Published on *The National Law Review* https://natlawreview.com

Court of Chancery Invalidates Charter-Based Federal Forum Provision

Article By:

Michelle R. McCreery

In *Matthew Sciabacucchi v. Matthew B. Salzberg, et al.*, C.A. No. 207-0931-JTL (Del. Ch. Dec. 19, 2018), the Court of Chancery invalidated a provision in the charter documents of certain Delaware corporations that specified the federal courts as the exclusive forum for claims arising under the Securities Act of 1933 (the "1933 Act").

The plaintiff, Matthew Sciabacucchi, bought shares of common stock of each nominal defendant, which included Blue Apron Holdings, Inc. ("Blue Apron"), Stitch Fix, Inc. ("Stitch Fix"), and Roku, Inc. ("Roku"). Roku and Stitch Fix included the following language in their respective corporate charter documents:

> Unless the Company consents in writing to the selection of 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. Any person or entity purchasing or otherwise acquiring any interest in any security of the Corporation shall be deemed to have notice of and consented to [this provision].

Blue Apron's charter documents contained a similar provision, except that it expressly contained a savings clause and indicated the federal forum provision was enforceable "to the fullest extent permitted by law."

In invalidating the federal forum charter provisions, the court, citing the holding in *Boilermakers Local 154 Ret. Fund v. Chevron Corp*., 73 A. 3d 934 (Del Ch. 2013), applicable to forum selection bylaw provisions, distinguished between "internal" and "external" affairs, holding that a forum selection charter provision can be adopted with respect to internal affairs of the corporation, but could not be adopted with respect to its external affairs and relationships. The court held that claims under the 1933 Act relate to the corporation's external affairs, including because: (1) such claims assert wholly federal statutory causes of action based on a defective registration statement, (2) possible defendants in such claims are not limited to those having internal roles with the corporation, (3) the definition of "security" includes more than just shares of a Delaware corporation, and (4) such

causes of action arise from a purchase of shares, at which point the purchaser is not yet a stockholder.

The court further explained that “a certification of incorporation differs from an ordinary contract, in which private parties execute a private agreement in their personal capacities to allocate their rights and obligations.” A certification of incorporation instead “effectuates the sovereign act” of creating a corporation under Delaware law. The certification of incorporation is governed by and subject to the restrictions of the Delaware General Corporation Law (“DGCL”). The DGCL regulates the corporation’s internal affairs; however, the authority of Delaware law does not extend to the corporation’s external relationships, especially when such relationships are governed by the laws of other jurisdictions. As an example, the court pointed to the fact that a Delaware corporation is still subject to the labor laws of other jurisdictions in which it operates, and that the DGCL cannot provide the necessary authority to regulate such claims. Therefore, if a “claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate.”

In reviewing the federal forum provisions in controversy, the court held that there was not “a sufficient legal connection to enable the constitutive documents of a Delaware corporation to regulate” a claim under the 1933 Act. Any claims under the 1933 Act would arise from the plaintiff’s purchase of the shares and not the corporate contract or internal affairs of the applicable corporation. Accordingly, the federal forum provisions were held ineffective and invalid.

In January 2019, following the Chancery Court’s decision, the defendants appealed the decision to the Delaware Supreme Court. However, on February 12, 2019, the Supreme Court rejected the appeal as interlocutory, based on the pendency of the plaintiff’s motion for an award of attorneys’ fees, which was originally filed on January 11, 2019, and which remains pending as of the date of this post.

Matthew Sciabacucchi v. Matthew B. Salzberg, et al., C.A. No. 207-0931-JTL (Del. Ch. Dec. 19, 2018)

National Law Review, Volume IX, Number 75