FREEDMAN NORMAND FRIEDLAND LLP
Ivy T. Ngo (CA 249860)
Velvel (Devin) Freedman (*pro hac vice* forthcoming)
Constantine Economides (*pro hac vice*)
Brianna Pierce (CA 336906)
1 SE 3rd Avenue, Suite 1240
Miami, Florida 33131
T: (786) 924-2900
F: (646) 392-8842

SCOTT+SCOTT ATTORNEYS AT LAW LLP
John T. Jasnoch (CA 281605)
600 W. Broadway, Suite 3300
San Diego, CA 92101
T: (619) 233-4565
F: (619) 233-0508

Counsel for Lead Plaintiffs and the Class

- additional counsel on signature page -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MATT PASQUINELLI and BRYAN PAYSEN, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

HUMBL, LLC, BRIAN FOOTE, JEFFREY HINSHAW, GEORGE SHARP, KAREN GARCIA, and MICHELE RIVERA,

Defendants.

Case No. 3:22-cv-00723-AJB-BLM

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

Date: February 2, 2023
Time: 2:00 p.m.
Judge: Hon. Anthony Battaglia
Courtroom: 4A
Complaint Filed: May 19, 2022
Trial: Not yet set

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION 1
II. RELEVANT FACTS 2
III. LEGAL STANDARD 3
IV. ARGUMENT 7
A. Purchasers of Unregistered HUMBL ETX Securities Are Not Bound by the FFP 7
B. HUMBL's FFP is Not Enforceable Against Plaintiffs' Federal Securities Law Claims 9
C. The Relevant Facts Weigh Against Transferring this Case to the District of Delaware 12
1. Plaintiffs' Choice of Forum 12
2. Convenience to the Parties 13
3. Convenience to the Witnesses 13
4. Other Factors 14
V. CONCLUSION 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

A. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. Of Texas,
571 U.S. 49 (2013) 5

Altimeo Asset Management v. Qihoo 360 Tech. Co., Ltd.,
19-CV-01619 JAK (JCx), 2019 WL 11274587 (C.D. Cal. Oct. 24, 2019) 6

Boilermakers Local 154 Ret. Fund v. Chevron Corp.,
73 A.3d 934 (Del. Ch. 2013) 9, 10

Burnett v. Tyco Corp.,
531 U.S. 928 (2000) 7

Bustamante v. Intuit, Inc.,
45 Cal. Rptr. 3d 692 (Cal. App. 6th Dist. 2006) 5

Byler v. Deluxe Corp.,
222 F. Supp. 3d 885 (S.D. Cal. 2016) 14, 15

Cape Flattery Ltd. v. Titan Maritime, LLC,
647 F.3d 914 (9th Cir. 2011) 6

Carnival Cruise Lines, Inc. v. Superior Ct.,
234 Cal. App. 3d 1019, 286 Cal. Rptr. 323 (Ct. App. 1991) 8

Carolina Cas. Co. v. Data Broad. Corp.,
158 F. Supp. 2d 1044 (N.D. Cal. 2001) 13

Commodity Futures Trading Commn v. Savage,
611 F.2d 270 (9th Cir. 1979) 5

Core Litig. Tr. v. Apollo Glob. Mgmt., LLC,
2:17-CV-00927 JFW(AGRx), 2017 WL 3045919 (C.D. Cal. Apr. 5, 2017) 4

Ctr. for Biological Diversity v. Kempthorne,
C08-1339CW, 2008 WL 4543043 (N.D. Cal. Oct. 10, 2008) 4

Decker Coal Co. v. Commonwealth Edison Co.,
805 F.2d 834 (9th Cir. 1986)..4

Denver & R. G. W. R. Co. v. Bhd. of R. R. Trainmen,
387 U.S. 556 (1967) 5

Florens Container v. Cho Yang Shipping,
245 F. Supp. 2d 1086 (N.D. Cal. 2002) 13

Galaviz v. Berg,
763 F. Supp. 2d 1170 (N.D. Cal. 2011) 6

Glob. Power Supply, LLC v. Acoustical Sheetmetal Inc.,
18-CV-3719-R, 2018 WL 3414056, *2 (C.D. Cal. 2018) 5

H.L. v. Wal-Mart Stores, Inc.,
15-CV-1056 JGB (KKx), 2015 WL 12743600 (C.D. Cal. Sept. 9,
2015)..12

In re Activision Blizzard, Inc. Stockholder Litig.,
124 A.3d 1025 (Del. Ch. 2015), *as revised* (May 21,
2015), *judgment entered sub nom. In re Activision Blizzard, Inc. Stockholder Litig.*, C.A. No. 8885-VCL, 2015 WL 2415559 (Del.
Ch. May 20, 2015)...10

In re Ebix, Inc. Stockholder Litig., C.A.
No. 8526-VCN, 2014 WL 3696655 (Del. Ch. July 24, 2014)......................10

In re Ferrero Litigation,
768 F. Supp. 2d 1074 (S.D. Cal. 2011) 12

Iuso v. Snap, Inc.,
17-CV-7176-VAP-RAO, 2017 WL 10410800 (C.D. Cal. Nov. 21,
2017)..10

Jones v. GNC Franchising, Inc.,
211 F.3d 495 (9th Cir. 2000)...4, 7

Kellerman v. InterIsland Launch,
2:14-CV-01878-RAJ, 2015 WL 6620604 (W.D. Wash. 2015) 5

Lee on behalf of The Gap, Inc v. Fisher,
21-15923, 2022 WL 13874339 (9th Cir. Oct. 24, 2022) 12

Lopez v. Charles Schwab & Co.,
13 Cal. Rptr. 3d 544 (Cal. App. 1st Dist. 2004)... 5

Manetti-Farrow, Inc. v. Gucci Am., Inc.,
858 F.2d 509 (9th Cir. 1988).. 11

Marin Storage & Trucking, Inc v. Benco Contracting & Eng'g, Inc.,
107 Cal. Rptr. 2d 645 (Cal. App. 1st Dist. 2001), *as modified* (June
8, 2001).. 6, 8

O'Byrne v. Santa Monica-UCLA Medical Center,
114 Cal. Rptr. 2d 575 (Cal. App. 2d Dist. 2001) 5

Perry v. AT&T Mobility LLC,
11-CV-01488 SI, 2011 WL 4080625 (N.D. Cal. Sept. 12, 2011) 12

Ronlake v. US-Reports, Inc.,
1:11-CV-02009 LJO, 2012 WL 393614 (E.D. Cal. Feb. 6, 2012).................. 6

S.E.C. v. W.J. Howey Co.,
328 U.S. 293 (1946) 7

Saleh v. Titan Corp.,
361 F. Supp. 2d 1152 (S.D. Cal. 2005) 13

Salzberg v. Sciabacucchi,
227 A.3d 102 (Del. 2020)... 11

Scott v. Lee,
208 Cal. App. 2d 12 (1962)... 5

Seafarers Pension Plan on behalf of Boeing Co. v. Bradway,
23 F.4th 714 (7th Cir. 2022)... 12

Securities Investor Protection Corp. v. Vigman,
764 F.2d 1309 (9th Cir. 1985).. 13

Stewart Org. Inc. v. Ricoh Corp.,
487 U.S. 22 (1988) 4

United Hous. Found., Inc. v. Forman,
421 U.S. 837 (1975) 7

Van Dusen v. Barrack,
376 U.S. 612 (1964) 13

Vaughn v. LJ Int'l, Inc.,
94 Cal. Rptr. 3d 166 (Cal. App. 2d Dist. 2009) 11

Ventress v. Japan Airlines,
486 F.3d 1111 (9th Cir. 2007) 4

Williams v. Gaylord,
186 U.S. 157 (1902) 10

Windsor Mills, Inc. v. Collins & Aikman Corp.,
101 Cal. Rptr. 347 (Cal. App. 2d Dist. 1972) 6

OTHER AUTHORITIES

15 U.S.C. § 77 7

15 U.S.C. § 78 12

28 U.S.C. § 1391 3

28 U.S.C. § 1404 4

Cal. Civ. Code § 1550 5

Del. Code Ann. tit. 8, § 109 (West) 9

Del. Code Ann. tit. 8, § 115 (West) 9

Lead Plaintiffs Alfred Miller and Matt Pasquinelli ("Plaintiffs") respectfully submit this Opposition to Defendants' Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) and supporting documents ("Motion") (ECF No. 31).[1]

I. INTRODUCTION

Plaintiffs seek to recover damages caused by Defendants' violations of the federal securities laws and to pursue remedies under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder by the Securities Exchange Commission ("SEC"), and/or §§ 5 and 12(a)(1) of the Securities Act of 1933 (the "Securities Act"), on behalf of a class consisting of all persons and entities, other than Defendants, who purchased or otherwise acquired (1) HUMBL common stock between November 21, 2020 and November 17, 2021 and/or (2) unregistered HUMBL ETX securities between November 21, 2020 and February 14, 2022, all dates inclusive. ¶1.

As is typical in securities fraud class actions, this Action was filed in the district court in which all Defendants reside and the alleged misstatements occurred – the District Court for the Southern District of California. ¶¶13-15, 17-18. Defendants now delay the Action's adjudication on the merits by attempting to override Plaintiffs' choice of venue and transferring to the District Court for the District of Delaware based on a federal forum provision ("FFP") in the Company's bylaws which does not bind the purchasers of HUMBL ETX securities. That provision states, in relevant part, that:

[1] Unless otherwise noted, capitalized terms used but not defined herein have the meanings ascribed in the Amended Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint") (ECF No. 26), citations to "¶" refer to the Complaint, internal citations have been omitted, and all emphasis has been added. As used herein, the term "Defendants" refers to HUMBL, Inc. (f/d/b/a HUMBL, LLC) ("HUMBL" or the "Company"), Brian Foote, Jeffrey Hinshaw, Karen Garcia, and Michele Rivera.

> Unless [HUMBL] consents in writing to the selection of an alternative forum, to the fullest extent permitted by law, the federal district courts of the United States situated in the State of Delaware shall be the exclusive forum for the resolution of any complaint asserting a cause of action under the Securities Act [] and the [] Exchange Act []. Any person or entity purchasing or otherwise acquiring any interest in share of capital stock of [HUMBL] shall be deemed to have notice of and consented to the provisions of this Section 7.13.

See ECF No. 31-3 at 16.

For three reasons, Defendants' Motion should be denied. First, HUMBL's FFP is unenforceable under state and/or federal law because it: (i) improperly seeks to govern the Company's external affairs and (ii) would eliminate the substantive rights of Plaintiffs to assert Securities Act claims in state court. Next, Plaintiff Pasquinelli and other members of the Class who purchased unregistered HUMBL ETX securities, are not bound by the FFP as they did not consent to its terms. Lastly, consideration of the relevant factors weigh against transferring this Action to the District of Delaware.

II. RELEVANT FACTS

On May 19, 2022, plaintiffs Matt Pasquinelli and Bryan Paysen filed the initial complaint alleging violations of the federal securities laws in this District. ECF No. 1. Following their appointment as lead plaintiff and approval of selection of counsel (ECF No. 21), Plaintiffs filed their Complaint on September 22, 2022 (ECF No. 26).

The Complaint alleges that throughout the Class Period, Defendants made materially false and/or misleading statements regarding HUMBL's business and operations. ¶2. Specifically, Defendants made material misstatements and/or failed to disclose that: (1) the HUMBL Pay App did not have even the basic functionality the Company promised to investors; (2) as a result, the Company could not and did not follow through on the international business partnerships it touted to be able to generate revenue through; and (3) certain of the Company's acquisitions were

overvalued, which misleadingly conveyed a strong balance sheet until the related goodwill accounting measures were impaired. *Id.*

In addition, throughout the Class Period, Defendants engaged in and financially benefited from a multifaceted scheme that relied on the alleged materially false statements and/or omissions about stock ownership, share count restrictions and reductions, dilution probability, global partnerships, functionality, and geographic reach of the HUMBL platform, and the undisclosed use of paid promotors. ¶4. As a result of Defendants' wrongful acts, omissions, and scheme, and the precipitous decline in the market value of the Company's securities, Plaintiffs and other Class members have suffered significant losses and damages. ¶5.

Likewise, during the Class Period, Defendants sold a series of unregistered securities called BLOCK Exchange Traded Index ("ETX") to customers seeking exposure to cryptocurrency investments. ¶3. Unbeknownst to the customers, those unregistered securities were collateralized by a variety of highly speculative and risky digital assets. *Id.*

III. LEGAL STANDARD

The general federal venue statute provides that "[a] civil action may be brought in—(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." 28 U.S.C. § 1391(b).

"For the convenience of parties and witnesses" or "in the interest of justice, a district court may transfer any civil action to any other district or division where it

might have been brought or…to which all parties have consented." 28 U.S.C. § 1404(a). In addition, the Ninth Circuit provides several other discretionary factors for district courts to consider in determining whether to grant a motion to transfer:

> (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, [ ] (8) the ease of access to sources of proof.... [9] the presence of a forum selection clause ... [and (10)] the relevant public policy of the forum state.

Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000). Likewise, district courts may also consider factors such as (11) relative court congestion, (12) "the local interest in having localized controversies decided at home," and (13) "the unfairness of burdening citizens in an unrelated forum with jury duty." *Decker Coal Co. v. Commonwealth Edison Co.,* 805 F.2d 834, 843 (9th Cir. 1986). Courts maintain broad discretion to adjudicate transfer motions on a "case-by-case" basis. *Stewart Org. Inc. v. Ricoh Corp.,* 487 U.S. 22, 29 (1988); *see e.g*, *Ventress v. Japan Airlines*, 486 F.3d 1111, 1118 (9th Cir. 2007) ("Weighing of the factors for and against transfer involves subtle considerations and is best left to the discretion of the trial judge."). While "[n]o single factor is dispositive," *Ctr. for Biological Diversity v. Kempthorne*, 08-CV-1339 CW, 2008 WL 4543043, at *2 (N.D. Cal. Oct. 10, 2008) (citing *Ricoh*, 487 U.S. at 29), "[t]he convenience of the parties and the witnesses are often the most important factors." *Core Litig. Tr. v. Apollo Glob. Mgmt., LLC*, 2:17-CV-00927 JFW(AGRx), 2017 WL 3045919, at *4 (C.D. Cal. Apr. 5, 2017); *see also Denver & R. G. W. R. Co. v. Bhd. of R. R. Trainmen,* 387 U.S. 556, 560 (1967) ("[V]enue is primarily a matter of convenience of litigants and witnesses.").

1 The party moving for transfer bears the burden of demonstrating the transfer's
2 appropriateness. *Commodity Futures Trading Commn v. Savage,* 611 F.2d 270, 279
3 (9th Cir. 1979). When a party, as here, claims transfer is appropriate pursuant to a
4 mandatory forum selection clause, a court must first determine if there is, in fact, a
5 "contractually ***valid*** forum-selection clause" under state law. *A. Marine Const. Co.*
6 *v. U.S. Dist. Ct. for W. Dist. Of Texas,* 571 U.S. 49, 62 n.5 (2013). *Kellerman v.*
7 *InterIsland Launch,* 2:14-CV-01878-RAJ, 2015 WL 6620604, *3 (W.D. Wash.
8 2015) ("To determine the enforceability of a forum selection clause, a federal court
9 must [first] ask whether a contract existed under state law."); *see also Glob. Power*
10 *Supply, LLC v. Acoustical Sheetmetal Inc.,* 18-CV-3719-R, 2018 WL 3414056, *2
11 (C.D. Cal. 2018) ("Although federal law governs the interpretation and enforcement
12 of forum selection clauses, state law governs contract formation and the
13 interpretation of an agreement's terms.").
14 In California, "the essential elements of a contract are: parties capable of
15 contracting; the parties' consent; a lawful object; and sufficient cause or
16 consideration." *Lopez v. Charles Schwab & Co.,* 13 Cal. Rptr. 3d 544, 548 (Cal.
17 App. 1st Dist. 2004) (citing Cal. Civ. Code § 1550); *see also O'Byrne v. Santa*
18 *Monica-UCLA Medical Center*, 114 Cal. Rptr. 2d 575, 583 (Cal. App. 2d Dist. 2001)
19 ("Whether a set of bylaws constitutes a contract 'turns on whether the elements of a
20 contract are present.'") (quoting *Scott v. Lee* 208 Cal. App. 2d 12, 15 (1962)).
21 "Contract formation requires mutual consent, which cannot exist unless the parties
22 agree upon the same thing in the same sense." *Bustamante v. Intuit, Inc.,* 45 Cal.
23 Rptr. 3d 692, 698 (Cal. App. 6th Dist. 2006). Because mutual assent requires
24 "adequate notice," "an offeree, regardless of apparent manifestation of his consent,
25 is not bound by inconspicuous contractual provisions of which he was unaware,
26 contained in a document whose contractual nature is not obvious." *Windsor Mills,*
27
28

1 *Inc. v. Collins & Aikman Corp.,* 101 Cal. Rptr. 347, 351 (Cal. App. 2d Dist. 1972);
2 *see also Marin Storage & Trucking, Inc v. Benco Contracting & Eng'g, Inc.,* 107
3 Cal. Rptr. 2d 645, 651 (Cal. App. 1st Dist. 2001), *as modified* (June 8, 2001) (a party
4 is not bound if there "does not appear to be a contract and the terms are not called to
5 the attention of the recipient").

6 Next, a court must consider whether a case's claims fall within the purview of
7 the forum selection clause. To do so, the court must evaluate "the breadth" of the
8 clause's language. *Altimeo Asset Management v. Qihoo 360 Tech. Co., Ltd.*, 19-CV-
9 01619 JAK (JCx), 2019 WL 11274587, at *4 (C.D. Cal. Oct. 24, 2019); *see e.g.*,
10 *Ronlake v. US-Reports, Inc.,* 1:11-CV-02009 LJO, 2012 WL 393614, at *3-4 (E.D.
11 Cal. Feb. 6, 2012) ("The scope of the claims governed by a forum-selection clause
12 depends [upon] the language used in the clause."). Where, for example, the clause
13 governs claims "arising under" the contract containing it, it "should be interpreted
14 narrowly," *i.e.,* as applying only to those disputes "relating to the interpretation and
15 performance of the contract itself." *Cape Flattery Ltd. v. Titan Maritime, LLC,* 647
16 F.3d 914, 922 (9th Cir. 2011).

17 Even if a court finds that a valid forum selection clause exists, it may be
18 deemed unenforceable if one of the following conditions is met: "(1) if the inclusion
19 of the clause in the agreement was the product of fraud or overreaching; (2) if the
20 party wishing to repudiate the clause would effectively be deprived of his day in
21 court were the clause enforced; and (3) if enforcement would contravene a strong
22 public policy of the forum in which suit is brought." *Holland Am. Line, Inc. v.*
23 *Wartsila N. Am., Inc.,* 485 F.3d 450, 457 (9th Cir.2007); *see Galaviz v. Berg,* 763 F.
24 Supp. 2d 1170 (N.D. Cal. 2011) (finding forum selection clause in a corporation's
25 bylaws unenforceable because, in part, "it was unilaterally adopted by the directors,
26 who are defendants in this action"); *see also Jones v. GNC Franchising, Inc.,* 211
27
28

F.3d 495, 498 (9th Cir.), *cert denied, Burnett v. Tyco Corp.,* 531 U.S. 928 (2000) (finding unenforceable, a forum selection clause in a franchise agreement "limiting venue to a non-California forum for claims arising under or relating to a franchise located in the state" due to California's strong public policy to "protect California franchises from the expense, inconvenience, and possible prejudice of litigation in a non-California venue").

IV. ARGUMENT

A. Purchasers of Unregistered HUMBL ETX Securities Are Not Bound by the FFP.

Under §2(a)(1) of the Securities Act, a "security" is defined to include an "investment contract." 15 U.S.C. § 77b(a)(1). An investment contract is "an investment of money in a common enterprise with profits to come solely from the efforts of others." *S.E.C. v. W.J. Howey Co.,* 328 U.S. 293, 301 (1946). Specifically, a transaction qualifies as an investment contract and, thus, a security if it is: (1) an investment; (2) in a common enterprise; (3) with a reasonable expectation of profits; and (4) to be derived from the entrepreneurial or managerial efforts of others. *See United Hous. Found., Inc. v. Forman,* 421 U.S. 837, 852-53 (1975). This definition embodies a "flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits," and thereby "permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of 'the many types of instruments that in our commercial world fall within the ordinary concept of a security.'" *W.J. Howey,* 328 U.S. at 299. Accordingly, in analyzing whether something is a security, "form should be disregarded for substance," and the emphasis should be "on the economic realities underlying a transaction, and not on the name appended thereto." *Forman,* 421 U.S. at 848-49.

1 The Complaint alleges that investors who bought HUMBL ETX products
2 invested money or other valuable consideration in a common enterprise, and thus
3 had a reasonable expectation of profit based upon Defendants' efforts, including,
4 among other things, their proprietary trading codes. ¶235. Defendants sold
5 HUMBL's ETX products to the public through the Company's website. ¶237. Every
6 purchase of HUMBL ETX securities constituted an investment contract. ¶238.
7 Defendants do not claim that the investment contracts for the purchase of
8 HUMBL ETX securities incorporate the FFP contained in the Company's bylaws,
9 relating to its rights or powers, its ***stockholders***, directors, officers, or employees.
10 Nor does the language of the FFP support the enforcement of the provision against
11 purchasers of HUMBL ETX securities. The FFP in question states, in relevant part,
12 that "[a]ny person or entity purchasing or otherwise acquiring any interest in ***share***
13 ***of capital stock*** of [HUMBL] shall be deemed to have notice of and consented to the
14 provisions of this Section…" ECF No. 31-3 at 16. While the Complaint asserts that
15 the purchase of HUMBL ETX products constitutes an investment contract, and
16 therefore, is a security under the federal securities laws, HUMBL's FFP explicitly
17 limits notice and consent of the provision to purchasers of "capital stock."
18 The FFP thus does not bind purchasers of HUMBL ETX securities as there is
19 no valid enforceable contract between the parties containing the provision, and
20 Defendants have failed to show that the terms of the agreement were ever called to
21 the attention of said Class members. *See Marin Storage & Trucking, Inc. v. Benco*
22 *Contracting and Engr., Inc.,* 107 Cal. Rptr. 2d 645 (Cal. App. 1st Dist. 2001), *as*
23 *modified* (June 8, 2001); *see also Carnival Cruise Lines, Inc. v. Superior Ct.,* 234
24 Cal. App. 3d 1019, 1027, 286 Cal. Rptr. 323, 328 (Ct. App. 1991) ("Absent such
25 notice, the requisite mutual consent to that contractual term is lacking and no valid
26 contract with respect to such clause thus exists.").
27
28

B. HUMBL's FFP is Not Enforceable Against Plaintiffs' Federal Securities Law Claims.

HUMBL's FFP is unauthorized by Delaware law and eliminates statutory protections offered by the federal securities laws.[2] Therefore, HUMBL's FFP is unenforceable against Plaintiffs' Securities and Exchange Act Claims.

Delaware's General Corporation Law ("DGCL") authorizes Delaware corporations, such as HUMBL, to adopt provisions in their bylaws that govern their internal affairs. *See* Del. Code Ann. tit. 8, § 109 (West) ("[B]ylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."). This power includes a limited ability to adopt a forum-selection clause requiring internal corporate claims to be brought in Delaware. *See* Del. Code Ann. tit. 8, § 115 (West) ("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.").

Here however, Plaintiffs' claims are not based on the Company's internal workings, but on its violations of the federal securities laws, which its corporate bylaws cannot override. *See Iuso v. Snap, Inc.*, 17-CV-7176-VAP-RAO, 2017 WL 10410800, at *4 (C.D. Cal. Nov. 21, 2017). Specifically, the Delaware Supreme Court has held that "bylaws ... regulating external matters," such as one

---

[2] The parties agree that "Delaware law governs the Company's internal affairs, including the interpretation and enforcement of its Certificate of Incorporation." *Boilermakers Local 154 Ret. Fund v. Chevron Corp.,* 73 A.3d 934, 938 (Del. Ch. 2013) ("[W]hen faced with a motion to enforce the bylaws [of a corporation, a court] will consider, as a first order issue, whether the bylaws are valid under the chartering jurisdiction's domestic law.").

1 "purport[ing] to bind a plaintiff, even a stockholder plaintiff, who sought to bring a
2 tort claim against the company based on a personal injury she suffered" would be
3 "beyond the statutory language of 8 Del. C. § 109(b)." *Chevron*, 73 A.3d at 952.
4 "[W]hy those kinds of bylaws would be beyond the statutory language of 8 Del. C.
5 § 109(b) is obvious: the bylaws would not deal with the rights and powers of the
6 plaintiff-stockholder as a stockholder." *Id.*; *In re Ebix, Inc. Stockholder Litig.,* C.A.
7 No. 8526-VCN, 2014 WL 3696655, at *17 (Del. Ch. July 24, 2014) ("[T]he Board's
8 disclosing accurate, material information when seeking stockholder action is a
9 matter of Delaware law under the internal affairs doctrine, but the Board's
10 complying with SEC rules and regulations when filing information with the SEC is
11 not. Instead, that issue is governed by the federal securities laws, over which this
12 Court does not have subject matter jurisdiction."); *Williams v. Gaylord,* 186 U.S.
13 157, 165 (1902) ("[W]hen a corporation sells or encumbers its property, incurs debts
14 or gives securities, it does business, and a statute regulating such transactions does
15 not regulate the internal affairs of the corporation.").
16 Plaintiffs' Securities and Exchange Act claims are exactly the type of external
17 claims discussed in *Chevron*. 73 A.3d at 952; *see In re Activision Blizzard, Inc.*
18 *Stockholder Litig.,* 124 A.3d 1025, 1056 (Del. Ch. 2015), *as revised* (May 21,
19 2015), *judgment entered sub nom*. *In re Activision Blizzard, Inc. Stockholder Litig.*,
20 C.A. No. 8885-VCL, 2015 WL 2415559 (Del. Ch. May 20, 2015) ("A Rule 10b-5
21 claim under the federal securities laws is a personal claim akin to a tort claim for
22 fraud. The right to bring a Rule 10b-5 claim is not a property right associated with
23 shares, nor can it be invoked by those who simply hold shares of stock. …As such,
24 the Rule 10b-5 claim is personal to the purchaser or seller and remains with that
25 person; it does not travel with the shares."); *see also Manetti-Farrow, Inc. v. Gucci*
26 *Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) (While "forum selection clauses can be
27
28

1 equally applicable to contractual and tort causes of action… [w]hether a forum
2 selection clause applies to tort claims depends on whether resolution of the claims
3 relates to interpretation of the contract.").
4 Defendants provide no authority to support enforcing a forum selection
5 provision in a corporation's bylaws on claims that do not relate to its internal affairs.
6 Rather, Defendants attempt to categorize Plaintiffs' claims as "intra-corporate" and
7 thus susceptible to an FFP in order to analogize this case to *Salzberg v. Sciabacucchi*,
8 227 A.3d 102 (Del. 2020). But *Salzberg* is inapposite because there, the Delaware
9 Supreme Court altered existing ***Delaware state*** law by holding that a FFP in the
10 charter of a Delaware corporation, identifying federal district courts in Delaware as
11 the exclusive forum for resolving any complaint asserting a cause of action arising
12 under the Securities Act, was valid. *See* 227 A.3d at 120. In essence, the Court held
13 that, although disputes concerning a corporation's "internal affairs" are typically
14 limited in their adjudication to the state of incorporation, a forum selection provision
15 limiting the adjudication of Securities Act claims to federal courts, falls somewhere
16 between that limited circle and the larger sphere of external affairs, landing in "intra-
17 corporate affairs." *Id.* at 131.
18 This line of reasoning directly contradicts legal precedent and public policy
19 in the state of California. *Vaughn v. LJ Int'l, Inc.,* 94 Cal. Rptr. 3d 166, 174 (Cal.
20 App. 2d Dist. 2009) ("[S]ecurities regulations designed to protect participants in
21 California's securities marketplace are not limited by the internal affairs doctrine.").
22 Defendants likewise fail to provide any legal precedent from this Circuit adopting
23 this new category of "intra-corporate affairs" relating to Plaintiffs' Securities Act
24 claims which eliminates their statutory right to state court and is thus explicitly
25 barred under § 77v(a) of the Securities Act and § 115 of the DGCL. *See Perry v.*
26 *AT&T Mobility LLC,* 11-CV-01488 SI, 2011 WL 4080625, at *5 (N.D. Cal. Sept.
27
28

1 12, 2011) (If a forum-selection clause "applies to a non-waivable statutory claim
2 [and] may, in fact, improperly compel the claimant to forfeit his or her statutory
3 rights," then the clause is "contrary to the strong public policy of California and will
4 not be enforced.").[3]

5 In sum, Defendants do not and cannot support their proposition that an FFP
6 in a corporation's bylaws, like HUMBL's, has been found enforceable in any
7 California state or federal court.

8 **C. The Relevant Facts Weigh Against Transferring this Case to the**
9 **District of Delaware.**

10 1. Plaintiffs' Choice of Forum

11 "Generally, a defendant must make a strong showing of inconvenience to
12 warrant upsetting the plaintiff's choice of forum." *In re Ferrero Litigation,* 768 F.
13 Supp. 2d 1074, 1078 (S.D. Cal. 2011); *H.L. v. Wal-Mart Stores, Inc.,* 15-CV-1056
14 JGB (KKx), 2015 WL 12743600, at *2 (C.D. Cal. Sept. 9, 2015) (same). The
15 operative facts in this case are connected to this District. Defendants Foote,
16 Hinshaw, Garcia, and Rivera (the "Individual Defendants") are HUMBL advisors,
17 directors and/or executives who have residences in this District. The Individual
18 Defendants received compensation from the Company, also located in this District,
19 which disseminated the alleged misstatements to the public. Furthermore, in

20 ---

21 [3] Defendants' reliance on *Lee v. Fisher* is inapposite here as the opinion has since been vacated and will be reheard *en banc* pursuant to F.R.A.P. 35(a) and Circuit Rule 35-3. *See* 34 F.4th 777
22 (9th Cir. 2022), *reh'g en banc granted, opinion vacated sub nom. Lee on behalf of The Gap, Inc v. Fisher,* 21-15923, 2022 WL 13874339 (9th Cir. Oct. 24, 2022). The vacated *Lee* decision deviated
23 from legal precedent finding forum selection provisions that violate the Exchange Act's antiwaiver provision, 15 U.S.C. § 78cc(a), unenforceable as a matter of public policy. *See id.* at 781-82;
24 *compare Seafarers Pension Plan on behalf of Boeing Co. v. Bradway,* 23 F.4th 714, 718-20 (7th Cir. 2022) (finding a similar forum-selection clause unenforceable as "contrary to Delaware
25 corporation law and federal securities law"). The Ninth Circuit noted in its vacated decision that if the plaintiff had "identified Delaware law clearly stating that she could not get any relief in the
26 Delaware Court of Chancery, we would have little trouble considering the effect of that law as part of our public policy analysis." *Id.* at 782. Here, Plaintiffs have identified relevant state and federal
27 law that definitively supports the unenforceability of Defendants' FFP. *See supra,* § IV.B.

28

1 securities litigation "unless the balance of factors is strongly in favor of the
2 defendants, the plaintiff's choice of forum should rarely be disturbed." *Securities*
3 *Investor Protection Corp. v. Vigman,* 764 F.2d 1309, 1317 (9th Cir. 1985).
4 Accordingly, Plaintiffs' choice of forum is entitled to deference, and thus, weighs in
5 favor of this District.

6 2. Convenience to the Parties

7 The convenience of the Parties would not be served by transferring this case—
8 each Individual Defendant resides in the state of California and HUMBL's
9 headquarters are in this District. Because Defendants have the burden of proving that
10 the proposed forum is "more convenient" rather than just "equally convenient or
11 inconvenient," this factor does not support transferring the case to the District of
12 Delaware. *Van Dusen v. Barrack,* 376 U.S. 612, 646 (1964).

13 3. Convenience to the Witnesses

14 "The relative convenience to the witnesses is often recognized as the most
15 important factor to be considered in ruling on a motion under § 1404(a)." *Saleh v.*
16 *Titan Corp.,* 361 F. Supp. 2d 1152, 1160 (S.D. Cal. 2005). "In determining whether
17 this factor weighs in favor of transfer, the court must consider not simply how many
18 witnesses each side has and the location of each, but, rather, the court must consider
19 the importance of the witnesses." *Id.* at 1160-61. "The party seeking a transfer cannot
20 rely on vague generalizations as to the convenience factors." *Florens Container v.*
21 *Cho Yang Shipping,* 245 F. Supp. 2d 1086, 1093 (N.D. Cal. 2002). In establishing
22 inconvenience to witnesses, the moving party must name the witnesses, state their
23 location, and explain their testimony and its relevance. *Carolina Cas. Co. v. Data*
24 *Broad. Corp.,* 158 F. Supp. 2d 1044, 1049 (N.D. Cal. 2001).

25 Here, Defendants' Motion fails to identify any witnesses in Delaware and
26 what the content of their testimony would be. Furthermore, key witnesses in this
27
28

case will include HUMBL employees, including, but not limited to, the Individual Defendants, as well as interested third parties related to the Individual Defendants. These witnesses reside in this District. The Individual Defendants will be able to testify about the who, what, where and when of their statements, as well as their scienter. The third parties related to the Individual Defendants will be able to testify about the terms of their investment in the Company and the timing and nature of the returns on those investments. Accordingly, this factor weighs in favor of this litigation remaining in this District.

4. Other Factors

The remaining factors either do not support a transfer or are neutral.

First, ease of access to evidence is generally not a predominate concern in evaluating whether to transfer venue because "advances in technology have made it easy for documents to be transferred to different locations." *Byler v. Deluxe Corp.*, 222 F. Supp. 3d 885, 906-07 (S.D. Cal. 2016). Nonetheless, HUMBL's principal place of business is in this District, thereby eliminating any concern regarding ease of access to evidence and weighing against a transfer.

Second, the Southern District of California has a "strong interest" in adjudicating this case because HUMBL's principal place of business is in the District and in the context of § 1391(b)(2), a "substantial part of the events" giving rise to this Action occurred in the District. This factor thus weighs in favor of this District.

Indeed, at all relevant times, the Individual Defendants worked for HUMBL while violating the federal securities laws; HUMBL and the Individual Defendants issued their false and misleading statements to the Class from this District. While Plaintiffs assert violations of the federal securities laws on behalf of a nationwide class, the hub around which all Defendants' unlawful conduct revolved is in this District, where HUMBL is headquartered.

Third, because this case involves ***federal*** securities laws, there is no reason to believe that the District of Delaware will have greater familiarity with the relevant statutes and case law than this district. *Accord Byler*, 222 F. Supp. 3d at 907 ("The parties concede that each forum is equally familiar with the law necessary to resolve Plaintiffs' claims …Thus, this factor is neutral.").

Lastly, Defendants made no claim that the court and congestion time in the District of Delaware favor a transfer of this case to that district.

V. CONCLUSION

In sum, Defendants have failed to demonstrate that an enforceable contract existed between the parties containing the purported FFP, and even if such a contract existed, the FFP should be set aside based on the lack of notice to half of the putative class and because the weight of the relevant factors tips in favor of upholding Plaintiffs' choice of forum in the Southern District of California. Accordingly, the Court should deny Defendants' Motion in its entirety.

Dated: November 7, 2022

Respectfully Submitted,

FREEDMAN NORMAND FRIEDLAND LLP

/s/ *Ivy T. Ngo*

Ivy T. Ngo (CA 249860)
Velvel (Devin) Freedman (*pro hac vice* forthcoming)
Constantine Economides (*pro hac vice*)
Brianna Pierce (CA 336906)
1 SE 3rd Avenue, Suite 1240
Miami, Florida 33131
T: (786) 924-2900
F: (646) 392-8842
ingo@fnf.law
vel@fnf.law
ceconomides@fnf.law
bpierce@fnf.law

SCOTT+SCOTT ATTORNEYS AT LAW LLP
John T. Jasnoch (CA 281605)
600 W. Broadway, Suite 3300
San Diego, CA 92101
T: (619) 233-4565
F: (619) 233-0508
jjasnoch@scott-scott.com

Counsel for Lead Plaintiffs and the Class

BRONSTEIN, GEWIRTZ & GROSSMAN, LLC
Peretz Bronstein (*pro hac vice* forthcoming)
60 East 42nd Street, Suite 4600
New York, New York 10165
T: (212) 697-6484
peretz@bgandg.com

Additional Counsel for Alfred Miller

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on November 7, 2022, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to counsel of record.

/s/ Ivy T. Ngo
Ivy T. Ngo