HULETT HARPER STEWART LLP
KIRK B. HULETT, SBN: 110726
550 West C Street, Suite 1500
San Diego, CA 92101
Telephone: (619) 338-1133
Facsimile: (619) 338-1139

Attorneys for Plaintiff
[Additional Counsel on Signature Page]

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

DEAN DRULIAS, on Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

1ST CENTURY BANCSHARES, INC., ALAN I. ROTHENBERG, WILLIAM W. BRIEN, M.D., DAVE BROOKS, JASON P. DINAPOLI, ERIC M. GEORGE, ALAN D. LEVY, BARRY D. PRESSMAN, ROBERT A. MOORE, LEWIS N. WOLFF, NADINE WATT, STANLEY R. ZAX, and SANDLER O'NEILL & PARTNERS, L.P.,

Defendants.

CASE NO. 16CV294673

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE 1ST CENTURY DEFENDANTS' MOTION TO DISMISS

DATE: April 7, 2017
TIME: 9:00 a.m.
JUDGE: Honorable Brian C. Walsh
DEPT: 1C

Date Action Filed: May 3, 2016

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I. PRELIMINARY STATEMENT

Plaintiff Dean Drulias respectfully submits this memorandum in opposition to the 1st Century Defendants' motion to dismiss based on a Delaware forum selection provision that was unilaterally adopted by the 1st Century directors after Plaintiff acquired his 1st Century stock.

This is just a case of judge-shopping by the 1st Century Defendants. They opted to keep this case in this Court and litigated in this forum for over *five months*, engaging in discovery and filing multiple motions seeking various relief from this Court. It is only after Judge Kirwan ruled adversely on their joint motion for preliminary approval of a settlement – a settlement with a concomitant broad class-wide release of Defendants – that they seek to move this case to Delaware.

This case raises two issues of first impression in California: (1) whether the 1st Century Defendants' actions in participating in discovery and filing multiple motions, including the denied motion seeking approval of a proposed settlement and a broad class-wide release by a California Court, constitute a waiver of the forum provision, and (2) whether a California shareholder waives his right to a California forum under California Corporations Code § 2116 simply by acquiring the stock of a Delaware corporation before the corporation adopts a forum selection bylaw. None of the cases cited by Defendants have addressed either a defendant's waiver of the forum bylaw or the Cal. Corp. Code § 2116 right to a California forum.

II. BACKGROUND

This is a shareholder class action on behalf of the former public stockholders of 1st Century against 1st Century, the former members of its board of directors (the "Board" or the "Individual Defendants) and Sandler O'Neill & Partners, L.P. ("Sandler"), their "financial advisor." The First Amended Complaint (the "Complaint") alleges that the Individual Defendants caused 1st Century to be sold to privately-held Midland Financial Co. ("Midland") in a sale that undervalued 1st Century and that was orchestrated to ensure that 1st Century's Chief Executive Officer ("CEO"), Alan I. Rothenberg, and President and Chief Operating Officer ("COO"), Jason P. DiNapoli ("DiNapoli"), would keep their multi-million dollar employment contracts with 1st Century. Rothenberg and DiNapoli were motivated to sell 1st Century as a result of the actions of

an activist investor, Maltese Capital Management LLC, which had acquired a significant block of 1st Century's stock and had implicitly, if not explicitly, threatened a public proxy fight to remove Rothenberg and DiNapoli, and 1st Century's other directors, if 1st Century were not put up for sale. The other 1st Century directors acquiesced in Rothenberg's and DiNapoli's scheme to sell the Company due to their personal lending relationships with 1st Century, which were dependent on Rothenberg's and DiNapoli's continued good will and that of Midland and rendered each director beholden to Rothenberg, DiNapoli and Midland.

Notably, the 1st Century Defendants have publicly admitted that all of the 1st Century board members were conflicted and had economic interests in the sale that were different from those of the ordinary 1st Century shareholders. Namely, as a result of the sale, Rothenberg has received over $2.7 million in cash payments; DiNapoli has received over $4.1 million; and each of the Company's other directors has received over $22,000.00.

As alleged in the Complaint, Defendants breached their fiduciary duties of good faith and loyalty to shareholders by, *inter alia*:

- Placing their personal interests in the above cash payments and future employment with Midland ahead of their duty to maximize value for shareholders;[1]
- Allowing Rothenberg and DiNapoli to negotiate their own lucrative employment agreements with Midland at the very same time they were negotiating the sale of 1st Century to Midland;
- Allowing the conflicted Rothenberg and DiNapoli to conclude their employment contracts with Midland before responding to Midland's reduction of its offer price from $12.00 to $11.13 per share;
- Allowing Rothenberg and DiNapoli to select Sandler as the Company's financial advisor;
- Retaining Sandler to advise the Company even though it had an ongoing business relationship with Midland and was effectively on both sides of the transaction;
- Allowing Rothenberg and DiNapoli to structure Sandler's compensation such that most of its fee – $1.66 million – would only be payable if the sale closed, thereby incentivizing Midland to opine that the Midland purchase

[1] When the directors of a company decide to sell the company, they are "charged with the duty of selling the company at the highest price attainable for the stockholders' benefit." *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 n.16 (Del. 1986).

price was fair, without which "fairness opinion" the sale would not have closed and Midland would not have been paid most of its fee. In other words, Sandler had a $1.66 million incentive to support the sale regardless of its fairness to shareholders;

- Allowing the conflicted Rothenberg and DiNapoli to oversee the preparation of financial projections used to value the Company on a standalone basis and by Sandler in rendering its fairness opinion; and
- Allowing the conflicted Rothenberg and DiNapoli to manipulate the financial projections so that it would appear that the sale price was "fair," even after Midland reduced its offer.

Although Defendants claim that the sale price purportedly represents a 36% premium to 1st Century's pre-announcement market price, it, in fact, undervalues 1st Century. *See* Def. Mem. 1.[2] This is because a premium does not mean that the Defendants did not breach their fiduciary duty to maximize shareholder value or "that stockholders were not harmed." *In Re Rural Metro Corporation S'holders Litig.*, 88 A.3d 54, 102 & n. 26 (Del. Ch. 2014). *See also Smith v. Van Gorkom*, 488 A.2d 858, 875 (Del. 1985) ("[T]he fact of a premium alone does not provide an adequate basis upon which to assess the fairness of an offering price.") (overruled on other grounds); *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 434-35 (Del. Ch. 2012) (meritorious breach of fiduciary duty claim despite nominal 47.8% premium); *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 817-19 (Del. Ch. 2011) (same despite nominal 40% premium).[3]

As the Delaware Supreme Court has recognized, when a company is sold, there exists "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985). Given that that is the case here, Plaintiff commenced this action challenging the

[2] "Def. Mem." refers to the Memorandum of Points and Authorities in Support of the 1st Century Defendants' Motion to Dismiss.

[3] Moreover, the pre-announcement stock price represents the value of one share – a "minority interest." By contrast, the merger price represents the value of all of the stock of 1st Century – a "controlling interest." A controlling interest is worth more than a minority interest, on average, over 67% more. *See, e.g.*, MergerStat, Control Premium Study, at ii (3rd Qtr. 2014) (average control premium for domestic transactions was 67.3%). By this measure, shareholders were deprived of over $ 2.50 per share, or $26 million collectively.

fairness of the sale price to shareholders,[4] and, *inter alia*, to compel disgorgement by the Defendants of the $7 million that they collectively improperly received in connection with the sale.[5]

Defendants now seek dismissal based on a corporate bylaw (the "Bylaw") that the Individual Defendants unilaterally adopted[6] at the same time that they announced the proposed sale and after Plaintiff acquired his 1st Century stock. Although 1st Century is headquartered in California, and all of the Parties to this action are citizens of California (except for one director who recently relocated to Texas) the bylaw designates the state courts of Delaware as the exclusive forum for shareholder litigation against this California-based bank and its California-based directors.

Defendants' motion should be denied for three reasons. *First*, the Bylaw should not be enforced because it conflicts with Cal. Corp. Code § 2116, which provides California shareholders with the right to sue directors of foreign corporations "in the courts of this state" and

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[4] Defendants' contention that "99.8%" of the shareholders voted in favor of the sale and "only one share voted against the deal" (Def. Mem. at 5-6) is disingenuous. That assertion does not take into account non-votes and abstentions which are treated as "No" votes as a matter of law. *See In re PNB Holding Co. S'holders Litig.*, 2006 Del. Ch. LEXIS 158, at *55 (Aug. 18, 2006) (noting that "a refusal to return a proxy (if informedly made) is more likely a passive dissent. Why? Because under 8 Del. Ch. § 251, a vote of a "majority of the outstanding stock of the corporation entitled to vote" is required for merger approval, and a failure to cast a ballot is a *de facto* no vote."). When all of the non-votes and abstentions are counted, nearly 28% of the shares outstanding did not support the sale. Def. Mem. at 6. In any event, the shareholder vote is "meaningless" because it was held without full disclosure. *Weinberger v. UOP*, 457 A.2d 701, 712 (Del. 1983); *RBC Capital Markets, LLC v. Jervis*, 129 A. 3d 816, 857 (Del. 2015) (rejecting shareholder vote because it was not fully informed).

[5] In *Thorpe by Castleman v. CERBCO*, 676 A.2d 436, 437, 445 (Del. 1996), the Delaware Supreme Court held that a director may not profit from a breach of fiduciary duty and that disgorgement is required to discourage disloyalty to shareholders.

[6] Undoubtedly, Defendants did not seek shareholder approval because Glass Lewis, a highly regarded proxy service, has opposed exclusive forum provisions. *See Glass Lewis on Exclusive Forum Provisions* ("Glass Lewis believes that such exclusive forum bylaws are generally not in shareholders' interests since they unnecessarily limit full legal recourse by preventing shareholders from bringing suit in a forum of their choosing.") The directors' unilateral adoption of the forum bylaw is particularly egregious here because it was adopted after most of the wrongdoing alleged in the Complaint had occurred. Moreover, despite claiming to have adopted a bylaw of general application, the Director Defendants in fact adopted the bylaw for a singular purpose: to protect themselves against claims in connection with this merger.

Plaintiff, a citizen of California, has not waived his Cal. Corp. Code § 2116 right. *Second*, the 1st Century Defendants waived the Bylaw when they filed numerous motions in this Court, including one for judicial approval of a proposed settlement of this litigation. Until a California court rejected their proposed settlement, Defendants preferred to keep this case in California. *Third*, the Bylaw does not prevent a separate suit in California against Defendant Sandler. And Sandler has not joined in the 1st Century Defendants' motion in any event. Thus, even if the 1st Century Defendants were dismissed, Plaintiff should be permitted to sever his claims against Sandler from this action and maintain those claims in this Court.

III. ARGUMENT

A. Defendants Waived the Forum Bylaw When They Sought Judicial Approval of the Stipulation of Settlement

A party may by its conduct waive a forum provision. *Trident Labs Inc. v. Merrill Lynch Commercial Finance Corp*., 200 Cal. App. 4th 147, 157 (2011). A defendant's "failure to timely invoke the forum selection clause, and the resulting time and judicial resources spent by the California courts on the case, is reason to deem the provision waived." *Ceradyne v. Argonaut Ins. Co*., 2009 Cal. App. Unpub. LEXIS 4375 (4th Dist. June 2, 2009).

Defendants did not move to dismiss or stay this action when it was commenced. Although they contend that the Court's complex case scheduling order prevented them from making such a motion, that Order was not entered until June 9, 2016, some 37 days after the case was filed. Nothing prevented Defendants from moving to dismiss during that 37 day period. Notably, on June 6, 2016, Defendants filed an opposition to Plaintiff's motion for a preliminary injunction. That opposition admittedly relied on the Bylaw. It would have been a simple matter for Defendants to have filed a motion to dismiss or stay at that time. They did not.

Defendants elected to forego seeking enforcement of the Bylaw as a matter of strategy. Within a week of the filing of the lawsuit, they sought to settle the case and wanted the settlement approved by a California, not a Delaware, court. Defendants undoubtedly concluded that a Delaware court would have been "loath" to approve the broad release of liability that they sought. In *In re Trulia, Inc. S'holder Litig*., 129 A.3d 884 (Del. Ch. 2016), a case decided only months

before the proposed settlement was reached, the Delaware Chancery Court reversed its "historical willingness" to approve disclosure settlements that include broad releases. Defendants' counsel were well aware of this decision, as a January 2016 memorandum that Sullivan & Cromwell sent to its clients regarding *Trulia* demonstrates. *See* Sullivan & Cromwell Memorandum, *In re Trulia Stockholder Litigation*, dated January 26, 2016, attached as Exhibit A to the accompanying Declaration of Kirk B. Hulett. That memorandum counsels clients that because *Trulia* has foreclosed "the 'insurance' of easy settlements" in Delaware, directors "will need to evaluate" whether to "keep" litigation in other jurisdictions or to transfer it to Delaware. *Id.* at 4. In this case, Defendants chose to keep the case in California with the expectation that a California court would approve the proposed settlement, including the "insurance" that they sought in the form of a broad release. To that end, they jointly moved (with Plaintiff) for the approval of the settlement (after having engaged in document discovery and having made two witnesses available in California for "confirmatory depositions"). It was only after this Court (Kirwan, J,) followed *Trulia* and rejected the settlement (including the broad release that Defendants sought as "deal insurance"), that Defendants determined not to "keep the case" in this forum.

Moreover while Judge Kirwan was critical of Plaintiff's counsel for not bringing *Trulia* to the court's attention in the memorandum seeking preliminary approval, Plaintiff's counsel submitted a draft of that memorandum to counsel for the 1st Century Defendants for their review and comments before filing. Notwithstanding that they were clearly aware of *Trulia* (as their client memorandum reflects), they did not suggest citing *Trulia* to this Court. And, in all events, Judge Kirwan's criticism was unwarranted because the approval of a settlement is a procedural matter that is governed by the law of the forum, not Delaware law. *See* Cal. Rule of Court, Rule 3.769(a); *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006). Judge Kirwan was not required to follow the Delaware trial court decision in *Trulia*. Notably, the Appellate Division for the First Department of the State of New York, the court in which most of New York's commercial cases are filed, has recently explicitly refused to follow *Trulia*. *See Gordon v Verizon Communications, Inc.*, 2017 N.Y. App. Div. LEXIS 740, at *13-*16 (1st Dep't Feb. 2, 2017) (refusing to apply *Trulia* to a disclosure settlement of claims against a Delaware corporation and

instead imposing an easier to meet New York standard for approval of disclosure-only settlements).

Defendants' actions in engaging in discovery in this forum and seeking to have this Court adjudicate the case, *i.e.*, enter judgment approving the stipulation of settlement and a broad release of themselves, constitutes a waiver of the forum bylaw. In *Trident Labs Inc. v. Merrill Lynch Commercial Finance Corp.*, 200 Cal. App. 4th 147 (2011), the court declined to enforce a forum selection clause that required litigation in Illinois or, at defendant's sole option, litigation in California. The court noted that "[w]hen plaintiff filed its lawsuit in California, instead of in Illinois as required under the forum selection clause, defendant could have moved to enforce the forum selection clause, but it did not." *Id.* at 155. Instead, it litigated in California. The court concluded:

> when a party, under the terms of a forum selection clause, has the option to litigate in more than one forum, that party cannot choose to extensively litigate in the original forum by filing a cross-complaint, conducting substantial discovery, and filing motions seeking relief from the forum court, and then decide to enforce the right it otherwise would have had to compel the other party to litigate in a different forum. Such circumstances make enforcement of the forum selection clause unreasonable as a matter of law.

Id. at 157.

Trident Labs also rejected the defendant's argument that "it reserved the right to move to enforce the forum selection clause in its case management statement and by asserting affirmative defenses" stating: "where defendant has the right to decide where to litigate, defendant cannot litigate in California until such time as, 'in its sole discretion,' it decides it prefers to litigate in Illinois." *Id.* at 155

Similarly, in *Ceradyne v. Argonaut Ins. Co.*, 2009 Cal. App. Unpub. LEXIS 4375 (4th Dist. June 2, 2009), the court declined to enforce a forum clause "because six months had passed since the action was filed, the litigation machinery had been substantially invoked. Both parties had submitted briefing and supporting declarations in support of, and opposing [motions]."

Here, Defendants litigated for five months – briefed a preliminary injunction motion, completed a document production, conducted two depositions and sought a final adjudication of

the matter by this Court. Defendants sought court approval of a broad release and the dismissal of this class action "with prejudice." Had Judge Kirwan approved the settlement, his decision would have been a final adjudication on the merits. *See* Cal. Civ. Proc. Code § 128(a)(8) (providing that with limited exceptions "[a]n appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties . . .").

Until Judge Kirwan's adverse ruling, Defendants preferred keeping the case in this court. Their attempt to move the case to Delaware now is by definition "judge shopping." The California Supreme Court has refused to countenance this sort of "procedural gamesmanship." In *Christensen v. Dewor Developments*, 33 Cal. 3d 778 (1983), plaintiffs sought arbitration after commencing litigation and obtaining discovery "unavailable" in arbitration. The California Supreme Court held that as a result of that "procedural gamesmanship," plaintiffs had waived arbitration. *Id.* at 783-84. Just as the plaintiffs in *Christensen* were found to have waived arbitration, Defendants should be found to have waived a Delaware litigation forum by virtue of their "procedural gamesmanship" in seeking the approval of a stipulation of settlement from this Court that was "unavailable" in Delaware.

Moreover, as noted above, the California courts have rejected Defendants' contention that they may preserve a forum provision with a case management order or by stipulation. *See Trident Labs, Inc. v. Merrill Lynch Commercial Finance Corp.*, 200 Cal. App. 4th 147, 155 (2011). Notably, in the arbitration context, the Court of Appeal has stated that stipulations that attempt to preserve the right to litigate in an alternate forum are "void as against public policy." *Berman v. Health Net*, 80 Cal. App. 4th 1359, 1372, n. 16 (2000).

Defendants' "failure to timely invoke the forum selection clause" and "the resulting time and judicial resources spent by" this Court on this case is reason to find that Defendants waived the forum bylaw.

B. Plaintiff Did Not Waive His California Corporations Code Section 2116 Right to a California Forum

California Corporations Code §2116 is intended to protect shareholders from "violation[s] of official duty" by the directors of foreign corporations transacting business in California. It states:

> Section 2116. Liability of directors
>
> ***The directors of a foreign corporation transacting intrastate business are liable to*** the corporation, its ***shareholders***, creditors, receiver, liquidator or trustee in bankruptcy ***for*** the making of unauthorized dividends, purchase of shares or distribution of assets or false certificates, reports or public notices or other ***violation of official duty*** according to any applicable laws of the state or place of incorporation or organization, whether committed or done in this state or elsewhere. ***Such liability may be enforced in the courts of this state.***

Cal. Corp. Code § 2116 (emphasis added).

California Corporations Code § 2116 explicitly gives shareholders the right to sue directors of foreign corporations "in the courts of this state." *See Wang v. Saitama Bank, Ltd*., 1991 U.S. App. LEXIS 17523, *4 (9th Cir. July 25, 1991) ("[T]he statute provides a shareholder cause of action against corporate directors for violations of their official duties and declares that the cause of action may be enforced in California").

The Bylaw, by purporting to require California shareholders to bring suit exclusively in Delaware, conflicts with Cal. Corp. Code § 2116. Where a forum selection provision conflicts with California statutes, the courts have refused to enforce it. *See, e.g.*, *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141, 144, 162 (2015); *America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 12-13 (2001) (Virginia forum clause that was contrary to the California Consumers Legal Remedies Act was unenforceable); *Wimsatt v. Beverly Hills Weight etc. Int'l, Inc.*, 32 Cal. App. 4th 1511, 1520-1521 (1995) (declining to enforce a Virginia forum selection provision that conflicted with California's Franchise Investment Law); *Hall v. Superior Court*, 150 Cal. App. 3d 411, 418-19 (1983) (Nevada forum clause that conflicted with the California Securities Law was unenforceable).

Moreover, where there is a conflict, the burden of proving that the forum provision is enforceable is on the party seeking enforcement. *Wimsatt*, 32 Cal. App. 4th at 1520-1524 (noting that the party opposing enforcement of a forum selection clause ordinarily bears the burden of proving why it should *not* be enforced. That burden is *reversed* when the claims at issue are

based on rights created by California statutes).[7]

None of the cases cited by the Defendants address the conflict between Cal. Corp. Code § 2116 and the Delaware Bylaw. *Roberts v. TriQuint Semiconductor, Inc.* 358 Or. 413 (2015), a decision by the Oregon Supreme Court upon which the Defendants heavily rely, merely holds that the bylaw is enforceable "as a matter of Oregon law." *Id.* at 415. It did not consider Cal. Corp. Code § 2116 or whether the bylaw is enforceable under California law. As the Oregon Supreme Court noted, it is "the law of the forum in which the action has been filed [that] governs the decision whether a forum-selection clause will be enforced." *Roberts,* 358 Or. at 417. And, as the Oregon Supreme Court also observed, where "enforcement [of the forum provision] would contravene a strong public policy of the forum in which suit is brought," it will not be enforced. *Id.* at 424. That is precisely the case here. Enforcement of the Bylaw will contravene the strong public policy of California, embodied in Cal. Corp. Code § 2116, to provide shareholders with the right to hold the directors of a foreign corporation liable for "violations of official duty" in the courts of California.

Garfield v. RealD merely followed *TriQuint.* ("The decision in . . . *Triquint* . . . although not controlling, is persuasive"). It too does not address the conflict between Cal. Corp. Code § 2116 and the Delaware Bylaw. Moreover, the court's assertion that the forum clause should be enforced because the "Delaware courts have special expertise in corporate matters," has been rejected by the Delaware courts and the Oregon Supreme Court upon whose decision the court relied. *See City of Providence v. First Citizens Bancshares, Inc*., 99 A.3d 229, 237 (Del. Ch. 2014) (upholding North Carolina forum provision); *Roberts v Triquint Semiconductor,* 358 Or. 413, 421 (2015) ("The [Delaware] Chancery Court . . . rejected the idea that only Delaware had the expertise to adjudicate matters of Delaware corporate law.")

Brewerton v. Oplink Commc'ns Inc., No. RG14-750111, slip op. (Cal. Super. Ct. Dec. 14,

[7] *Lu v. Dryclean-U.S.A. of Cal., Inc*., 11 Cal. App. 4th 1490, 1493 (1992), cited by the Defendants (Def. Mem. at 7) for the proposition that Plaintiff bears the "heavy burden" of establishing that the forum provision is unenforceable, did not involve a forum provision that conflicts with a California statute as here. As noted, where the forum provision conflicts with a California statute, the burden shifts to the proponent of the forum provision to prove its enforceability.

2014) and *Groen* v. *Safeway, Inc.*, No. RG14-716651, 2014 WL 3405752 (Cal. Super. Ct. May 14, 2014) decisions by the Superior Court for Alameda County and *Miller v. Beam, Inc.*, No. 2014 CH 00932, 2014 WL 2727089 (Ill. Ch. Ct. Mar. 5, 2014), an Illinois bench decision, also did not consider the conflict between the Delaware Bylaw and Cal. Corp. Code § 2116.

In re: CytRx Corp. Stockholder Derivative Litig., 2015 U.S. Dist. LEXIS 176966, at *17-*18 (C.D. Cal. Oct. 30, 2015) enforced the forum clause because "Plaintiffs have not identified any California-specific public policy that supports keeping the action here." By contrast, in this case Plaintiff has identified a California-specific public policy: the policy, embodied in Cal. Corp. Code § 2116, to provide shareholders with a California forum to hold directors of foreign corporations accountable for "violations of official duty."[8]

Defendants have not sustained their burden of proving that Plaintiff waived his Cal. Corp. Code § 2116 right to a California forum. As set forth in the declaration of Dean Drulias (the "Drulias Decl.," attached as Ex. B. to the Hulett Decl.), at no time did he knowingly waive a California forum.

Defendants' contention that Plaintiff *impliedly* waived the right to a California forum when he purchased his 1st Century stock is mistaken because the Bylaw was adopted after he acquired his 1st Century stock. He could not have had notice of and freely consented to a provision that did not even exist. Under California law, a waiver will be found only where it is knowing and voluntary. *See Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 495 (1976) (the policy favoring access to California courts by resident plaintiffs "is satisfied in those cases where . . . a plaintiff has *freely and voluntarily negotiated away* his right to a California forum") (emphasis added); *Intershop Communs. v. Superior Court*, 104 Cal. App. 4th 191, 201-202 (2002) (there must be "adequate notice to the [party] that he was agreeing to the jurisdiction cited in the contract"); *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 464

[8] The other cases cited by Defendants also do not address Cal. Corp. Code § 2116 or the enforceability of the bylaw under California law. *See North ex rel. Chemed Corp v. McNamara*, 47 F. Supp. 3d 635 (S. D. Ohio 2014). *HEMG v. Aspen Univ*, a New York decision, is further distinguishable because the forum clause there was approved by the shareholders before the claims arose, not unilaterally adopted by a board of directors after the fact. *Collins v. Santoro*, is another New York decision by the same Judge and merely follows *HEMG*.

(1992) (enforcing forum selection clause in a contract entered into "freely and voluntarily by parties who have negotiated at arm's length."). The burden is on the party seeking enforcement to establish that the other party freely and voluntarily gave away his or her right to a California forum. *Wimsatt*, 32 Cal. App. 4th at 1520-24.[9]

Here, there was neither actual notice nor free and voluntary assent. *See* Drulias Decl., ¶¶ 2, 3, 5, 7, 8, 9. The forum provision was adopted unilaterally by the directors after Plaintiff acquired his 1st Century stock. In *In re Facebook, Inc.*, 922 F. Supp. 2d 445, 463 (S.D.N.Y. 2013), the court refused to enforce a forum provision against shareholders who purchased their stock in the corporation before the forum provision became effective.

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[9] The contention that 1st Century shareholders consented to the adoption of the Bylaw when they authorized the board, in 2008, to unilaterally make changes to the bylaws is wrong because, in 2008, there was no reason to think that Delaware law permitted the inclusion of a forum selection provision *in the bylaws*. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), the first decision to hold that a forum provision could be included in the bylaws, was not decided until June, 2013, over five years after the 1st Century charter amendment. Prior to *Boilermakers*, a shareholder of a Delaware corporation was justified in believing that a forum selection provision could only be adopted with explicit approval of the shareholders. That is so because 8 Del. Ch. §§ 102(a)(4) and 151(a) explicitly require that any "qualifications, limitations or restrictions" on the rights of shareholders be set forth *in the certificate of incorporation* and 8 Del. Ch. § 242(b) requires shareholder approval for amendments to the certificate of incorporation. This belief was confirmed by *In re Revlon, Inc. S'holder Litig.*, 990 A.2d 940, 960-61 (Del. Ch. 2010), in which the Delaware Chancery Court stated that a forum provision could be included in the certificate of incorporation. *Id.* (corporations are "free to respond with *charter provisions* selecting an exclusive forum for intra-entity disputes") (emphasis added). The court did not state that a forum provision could be included in the bylaws and the omission was intentional. In a later decision, *Choupak v. Rivkin*, 2015 Del. Ch. LEXIS 107, at *59-*60, n.3 (Apr. 6, 2015) the court noted that "at the time" of the *Revlon* decision and prior to *Boilermakers*, it was "unclear" whether Delaware General Corporate Law ("DGCL") sections 102(a)(4) and 151(a) permitted a forum provision in the bylaws. *Id.* ("It was unclear to me at the time whether a forum-selection provision constituted a qualification, limitation, or restriction on the right to sue that had to appear in the charter. . . . To avoid hazarding a view on the viability of including a forum-selection provision in a bylaw, I only referred to charter provisions . . . ."). Thus, the adoption, in 2008, of the charter amendment authorizing the 1st Century board to unilaterally make bylaw changes does not signify shareholders consent to the forum provision.

Similarly, when 1st Century amended its certificate of incorporation in 2008, the Delaware Business Corporation Law did not authorize forum selection bylaws. 8 Del. Ch. § 115, permitting adoption of a Delaware (and only a Delaware) forum provision was enacted in August 2015, some eight years after 1st Century amended its certificate of incorporation to permit its directors to unilaterally amend the bylaws.

Similarly, in the recent federal case *Meyer v. Kalanick*, 2016 U.S. Dist. LEXIS 99921, at *2 (S.D.N.Y July 29, 2016), the court refused to indulge the "legal fiction" that an individual consents to a lengthy set of terms and conditions, including an arbitration forum, simply by accessing a service on the Internet. The court held that proof of "reasonably conspicuous notice" of the mandatory forum and "unambiguous manifestation of assent" is required. *Id.* at *30-*31.

Given that Plaintiff did not knowingly and voluntarily waive his statutory right to a California forum, the Bylaw should not be enforced in this case.[10] Defendants have not cited any authority holding that a shareholder impliedly waives his Cal. Civ. Proc Code § 2116 right to a California forum every time he acquires the stock of a Delaware corporation. Given that most, if not the vast majority, of "foreign corporations" doing "intrastate business" in California are Delaware corporations, blanket enforcement of the Bylaw would render the Cal. Civ. Proc. Code § 2116 right to a California forum meaningless.

C. The Claims Against Sandler Are Not Covered by the Bylaw

The Delaware Bylaw is limited to four types of claims: (1) "derivative actions;" (2) claims of "breach of fiduciary duty owed by any director;" (3) certain claims against "the Corporation or any director or officer or other employee of the corporation;" and (4) claims against "the Corporation or any director or officer or other employee of the Corporation governed by the internal affairs doctrine."

Plaintiff's causes of action against Sandler do not fall within any of these categories. They are not "derivative actions." They are not claims against "the Corporation [1st Century] or any director or officer or other employee of the corporation." Nor are they "internal affairs" claims. The U.S. Supreme Court has defined, "internal affairs," in the context of corporate law, as those "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders . . . ." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). Here, the aiding and abetting claims against Sandler are not claims by a shareholder against a

[10] Even the Delaware courts recognize that the bylaw may be unenforceable in a given case. *See Boilermakers*, 73 A.3d at 958 ("plaintiff may sue in her preferred forum and . . . [argue that] the forum selection clause should not be respected").

corporation or its officers or directors. Rather, they are tort claims against a third party.

Nor are the aiding and abetting claims "claims of breach of fiduciary by a director." "The law of fiduciary duties regulates the relationships between *directors, officers, the corporation, and its stockholders*." *Boilermakers,* 73 A.3d at 943 (emphasis added). Sandler is not a director of 1st Century.

Defendants assert that even though the "claims" against Sandler are not covered by the bylaw, the claims should be dismissed because they have been asserted in the same "action" as Plaintiff's breach of fiduciary duty claims against the directors. Def. Mem. at 10, n.6. But even if the Court determines that the bylaw requires the dismissal of the "action," the claims against Sandler should be severed from the action to permit Plaintiff to maintain them in this forum. Plaintiff could have sued Sandler separately, in which event Sandler would not have been part of the "action." Plaintiff should not be deprived of his chosen forum by the fortuity that he joined his claims against Sandler with his claims against the 1st Century directors. Nothing in the bylaw prevents the maintenance, in this Court, of a separate suit against Sandler that does not include a claim against the corporation or its directors.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully submits that Plaintiff's choice of forum should be respected and that the 1st Century Defendants' motion to dismiss be denied.

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HULETT HARPER STEWART LLP
KIRK B. HULETT

/s/ Kirk B. Hulett
KIRK B. HULETT

550 West C Street, Suite 1500
San Diego, CA 92101
Telephone: (619) 338-1133
Facsimile: (619) 338-1139

Attorneys for Plaintiff

Of Counsel:

THE BRUALDI LAW FIRM, P.C.
RICHARD B. BRUALDI
29 Broadway, Suite 2400
New York, NY 10006
Telephone: (212) 952-0602
Facsimile: (212) 952-0608