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Salzberg v. Sciabacucchi: Expanding Delaware Corporations' Power to Require Securities Act Claims to be Brought in Federal Court

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INTRODUCTION

In *Salzberg v. Sciabacucchi*,¹ the Delaware Supreme Court addressed the validity of provisions included in several Delaware corporations' charters requiring actions arising under the Securities Act of 1933 (the "Securities Act") to be filed exclusively in federal court.² The court held that the provisions are facially valid.³ Part I examines the procedural history of the *Salzberg v. Sciabacucchi* case.⁴ Part II discusses the legal background of the Securities Act, securities litigation, and forum-selection clause litigation.⁵ Part III examines the reasoning behind the Supreme Court of Delaware's holding that federal-forum provisions ("FFPs") can survive a facial challenge.⁶ Part IV analyzes the court's holding and discusses implications of the court's decision.⁷ The court correctly held that the FFPs do not violate Delaware General Corporation Law ("DGCL") and policy,⁸ and precedent supports the court's holding.⁹ The court's holding will likely have the practical result of increasing the amount of Delaware corporations that adopt FFPs in their charters due to the

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1. 227 A.3d 102 (Del. 2020).
2. *Id.* at 109.
3. *Id.*
4. *See infra* Part I.
5. *See infra* Part II.
6. *See infra* Part III.
7. *See infra* Part IV.
8. *See infra* Section IV.A.
9. *See infra* Section IV.B.

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efficiencies that FFPs provide in securities litigation.¹⁰ The *Salzberg* decision continues to make Delaware a favorable place to incorporate.¹¹ However, the court's holding still enables shareholders to bring "as-applied" challenges to FFPs and the question of whether Delaware's sister states will enforce FFPs still remains.¹²

I. THE CASE

In 2017, Delaware corporations, Blue Apron Holdings, Inc., Roku, Inc., and Stitch Fix, Inc., launched initial public offerings.¹³ Each company adopted an FFP prior to filing their registration statements with the United States Securities and Exchange Commission.¹⁴ For example, an FFP could provide, "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."¹⁵ Matthew Sciabacucchi purchased shares of Blue Apron Holdings, Inc., Roku, Inc., and Stitch Fix, Inc. in the companies' initial public offerings or a short time after.¹⁶ Sciabacucchi filed a class-action complaint in the Delaware Court of Chancery on December 29, 2017, "against the individuals [that] served as the companies' directors since [the companies] went public, and [Sciabacucchi] named the companies as nominal defendants."¹⁷ Sciabacucchi sought a declaratory judgment that the FFPs are invalid under Delaware law.¹⁸

The Delaware Court of Chancery granted summary judgment, invalidating the provisions that required securities claims to be brought in federal court because the "constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law."¹⁹ The court reasoned that the Securities Act claims against the corporations were external to the corporations and

10. *See infra* Section IV.C.

11. *See infra* Section IV.D.

12. *See infra* Section IV.E.

13. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 109 (Del. 2020).

14. *Id.*

15. *Id.* (citing *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 Del. Ch. WL 6719718, at *6 (Del. Ch. Dec. 19, 2018)). "Any person or entity purchasing or otherwise acquiring any interest in any security of [the Company] shall be deemed to have notice of and consented to [this provision]." *Id.* (citing *Sciabacucchi*, 2018 Del. Ch. WL 6719718, at *6).

16. *Id.*

17. *Id.* at 112.

18. *Id.*

19. *Id.* (citing *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 Del. Ch. WL 6719718, at *3 (Del. Ch. Dec. 19, 2018)).

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not able to be regulated by a corporation's forum selection clause.²⁰ As a result, the Delaware Court of Chancery held the provisions to be "ineffective and invalid."²¹ The Supreme Court of Delaware reviewed the Court of Chancery's decision to grant summary judgment de novo.²²

II. LEGAL BACKGROUND

Purchasers of securities may bring private rights of action under the Securities Act to enforce the registration and disclosure requirements that the Securities Act requires.²³ These claims can be brought in either federal or state court.²⁴ Corporations include FFPs in their charters to require actions arising under the Securities Act to be filed in a federal court.²⁵ Section II.A discusses the Securities Act.²⁶ Section II.B examines the Private Securities Litigation Reform Act.²⁷ Section II.C discusses the Securities Litigation Uniform Standards Act.²⁸ Section II.D surveys forum-selection clause litigation in the Delaware Court of Chancery.²⁹ Section II.E examines forum-selection clause litigation in the Delaware Supreme Court.³⁰ Section II.F discusses forum-selection clause litigation in the United States Supreme Court.³¹

A. The Securities Act of 1933

Under the Securities Act of 1933,³² persons offering securities for sale to the public must file a registration statement that makes "full and fair disclosure of relevant information."³³ Under Section 12(a)(1) of the Securities Act,³⁴ there is strict

20. See *Sciabacucchi*, 2018 Del. Ch. WL 6719718, at *18 (noting that FFPs purport to regulate the forum where parties that are external to the corporation are able to sue under a body of law that is external to the corporate contract).

21. *Salzberg*, 227 A.3d at 112 (citing *Sciabacucchi*, 2018 Del. Ch. WL 6719718, at *3).

22. *Id.* (citing *Anderson v. Krafft-Murphy Co. (In re Krafft-Murphy Co.)*, 82 A.3d 696, 702 (Del. 2013)).

23. *Id.* at 110 (citing *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018) (internal quotation marks omitted); *Omnicare, Inc. v. Laborers Dist. Counsel Constr. Indus. Pension Fund*, 575 U.S. 175, 179 (2015)).

24. *Id.* (citing *Cyan*, 138 S. Ct. at 1079; 15 U.S.C. § 77v(a)).

25. *Id.* at 111.

26. See *infra* Section II.A.

27. See *infra* Section II.B.

28. See *infra* Section II.C.

29. See *infra* Section II.D.

30. See *infra* Section II.E.

31. See *infra* Section II.F.

32. 15 U.S.C. § 77a.

33. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 109-10 (Del. 2020) (citing 15 U.S.C. § 77e; *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018) (internal quotation marks omitted)).

34. 15 U.S.C. § 77l.

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liability for the violation of securities registration requirements of the Act.³⁵ Section 11 of the Securities Act³⁶ enables purchasers of a registered security to sue certain parties in a registered offering when a registration statement includes false or misleading information.³⁷ The Securities Act states that private plaintiffs are able to bring their Securities Act claims in either federal or state court.³⁸ Additionally, the Securities Act prevents the removal of Securities Act claims from state courts to federal courts.³⁹ Therefore, when a plaintiff brings a Securities Act claim in state court, the defendant is unable to change the forum.⁴⁰

B. The Private Securities Litigation Reform Act

In 1995, Congress adopted the Private Securities Litigation Reform Act (“PSLRA”), due to the perception that the class-action vehicle was being abused in litigation involving nationally traded securities.⁴¹ PSLRA limits recoverable damages and attorney’s fees, creates restrictions on the selection of lead plaintiffs, establishes sanctions for frivolous litigation, and authorizes stays of discovery when there is a pending resolution of any motion to dismiss.⁴² However, PSLRA also caused individuals to avoid the federal forum, which meant that more class actions were often brought in state courts.⁴³

C. The Securities Litigation Uniform Standards Act

Congress adopted the Securities Litigation Uniform Standards Act (“SLUSA”) in 1998 to prevent plaintiffs from avoiding the PSLRA by filing state law claims in state courts.⁴⁴ SLUSA allows certain class actions to be removed to federal courts.⁴⁵ Prior to the adoption of SLUSA, state and federal courts had concurrent jurisdiction over

35. *Salzberg*, 227 A.3d at 110 (quoting *Pinter v. Dahl*, 486 U.S. 622, 638 (1988)).

36. 15 U.S.C. § 77k(a).

37. *Salzberg*, 227 A.3d at 109 (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983)).

38. *Id.* (citing *Cyan*, 138 S. Ct. at 1079; 15 U.S.C. § 77v(a)).

39. *Salzberg*, 227 A.3d at 110 (citing 15 U.S.C. § 77v(a); *Cyan*, 138 S. Ct. at 1078).

40. *Id.* at 110 (citing *Cyan*, 138 S. Ct. at 1066).

41. *Id.* at 111 (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006)).

42. *Id.* (citing *Merrill Lynch*, 547 U.S. at 81 (summarizing 15 U.S.C. § 78u-4)).

43. *Id.* (citing *Merrill Lynch*, 547 U.S. at 82).

44. *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 Del. Ch. WL 6719718, at *5 (Del. Ch. Dec. 19, 2018) (citing *Merrill Lynch*, 547 U.S. at 82; *Madden v. Cowen & Co.*, 576 F.3d 957, 963-64 (9th Cir. 2009); *Sofonia v. Principal Life Ins. Co.*, 465 F.3d 873, 876 (8th Cir. 2006)).

45. *Id.* (citing 15 U.S.C. § 77p(c); *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1067 (2018)).

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Securities Act claims.⁴⁶ SLUSA modified the Securities Act to state that concurrent jurisdiction existed “except as provided in [SLUSA].”⁴⁷

D. Forum-Selection Clause Litigation in the Delaware Court of Chancery

In *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,⁴⁸ the Delaware Court of Chancery held that bylaw provisions providing that litigation relating to internal affairs was to be conducted in Delaware were valid.⁴⁹ The court asserted that bylaws regulating the external matters were beyond the statutory language of 8 Del. C. § 109(b).⁵⁰ The adoption of Section 115 of DGCL was intended, in part, to codify the holding of *Boilermakers*.⁵¹ Section 115 of DGCL provides that a corporation is able to require, in the certification of corporation or bylaws, 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.”⁵² Internal corporate claims are claims, “(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 Delaware Court of Chancery.”⁵³

E. Forum-Selection Clause Litigation in the Delaware Supreme Court

In 1952, the Delaware Supreme Court held in *Sterling v. Mayflower Hotel Corp.*,⁵⁴ that Section 102(b)(1) of DGCL bars only charter provisions that are contrary to rules of public policy.⁵⁵ In 1996, in *Williams v. Geier*,⁵⁶ when discussing the broad policies of DGCL, the Delaware Supreme Court noted that amending the certificates of incorporation and mergers requires stockholder action, and that under the legislative policy of Delaware, the will of stockholders should be looked at in these

46. *Id.* (citing *Cyan*, 138 S. Ct. at 1068).

47. *Id.* (citing 15 U.S.C. § 77v(a)). “The district courts of the United States . . . shall have jurisdiction . . . concurrent with State . . . courts, except as provided in [SLUSA] with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.” *Id.* at *12 n.28 (quoting 15 U.S.C. § 77v(a)).

48. 73 A.3d 934 (Del. Ch. 2013).

49. *Id.* at 939.

50. *Id.* at 952 (citing Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 Bus. L. 325, 330 (2013)).

51. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 117 (Del. 2020).

52. *Id.* at 116 (quoting DEL. CODE ANN. tit. 8, § 115 (2018)).

53. *Id.* at 116-17 (quoting DEL. CODE ANN. tit. 8, § 115 (2018)).

54. 93 A.2d 107 (Del. 1952).

55. *Salzberg*, 227 A.3d at 115 (citing *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. 1952)).

56. 671 A.2d 1368 (Del. 1996).

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areas.⁵⁷ Additionally, in 2014, the Delaware Supreme Court held, in *ATP Tour, Inc. v. Deutscher Tennis Bund*,⁵⁸ that fee-shifting provisions included in a non-stock corporation's bylaws that shift all litigation expenses to a plaintiff in intra-corporate litigation were valid under Delaware law if the plaintiff "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought."⁵⁹

F. Forum-Selection Clause Litigation in the United States Supreme Court

In 1989, in *Rodriquez de Quijas v. Shearson/American Express, Inc.*,⁶⁰ the United States Supreme Court held that federal law does not have an objection to provisions that preclude state litigation of Securities Act claims.⁶¹ Additionally, the United States Supreme Court held in *Cyan Inc. v. Beaver County Employees Retirement Fund*,⁶² that SLUSA does not prevent state courts from having jurisdiction over class actions alleging violations of only the Securities Act, and that SLUSA does not allow defendants to remove such actions from state to federal court.⁶³ As a result of the holding in *Cyan*, FFPs enable a corporation to more effectively manage the procedural elements of securities litigation.⁶⁴ The amount of filings in state courts for claims arising under the Securities Act "escalated" after the holding in *Cyan*.⁶⁵

III. THE COURT'S REASONING

The Supreme Court of Delaware reversed the judgment of the Delaware Court of Chancery, holding that the FFPs can survive a facial challenge.⁶⁶ Section III.A examines the court's holding that FFPs are facially valid since FFPs fall within the broad text of Section 102(b)(1) of DGCL.⁶⁷ Section III.B reviews the court's reasoning that FFPs are not contrary to statutory law and policy.⁶⁸ Section III.C discusses the court's reasoning that the 2015 Amendments to DGCL do not alter the broad scope of Section 102(b)(1).⁶⁹ Section III.D analyzes the court's reasoning that the Delaware

57. *Salzberg*, 227 A.3d at 116 (citing *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996)).

58. 91 A.3d 554 (Del. 2014).

59. *Id.* at 557.

60. 490 U.S. 477 (1989).

61. *Salzberg*, 227 A.3d at 132.

62. 138 S. Ct. 1061 (2018).

63. *Id.* at 1066.

64. *Salzberg*, 227 A.3d at 114.

65. *Id.*

66. *Id.* at 109.

67. *See infra* Section III.A.

68. *See infra* Section III.B.

69. *See infra* Section III.C.

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Court of Chancery incorrectly narrowed the scope of Section 102(b)(1).⁷⁰ Section III.E reviews the court's reasoning that FFPs do not violate federal law or policy.⁷¹

A. FFPs Fall Within the Broad Text of Section 102(b)(1)

Section 102(b)(1) of DGCL authorizes two broad types of provisions.⁷² First, Section 102(b)(1) enables "any provision for the management of the business and for the conduct of the affairs of the corporation."⁷³ Second, Section 102(b)(1) enables "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 [Delaware]."⁷⁴ The court noted that FFPs are facially valid because an FFP could "easily" fall into either broad category.⁷⁵ The court reasoned that FFPs involve securities claims related to the management of litigation originating from the board's disclosures to shareholders.⁷⁶ Further, the court noted that a corporation and its directors drafting, reviewing, and filing registrations is an important part of the corporation managing its business.⁷⁷

B. FFPs Are Not Contrary to Delaware Law and Policy

The Delaware Supreme Court held that FFPs are not contrary to Delaware law because the scope of Section 102(b)(1) of DGCL, which governs the matters in a corporation's certificate of incorporation, is broadly enabling.⁷⁸ The court supported this holding by observing that in *Sterling v. Mayflower Hotel Corp.*,⁷⁹ the Delaware Supreme Court held that Section 102(b)(1) bars only charter provisions that would accomplish a result that goes against public policy rules.⁸⁰ This demonstrates that shareholders of Delaware corporations "may by contract embody in the [certificate of incorporation] a provision departing from the rules of the common law, provided that it does not transgress a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself."⁸¹

70. *See infra* Section III.D.

71. *See infra* Section III.E.

72. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 113 (Del. 2020) (citing DEL. CODE ANN. tit. 8, § 102(b)(1) (2018)).

73. *Id.* (citing DEL. CODE ANN. tit. 8, § 102(b)(1) (2018)).

74. *Id.* (citing DEL. CODE ANN. tit. 8, § 102(b)(1) (2018)).

75. *Id.* at 114.

76. *Id.*

77. *Id.*

78. *Id.* at 115 (citing DEL. CODE ANN. tit. 8, § 102 (2018)).

79. 93 A.2d 107 (Del. 1952).

80. *Salzberg*, 227 A.3d at 115 (citing *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. 1952)).

81. *Id.* (citing *Sterling*, 93 A.2d at 118).

*Salzberg v. Sciabacucchi**C. The 2015 Amendments to DGCL Do Not Alter Section 102(b)(1)'s Broad Scope*

The court noted that the 2015 Amendments to DGCL should not be viewed as modifying the broad scope of 102(b)(1) of DGCL.⁸² Section 115 of DGCL,⁸³ which was added in the 2015 amendments to DGCL, is “not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction, nor is Section 115 intended to limit or expand the jurisdiction of the Court of Chancery or the Superior Court.”⁸⁴ FFPs direct claims arising under the Securities Act to federal court rather than prevent suits from being brought in federal court.⁸⁵ Section 115 confirms the holding in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,⁸⁶ where the court held that a charter may require internal corporate claims to be brought in “the courts in this State,” (presumably, including the federal court), while prohibiting provisions that would preclude bringing internal corporate claims ‘in the courts of this State.’”⁸⁷ The court also reasoned that Section 115 does not address the relevancy of FFPs in different types of claims.⁸⁸ FFPs that govern intra-corporate litigation fall outside the definition of “internal corporate claims,” which means that “we must look elsewhere (back to Section 102(b)(1)) to determine whether the provision is permissible.”⁸⁹

D. The Court of Chancery Incorrectly Narrowed the Scope of Section 102(b)(1)

The Delaware Supreme Court reasoned that the Delaware Court of Chancery incorrectly narrowed the scope of Section 102(b)(1).⁹⁰ The Delaware Supreme Court noted that the scope of Section 102(b)(1) is not limited to “internal affairs” matters.⁹¹ Further, FFPs are permissible under Section 102(b)(1) and include intra-corporate claims.⁹² The court stated that *ATP Tour, Inc. v. Deutscher Tennis Bund*,⁹³ which involved intra-corporate claims and held that fee-shifting provisions included in bylaws are within the scope of Section 102(b)(1), supports the holding that FFPs are facially valid since they can fall within Section 102(b)(1).⁹⁴ The court further supported the holding by stating that the Delaware Court of Chancery narrowly

82. *Id.* at 116.

83. DEL. CODE ANN. tit. 8, § 115 (2018).

84. *Salzberg*, 227 A.3d at 117 (quoting S.B. 75, 148th Gen. Assem., Reg. Sess. (Del. 2015)).

85. *Id.*

86. 73 A.3d 934 (Del. Ch. 2013).

87. *Salzberg*, 227 A.3d at 119.

88. *Id.*

89. *Id.*

90. *Id.* at 120.

91. *Id.*

92. *Id.* at 121.

93. 91 A.3d 554 (Del. 2014).

94. *Salzberg*, 227 A.3d at 121 (citing *ATP Tour, Inc.*, 91 A.3d 554).

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interpreted *ATP Tour, Inc.* when the court noted that “intracorporate litigation” was only the same idea as the state law fiduciary duty claims.⁹⁵

E. FFPs Do Not Violate Federal Law or Policy

The court further asserted that FFPs are facially valid because they do not offend federal law or policy.⁹⁶ The court noted that in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,⁹⁷ the United States Supreme Court held that federal law does not prohibit provisions that preclude Securities Act claims from being litigated in state courts.⁹⁸ This holding supports the conclusion that FFPs, which narrow the forums where claims arising under the Securities Act may be brought in, are facially valid.⁹⁹ Additionally, the Delaware Supreme Court discussed that the Delaware Court of Chancery cited *Cyan, Inc. v. Beaver County Employees Retirement Fund*,¹⁰⁰ rather than *Rodriguez de Quijas v. Shearson/American Express, Inc.*,¹⁰¹ but the holding in *Cyan* does not demonstrate that FFPs are prohibited from requiring Securities Act claims to be litigated in federal court.¹⁰²

IV. ANALYSIS

In *Salzberg v. Sciabacucchi*,¹⁰³ the Delaware Supreme Court held that FFPs are facially valid, which was correct in this case because the court accurately construed DGCL and policy.¹⁰⁴ Precedent also supports the court’s holding.¹⁰⁵ The court’s holding will likely have the practical result of causing an increase in the amount of Delaware corporations that adopt FFPs.¹⁰⁶ The court’s decision in *Salzberg* continues to make Delaware a desirable place to incorporate.¹⁰⁷ However, the court’s holding still enables shareholders to challenge FFPs.¹⁰⁸

95. *Id.* at 123.

96. *Id.* at 132.

97. 490 U.S. 477 (1989).

98. *See Salzberg*, 227 A.3d at 132 (noting that the Supreme Court upheld an arbitration provision included in a brokerage firm’s standard customer agreement precluding Securities Act claims from being litigated in state courts).

99. *Id.*

100. 138 S. Ct. 1061 (2018).

101. 490 U.S. 477 (1989).

102. *Salzberg*, 227 A.3d at 132.

103. 227 A.3d 102 (Del. 2020).

104. *See infra* Section IV.A.

105. *See infra* Section IV.B.

106. *See infra* Section IV.C.

107. *See infra* Section IV.D.

108. *See infra* Section IV.E.

*Salzberg v. Sciabacucchi**A. The Delaware Supreme Court's Holding that FFPs are Facially Valid is Correct Because the Court Accurately Construed DGCL and Policy*

The court's holding that FFPs are facially valid is consistent with statutory language and policy.¹⁰⁹ DGCL provides businesses with the freedom to adopt appropriate terms for how the business is organized.¹¹⁰ Further, Delaware's corporate statute is considered flexible because it enables parties to have a large amount of leeway when participating in corporate contracts and structuring the enterprise's relations.¹¹¹ Additionally, DGCL policy includes promoting "certainty and predictability"¹¹² and "prompt judicial resolution to corporate disputes."¹¹³

The court correctly held that FFPs are facially valid because FFPs fall within the scope of Section 102(b)(1).¹¹⁴ "The 'most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it.'"¹¹⁵ The court correctly emphasized that FFPs could fall into either category of Section 102(b)(1) since FFPs concern claims arising under the Securities Act that are related to managing litigation that arises under the Board's disclosures to shareholders.¹¹⁶ Since FFPs regulate forums for "intra-corporate" litigation and are related to the "management of the business," the court correctly held that FFPs are facially valid.¹¹⁷

B. Precedent Supports the Court's Holding

The Delaware Supreme Court's holding that FFPs are facially valid is supported by precedent. In *Ingres Corp. v. CA, Inc.*,¹¹⁸ the Supreme Court of Delaware held that forum-selection clauses are enforceable under Delaware law.¹¹⁹ Further, in *Sterling v. Mayflower Hotel Corp.*,¹²⁰ the Supreme Court of Delaware held that Section 102(b)(1) of DGCL bars only charter provisions that "achieve a result

109. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 115-16 (Del. 2020).

110. *Id.* at 116 (citing Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 847 (2008)).

111. *Id.*

112. *Id.* at 137 (citing *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 159 (Del. 1996)).

113. *Id.* (citing *Carvel v. Andreas Hldgs. Corp.*, 698 A.2d 375, 379 (Del. Ch. 1995)).

114. *Id.* at 113-14.

115. *Id.* at 113 (citing *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 950 (Del. Ch. 2013); *New Cingular Wireless PCS v. Sussex Cty. Bd. of Adjustment*, 65 A.3d 607, 611 (Del. 2013)).

116. *Id.* at 114.

117. *Id.*

118. 8 A.3d 1143 (Del. 2010).

119. *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010).

120. 93 A.2d 107 (Del. 1952).

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forbidden by settled rules of public policy.”¹²¹ This demonstrates that the broad scope of DGCL is broadly enabling and that FFPs do not violate public policy.¹²²

Additionally, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,¹²³ the United States Supreme Court upheld an arbitration provision included in a firm’s standard customer agreement that precluded state court litigation of claims arising under the Securities Act.¹²⁴ The United States Supreme Court’s holding that the specialized type of forum selection clause was valid supports the notion that FFPs do not violate federal policy.¹²⁵ Further, in *The Bremen v. Zapata Off-Shore Co.*,¹²⁶ the United States Supreme Court held that courts should effectuate the enforcement of forum-selection clauses.¹²⁷ In *Bremen*, the Supreme Court noted that when “[t]he choice of that forum was made in an arm’s-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason[,] it should be honored by the parties and enforced by the courts.”¹²⁸

C. The Court’s Holding Will Likely Have the Practical Result of Increasing the Amount of Delaware Corporations That Adopt FFPs

The court’s holding will likely result in an increase of pre-IPO Delaware corporations that adopt FFPs in their articles of incorporation.¹²⁹ Mature companies may also be incentivized to amend their bylaws in order to add FFPs.¹³⁰ FFPs provide corporations with efficiencies for addressing the procedural aspects of securities litigation.¹³¹ FFPs benefit corporations by only allowing shareholders to bring

121. *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. 1952).

122. *Id.* (citing *Sterling*, 93 A.2d at 118).

123. 490 U.S. 477 (1989).

124. *Salzberg*, 227 A.3d at 132 (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 90 U.S. 477, 482-83 (1989)).

125. *Id.*

126. 407 U.S. 1 (1972).

127. *Id.* at 15.

128. *Bremen*, 407 U.S. at 12.

129. Dhruv Aggarwal, et al., *Federal Forum Provisions and the Internal Affairs Doctrine*, 10 HARV. BUS. L. REV. 383, 391 (2020) (citing Nicki Locker & Laurie Smilan, *Saying So Long to State Court Securities Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 11, 2019), <https://corpgov.law.harvard.edu/2019/02/11/saying-so-long-to-state-court-securities-litigation/>); see also Joel Kurtzburg & Benjamin Lash, *United States: Delaware Supreme Court Rules Federal-Forum Provisions Survive Facial Challenge Under Delaware Corporate Law*, MONDAQ (May 22, 2020), <https://www.mondaq.com/unitedstates/securities/938538/delaware-supreme-court-rules-federal-forum-provisions-survive-facial-challenge-under-delaware-corporate-law> (noting that pre-IPO Delaware corporations will likely adopt FFPs to avoid the risk of duplicative Securities litigation in state and federal court).

130. Kurtzburg & Lash, *supra* note 129.

131. *Salzberg*, 227 A.3d at 114 (citing *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018)).

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Securities Act claims in federal courts.¹³² In comparison to federal courts, state courts have less experience with securities litigation.¹³³ Securities claims being litigated in “non-expert state courts” has resulted in a large increase in the amount of cases filed in state courts.¹³⁴ In the three years before *Cyan v. Beaver County Employees Retirement Fund*,¹³⁵ decided in 2018, there were “an average of 19 [Securities Act] filings each year, [which then] rose to 35 in 2018, and 49 in 2019.”¹³⁶ According to the 2018 Year in Review Report by Cornerstone Research, “[t]here were 55 percent more state-only filings than federal-only filings in 2018.”¹³⁷ The Cornerstone 2019 Year in Review Report also notes that “[t]he number of state 1933 Act filings in 2019 increased by 40 percent from 2018,” and that “[a]bout 45 percent of all state 1933 Act filings in 2019 had a parallel action in federal court.”¹³⁸ Due to jurisdictional uncertainty and the alleged abuse of plaintiff-shareholders bringing federal-related IPO claims in state courts, additional Delaware companies may begin to include FFPs in IPO documents.¹³⁹

The venue that a claim is brought in can have a great impact on the outcome.¹⁴⁰ In comparison to federal courts, state courts are more plaintiff friendly, less likely to grant a discovery stay, not as experienced in handling complex securities class actions, and less likely to consolidate multiple actions that are filed in multiple jurisdictions.¹⁴¹ For example, in federal court, under PSLRA, discovery is stayed until after the motion to dismiss is decided.¹⁴² As a result, defendants are able to avoid the cost of discovery when a case is dismissed.¹⁴³ Further, in federal courts, pleadings in Section 11 cases are required to comply with the *Twombly Iqbal* standard, which means that the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face,”¹⁴⁴ rather than rely on conclusory

132. Aggarwal et al., *supra* note 129, at 386.

133. *Id.* at 408.

134. Locker & Smilan, *supra* note 129.

135. 138 S. Ct. 1061 (2018).

136. 1 JONATHAN EISENBERG & SCOTT MUSOFF, LITIGATING SECURITIES CLASS ACTIONS § 2.14 (2020).

137. Salzberg v. Sciabacucchi, 227 A.3d 102, 114 (Del. 2020) (quoting Cornerstone Rsch., *Securities Class Action Filings 2018 Year in Review*, STANFORD LAW SCH. SECS. CLASS ACTION CLEARINGHOUSE (2019), <https://securities.stanford.edu/research-reports/1996-2018/Cornerstone-Research-Securities-Class-Action-Filings-2018-YIR.pdf>).

138. *Id.* (citing Cornerstone Rsch., *Securities Class Action Filings 2019 Year in Review*, STANFORD LAW SCH. SECS. CLASS ACTION CLEARINGHOUSE (2020), <https://securities.stanford.edu/research-reports/1996-2019/Cornerstone-Research-Securities-Class-Action-Filings-2019-YIR.pdf>).

139. Aggarwal et al., *supra* note 129, at 391.

140. *Id.* at 394.

141. EISENBERG & MUSOFF, *supra* note 136, at § 2.14.

142. Aggarwal et al., *supra* note 129, at 394.

143. *Id.*

144. *Id.* at 396 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

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statements.¹⁴⁵ There is also the danger of inconsistent adjudication when plaintiff class actions that involve similar claims are brought in different courts.¹⁴⁶ Further, there is not a procedural mechanism that is available to consolidate multiple parallel suits in state and federal court.¹⁴⁷ Through the adoption of FFPs, corporations are able to seek the consolidation of related claims.¹⁴⁸ The inefficiencies of multiple cases being “litigated simultaneously in both state and federal courts are obvious.”¹⁴⁹ Additionally, the costs of insurance for directors and officers of companies going public has increased, as well as the costs of state-court securities filings.¹⁵⁰ The decrease in parallel cases being litigated may result in a decrease in the rates for directors’ and officers’ liability insurance.¹⁵¹

D. The Effect of the Court’s Holding on Incorporating in Delaware

There are currently various factors that lead to Delaware being a favorable place of incorporation, including DGCL, Delaware’s judicial system, case law, legal tradition, and the Delaware Secretary of State.¹⁵² The holding in *Salzberg*, enabling Delaware corporations to require securities claims to be brought in federal court,¹⁵³ continues to make Delaware a favorable place to incorporate and may further weaken a corporation’s motivation to incorporate in a state outside of Delaware. Additionally, the Delaware Supreme Court correctly expanded the Delaware Court

145. *Id.* (citing *Bell Atl.*, 550 U.S. at 561; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

146. See George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099, 1101 (1987) (noting that joinder or consolidation of related actions can promote fair adjudication and decrease the danger of inconsistent adjudication); see also Mark A. Olthoff, *Delaware Supreme Court Upholds Exclusive Federal Forum Selection Provisions*, NAT’L L. REV. (July 13, 2020), <https://www.natlawreview.com/article/delaware-supreme-court-upholds-exclusive-federal-forum-selection-provisions> (noting that concurrent jurisdiction can result in creating the risk of higher costs and potentially inconsistent judgments).

147. *Salzberg v. Sciacacchi*, 227 A.3d 102, 115 (Del. 2020).

148. See Heyward Armstrong et al., *Another Tool in the Toolbox – Delaware Approves “Federal Forum Provisions” For Stockholder Securities Claims*, JD SUPRA (Mar. 30, 2020), <https://www.jdsupra.com/legalnews/another-tool-in-the-toolbox-delaware-19157/> (noting that FFPs requiring all claims to be brought in federal court enable corporations to seek consolidation or coordination of related claims and potentially avoid simultaneous litigation).

149. *Salzberg*, 227 A.3d at 115.

150. See Alison Frankel, *Dela. Supreme Court: Companies Can Pick Forum for Shareholders’ Section 11 Claims*, REUTERS (Mar. 18, 2020, 7:08 PM), <https://www.reuters.com/article/legal-us-otc-blueapron/dela-supreme-court-companies-can-pick-forum-for-shareholders-section-11-claims-idUSKBN21540M> (noting that the Delaware decision in *Salzberg v. Sciacacchi* will likely decrease insurance costs for directors and officers).

151. Kurtzburg & Lash, *supra* note 129.

152. *Why Businesses Choose Delaware*, DEL. CORP. L., <https://corplaw.delaware.gov/why-businesses-choose-delaware/> (last visited Nov. 21, 2021).

153. *Salzberg*, 227 A.3d at 109.

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of Chancery's narrow definition of the internal affairs doctrine.¹⁵⁴ 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—the state of incorporation."¹⁵⁵ The Delaware Supreme Court's broader interpretation of the internal affairs doctrine limits the ability of other states to interfere with and regulate Delaware corporations, which further makes Delaware a desirable state for incorporation.¹⁵⁶

E. The Court's Holding Still Enables Shareholders to Challenge FFPs

While the Delaware Supreme Court held that FFPs are facially valid, the court's holding still enables shareholders to challenge FFPs.¹⁵⁷ The court did not consider hypothetical situations regarding the adoption or application of FFPs.¹⁵⁸ This means shareholders are still able to bring "as applied" challenges.¹⁵⁹ For example, an FFP may be found to be invalid if enforcing the FFP is found to be unjust, an occurrence of fraud, or if the FFP violates public policy.¹⁶⁰ Additionally, there is still the question of whether provisions similar to FFPs in a company's bylaws will be held valid.¹⁶¹ The court noted that "[c]harter and bylaw provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose."¹⁶² The court's holding does not limit which federal court the stockholder is able to bring their suit in.¹⁶³ The plaintiff may also seek review by the United States Supreme

154. *Id.* at 125.

155. *Id.* at 129 (quoting *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1115 (Del. 2005)).

156. Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 269-72 (2020).

157. *Salzberg*, 227 A.3d at 135.

158. *Id.*

159. *Id.*

160. *Id.* (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

161. Compare David A. Edgar et al., *Channeling Claims: the Importance of Considering (and Updating) Exclusive Forum Provisions Now*, NAT'L L. REV. (Nov. 25, 2020), <https://www.natlawreview.com/article/channeling-claims-importance-considering-and-updating-exclusive-forum-provisions-now> (noting that there is a good argument for a court to hold that a Securities Act exclusive forum bylaw is facially valid because the *Salzberg* court referenced Section 109(b) of DGCL which relates to bylaws), with Bruce Erikson, *Delaware Supreme Court: Delaware Corporations May Adopt Federal Forum Provisions Requiring That Securities Act Claims Be Brought in Federal Court*, JD SUPRA (Mar. 26, 2020), <https://www.jdsupra.com/legalnews/delaware-supreme-court-delaware-11919/> (noting that while there are good arguments for the validity of similar provisions placed in bylaws, if the provisions have not been approved by the stockholders or were added after an initial public offering, it is unclear if the arguments will work).

162. *Salzberg*, 227 A.3d at 135 (Del. 2020) (citing *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Schnell v. Chris-Craft, Indus., Inc.*, 285 A.2d 437 (Del. 1971)).

163. Erikson, *supra* note 161.

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Court.¹⁶⁴ Further, there is still the concern of whether Delaware's sister states will enforce FFPs.¹⁶⁵ The Delaware Supreme Court asserted that "[t]he question of enforceability is a separate, subsequent analysis that should not drive the initial facial validity inquiry."¹⁶⁶ Delaware corporations that are seeking to enforce an FFP in a different state will be subject to the other states' policy considerations when determining if the FFP is able to be enforced.¹⁶⁷

V. CONCLUSION

In *Salzberg v. Sciabacucchi*,¹⁶⁸ the Delaware Supreme Court held that provisions several Delaware corporations included in their charters requiring actions arising under the Securities Act to be filed in federal court are facially valid.¹⁶⁹ The court correctly asserted that the provisions are not contrary to DGCL and policy,¹⁷⁰ and the court's holding is correct because it is supported by precedent.¹⁷¹ The Delaware Supreme Court's holding will likely have the practical result of increasing the amount of Delaware corporations that adopt FFPs.¹⁷² The decision is *Salzberg* continues to make Delaware a favorable place to incorporate.¹⁷³ Additionally, the court's holding still enables shareholders to challenge FFPs.¹⁷⁴

164. *Id.* (noting that the United States Supreme Court decided *Cyan* just two years ago).

165. *See Salzberg*, 227 A.3d at 133 (noting that whether FFPs will be enforced by sister states is the most difficult aspect of the dispute, rather than the facial validity of FFPs); *see also* Daphne Morduchowitz et al, *California Superior Courts Enforce Delaware Corporations' Federal Forum Provision For Securities Act Lawsuits*, MONDAQ (Nov 23, 2020), https://www.seyfarth.com/news-insights/california-superior-courts-enforce-delaware-corporations-federal-forum-provision-for-securities-act-lawsuits.html?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration (stating that two separate California Superior Courts have upheld federal forum provisions in governing corporate documents); *see also* Joni Jacobsen et al., *State Courts Continue to Enforce Federal Forum Provisions*, JD SUPRA (Dec. 9, 2020), <https://www.jdsupra.com/legalnews/state-courts-continue-to-enforce-90251/> (noting that federal Securities Act claims are able to be brought in state courts in New York).

166. *Salzberg*, 227 A.3d at 134.

167. Megan Barriger et al., *Open Questions After the Landmark Decision in Salzberg*, JD SUPRA (May 13, 2020), <https://www.jdsupra.com/legalnews/open-questions-after-the-landmark-58172/>.

168. 227 A.3d 102 (Del. 2020).

169. *Id.* at 109.

170. *See supra* Section IV.A.

171. *See supra* Section IV.B.

172. *See supra* Section IV.C.

173. *See supra* Section IV.D.

174. *See supra* Section IV.E.

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