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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

Complaint Filed: May 19, 2022
Trial: Not yet set

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR 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

INTRODUCTION

Plaintiffs' Opposition to Defendants HUMBL, Inc.[1] ("HUMBL"), Brian Foote, Jeffrey Hinshaw, Karen Garcia, and Michele Rivera's (collectively, "Defendants") Motion to Transfer Venue to the District of Delaware pursuant to 28 U.S.C. § 1404(a) fails to identify any basis to disregard the unambiguous language of HUMBL's forum-selection bylaw. Plaintiffs do not dispute that the bylaw's plain language requires HUMBL shareholders to bring any claims under the Securities Act or Exchange Act in the District of Delaware. Nevertheless, Plaintiffs contend that the bylaw is unenforceable for three reasons, none of which holds any water. In summary:

1. Plaintiffs are wrong that they are somehow "not bound" by the bylaw because one of them also purchased HUMBL's BLOCK ETX products. The fact remains that, as HUMBL shareholders, Plaintiffs are each bound by the forum-selection bylaw.
2. Plaintiffs are wrong that the forum-selection bylaw is unenforceable because it is "unauthorized by Delaware law." To the contrary, the Delaware Supreme Court has expressly held that such federal-forum bylaws are valid and enforceable under Delaware law, and Plaintiffs' argument appears simply to reflect a disagreement with that holding.
3. Plaintiffs are wrong that the forum-selection bylaw is unenforceable because it "eliminates statutory protections offered by the federal securities laws." To the contrary, federal law reflects a "strong federal policy" in favor of enforcing forum-selection clauses absent "extraordinary circumstances," which Plaintiffs do not even attempt to demonstrate here. As to the purported "statutory protections," Plaintiffs' argument is nonsensical because this would be a transfer from one *federal* court to another *federal* court of a complaint

[1] As explained in Defendants' opening brief (the "Opening Brief" or "Op. Br."), HUMBL, Inc. was erroneously sued as "HUMBL, LLC." (*See* Op. Br. at 2 n.1.)

raising exclusively *federal* claims. In any event, Plaintiffs do not even identify what "statutory protection" is jeopardized by a transfer here – and there is none.

Accordingly, HUMBL's forum-selection bylaw is fully enforceable under Delaware law, and the "strong federal policy" in favor of enforcement of forum-selection clauses dictates a transfer here.

ARGUMENT

Plaintiffs' baseless arguments in opposition can be swiftly refuted because Plaintiffs are indisputably bound by an unambiguous forum-selection clause in HUMBL's bylaws, which is fully enforceable under controlling authority under both Delaware and federal law.

I. PLAINTIFFS ARE BOUND BY HUMBL'S FORUM-SELECTION BYLAW.

As Plaintiffs concede, HUMBL's forum-selection bylaw applies to any person or entity who acquires HUMBL's "capital stock." (Opp'n at 8.) Plaintiffs expressly allege that they each purchased HUMBL's stock. (Am. Compl., ¶¶ 11, 12 (ECF No. 26).)[2] Accordingly, they are unambiguously bound by the forum-selection bylaw.

Undeterred, Plaintiffs appear to contend that, because one of them – Pasquinelli – allegedly *also* purchased HUMBL's BLOCK ETX products, that fact somehow negates the effect of the forum-selection bylaw on HUMBL's shareholders. (*See* Opp'n at 2.)[3]

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[2] Just as Lead Plaintiffs Miller and Pasquinelli allege ownership of HUMBL stock in the Amended Complaint, so did Plaintiff Paysen in the original Complaint. (Orig. Compl., ¶ 11 (ECF No. 1).) Further, each of the individuals who previously sought to be named as lead plaintiff also alleged that they owned HUMBL stock. (*See* ECF Nos. 9-5 (Xiao); 11-4 (Davis); 12-3 (Berry); 14-1, at 9 (Patel).)

[3] Plaintiffs allege that the BLOCK ETX products are "unregistered securities" that did not have an accompanying forum-selection provision. Defendants will dispute that characterization at the appropriate time. But for present purposes, what matters is that Plaintiffs concede that they were shareholders of HUMBL common stock, regardless of what other "securities" they claim to have held.

That is nonsensical. Plaintiffs do not explain why that would be, other than to make a vague reference to "Pasquinelli and other members of the Class who purchased [BLOCK ETX products]," with the suggestion being that there was no forum-selection clause associated with the purchase of the BLOCK ETX products. (Opp'n at 2; *see also id.* at 8.) But the fact remains that each of the Plaintiffs, including Pasquinelli, is indisputably bound by the forum-selection bylaw by virtue of having been HUMBL shareholders. Defendants do not need to rely on any additional forum-selection clause relating to the BLOCK ETX products.

As for the putative "Class" members, any who were HUMBL shareholders, like Pasquinelli, would likewise be bound by the forum-selection bylaw and required to assert any securities law claims in the District of Delaware.[4] Indeed, Pasquinelli stated in his lead-plaintiff motion that his claims are "typical" of those of the putative Class members because, "***like all other Class members***," he "***purchased HUMBL stock***." (Pasquinelli Lead Pl. Mot. at 8 (ECF No. 10) (emphasis added).) Regardless, what is relevant to the pending motion to transfer is that all named Plaintiffs are indeed shareholders bound by the forum-selection bylaw, and their claims cannot be heard in this Court.

II. HUMBL'S FORUM-SELECTION BYLAW IS VALID UNDER DELAWARE LAW.

Plaintiffs concede, as they must, that Delaware law governs the validity of the forum-selection bylaw as HUMBL is a Delaware corporation. (*See* Opp'n at 9 & n.2.) Yet, in an extended and opaque section of their brief (at pp. 9-11), Plaintiffs' arguments seem to be at war with the Delaware Supreme Court's on-point holding that federal forum-selection bylaws validly cover "intra-corporate" disputes arising under federal law, such as

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[4] Note that no class has been certified at this stage, nor have the parties submitted briefs on class certification. Accordingly, Plaintiffs have not justified the bare allegations in the Amended Complaint as to commonality, typicality, or the other requirements for class certification. (*See* Am. Compl., ¶¶ 308–09.)

Plaintiffs' federal securities law claims here. *See Salzberg v. Sciabacucchi*, 227 A.3d 102, 114, 131-32 (Del. 2020).

To be clear, in *Salzberg*, the Delaware Supreme Court squarely rejected the very argument Plaintiffs seem to make here, namely that Delaware forum-selection bylaws cannot cover any disputes beyond the "internal affairs" of a corporation governed by Delaware law. *Id.* at 120–24. To the contrary, *Salzberg* held that federal-forum-selection bylaws are valid to more broadly cover "intra-corporate" disputes that "arise from internal corporate conduct on the part of the Board" or that relate to "the corporation-stockholder relationship," such as the Securities Act claims at issue in that case. *Id.* at 123-24, 129-32.

Plaintiffs do not appear to dispute that *Salzberg* held as such. (*See* Opp'n at 11.) Instead, Plaintiffs apparently attempt to distinguish *Salzberg* on the grounds that it pertained to "***Delaware state*** law," and then quickly pivot to the assertion that *Salzberg*'s "line of reasoning directly contradicts legal precedent and public policy in the state of California." (*Id.* at 11 (emphasis in Plaintiffs' brief).) First, this argument is a *non sequitur* given Plaintiffs' concession that Delaware law governs, as noted above. (*See also* Opp'n at 9-10 (citing Delaware statutes and cases).) Second, to the extent that Plaintiffs contend that federal law would not enforce a valid Delaware forum-selection clause, that argument is wrong for the reasons discussed in the next section. (*See infra* Section III.)

Third, to the extent that Plaintiffs' argument relies on California state law, that argument is unavailing because California law has no application here when Plaintiffs filed exclusively *federal* claims in *federal* court, and Defendants seek transfer to another *federal* court. Accordingly, Plaintiffs' citations to the *Vaughn* and *Perry* cases are inapposite. (*See* Opp'n at 11-12; *see Vaughn v. LJ Int'l., Inc.* (2009) 174 Cal.App.4th 213, 223, 230 (affirming dismissal of fiduciary duty claims based on law of the British Virgin Islands, notwithstanding precedent, cited by Plaintiffs here, that "securities regulations designed to protect participants in California's securities marketplace are not limited by the internal affairs doctrine"); *Perry v. AT&T Mobility LLC*, 2011 U.S. Dist. LEXIS 102334, at *15-16 (N.D. Cal. Sep. 12, 2011) (denying motion to dismiss or transfer where there was "true

conflict of law" between California and Florida law on the employment law claims at issue, and where there was legitimate concern that Florida forum was "not adequate" to vindicate rights under California employment law).) Tellingly, Plaintiffs' Opposition selectively omits the beginning of the sentence it quotes from *Perry*, which states that the concern applies "if the forum is not adequate." *Perry*, 2011 U.S. Dist. LEXIS 102334, at *15; *compare* Opp'n at 12 (quoting *Perry*). Here, there are no claims under California law, nor is there any assertion that the federal court in the District of Delaware is somehow "inadequate" to adjudicate Plaintiff's claims under federal securities law.

Even if California state law did apply, it too favors enforcement of federal forum-selection provisions adopted by Delaware corporations. As the California Court of Appeal recently held:

> We conclude that Delaware has a legitimate interest in allowing its corporations to include FFP's [federal-forum provisions] in their certificates of incorporation…. Under 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 v. Restoration Robotics, Inc. (2022) 78 Cal.App.5th 48, 70, 293 (enforcing federal-forum provision) (citing *Salzberg*).

In sum, applicable Delaware law is clear that federal-forum-selection provisions, like the one in HUMBL's bylaws, are fully valid and enforceable.

III. "STRONG FEDERAL POLICY" FAVORS ENFORCEMENT.

As set forth in Defendants' Opening Brief, there is a "strong federal policy in favor of enforcing forum-selection clauses." *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1090 (9th Cir. 2018).[5] As the U.S. Supreme Court has held, "a district court should

[5] Plaintiffs' Opposition observes in a footnote (at p. 12, n.3) that the Ninth Circuit decision Defendants cited in their Opening Brief has since been vacated for a rehearing *en banc*. *See Lee v. Fisher*, 34 F.4th 777, 779 (9th Cir. 2022), *reh'g en banc granted*, No.

transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer." *Atlantic Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 52 (2013).

"As a consequence, a district court may consider arguments about public-interest factors only. Because those factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases." *Id.* at 64. For example, "under *Atlantic Marine*, courts must enforce a forum-selection clause unless the contractually selected forum affords the plaintiffs no remedies whatsoever." *Sun*, 901 F.3d at 1092. Plaintiffs bear a "heavy burden" to make such an exceptional showing. *Id.* at 1084.

The Opposition fails to meet this heavy burden. Instead, it makes some fleeting and vague references to the notion that a transfer would somehow "eliminate the substantive rights of Plaintiffs to assert Securities Act claims in state court" (Opp'n at 2), "eliminate[] statutory protections offered by the federal securities laws" (*id.* at 9), or "eliminate[] their statutory right to state court" (*id.* at 11). These assertions are plainly wrong, and Plaintiffs provide no support for them. Plaintiffs have obviously sued in *federal* court here, so it makes no sense that they complain about losing the right sue in "state court." Nor do Plaintiffs identify any other "statutory rights" that they would lose merely from the case's transfer from one federal court to another federal court – and there are none, of course. Plaintiffs have utterly failed to carry their heavy burden to demonstrate a strong public policy that is contravened by enforcement of the forum-selection bylaw. *See Sun*, 901 F.3d

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21-15923, 2022 U.S. App. LEXIS 29613, at *1 (Oct. 24, 2022). That is immaterial here, where the prior *Sun* case, cited above, is on point and remains good law. Plaintiffs unavailingly try to make something of the rehearing in *Lee*, pointing to *Lee*'s holding that a forum-selection provision was enforceable even where it would result in the plaintiff's losing one of her federal securities claims when the case was re-filed in the Delaware Court of Chancery. 34 F.4th at 781-82. There are no such issues here. Again, this would be a federal-to-federal transfer of a case alleging only federal claims and, of course, the transfer would not result in the loss of any claims.

at 1090 ("[T]he plaintiff must point to a statute or judicial decision that clearly states such a strong public policy."); *see also In re Stamps*, No. CV 19-4272-MWF, 2020 U.S. Dist. LEXIS 122555, at *19 (C.D. Cal. July 8, 2020) ("Plaintiffs have not identified any California-specific public policy that supports keeping the action here.").

Plaintiffs' remaining arguments about the private-interest factors are irrelevant given the existence of the forum-selection provision. As explained in Defendants' Opening Brief, "a court evaluating a defendant's §1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests…. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum." *Atlantic Marine*, 571 U.S. at 64.[6] Likewise, where a forum-selection provision applies, "the plaintiff's choice of forum merits no weight." *Id.* at 63.

CONCLUSION

For the foregoing reasons, and those set forth in Defendants' Opening Brief, Defendants respectfully request that this Court enforce HUMBL's forum-selection bylaw and transfer this case to the District of Delaware pursuant to 28 U.S.C. § 1404(a).

Respectfully submitted,

Dated: November 21, 2022

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[6] Such private-interest factors that apply absent a forum-selection clause include "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Atlantic Marine*, 571 U.S. at 62, n.6.