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Court of Appeal, Fourth District, Division 3, California.

WALTER W. BULLOCK et al., Plaintiffs and Appellants,
v.
RIVIAN AUTOMOTIVE, INC., et al., Defendants and Respondents.

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(Super. Ct. No. 30-2023-01310105)

Appeal from a judgment of the Superior Court of Orange County, Peter J. Wilson, Judge. Affirmed.

**Attorneys and Law Firms**

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OPINION

DELANEY, J.

***1** Walter W. Bullock and Todd R. Smith (collectively, Plaintiffs) appeal from a judgment dismissing their state court action for inconvenient forum. Plaintiffs sued Rivian Automotive, Inc., a Delaware corporation (Rivian), the underwriters for Rivian's initial public offering (IPO) of stock, and others for violations of disclosure requirements under the Securities Act of 1933 (15 U.S.C. § 77a et seq.; 1933 Act). Rivian filed a motion to dismiss the action based on a federal forum provision (FFP) in Rivian's articles of incorporation that mandated 1933 Act claims be brought in federal court unless Rivian agreed otherwise. Underwriters Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, and Morgan Stanley LLC (collectively, Underwriters) filed a joinder to the motion to dismiss. The trial court granted both. In so ruling, the court followed the recent opinion of *Wong v. Restoration Robotics, Inc.* (2022) 78 Cal.App.5th 48 (*Wong*), which held that FFP's are valid under Delaware law and the federal Constitution and that the FFP at issue was enforceable under California law.

On appeal, Plaintiffs argue the trial court erred in granting the motion to dismiss for three main reasons. First, the FFP violates the 1933 Act, which prohibits the removal of state court actions asserting 1933 Act claims to federal court. Second, the Delaware statutory scheme permitting the FFP violates the commerce clause and the supremacy clause of the United States Constitution. Third, the FFP is invalid and unenforceable under California law. All three arguments were considered and rejected by *Wong*. Because we find *Wong* to be well-reasoned, we also reject these arguments. Finally, Plaintiffs argue the court erred in granting the joinder motion because Underwriters were not intended third party beneficiaries of the FFP. We need not address this argument, however, because we conclude the court's alternative reason for granting the joinder motion —Underwriters' close relationship with Rivian's IPO—was supported by the evidence. Accordingly, we affirm the judgment of dismissal.

FACTS

Rivian is a Delaware corporation headquartered in California. It manufactures electric vehicles. In November 2021, Rivian

completed its IPO. To do so, Rivian filed a registration statement a month prior, which included a prospectus to solicit investors, also called an offering document, with information about Rivian and the IPO. According to Plaintiffs,[1] they acquired Rivian's common stock "pursuant or traceable to" the registration statement.

[1] At the hearing on the motion to dismiss, Plaintiffs' counsel stated his clients lived in Tennessee and Arizona.

In February 2023, Plaintiffs filed a putative class action in California state court against Rivian and others alleging Rivian's registration statement contained materially false and misleading information, in violation of sections 11 and 15 of the 1933 Act.[2] (15 U.S.C. §§ 77k, 77*o*.) They alleged Underwriters helped draft and disseminate the registration statement and market the IPO to investors.

[2] Almost a year before Plaintiffs filed their state action, a "parallel federal action" had been filed by different plaintiffs against Rivian and Underwriters.

***2** The complaint also sought a declaratory judgment that the FFP in article tenth of Rivian's amended and restated articles of incorporation is invalid and unenforceable. As relevant here, article tenth provides, "Unless the Corporation [Rivian] consents in writing to the selection of an alternative forum, ... the federal district courts of the United States of America shall, to the fullest extent permitted by law, be the sole and exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder." It further provides, "Any person or entity purchasing or otherwise acquiring or holding any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Article Tenth."

Rivian filed a motion to dismiss the action for inconvenient forum (Code Civ. Proc., § 410.30, subd. (a)) based on article tenth's FFP. Underwriters filed a notice of joinder to the motion. The trial court granted both motions. The court found the FFP was a mandatory forum selection clause, that Plaintiffs placed the validity of the FFP at issue, and that *Wong* was "controlling" on that issue. The court also found that language in article tenth "indicate[d] an intent to permit third parties to benefit from the FFP" and the allegations against Rivian and Underwriters were "so intertwined that they cannot be separated."

In the written order granting the motion and joinder, the trial court also ordered "the case ... dismissed" and "enter[ed] judgment against Plaintiffs."[3] Plaintiffs timely appealed.

[3] "[D]ismissals ... in the form of a written order signed by the court and filed in the action ... shall constitute judgments ...." (Code Civ. Proc., § 581d.)

## DISCUSSION

To better understand Plaintiffs' contentions in this appeal and the trial court's reliance on *Wong*, we begin by discussing the facts and holding of that case. In *Wong*, when the value of the plaintiff's shares in the defendant company dropped within months after its IPO, the plaintiff sued the company in state court alleging its offering documents contained materially false and misleading statements in violation of the 1933 Act. (*Wong, supra*, 78 Cal.App.5th at p. 56.) The company, a Delaware corporation, successfully moved to dismiss the action based on an FFP that had been added to its certificate of incorporation before the IPO. (*Id.* at p. 57.) In affirming the judgment of dismissal, the *Wong* court rejected all three of the plaintiff's arguments raised on appeal: (1) the FFP violates the anti-removal and antiwaiver provisions of the 1933 Act; (2) "the Delaware statutory scheme permitting the FFP violates the commerce clause and the supremacy clause of the [federal] Constitution"; and (3) the FFP is invalid and unenforceable. (*Wong*, at p. 57.)

Plaintiffs here have repackaged each of the contentions raised by the plaintiff in *Wong*. This is not too surprising since Plaintiffs are represented by the same counsel who represented Wong. As we discuss below, we are unpersuaded by Plaintiffs' efforts to recast what are essentially the same arguments rejected in *Wong*, agree with and adopt *Wong's* reasoning, and thus reach the same conclusions as the *Wong* court.

## I.

## STANDARDS OF REVIEW

  

"The proper procedure [to enforce] a contractual forum selection clause in California is a motion" to dismiss under Code of Civil Procedure section 410.30, subdivision (a). (*Drulias v. 1st Century Bancshares, Inc.* (2018) 30 Cal.App.5th 696, 703 (*Drulias*).) The FFP at issue here is found in Rivian's articles of incorporation, which is " 'a contractual agreement between the corporation and its shareholders.' " (*Wong, supra*, 78 Cal.App.5th at p. 61 [referring to "certificate of incorporation"]; Black's Law Dict. (7th ed. 1999) p. 107, col. 2 ["articles of incorporation" also termed "certificate of incorporation"].) "Whether the FFP comports with statutory or constitutional law is a legal question that we review de novo. [Citation.] Whether the FFP constitutes a valid contract is also a legal question, which we review de novo because the material facts are undisputed. [Citation.] And because the facts are undisputed, we review de novo the question whether the FFP is ... unenforceable." (*Wong*, at p. 61.) If the FFP is valid and enforceable, "the question remains whether enforcement of the FFP is reasonable." (*Ibid.*) We review a trial court's decision on whether to enforce a forum selection clause for abuse of discretion. (*Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, 148 (*Verdugo*) [disagreeing with *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1681].)

II.

THE DEVELOPMENT OF FFP'S

***3** "The 1933 Act protects investors by requiring companies offering securities for sale to the public to make a ' "full and fair disclosure" ' of relevant information" in a registration statement. (*Wong, supra*, 78 Cal.App.5th at p. 57.) The registration statement is the " 'linchpin' " of the 1933 Act; it " 'must contain specified information about both the company itself and the security for sale.' " " '[T]o aid enforcement of' the obligation to make full and fair disclosure," the 1933 Act created a private right of action and "authorized state and federal courts to exercise jurisdiction over 1933 Act suits ...." (*Wong*, at p. 57; see 15 U.S.C. § 77v(a).) It "barred the removal of those suits from state to federal court. [Citation.] 'So if a plaintiff chose to bring a 1933 Act suit in state court, the defendant could not change the forum.' " (*Wong*, at p. 57.) Finally, it contains the following antiwaiver provision: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." (15 U.S.C. § 77n.)

"Congress amended the 1933 Act by enacting the Private Securities Litigation Reform Act of 1995" to address " ' "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." ' " (*Wong, supra*, 78 Cal.App.5th at p. 58.) Certain provisions of the Private Securities Litigation Reform Act of 1995 (Pub.L. No. 104-67 (Dec. 22, 1995) 109 Stat. 737; PSLRA) applied only to 1933 Act claims filed in federal court. (*Wong*, at p. 58.) For example, it " 'required a lead plaintiff in any class action brought under the Federal Rules of Civil Procedure to file a sworn certification stating, among other things, that he had not purchased the relevant security "at the direction of plaintiff's counsel." ' " (*Ibid.*) These additional requirements in federal court produced " ' "unintended consequence[s]" ': ' "Rather than face the obstacles set in their path by the [PSLRA], plaintiffs and their representatives began bringing class actions under state law." ' " (*Ibid.*)

Congress again amended the 1933 Act by enacting "the Securities Litigation Uniform Standards Act of 1998 (SLUSA) 'to limit the conduct of securities class actions under [s]tate law, and for other purposes.' " (*Wong, supra*, 78 Cal.App.5th at p. 58.) The "SLUSA prohibited certain securities class actions that are based on state law, and provided for the removal of such class actions to federal court, where they were subject to dismissal." (*Ibid.*) It, however, " 'did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations. Neither did [it] authorize removing such suits from state to federal court.' " (*Ibid.*) Thus, a plaintiff filing a state court class action asserting only federal 1933 Act violations would remain free from the PSLRA's additional requirements for such suits filed in federal court.

In recent years, corporations began including FFP's in their articles or certificates of incorporation to designate federal court as the exclusive forum for 1933 Act claims. (*Wong, supra*, 78 Cal.App.5th at p. 58.) For Delaware corporations, the Delaware Supreme Court in *Salzberg v. Sciabacucchi* (Del. 2020) 227 A.3d 102 (*Salzberg*) analyzed three FFP's in certificates of incorporation and held they "were facially valid under the Delaware General Corporation Law, which governs the contents of certificates of incorporation, and that the provisions did not violate any Delaware or federal law or policy." (*Wong*, at p. 58; *Salzberg*, at pp. 109, 113, 115, 132.)

  

III.

THE FFP AND THE 1933 ACT'S ANTI-REMOVAL AND ANTIWAIVER PROVISIONS

Plaintiffs argue the FFP is invalid and unenforceable because it violates two provisions of the 1933 Act. We disagree.

First, Plaintiffs argue the FFP violates the 1933 Act's anti-removal provision, which provides that "no case arising under [the 1933 Act] and brought in any State court of competent jurisdiction shall be removed to any court of the United States." (15 U.S.C. § 77v(a).) "But a statute's 'mere "contemplation" of suit in any competent court does not *guarantee* suit in all competent courts, disabling the parties from adopting a reasonable forum-selection clause.' (*CompuCredit Corp. v. Greenwood* (2012) 565 U.S. 95, 102 ... [forum selection clause can require arbitration, or limit 'the contemplated availability of all judicial forums ... to a single forum by contractual specification'].)" (*Wong, supra*, 78 Cal.App.5th at p. 62.) The plain language of the anti-removal provision simply bars removal to federal court. Defendants here did not seek removal; they sought dismissal of the state court action. (*Id.* at p. 63 ["The removal bar ... prohibits the removal of cases to federal court, but does not prohibit the enforcement of a forum selection clause concerning 1933 Act claims that is part of a company's certificate of incorporation"].)

***4** In *Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477 (*Rodriguez*), the Supreme Court held a plaintiff's decision to litigate 1933 Act claims in state court could be overridden by means of an arbitration provision. (*Rodriguez*, at p. 478.) "If, despite the grant of concurrent jurisdiction to state and federal courts in section 77v(a), 1933 Act claims can be adjudicated outside of *any* court by the terms of a forum selection provision that requires arbitration, we are hard pressed to see why the claims cannot be adjudicated in a federal court by the terms of an FFP." (*Wong, supra*, 78 Cal.App.5th at p. 64.)

Second, Plaintiffs argue that the FFP violates the 1933 Act's antiwaiver provision, which states that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of [the 1933 Act] shall be void." (15 U.S.C. § 77n.) In interpreting the 1933 Act, the *Rodriguez* court distinguished between its "substantive" provisions (e.g., "the provision placing on the seller the burden of proving lack of scienter when a buyer alleges fraud") (*Rodriguez, supra*, 490 U.S. at p. 481) *and* its "procedural" provisions (e.g., "the grant of concurrent jurisdiction in the state and federal courts without possibility of removal") (*id.* at pp. 481–482). The *Rodriguez* court reasoned that "[t]here is no sound basis for construing" the 1933 Act's antiwaiver provision "to apply to these procedural provisions." (*Rodriguez*, at p. 482.) In fact, the *Rodriguez* court expressly held that the antiwaiver provision is not "properly construed to bar any waiver" of "the right to select the judicial forum and the wider choice of courts ...." (*Id.* at p. 481.)

"In so doing, [the *Rodriguez* court] construed section 77n the same way it had construed the antiwaiver provision of the Securities Exchange Act of 1934 [citation] in *Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220 ...." (*Wong, supra*, 78 Cal.App.5th at p. 65.) The language in the antiwaiver provisions of the 1933 Act and the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.) are nearly identical. (See 15 U.S.C. §§ 77n, 78cc(a).) "*McMahon* holds that the jurisdictional provision of the 1934 Act 'does not impose any duty with which persons trading in securities must "comply." ' " (*Wong*, at p. 65.) "If the exclusive federal jurisdiction provision of the 1934 Act does not impose any duty, as the United States Supreme Court held in *McMahon, supra*, 482 U.S. at page 228, then neither does the concurrent jurisdiction provision of the 1933 Act. And if the exclusive federal jurisdiction provision of the 1934 Act can be overridden by a forum selection agreement without violating the 1934 Act's antiwaiver provision, then the concurrent jurisdiction provision of the 1933 Act can likewise be overridden by a forum selection agreement without violating the 1933 Act's antiwaiver provision." (*Wong*, at p. 65.)

Accordingly, we conclude the FFP does not conflict with, and thus is not barred by, either the anti-removal or antiwaiver provisions of the 1933 Act.

IV.

THE CONSTITUTIONALITY OF DELAWARE'S STATUTORY SCHEME

Plaintiffs contend the Delaware statutory scheme under which Rivian created its FFP violates the supremacy clause and the commerce clause of the federal Constitution.

  

"A threshold requirement of any constitutional claim is the presence of state action." (*Roberts v. AT&T Mobility LLC* (9th Cir. 2017) 877 F.3d 833, 837.) "The state action requirement 'preserves an area of individual freedom by limiting the reach of federal law and federal judicial power,' and 'avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.' " (*Ibid.*) To qualify as state action, the conduct must meet two criteria. (*Id.* at p. 838.) " 'First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state[.]' [Citation.] 'Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.' " (*Ibid.*)

***5** The state action, according to Plaintiffs, is either the Delaware Legislature's adoption of statutes permitting the FFP or the trial court's dismissal of the action based on the FFP. While we doubt whether state action is involved here, we need not decide the issue. Even assuming the presence of state action, we conclude Plaintiffs' constitutional challenges to the Delaware statutory scheme fail.

*A. The Supremacy Clause*

According to Plaintiffs, the Delaware statutory scheme violates the supremacy clause (U.S. Const., art. VI, cl. 2) because it "discriminates against federal law in favor of state law." "Under the supremacy clause, '[a] state may not discriminate against rights arising under federal laws.' [Citation.] The supremacy clause prohibits states from 'dissociat[ing] themselves from federal law because of disagreement with its content,' and from refusing to allow state court jurisdiction over federal claims while permitting state court jurisdiction over 'similar state-law actions.' " (*Wong, supra*, 78 Cal.App.5th at p. 70.) Specifically, Plaintiffs argue that Delaware General Corporation Law (DGCL) sections 102[4] and 115,[5] when read together, discriminate against federal claims by prohibiting corporations from adopting a forum selection provision that eliminates state court jurisdiction for securities claims under Delaware law while allowing corporations to adopt one that eliminates state court jurisdiction for comparable claims under the 1933 Act.

4 DGCL section 102 authorizes a corporation to include in its certificate of incorporation "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, ... if such provisions are not contrary to the laws of this State." (Del. Code Ann. tit. 8, § 102, subd. (b)(1) (2022).)

5 DGCL section 115 provides: "The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. 'Internal corporate claims' means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery." (Del. Code Ann. tit. 8, § 115 (2022).)

Here, as in *Wong*, nothing in the Delaware statutory scheme precludes a plaintiff from bringing a 1933 Act claim in state court: Delaware is not "refusing to entertain a federal claim" but is "allowing corporations and shareholders to agree to forum selection provisions that limit 1933 Act claims to federal courts ...." (*Wong, supra*, 78 Cal.App.5th at p. 74.)

Plaintiffs' claim that the Delaware statutes effectively permit corporations to discriminate against federal law "rest[s] on a false premise" (*Wong, supra*, 78 Cal.App.5th at p. 71) that some Delaware state law claims are analogous—"similar ... in 'size and type' "—to a 1933 Act claim (*Wong*, at p. 72, citing *Howlett v. Rose* (1990) 496 U.S. 356, 367, 378 (*Howlett*) ["differential exercise of jurisdiction over state and federal claims [of] similar in 'size and type' shows discrimination against federal" claims].) In the opening brief, Plaintiffs argue "there are at least some claims arising from the purchase or sale of stocks that fit within [DGCL] Section 115's protection." But Plaintiffs do not actually identify a Delaware state law claim they believe to be analogous to a 1933 Act claim. This is likely because "the 1933 Act itself 'completely disallows (in both state and federal courts) sizable class actions that are founded on state law and allege dishonest practices regarding a nationally traded security's purchase or sale.' [Citation.] To put it another way, Congress has made it clear that no state law securities class actions with claims similar to 1933 Act claims can be brought in any court, state or federal." (*Wong*, at p. 72.)

  

***6** Finally, we reject Plaintiffs' arguments which rely on *Salzberg, supra*, 227 A.3d 102, *Howlett, supra*, 496 U.S. 356, and *Haywood v. Drown* (2009) 556 U.S. 729 for the same reasons set forth in *Wong, supra*, 78 Cal.App.5th at pages 71–74. In sum, the Delaware statutory scheme does not discriminate in favor of state law claims and against 1933 Act claims. (*Wong*, at p. 74 .) It simply "leaves parties free to adopt forum selection provisions for state and federal claims." (*Ibid.*)

*B. The Commerce Clause*

The commerce clause (U.S. Const., art. I, § 8, cl. 3) prohibits a state from regulating interstate commerce, but it allows indirect regulation if the state statute " 'regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental ... unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' " (*Edgar v. MITE Corp.* (1982) 457 U.S. 624, 640 (*Edgar*).) Plaintiffs contend the Delaware statutory scheme "indirectly burdens interstate commerce by permitting corporations to unilaterally condition the interstate sale of securities on the loss of the right to state court fora with no clear local Delaware interest in doing so."

But as the *Wong* court explained, Delaware has an interest in " 'promoting stable relationships among parties involved in the corporations it charter[s].' " (*Wong, supra*, 78 Cal.App.5th at p. 69.) "By limiting the litigation of 1933 Act claims to federal courts, FFP's 'allow for consolidation and coordination of [1933 Act] claims to avoid inefficiencies and unnecessary costs' " that might otherwise arise when different plaintiffs file cases in both state and federal fora, benefitting "companies and shareholders alike." (*Ibid.*) FFP's thus "advance Delaware's policies" on corporations by promoting certainty, predictability, uniformity, prompt judicial resolution of corporate disputes, and judicial efficiency. (*Ibid.*)

Given these local benefits, "[a]ny burden on interstate commerce here is slight." (*Wong, supra*, 78 Cal.App.5th at p. 69.) As in *Wong*, "[t]he burden arising from Delaware permitting (but not requiring) Delaware corporations to include FFP's in their articles of incorporation, lies wholly in the FFP's specification that a 1933 Act claim be brought in federal court (which the 1933 Act identifies as an appropriate forum for 1933 Act claims) rather than state court. Notably, the FFP does not prevent a shareholder from bringing a 1933 Act claim in court, and does not require venue in any particular federal district court. The FFP simply restricts the range of possible forums for a shareholder's 1933 Act claim, absent consent from [the corporation]." (*Id.* at pp. 69–70.)

*Edgar*, on which Plaintiffs heavily rely, does not compel a different result. At issue was an Illinois statute that allowed the Illinois Secretary of State to review and reject tender offers for specified target companies, including "a corporation or other issuer of securities of which shareholders located in Illinois own 10[percent] of the class of equity securities subject to the offer" and a corporation with "at least 10[percent] of its stated capital and paid-in surplus represented within the State." (*Edgar, supra*, 457 U.S. at p. 627.) The *Edgar* court held the Illinois statute unduly burdened interstate commerce. (*Id.* at p. 630.) Specifically, the *Edgar* court noted the statute "directly regulate[d] transactions which take place across state lines" (*id.* at p. 641), was "a direct restraint on interstate commerce," and had "a sweeping extraterritorial effect" (*id.* at p. 642). In short, the statute "was not limited to Illinois corporations and effectively allowed Illinois to block nationwide tender offers." (*Wong, supra*, 78 Cal.App.5th at p. 70.) In contrast, "[a] statute that allows FFP's, which limit the choice of forum for 1933 Act claims, is not nearly as extensive in effect as the statute in *Edgar*." (*Ibid.*)

***7** We thus conclude Delaware has a legitimate interest in allowing its corporations to include FFP's in their certificates of incorporation, and that any [resulting] burden on interstate commerce ... does not exceed the benefits provided by the statute." (*Wong, supra*, 78 Cal.App.5th at p. 70.)

## V.

## THE VALIDITY OF THE FFP

To decide the validity of the FFP, we must first determine which state's law governs the validity of the forum selection clauses. (*Wong, supra*, 78 Cal.App.5th at p. 74.) Defendants contend that, under the internal affairs doctrine, Delaware law governs. Plaintiffs argue the internal affairs doctrine does not apply because nothing in this case implicates Rivian's internal affairs and that California contract law governs instead. We, like the *Wong* court, agree with defendants that Delaware law applies.

  

"California courts generally follow the internal affairs doctrine and apply the laws of a corporation's state of incorporation to resolve disputes concerning a corporation's internal affairs ...." (*Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1190.) " ' " ' 'The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—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.' " ' " (*Id.* at p. 1189; *Wong, supra*, 78 Cal.App.5th at pp. 74–75.) Matters constituting a corporation's internal affairs include " ' "steps taken in the course of the original incorporation, ... the adoption of by-laws, the issuance of corporate shares, [and] charter and by-law amendments ...." ' " (*Colaco*, at p. 1189.) California courts, however, "do not blindly apply the [internal affairs] doctrine. Instead, California courts carefully examine the specific issue and conduct to determine whether the corporation's internal affairs truly are implicated and whether the doctrine's policies require its application in the particular case." (*Id.* at p. 1190.)

Here, "the Delaware Supreme Court held that FFP's are permitted in a company's certificate of incorporation under [DGCL] section 102 ...." (*Wong, supra*, 78 Cal.App.5th at p. 75; *Salzberg, supra*, 227 A.3d at p. 113.) Thus, "[u]nder Delaware law, FFP's are valid provisions within the certificates of incorporation of Delaware corporations, and therefore we need not consider their validity under California contract law." (*Wong*, at p. 75.)

Plaintiffs argue the internal affairs doctrine is "not implicated by" the claims here. Quoting *Friese v. Superior Court* (2005) 134 Cal.App.4th 693, 709, Plaintiffs point out that California courts " 'have consistently found that a state's corporate securities laws are not subject to the internal affairs doctrine.' " Plaintiffs also contend, without citation to authority, that the internal affairs doctrine does not apply because federal laws prohibiting misrepresentations in the sale of securities "are a species of tort law" because they "regulate the rights and obligations of *tort victims versus tortfeasors*," rather than "corporate law, arising from the purchase of securities rather than the holding of stock." These arguments, and the cases Plaintiffs cite in support of them, are not helpful "because [they] say[ ] nothing about the choice of law for claims concerning the validity of provisions in a corporation's governing documents." (*Wong, supra*, 78 Cal.App.5th at p. 75.)

## VI.

## THE ENFORCEABILITY OF THE FFP UNDER CALIFORNIA LAW

***8** Having concluded article tenth's FFP is valid, we turn to the question of whether it is enforceable under the facts of the case. (*Wong, supra*, 78 Cal.App.5th at p. 76.) Plaintiffs contend defendants have the burden of showing enforcement of the FFP is reasonable. Plaintiffs also argue the FFP is outside the reasonable expectations of Rivian's shareholders and that the FFP is unconscionable. We disagree.

The forum court, here California, applies its own law to determine whether to enforce an otherwise valid forum selection clause. (*Drulias, supra*, 30 Cal.App.5th at pp. 702–703.) California favors enforcement of forum selection clauses. (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495.) "This favorable treatment is attributed to our law's devotion to the concept of one's free right to contract, and flows from the important practical effect such contractual rights have on commerce generally." (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 11.) Thus, mandatory forum selection clauses will typically be enforced "unless they are unfair or unreasonable." (*Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 358.) "The party opposing enforcement of a forum selection clause ordinarily 'bears the "substantial" burden of proving why it should *not* be enforced.' [Citations.] That burden, however, is reversed when the claims at issue are based on unwaivable rights created by California statutes. In that situation, the party seeking to enforce the forum selection clause bears the burden to show litigating the claims in the contractually designated forum 'will not diminish in any way the substantive rights afforded ... under California law.' " (*Verdugo, supra*, 237 Cal.App.4th at p. 147.)

Here, " 'the "substantial" burden of proving why it should *not* be enforced' " falls on Plaintiffs because their claims are not "based on unwaivable rights created by California statutes." (*Verdugo, supra*, 237 Cal.App.4th at p. 147.) Although Plaintiffs argue the 1933 Act gives them "an unwaivable right to choose state or federal court," we note that this alleged right is not created under California law and that, in any event, we have already determined the 1933 Act's

  

anti-removal and antiwaiver provisions are not an obstacle to enforcement of the FFP.

Plaintiffs contend the FFP, as a contract of adhesion, is unenforceable for two independent reasons: (1) it was outside the reasonable expectations of the shareholders; and (2) enforcement would be unduly oppressive or unconscionable. For the reasons discussed in *Wong*, we conclude Plaintiffs have failed to meet their burden to show the FFP should not be enforced.

First, Plaintiffs contend an ordinary investor, the weaker party in a purchase of stock pursuant to an IPO, had no reason to expect to be bound by an FFP because the 1933 Act provides for concurrent jurisdiction to state and federal courts over all claims without the possibility of removal to federal court. But Rivian's FFP was made public in its amended articles of incorporation when the IPO became effective. "Forum selection clauses have long been in existence, and the fact that this one is innovative does not mean it is not binding. And since a 'central purpose[ ]' of the 1933 Act 'is full and fair disclosure relative to the issuance of securities' [citation], we hesitate to agree that an investor is excused from attending to the required disclosures, particularly when they concern the governing documents of a corporation." (*Wong, supra*, 78 Cal.App.5th at p. 77.) Although an investor's reliance on the 1933 Act "might mean that [he] could anticipate litigation as to whether [the FFP] would be enforced, [it] does not mean that he should expect that it would not be enforced." (*Wong*, at pp. 77–78.)

***9** Second, Plaintiffs contend the FFP is unconscionable because it is adhesive and completely one-sided, giving Rivian the sole right to control the forum. "For a contract term to be unenforceable as unconscionable, it must be both procedurally and substantively unconscionable." (*Wong, supra*, 78 Cal.App.5th at p. 78.) We need not discuss the procedural aspect because "[w]e decline to hold that there is anything substantively unconscionable in the waiver of the waivable procedural right to a state forum, particularly where, as here, the provision does not restrict a plaintiff's procedural right under the statute to file suit in a local federal court." (*Id.* at pp. 79–80.)

We thus conclude the FFP is not unconscionable and Plaintiffs have failed to show the trial court abused its discretion in enforcing it.

## VII.

## UNDERWRITERS' STANDING TO ENFORCE THE FFP

Plaintiffs contend the trial court erred in allowing Underwriters to enforce the FFP because Underwriters were not intended third party beneficiaries of the FFP. We need not address this contention, however, because Plaintiffs have ignored the court's other finding which does give Underwriters standing to enforce the FFP: that the allegations against Rivian and Underwriters were "so intertwined that they cannot be separated."

Forum selection clauses may sometimes be enforced by a noncontracting party who is "closely related to the contractual relationship." (*Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1494 (*Lu*); see *Manetti-Farrow, Inc. v. Gucci America, Inc.* (9th Cir. 1988) 858 F.2d 509, 514, fn. 5.) The "closely related" test focuses on the closeness of the nonparty's relationship to "the contractual relationship," and not a contracting party. (*Bugna v. Fike* (2000) 80 Cal.App.4th 229, 235 (*Bugna*).) "This makes sense because the forum selection clause is part of the underlying contract, and it is the contractual relationship gone awry that presumably spawns litigation and activates the clause. Giving standing to all closely related entities honors general principles of judicial economy by making all parties closely allied to the contractual relationship accountable in the same forum, thereby abating a proliferation of actions and inconsistent rulings." (*Ibid.*) Accordingly, to establish standing to enforce a forum selection clause, the nonparty must show one of three things: " '(1) it agreed to be bound by the terms of the ... agreement, (2) the contracting parties intended [it] to benefit from the ... agreement, or (3) there was sufficient evidence of a defined and intertwining business relationship with a contracting party.' " (*Id.* at p. 233.)

Here, there was sufficient evidence to support the trial court's finding of a " 'defined and intertwining business relationship' " between Rivian and Underwriters. (*Bugna, supra*, 80 Cal.App.4th at p. 233.) Rivian's prospectus identified Underwriters as entities "expect[ed] to deliver the shares ... to purchasers ...." In that capacity, Underwriters belonged to a class of defendants against whom Plaintiffs could assert a 1933 Act claim. (See 15 U.S.C. § 77k(a)(5) [persons liable for false or omitted material fact in a security's registration statement includes "every underwriter with respect to such security"].) Plaintiffs alleged Underwriters

  

"acted as underwriters and lead underwriter representatives for Rivian's IPO by helping to draft, approving the content of, and disseminating the Registration Statement; by marketing the IPO; and by selling Rivian Class A common stock directly to investors." Plaintiffs further alleged Underwriters "participated in the IPO, including the roadshows, due diligence, solicitation of the purchase of Rivian Class A common stock by the public, and/or assistance in the preparation of the Registration Statement." As noted by the trial court, the plain language of the FFP broadly requires " 'any complaint asserting a cause of action arising under the [1933] Act' " to be filed in federal court. Under these circumstances, we conclude Underwriters were sufficiently close to the contractual relationships created by the sales of Rivian stock to be afforded standing to enforce the FFP. "To hold otherwise would be to permit a plaintiff to sidestep a valid forum selection clause simply by naming a closely related party who did not sign the clause as a defendant." (*Lu, supra*, 11 Cal.App.4th at p. 1494.)

DISPOSITION

***10** The judgment is affirmed. Respondents are to recover their costs on appeal.

WE CONCUR:

O'LEARY, P. J.

SANCHEZ, J.

**All Citations**

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