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Delaware Court of Chancery Invalidates Federal Forum Selection Provisions for Claims Arising Under the Securities Act of 1933

On December 19, 2018, the Delaware Court of Chancery (Laster, V.C) held in *Sciabacucchi v. Salzberg et al*, C.A. No. 2017-0931-VCL (Del. Ch. Dec. 19, 2018), that federal forum selection provisions contained in the certificates of incorporation of three Delaware corporations were invalid and unenforceable under the Delaware General Corporation Law (the “DGCL”). In particular, the Court reasoned that the Delaware corporations lacked the power to use their certificates of incorporation to require that claims arising under the Securities Act of 1933 (the “’33 Act”) be asserted exclusively in federal court. While corporations may validly use forum selection charter provisions to regulate claims pertaining to their internal affairs, the Court explained that corporations may not use such provisions to regulate external claims like those brought under the ’33 Act, which arise under and are defined by federal law.

Relevant Background

The ’33 Act creates a private right of action for purchasers of registered securities to sue for false or misleading information contained in registration statements. The ’33 Act provides for concurrent jurisdiction between state and federal courts, and prohibits removal by defendants from state court to federal court. After passage of the Private Securities Litigation Reform Act in 1995, which imposed certain procedural requirements for cases filed in federal court, and the Securities Litigation Uniform Standards Act in 1998, which authorized removal to federal court for certain class action suits, federal courts split on whether ’33 Act claims were removable to federal court.

In March 2018, the U.S. Supreme Court held in *Cyan, Inc. v. Beaver County Employees Retirement Fund*¹ that state court class actions under the ’33 Act are not removable to federal court. Our client alert describing that decision can be located [here](#). Following *Cyan*, stockholders have continued to file ’33 Act claims in state court, and lawsuits are sometimes filed when, following a public offering, the issuer experiences a stock price decline.²

¹ 138 S. Ct. 1061 (2018).

² See *Securities Class Action Filings*, 2018 Midyear Assessment, CORNERSTONE RESEARCH, 12, <https://www.cornerstone.com/Publications/Reports/Securities-Securities-Class-Action-Filings%E2%80%94Midyear-Assessment> (reporting on post-*Cyan* ’33 Act filings).

In an attempt to limit the available fora for '33 Act claims prior to and following the *Cyan* decision, some Delaware corporations adopted forum selection provisions in their bylaws or certificates of incorporation that purported to require the litigation of '33 Act claims exclusively in federal courts. The present decision addresses such provisions in the certificates of incorporation of Blue Apron Holdings, Inc., Stitch Fix, Inc., and Roku, Inc. – all of which had initial public offerings in 2017 and all of which adopted the federal forum selection provisions before filing their registration statements. In relevant part, the federal forum selection provisions stated that, unless the corporations consented to an alternative forum, “the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933.” They further provided that stockholders were “deemed to have notice of and consented to” these provisions.

The Court of Chancery’s Decision

In its memorandum opinion, the Court relied upon the reasoning and analysis in *Boilermakers*³, the seminal decision on the validity of forum selection bylaws authored by Chief Justice Strine while he served as Chancellor. In *Boilermakers*, certain stockholders challenged, as facially invalid, forum selection provisions in the bylaws of two Delaware corporations, which selected the Delaware Court of Chancery as the exclusive forum to resolve claims for breach of fiduciary duty, claims arising under the DGCL or otherwise governed by the internal affairs doctrine, and claims asserted derivatively on behalf of the corporations. Chief Justice Strine held that the forum selection bylaws were facially valid and enforceable under the DGCL. Among other things, the Chief Justice reasoned that the DGCL permits a corporation’s bylaws to regulate claims pertaining to the internal affairs of a corporation (i.e., those claims that “relate[] quintessentially to the corporation’s business, the conduct of its affairs, and the rights of its stockholders [*qua* stockholders]”). By contrast, Chief Justice Strine stressed that bylaws may not purport to regulate external relationships or claims, such as forum selection bylaws regulating the forum of a stockholder’s personal injury tort claim or a contract claim based on a commercial contract with the corporation. The Chief Justice further emphasized that the bylaws at issue did not purport “in any way to foreclose a plaintiff from exercising any statutory right of action created by the federal government.” The reasoning and analysis in *Boilermakers* was later codified by the DGCL in a manner suggesting that the Delaware legislature believed that charter and bylaw provisions could only regulate internal claims.

Given the parallel scope of what charter provisions and bylaws can address under the DGCL, Vice Chancellor Laster applied the reasoning of *Boilermakers* to the three federal forum selection charter provisions. Unlike the claims subject to the forum selection bylaws in *Boilermakers*, Vice Chancellor Laster reasoned that claims under the '33 Act concern external affairs that may not be regulated by a Delaware corporation’s certificate of incorporation or bylaws because '33 Act claims arise under and are defined by federal law. As a result, such claims do not turn on the rights, powers, or preferences of the stockholder’s

³ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

shares in the corporation, a DGCL provision, or the equitable relationships that flow from the corporation's internal structure.

Consequences and Implications

This decision renders invalid and unenforceable the federal forum provisions in the certificates of incorporation of Delaware corporations sued in '33 Act cases. By analogy, such provisions would likely be equally invalid and unenforceable if adopted in a Delaware corporation's bylaws. Together with *Cyan*, this decision will allow '33 Act actions to be asserted in both federal and state court against Delaware corporations, unless Congress takes action to alter the '33 Act's anti-removal provision. At this time, Defendants have not filed a notice of appeal to the Delaware Supreme Court.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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