.*; *see also ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 557 (Del. 2014) (applying same presumption

with respect to bylaws issued under Section 109). Specifically, Section 102(b)(1) permits corporate charters to include:

> (1) Any 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 . . .; if such provisions are not contrary to the laws of this State. [8 Del. C. §102.]

FFPs fit comfortably within the plain language of Section 102(b)(1). They provide a procedural rule for managing disputes arising from the corporation's core capital raising activities and its disclosures to investors by requiring that Securities Act claims be heard in federal court. They further "limit[] and regulat[e] the powers of … stockholders" to bring Securities Act claims in any other forum. There is no basis to suggest that FFPs are contrary to Delaware law, and the Court of Chancery did not do so. There are no other requirements for a valid charter provision and the settled presumption of validity must be respected, especially on a facial challenge.[1]

This reading of Section 102(b)(1) comports with *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, and its subsequent ratification by the

[1] Several corporations, including certain of the *amici*, have adopted FFPs in their bylaws, pursuant to Section 109(b), rather than in their certificates, pursuant to Section 102(b)(1). Under Section 109, a bylaw that is impermissible under Section 102(b)(1) would also be invalid. Accordingly, the analysis is the same for all FFPs whether in charters or bylaws.

General Assembly in Section 115. In *Boilermakers*, then-Chancellor Strine upheld a bylaw requiring that derivative claims be brought exclusively in the Court of Chancery. The Court concluded as "a matter of easy linguistics" that these bylaws were permitted under Section 109(b) "because they regulate where stockholders may file suit," *id.* at 950-52, and thus "plainly relate to the 'business of the corporation[s],' the 'conduct of [their] affairs,' and regulate the 'rights and powers of [their] stockholders.'" *Id*. at 939. There is no substantive or principled difference between the forum-selection bylaws at issue in *Boilermakers* and the FFPs at issue here.

Following *Boilermakers*, the General Assembly enacted Section 115 and codified corporations' ability to adopt forum selection bylaws that require stockholders to bring "internal corporate claims" in Delaware. Significantly, the legislation defines "internal corporate claims" broadly to include claims "based upon a violation of a duty by a current or former director or officer or stockholder in such capacity." 8 Del. C. § 115. Nothing in the text of Section 115 requires that an "internal corporate claim" be based on a duty that arises solely under Delaware law or otherwise incorporates the separate "internal affairs doctrine." Contrary to

the Court of Chancery's rationale, FFPs are entirely consistent with the text of Section 115, which draws no distinctions based on the legal source of the claims.[2]

This Court's decision in *ATP*, 91 A.3d 554, further undermines the Court of Chancery's decision. *ATP* upheld a fee-shifting bylaw as facially valid under Section 109(b), where the provision by its terms applied to any lawsuit by a corporate member against the non-stock corporation or another member. *Id.* at 555. Unlike the Court of Chancery, the *ATP* Court did not attempt to parse the underlying legal source of the claims and its decision did not hinge on whether the claims arose under federal or Delaware law. The *ATP* claims were "intra-corporate" simply because they were asserted by a member against the corporation. *Id.* at 555-56. And the Court found the fee-shifting bylaw validly applied to all of the claims asserted, including those based on federal antitrust law. *Id*.

The permitted scope of FFPs is no different. By definition, FFPs can only apply to Securities Act claims brought by a current or former stockholder against the corporation and its directors or officers. These claims are indisputably "intra-

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[2] There also is substantial overlap between Delaware and federal disclosure law. Both Delaware and federal law impose a duty on directors not to make material misstatements in public filings, such as IPO registration statements. *See, e.g., Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998) ("When corporate directors impart information they must comport with the obligations imposed by both the Delaware law and the federal statutes and regulations of the [SEC]."); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983) ("Section 11 … was designed to assure compliance with the disclosure provisions" of the Securities Act.).

corporate" under *ATP*. Neither the potential existence of other defendants, such as underwriters, nor the federal source of the legal duty, alters that basic fact or limits a corporation's authority to adopt an FFP under Section 102(b)(1).

Rather than follow the plain text of 102(b)(1), the directly relevant precedent in *Boilermakers* and *ATP*, or the General Assembly's more recent enactment in Section 115, the Court of Chancery sought to judicially amend Section 102(b)(1) to incorporate an "internal affairs doctrine." This was error.

As an initial matter, the internal affairs doctrine is not a limitation on a corporation's authority under Section 102(b)(1). Rather, it is a choice of law rule that determines which state's law governs a substantive claim. Under the internal affairs doctrine, state law claims arising from the "relationships among or between the corporation and its officers, directors, and shareholders" are governed by the law of the state of incorporation. *VantagePoint Venture Partners v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005). But FFPs have nothing to do with choice of law and the internal affairs doctrine does not limit the scope of a corporation's authority under Section 102(b)(1). As *Boilermakers* recognized, forum selection provisions "are process-oriented," and not substantive. 73 A.2d at 951. They "regulate *where* stockholders may file suit, not *whether* the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation." *Id.* at 951-52 (emphasis in original). The substantive choice of

law rule reflected in the internal affairs doctrine is not relevant to the questions presented in this appeal.

The Court of Chancery then went further by adopting a new, narrow definition of "internal affairs" that conflicts with Supreme Court precedent. Rather than adhere to the definition in *VantagePoint* (and also in *Edgar v. Mite Corp.*, 457 U.S. 624, 645 (1982)), the Court of Chancery applied a materially narrower definition: a claim is sufficiently "internal" to be governed by a corporate charter only if it "turn[s] on the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation." *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2018 WL 6719718, at *1 (Del. Ch. Dec. 19, 2018). The Court did not explain the origin of this test or its precise meaning, but it does not follow *VantagePoint* or Section 102(b)(1).

II. The Court of Chancery's Decision Was Based on Three Flawed Assumptions

Instead of presuming that FFPs are valid, the Court of Chancery searched for hypothetical situations that, in its view, could invalidate FFPs. The Court speculated that FFPs would permit extraterritorial application of Delaware's substantive law; that the validity of FFPs hinges on whether a purchaser is an existing stockholder at the time of purchase; and that FFPs could violate federal law by requiring that federal claims be litigated in federal court. None of these points withstand scrutiny, especially on a facial challenge.

A. Federal Forum Provisions Have No Exterritorial Effect

The Court of Chancery concluded that "first principles" limit a Delaware corporation's authority to select the permitted forum for disputes arising from the "corporation's external interactions" in its organic documents. *Sciabacucchi*, 2018 WL 6719718, at *2. The Court noted that "[a] Delaware corporation that operates in other states must abide by the labor, environmental, health and welfare, and securities law regimes (to name a few) that apply in those jurisdictions. When litigation arises out of those relationships, the DGCL cannot provide the necessary authority to regulate the claims." *Id.* But FFPs are expressly limited to Securities Act claims—claims alleging material misstatements or omissions in a registration statement filed in connection with the sale of securities. The drafting, reviewing and filing of registration statements by a corporation and its board is a fundamental

aspect of a corporation's business affairs and relationship with its stockholders. Section 102(b)(1) allows Delaware corporations to limit the permitted forum for the resolution of disputes arising from those business activities.

There is no basis to invalidate FFPs based on speculative hypotheticals about non-existent charter provisions that could potentially seek to regulate product liability or employee wage claims. *Sciabacucchi*, 2018 WL 6719718, at *2-3. Such provisions are of dubious validity given the substantial body of U.S. and Delaware Supreme Court precedent that already precludes extraterritorial application of the DGCL. *See, e.g., Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *FdG Logistics LLC v. A&R Logistics Holdings Inc.*, 131 A.3d 842, 855-57 (Del. Ch. 2016); *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918). Accordingly, courts do not need to engraft territorial limitations onto otherwise generally applicable statutory language. In any event, those hypotheticals are irrelevant to Securities Act claims governed by FFPs, which by definition, are narrow in scope, relate solely to Securities Act claims, and can never have any impact on product liability claims by customers who also happen to be stockholders.

Fundamentally, a Securities Act claim is not simply an ordinary tort case that incidentally involves a Delaware corporation because the underlying claim is

not based on Delaware law. *Sciabacucchi*, 2018 WL 6719718, at *3. The Court of Chancery's exclusive focus on the legal basis for the claim is inconsistent with this Court's decision in *ATP*. In upholding a fee-shifting bylaw, this Court did not distinguish between the validity of the bylaw's application to Delaware fiduciary claims and federal antitrust claims. *ATP*, 91 A.3d at 555-56. As long as the litigation implicates claims arising from corporate conduct, between a Delaware corporation, its directors and its stockholders, corporate charters can limit the forum where the dispute is heard.

B. The Court of Chancery Erred in its Timing Analysis

The Court of Chancery also improperly focused on the relationship between Section 11 plaintiffs and the corporation during the split second before a plaintiff purchased stock. *Sciabacucchi*, 2018 WL 6719718, at *2, 17-18, 22. This analysis assumes that all Securities Act plaintiffs purchased solely in the IPO, and never before in the private market or after in the secondary market. Both assumptions are flawed.

First, pre-existing stockholders can and do purchase additional shares in IPOs. Nothing in the record on this facial challenge supports the Court of Chancery's view that IPO purchasers are not already stockholders. *Id.* Indeed, publicly-available offering documents show the assumption is not well founded. For example, the prospectus of SI-BONE, Inc. states that certain of the

corporation's existing stockholders or their affiliates had agreed to purchase approximately 1,225,000 shares (17% of the offered shares) in the IPO. *See* Form 424B4, SI-BONE, Inc., filed Oct. 16, 2018, at cover, p. 11, *available at* https://www.sec.gov/Archives/edgar/data/1459839/000119312518301225/d452987d424b4.htm. The prospectus further states that the charter includes an FFP regulating "any complaint asserting a cause of action arising under the Securities Act." *Id.* at 58.

Second, as the Court of Chancery recognized, aftermarket purchasers have standing to assert Section 11 claims when they can trace their shares back to an initial offering. *Sciabacucchi*, 2018 WL 6719718, at *7 n. 37 (citing *DeMaria v. Anderson*, 318 F.3d 170, 176 (2d Cir. 2003)). Stockholders can and do purchase stock in multiple tranches over time. There is no basis in Section 102(b)(1) or elsewhere in Delaware law to distinguish between FFPs that apply to claims brought on a stockholder's second, third or fourth purchase from claims based on the stockholder's first purchase. Indeed, market literature shows that even single purchases are often split into a series of smaller trades for efficient execution. Thus, an order for 10,000 shares could be completed through dozens of smaller transactions automatically executed by electronic brokers. The Court of Chancery's technical formality ignores these market dynamics and is inconsistent

with the General Assembly's broad grant of flexibility in Section 102(b)(1). *Jones Apparel*, 883 A.2d at 845.

The Court of Chancery further erred in holding that Delaware law cannot apply to prospective stockholders before they purchase stock. *Sciabacucchi*, 2018 WL 6719718, at *2, 17-18, 22. Other DGCL provisions expressly allow corporations to limit or regulate the rights of prospective stockholders. For example, Section 202 authorizes corporations to impose transfer restrictions and holding limits on prospective stockholders. Section 202(a) states that such restrictions in a stock certificate "may be enforced against the holder of the restricted security or securities *or any successor or transferee* of the holder." 8 Del. C. § 202(a) (emphasis added). Section 202(b) also authorizes enforcement of such restrictions in the charter or bylaws so long as they were imposed before the shares were issued. *Id.* § 202(b). The Court of Chancery did not address Section 202.

Indeed, the Court of Chancery's focus on the "predicate act" of purchasing stock misconstrues the nature and import of claims under the Securities Act. *Sciabacucchi*, 2018 WL 6719718, at *2. As the United States Supreme Court has held, Section 11 was adopted "to assure compliance with the disclosure provisions" of the Securities Act. *Herman & MacLean*, 459 U.S. at 381-82. Securities Act claims arise from alleged corporate misstatements in a registration

statement or prospectus filed in connection with the sale of securities. The core issues in dispute are whether the disclosures were accurate and whether directors and officers acted appropriately when they drafted, reviewed and filed the offering documents. *See id.* at 382-83 (discussing the statutory due diligence defense). By focusing on the time just before the purchase transaction, the Court of Chancery confused the question of whether an individual plaintiff has standing to bring a Securities Act claim with the question of whether the underlying conduct giving rise to the dispute is sufficiently tied to the categories in Section 102(b)(1) to permit FFPs in the charter. The plain text of Section 102(b)(1) controls, not the hypothetical sufficiency of a particular stockholder's complaint.

C. The Court of Chancery Incorrectly Found Federal Forum Provisions are Contrary to Federal Law

The Court of Chancery also overlooked controlling United States Supreme Court precedent in finding that FFPs are "[c]ontrary to the federal regime." *Sciabacucchi*, 2018 WL 6719718, at *1. While the Securities Act gives federal and state courts concurrent jurisdiction, in *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, the United States Supreme Court held that there is no immutable right to litigate Securities Act claims in state or federal court, and that parties can agree to arbitrate those claims. 490 U.S. 477, 481 (1989). According to *Rodriguez*, "the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that §14 [the Act's anti-waiver provision] is

properly construed to bar any waiver of these provisions." *Id.* Because the Securities Act permits parties to bypass *both* federal and state courts, the Act cannot be read to preclude less-restrictive agreements that require litigation of these federal law claims exclusively in federal court. Consistent with *Rodriguez*, in the several years since corporations began including FFPs in their charters and bylaws, the SEC has never objected or challenged them as inconsistent with the Securities Act.

III. Public Policy Concerns Weigh in Favor of Federal Forum Provisions

Based on its own conception of "first principles," the Court of Chancery's decision dramatically limits the scope of a Delaware corporation's authority to manage its affairs in accordance with Section 102(b)(1). Taken to its literal extreme, the decision also limits the General Assembly's ability to exercise its plenary authority to amend the DGCL to address new developments in an evolving corporate and economic landscape. But these "first principles," and the Court of Chancery's novel application of the internal affairs doctrine, are inconsistent with clear statutory mandates and settled precedent. By limiting the ability of a Delaware charter (or bylaw) to address litigation concerning core board conduct, the decision invites regulation of that conduct by other states, potentially imposing inconsistent obligations and unnecessary cost and complexity.

This is not merely an academic question concerning the limits of corporate authority. Many corporations, including the *amici* here, adopted FFPs in response to substantial changes in the litigation environment facing newly-public companies. Since 2015, the number of public companies facing parallel Securities Act claims in state and federal court has increased dramatically. *See* Joseph A. Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions and Sciabacucchi*, at 16-19 (Rock Center for Corporate Governance, Working Paper No. 241, Sept. 12, 2019), *available at* SSRN:

https://ssrn.com/abstract=3448651.2019. In the future, this trend is likely to increase in light of the United States Supreme Court's 2018 decision precluding removal of Securities Act class actions in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018). Corporate boards made (and should continue to be free to make) well-informed decisions to manage corporate litigation risk by adopting FFPs that prevent duplicative litigation in multiple forums with attendant risks of inconsistent decisions and increased cost and disruption. Consistent with United States Supreme Court precedent, stockholders remain able to pursue Securities Act claims in an appropriate federal forum with expertise in the federal securities laws. This is exactly the flexibility to address new developments that the DGCL grants corporations in Section 102(b)(1). The decision should be reversed.

CONCLUSION

For these reasons, *amici* respectfully suggest that the Court of Chancery's judgment should be reversed.

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Dated: October 14, 2019