

1 Adam S. Paris (State Bar No. 190693)  
Jackson S. Trugman (State Bar No. 295145)  
2 **SULLIVAN & CROMWELL LLP**  
1888 Century Park East  
3 Los Angeles, California 90067-1725  
Telephone: (310) 712-6600  
4 Facsimile: (310) 712-8800

5 Laura Kabler Oswell (State Bar No. 241281)  
**SULLIVAN & CROMWELL LLP**  
6 1870 Embarcadero Road  
Palo Alto, California 94303  
7 Telephone: (650) 461-5600  
Facsimile: (650) 461-5700

8 *Attorneys for 1st Century Bancshares, Inc., Alan*  
9 *I. Rothenberg, William W. Brien, M.D., Dave*  
10 *Brooks, Jason P. DiNapoli, Eric M. George, Alan*  
11 *D. Levy, Barry D. Pressman, Robert A. Moore,*  
12 *Lewis N. Wolff, Nadine Watt, and Stanley R. Zax*

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **IN AND FOR THE COUNTY OF SANTA CLARA**

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

17 Plaintiff, )

18 v. )

19 1st CENTURY BANCSHARES, INC., )  
ALAN I. ROTHENBERG, WILLIAM W. )  
20 BRIEN, M.D., DAVE BROOKS, JASON P. )  
DINAPOLI, ERIC M. GEORGE, ALAN D. )  
21 LEVY, BARRY D. PRESSMAN, ROBERT )  
A. MOORE, LEWIS N. WOLFF, NADINE )  
22 WATT, and STANLEY R. ZAX, and )  
SANDLER O'NEILL & PARTNERS, L.P., )

23 Defendants. )  
24 )

CASE NO. 16CV294673

**CLASS ACTION**

**CORRECTED MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF THE 1ST CENTURY  
DEFENDANTS' MOTION TO DISMISS**

DATE: April 7, 2017

TIME: 10:00 a.m.

JUDGE: Honorable Brian C. Walsh

DEPT: 1

Amended Complaint Filed: Jan. 13, 2017

E-FILED  
2/27/2017 4:52:18 PM  
Clerk of Court  
Superior Court of CA,  
County of Santa Clara  
16CV294673  
Reviewed By:R. Walker

**TABLE OF CONTENTS**

**Page**

1

2 PRELIMINARY STATEMENT .....1

3 BACKGROUND .....2

4       A. 1st Century Agrees to be Acquired by Midland Financial Co.....2

5       B. 1st Century Adopts a Valid Bylaw Requiring Shareholders to Bring Specified

6             Intra-corporate Disputes in Delaware. ....2

7       C. Plaintiff Brings Suit in California in Violation of 1st Century’s Delaware

8             Forum-Selection Bylaw. ....3

9       D. 1st Century Expressly Preserves its Forum-Selection Bylaw Defense.....3

10 ARGUMENT .....6

11 I. The Court Should Enforce 1st Century’s Forum-Selection Bylaw. ....6

12       A. 1st Century’s Valid Delaware Forum-Selection Bylaw Applies to this Action. ....6

13       B. Enforcement of 1st Century’s Delaware Forum-Selection Bylaw is Reasonable. ....9

14       C. Plaintiff’s Contention that 1st Century’s Bylaw is Not Enforceable is Baseless. ....11

15       D. Plaintiff’s Contention that the 1st Century Defendants Consented to this Forum

16             is Preposterous. ....13

17 CONCLUSION.....15

18

19

20

21

22

23

24

25

26

27

28

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*Airgas, Inc. v. Air Prods. & Chem., Inc.*,  
8 A.3d 1182 (Del. 2010) .....7

*Aviation Data, Inc. v. Am. Express Travel Related Servs. Co.*,  
152 Cal. App. 4th 1522 (2007) ..... 15

*Berg v. MTC Elecs. Techs.*,  
61 Cal. App. 4th 349 (1998) .....9, 13

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

*Brewerton v. Oplink Commc’ns Inc.*,  
No. RG14-750111 (Cal. Super. Ct. Dec. 14, 2014).....6, 10, 11

*Butorin v. Blount*,  
106 F. Supp. 3d 833 (S.D. Tex. 2015) ..... 11 ,12

*Cal-State Bus. Prods. & Servs., Inc. v. Ricoh*,  
12 Cal. App. 4th 1666 (1993) ..... *passim*

*City of Providence v. First Citizens BancShares*,  
99 A.3d 229 (Del. Ch. 2014)..... 11

*Collins v. Santoro*,  
No. 154140/2014, 2014 WL 5872604 (N.Y. Sup. Ct. Nov. 10, 2014) .....8

*Edgar v. MITE Corp.*,  
457 U.S. 624 (1982).....3, 10

*Galaviz v. Berg*,  
763 F. Supp. 2d 1170 (N.D. Cal. 2011) .....8

*Garfield v. RealD Inc.*,  
No. BC608309 (Cal. Super. Ct. Feb. 29, 2016) ..... *passim*

*Groen v. Safeway, Inc.*,  
No. RG14-716651, 2014 WL 3405752 (Cal. Super. Ct. May 14, 2014).....6, 7, 8

*HEMG Inc. v. Aspen Univ.*,  
C.A. No. 650457/13, 2013 WL 5958388 (N.Y. Sup. Ct. Nov. 14, 2013) .....8

*In re CytRX Corp. S’holder Derivative Litig.*,  
No. CV 14-6414-GHK (PJWx), 2015 WL 9871275 (C.D. Cal. Oct. 30, 2015).....8, 11

1 *In re Dole Foods Co. S'holder Litig.*,  
No. 8703-VCL, 9079-VCL, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015).....12

2 *Intershop Commc'ns, AG v. Super. Ct.*,  
3 104 Cal. App. 4th 191 (2002) .....6

4 *Lidow v. Super. Ct.*,  
5 206 Cal. App. 4th 351 (2012) .....6

6 *Lu v. Dryclean-U.S.A. of Cal., Inc.*,  
11 Cal. App. 4th 1490 (1992) .....6, 9, 13

7 *Miller v. Beam, Inc.*,  
8 No. 2014 CH 00932, 2014 WL 2727089 (Ill. Ch. Ct. Mar. 5, 2014).....8

9 *North v. McNamara*,  
10 47 F. Supp. 3d 635, 644 (S.D. Ohio 2014) .....8, 11

11 *Promotional Prods. Grp., Inc. v. Sunset Golf, LLC*,  
No. 2009-P-0041, 2010 WL 3212991 (Ohio Ct. App. Aug. 13, 2010) .....15

12 *RBC Capital Markets, LLC v. Jervis*,  
13 No. 140, 2015, 2015 WL 7721882 (Del. Nov. 30, 2015) .....2

14 *Roberts v. TriQuint Semiconductor, Inc.*,  
15 358 Or. 413 (2015).....6, 8, 10

16 *Smith, Valentino & Smith, Inc. v. Superior Ct.*,  
17 17 Cal. 3d 491 (1976) .....11, 13

18 *Solak v. Sarowitz*,  
No. CV 12299-CB, 2016 WL 7468070 (Del. Ch. Dec. 27, 2016).....1

19 *United Techs. Corp. v. Treppel*,  
20 109 A.3d 553 (Del. 2014) .....7

21 *Villari v. Mozilo*,  
208 Cal. App. 4th 1470 (2012) .....9

22 **Statutes**

23 8 Del. C. § 109(b) .....9

24 Cal. Code Civ. Proc. § 410.30(a) .....6, 9

25 Cal. Code Civ. Proc. § 418.10 .....6, 9

26 Cal. Corp. Code § 2116..... *passim*

27 Del. Code Ann. tit. 8, § 109(a)–(b).....7

28 Del. Code Ann. tit. 8, § 115 .....7, 8, 9

**Other Authorities**

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

7A Fletcher Cyclopedia of the Law of Private Corporations § 3654 (2015).....7

Cal. Rule of Court 3.769(a).....5

Cal. Rule of Court 3.725 .....5, 13

Division of Corporations, State of Delaware,  
<https://corp.delaware.gov/aboutagency.shtml>.....12

**TABLE OF ABBEVIATIONS**

<b>Term</b>	<b>Abbreviation</b>
Application for Preliminary Injunction	PI App.
California Code of Civil Procedure	CCP
California Rules of Court	CRC
Case Management Statement	CMS
First Amended Complaint	FAC
Motion for Preliminary Approval	MPA
Securities and Exchange Commission	SEC

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

1 **PRELIMINARY STATEMENT**

2 On March 10, 2016, 1st Century Bancshares, Inc. (“1st Century”), a Delaware corporation,  
3 announced that it had agreed to be acquired by Midland Financial Corp. for \$11.22 per share in cash,  
4 a 36% premium to the trading price of 1st Century’s stock before the sale was announced. As has  
5 become the norm, plaintiff filed this class action alleging breaches of fiduciary duty by 1st Century  
6 and its directors and seeking to enjoin the merger based on supposedly inadequate disclosures and  
7 because the merger price purportedly was not “fair.” The parties thereafter agreed, subject to Court  
8 approval, to settle the case in exchange for certain supplemental disclosures that 1st Century made in  
9 advance of the shareholder vote on the merger. 99.8% of the voting 1st Century shares approved the  
10 merger at a June 20 vote. Afterwards, when seeking preliminary approval of the settlement, plaintiff  
11 represented to the Court that the disclosures made by 1st Century “allowed shareholders to make a  
12 decision on whether to vote in favor of the Merger Agreement with the benefit of disclosure of all  
13 relevant facts.” (Memo. ISO MPA, filed Aug. 8, 2016, at 6.) Frustrated with the Court’s decision to  
14 deny preliminary approval of the settlement—and deprive plaintiff of the attorneys fees he expected  
15 in connection with the settlement—plaintiff filed an Amended Complaint attacking the disclosures he  
16 represented to the Court were sufficient to allow shareholders to cast a fully informed vote on the  
17 transaction. Plaintiff’s about-face demonstrates the meritless nature of this lawyer-driven litigation.

18 Yet before the Court needs even to assess this action’s lack of merit, the Court should dismiss  
19 the action because plaintiff brought it in the wrong forum. 1st Century’s corporate bylaws require  
20 that this suit be brought in Delaware. Like many other Delaware corporations, 1st Century adopted  
21 an “exclusive forum” bylaw to ensure that shareholder fiduciary duty claims or other intra-corporate  
22 disputes are adjudicated in its state of incorporation: Delaware. Courts in California have held  
23 forum-selection bylaws like 1st Century’s to be valid and enforceable, and have regularly dismissed  
24 shareholder actions, like this one, filed outside the designated forum. As the Delaware Court of  
25 Chancery recently explained, “stockholders are expected to play by the rules of the company in  
26 which they chose to invest.” *Solak v. Sarowitz*, 2016 WL 7468070, at \*6 (Del. Ch. Dec. 27, 2016).

27 Nothing here justifies a different result. While the original Complaint contained several  
28 allegations purportedly in support of an argument that the bylaw should not be enforced, all of the

1 allegations have recently been dropped—because they are contrary to law and fact. The Amended  
2 Complaint instead contends that 1st Century consented to venue in California when the parties sought  
3 this Court’s approval of their proposed settlement. This allegation, like the others that came before it,  
4 is demonstrably false—1st Century and its former directors from the outset voiced their objection to  
5 plaintiff’s decision to breach the bylaw and sue in California, and preserved the forum defense at  
6 every opportunity, including in connection with the now-disapproved settlement.

7 The Court should dismiss this lawsuit. If plaintiff wishes to pursue his claims on the merits,  
8 he is free to bring suit in the appropriate Delaware court.

## 9 BACKGROUND

### 10 A. 1st Century Agrees to be Acquired by Midland Financial Co.

11 At the time plaintiff filed this action, 1st Century, the holding company for 1st Century Bank,  
12 was a Delaware corporation headquartered in Los Angeles, California. (FAC ¶ 10.) On March 10,  
13 2016, 1st Century announced that it had entered into a merger agreement with Midland Financial Co.  
14 (“Midland”) to be acquired for \$11.22 in cash per share. (Ex. A.<sup>1</sup>) That price reflects a 36%  
15 premium over the trading price of 1st Century’s stock price before news that 1st Century was an  
16 acquisition target became public. (Ex. B (the “Definitive Proxy Statement”) at 11, 18, 98.)

17 On April 8, 2016, 1st Century filed with the SEC a preliminary proxy statement relating to the  
18 merger (Ex. C), and on May 18, 2016, 1st Century filed the Definitive Proxy Statement. Among  
19 other things, the Definitive Proxy Statement includes over sixteen, single-spaced pages describing the  
20 “Background of the Merger,” the factors the 1st Century board of directors considered in  
21 recommending that shareholders approve the proposed merger and the process followed by 1st  
22 Century and its advisors. (Ex. B at 34–49.) The merger was subject to approval by a majority of 1st  
23 Century’s outstanding shares, and a shareholder vote was scheduled for June 20, 2016. (*Id.* at 2.)

### 24 B. 1st Century Adopts a Valid Bylaw Requiring Shareholders to Bring 25 Specified Intra-corporate Disputes in Delaware.

26 1st Century’s certificate of incorporation provides that “the Board of Directors shall have the  
27 power to adopt, alter, amend or repeal the Bylaws of the Corporation.” (Ex. D at Art. 8.1.) When 1st

28 <sup>1</sup> “Ex.” refers to exhibits to the accompanying Declaration of Laura Kabler Oswell.

1 Century's board of directors approved the merger agreement with Midland, it exercised its power to  
2 amend the company's bylaws and adopted a bylaw designating Delaware as the exclusive forum for  
3 the resolution of fiduciary duty claims and other intra-corporate disputes. In part, the bylaw provides:

4 Unless the Corporation consents in writing to the selection of an  
5 alternative forum, the Court of Chancery of the State of Delaware (or, if  
6 the Court of Chancery does not have jurisdiction, the federal district court  
7 for the District of Delaware) shall be the sole and exclusive forum for . .  
8 .(ii) any action asserting a claim of breach of a fiduciary duty owed by any  
9 director, officer, other employee or stockholder of the Corporation to the  
10 Corporation or the Corporation's stockholders, . . . or (v) any action  
11 asserting a claim governed by the internal affairs doctrine.”

12 (Ex. E at Art. VII, § 5.) Thus, 1st Century's bylaw designates Delaware as the exclusive forum for  
13 any action asserting a claim of breach of fiduciary duty, or a claim governed by the “internal affairs”  
14 doctrine, against any of the corporation's directors, officers or employees, unless the corporation  
15 agrees to another forum. Such claims are governed by Delaware law. *See Edgar v. MITE Corp.*, 457  
16 U.S. 624, 645 (1982). California has codified the internal affairs doctrine at Corp. Code § 2116.

17 **C. Plaintiff Brings Suit in California in Violation of 1st Century's  
18 Delaware Forum-Selection Bylaw.**

19 On May 3, 2016, nearly two months after the merger was announced and one month before  
20 1st Century's shareholders were scheduled to vote on the merger, plaintiff filed this lawsuit. The  
21 Complaint alleged that 1st Century's directors breached their fiduciary duties by approving the  
22 proposed merger (Count I), and 1st Century and its directors (the “1st Century Defendants”) breached  
23 their fiduciary duties by omitting material information from the proxy statement filed with the SEC  
24 concerning the merger (Count II). (*Id.* ¶¶ 47–54.) Plaintiff later added a claim that Sandler O'Neill  
25 (“Sandler”), an investment bank that advised 1st Century regarding the proposed merger, aided and  
26 abetted the directors' breaches of duty (Count III). (FAC ¶¶ 54–56.) The Amended Complaint seeks  
27 an injunction barring the merger, or in the alternative, rescission of the merger or rescissory damages,  
28 as well as attorney's fees. (*Id.* at 18–19.) No other cases were filed challenging the merger.

29 **D. 1st Century Expressly Preserves its Forum-Selection Bylaw Defense.**

30 On May 25, 2016, plaintiff filed an application for a preliminary injunction to enjoin the  
31 shareholder vote based on alleged disclosure deficiencies. Although plaintiff had been on notice of  
32 the alleged deficiencies since the preliminary proxy was filed, he waited more than six weeks to

1 notice the injunction hearing for the last possible business day (Friday, June 17, 2016) before the  
2 shareholder vote set for Monday, June 20, 2016. On June 6, 2016, the 1st Century Defendants<sup>2</sup> filed  
3 an opposition to the injunction application. The first argument in the 1st Century Defendants’  
4 Opposition Brief challenged plaintiff’s ability to pursue his claims in California, explaining that:  
5 “Plaintiff cannot prevail on the merits of his claims because he may not litigate them in this Court.  
6 1st Century’s forum selection bylaw requires Plaintiff to file any claims for breach of fiduciary duty  
7 related to the proposed transaction in Delaware.” (Opp. to PI App., filed Jun. 6, 2016, at 5–7.)

8 On June 9, 2016, the Court entered an order deeming the case complex, which provided that  
9 the “Parties shall not file or serve . . . motions for change of venue . . . until a date is set at the First  
10 Case Management Conference for such filings . . .” (Order, entered Jun. 9, 2016, at 5.) Pursuant to  
11 the Court’s Order, and having raised the issue in the preliminary injunction Opposition, the 1st  
12 Century Defendants did not have an opportunity to raise the issue again—until now.<sup>3</sup>

13 On June 10, 2016, with both the preliminary injunction hearing and shareholder vote looming,  
14 the parties reached a settlement in principle and entered into a stipulation of settlement under which  
15 the 1st Century Defendants agreed to make certain additional disclosures regarding the transaction  
16 before the scheduled shareholder vote. (*See* Stip. of Settlement, filed Aug. 8, 2016, ¶ 2.) As a  
17 condition of settlement, however, the parties agreed that, in the event the settlement was not approved  
18 by the Court, the parties’ attempt to settle the case, including seeking preliminary approval, would  
19 not prejudice any of their defenses: “If the settlement does not receive Final Approval, the parties  
20 shall revert to their respective litigation positions *as if this Stipulation never existed*.” (*Id.* ¶ 15  
21 (emphasis added).) In light of the settlement in principle, the parties requested that the preliminary  
22 injunction hearing be taken off calendar. On June 20, 2016, 1st Century shareholders  
23 overwhelmingly approved the merger with over 99.8% of the voting shares approving the transaction.  
24 (Ex. F at 2.) Out of nearly 7.5 million shares that voted in-person or by proxy, only one share voted

25 <sup>2</sup> The 1st Century Defendants include 1st Century and former directors Alan I. Rothenberg,  
26 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, and Stanley R. Zax.

27 <sup>3</sup> The June 9, 2016 Order also stayed filing of any responsive pleadings until the first case  
28 management conference and superseded the Court’s May 24, 2016 order extending 1st Century’s  
time to respond to the Complaint until July 1, 2016. (*See* Order, entered May 24, 2016.)

1 against the deal; 12,350 shares abstained. (*Id.*) In total, just over 72% of the 10.3 million shares  
2 outstanding voted in favor of the deal. (*See* Ex. G at 7.)

3 On August 8, 2016, plaintiff filed a motion seeking preliminary approval of the settlement  
4 having been satisfied that “the fairness of the Settlement was confirmed through [two] confirmatory  
5 deposition[s]” (Memo. ISO MPA, filed Aug. 8, 2016, at 9), and that the supplemental disclosures  
6 made by 1st Century as part of the settlement “allowed shareholders to make a decision on whether to  
7 vote in favor of the merger with the benefit of all relevant facts” (*id.* at 6). The motion announced  
8 that plaintiff would seek a fee award of \$400,000 for the benefit allegedly conferred by the  
9 supplemental disclosures. (*Id.* at 7 & n.7.) The 1st Century Defendants did not join in plaintiff’s  
10 memorandum of points and authorities in support of the motion (*id.* at 1 n.2), but joined in the motion  
11 because in California, any “settlement or compromise of an entire class action . . . requires the  
12 approval of the court.” CRC 3.769(a).

13 On November 21, 2016, the Court entered an order denying the motion for preliminary  
14 approval, based in part on its conclusion that the fundamental issues addressed by the supplemental  
15 disclosures had already been disclosed in the initial proxy statement. (*See* Order, entered Nov. 21,  
16 2016, Ex. A, at 5.) The Court further held that, as there was “no substantial benefit to the class, an  
17 award of attorneys fees is not justified.” (*Id.* at 6.)

18 On December 22, 2016, per CRC 3.725, the parties filed a case management statement fifteen  
19 days before the first case management conference scheduled for January 6, 2017. In accordance with  
20 the Court’s June 9, 2016 order, the parties proposed a briefing schedule for the 1st Century  
21 Defendants’ motion “seeking to move the Action to Delaware.” (CMS, filed Dec. 22, 2016, at 4.) At  
22 the conference, the Court entered a briefing schedule pursuant to which this motion was filed. (*See*  
23 Minute Order, entered Jan. 6, 2017; *see also* CMS, filed Jan. 26, 2017, at 2.) The Court also set a  
24 deadline for an Amended Complaint. (*Id.*)

25 On January 13, 2017, plaintiff filed his Amended Complaint, which asserts claims against the  
26 1st Century Defendants for breach of fiduciary duty and against Sandler for aiding and abetting the  
27 purported breach of fiduciary duty. Notwithstanding plaintiff’s prior representation to the Court that  
28 the disclosures made by 1st Century were sufficient to permit a fully informed shareholder vote on

1 the merger, the Amended Complaint now claims the opposite: that the 1st Century Defendants  
2 breached their fiduciary obligations “through materially inadequate disclosures and material  
3 omissions.” (FAC ¶ 51.) Regardless of the merits of plaintiff’s new claims, this action should be  
4 dismissed because it belongs in a different court.

## 5 ARGUMENT

### 6 I. THE COURT SHOULD ENFORCE 1ST CENTURY’S FORUM-SELECTION BYLAW.

7 Forum-selection clauses are “presumed valid,” *Intershop Commc’ns, AG v. Super. Ct.*, 104  
8 Cal. App. 4th 191, 198 (2002), and a defendant’s request for enforcement of a forum-selection  
9 provision is properly raised by a motion to dismiss under CCP § 410.30. *See Cal-State Bus. Prods. &*  
10 *Servs., Inc. v. Ricoh*, 12 Cal. App. 4th 1666, 1670 (1993); CCP § 410.30(a) (authorizing a court to  
11 dismiss an action if it finds that “in the interest of substantial justice an action should be heard in a  
12 forum outside the state”); *see also* CCP § 418.10. A court may decline to enforce a forum-selection  
13 clause only if a plaintiff carries the “heavy burden” of “demonstrat[ing] that enforcement of the  
14 clause would be unreasonable under the circumstances.” *Lu v. Dryclean-U.S.A. of Cal., Inc.*, 11 Cal.  
15 App. 4th 1490, 1493 (1992). Plaintiff fails altogether to carry his “heavy burden” in this case.

#### 16 A. 1st Century’s Valid Delaware Forum-Selection Bylaw Applies to this Action.

17 Under the internal affairs doctrine, which California has codified, courts look to the law of the  
18 state of incorporation in deciding matters that involve a corporation’s internal governance. *See Lidow*  
19 *v. Super. Ct.*, 206 Cal. App. 4th 351, 359 (2012); *see also* Cal. Corp. Code § 2116. As courts in  
20 California have confirmed, the validity of a corporation’s bylaws is a matter of internal governance  
21 subject to the laws of the state of incorporation.<sup>4</sup> *See Roberts v. TriQuint Semiconductor, Inc.*, 358  
22 Or. 413, 426 (2015) (applying Delaware law to determine the validity of a bylaw of a Delaware  
23 corporation); *Garfield v. RealD Inc.*, No. BC608309 (Cal. Super. Ct. Feb. 29, 2016), slip op. at 1  
24 (same); *Brewerton v. Oplink Commc’ns Inc.*, No. RG14-750111 (Cal. Super. Ct. Dec. 14, 2014), slip  
25 op. at 4 (same); *Groen v. Safeway, Inc.*, No. RG14-716651, 2014 WL 3405752, at \*2 (Cal. Super. Ct.  
26 May 14, 2014) (same). Delaware law governs the validity of 1st Century’s forum-selection bylaw.

27 <sup>4</sup> No California appellate court has addressed a forum-selection bylaw. We cite decisions of the  
28 Superior Court of this state to inform the court of the decisions by California trial courts addressing  
such bylaws. Copies of these decisions are attached to the Oswell Declaration as Exhibits H, I, and J.

1 Under the law of Delaware, as elsewhere, “corporate charters and bylaws are contracts among  
2 a corporation’s shareholders.” *Airgas, Inc. v. Air Prods. & Chem., Inc.*, 8 A.3d 1182, 1188 (Del.  
3 2010); *see also* 7A Fletcher Cyclopaedia of the Law of Private Corporations § 3654 (2015) (a  
4 corporation’s “articles, bylaws and governing general corporation laws, is often said to constitute a  
5 contract between the corporation, the state and the shareholders inter se”). A Delaware corporation  
6 may “confer the power to adopt, amend or repeal bylaws upon the directors” in its certificate of  
7 incorporation. Del. Code Ann. tit. 8, § 109(a). When the certificate of incorporation gives directors  
8 that authority, “[s]tockholders are on notice that, as to those subjects that are subject of regulation by  
9 bylaw under 8 Del. C. § 109(b), the board itself may act unilaterally to adopt bylaws addressing those  
10 subjects” as part of the corporate contract. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73  
11 A.3d 934, 955-56 (Del. Ch. 2013). For that reason, the Delaware Court of Chancery held in *Chevron*  
12 that a forum-selection bylaw duly adopted by a board is “valid under [Delaware] statutory law,” *id.* at  
13 939, and should be enforced “in the same way [a court] enforces any other forum selection clause,”  
14 *id.* at 940. That holding has been confirmed by the Delaware Supreme Court, *see United Techs.*  
15 *Corp. v. Treppel*, 109 A.3d 553, 561 & n.41 (Del. 2014), and codified by the Delaware legislature.

16 Section 115 of the Delaware General Corporation Law, titled “Forum selection provisions,”  
17 permits corporations to adopt bylaws requiring that “any and all internal corporate claims . . . be  
18 brought solely or exclusively in any or all of the courts in this State,” and defines “internal corporate  
19 claims” to include any claims “based upon a violation of a duty by a current or former director or  
20 officer or stockholder in such capacity.” Del. Code Ann. tit. 8, § 115. Forum-selection bylaws are  
21 thus expressly authorized under Delaware case law and statute.

22 Following *Chevron*, courts in California and other states have concluded that a Delaware  
23 forum-selection bylaw duly adopted by a board is valid and enforceable. The California courts that  
24 have considered forum-selection clauses have enforced them. In *Safeway*, shareholders of Safeway, a  
25 Delaware corporation, filed class actions alleging, as plaintiff does here, that the directors of the  
26 corporation had breached their fiduciary duties in approving and recommending a merger. 2014 WL  
27 3405752, at \*1. Invoking Safeway’s board-adopted bylaw designating Delaware as the “sole and  
28 exclusive forum” for actions asserting breach-of-fiduciary duty claims, the defendants moved to

1 dismiss the suits. *Id.* The court granted the motion, holding that “Plaintiffs [were] contractually  
2 obligated to bring their claims against Defendants only in the Delaware [Chancery] Court.” *Id.* at \*2.  
3 In *Oplink*, the court again enforced a board-adopted Delaware forum-selection bylaw and dismissed a  
4 shareholder class action asserting claims that the corporation’s directors had breached their fiduciary  
5 duties in approving and recommending a merger. No. RG14- 750111 (Cal. Super. Ct. Dec. 14,  
6 2014), slip op. at 4 (“Plaintiff is contractually obligated to bring her claims against Oplink only in the  
7 Delaware Court of Chancery.”). The Superior Court did exactly the same thing in *Garfield v. RealD*  
8 *Inc.*, No. BC608309 (Cal. Super. Ct. Feb. 29, 2016), slip op. at 1–2.

9 Federal district courts in California likewise enforce Delaware forum-selection bylaws. *See*  
10 *In re CytRX Corp. S’holder Derivative Litig.*, 2015 WL 9871275, at \*2–5, \*7 (C.D. Cal. Oct. 30,  
11 2015). So do federal and state trial courts around the country. *See North v. McNamara*, 47 F. Supp.  
12 3d 635, 644 (S.D. Ohio 2014); *HEMG Inc. v. Aspen Univ.*, 2013 WL 5958388, at \*3 (N.Y. Sup. Ct.  
13 Nov. 14, 2013); *Collins v. Santoro*, 2014 WL 5872604, at \*1–2 (N.Y. Sup. Ct. Nov. 10, 2014); Ex. K  
14 (Transcript of Oral Argument, *Miller v. Beam, Inc.*, 2014 WL 2727089 (Ill. Ch. Ct. Mar. 5, 2014)) at  
15 38, 47.<sup>5</sup> The only appellate court, state or federal, that has addressed a forum-selection bylaw—the  
16 Oregon Supreme Court—held that such bylaws are valid under Delaware law and issued a writ of  
17 mandamus directing the trial court to dismiss a suit filed in violation of the defendant corporation’s  
18 Delaware forum-selection bylaw. *See Roberts*, 358 Or. at 426, 430.

19 This case is no different than any of many cases in which courts have enforced a Delaware  
20 forum-selection bylaw. 1st Century’s certificate of incorporation authorized its board of directors to  
21 amend its bylaws. (Ex. D at Art. 8.1.) Acting pursuant to that authority, the board adopted the  
22 forum-selection bylaw. The bylaw designates Delaware as the “sole and exclusive forum” for any  
23

24 <sup>5</sup> Courts have uniformly declined to follow *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal.  
25 2011), which refused to enforce a forum-selection bylaw on the ground that it was adopted by the  
26 board of directors rather than the stockholders. *Galaviz* preceded Delaware’s *Chevron* decision, 73  
27 A.3d 934 (Del. Ch. 2013), which upheld board-adopted forum-selection bylaws, and the Delaware  
28 legislature’s amendment of the state’s corporation code to expressly authorize such bylaws, *see* Del.  
Code Ann. tit. 8, § 115. In addition, other courts have followed *Chevron*, which criticized the  
reasoning of *Galaviz*. *See Chevron*, 73 A.3d at 956 (holding that *Galaviz* “rests on a failure to  
appreciate the contractual framework” of Delaware corporate law); *In re CytRx*, 2015 WL 9871275,  
at \*2-4 (following *Chevron* and rejecting the reasoning of *Galaviz*); *North*, 47 F. Supp. 3d at 641-42  
(following *Chevron*); *Safeway*, 2014 WL 3405752, at \*2 (same).

1 action, like this one, that “assert[s] a claim of breach of a fiduciary duty owed by any director [or]  
2 officer . . . of the Corporation to the Corporation or the Corporation’s stockholders” or “assert[s] a  
3 claim governed by the internal affairs doctrine.” (Ex. E at Art. VII, § 5.) 1st Century’s bylaw is thus  
4 a valid provision that contractually obligates plaintiff to pursue this action, if at all, in Delaware.<sup>6</sup>

5 **B. Enforcement of 1st Century’s Delaware Forum-Selection Bylaw is Reasonable.**

6 Because 1st Century’s Delaware forum-selection bylaw is valid, plaintiff’s suit may proceed  
7 in this California court only if plaintiff carries the “heavy burden” of “demonstrat[ing] that  
8 enforcement of the clause would be unreasonable under the circumstances.” *Lu*, 11 Cal. App. 4th at  
9 1493.<sup>7</sup> Plaintiff cannot carry that burden. Enforcement of a forum-selection provision is  
10 “unreasonable” only if the “forum selected would be unavailable or unable to accomplish substantial  
11 justice,” or if the choice of forum lacks “some rational basis in light of the facts underlying the  
12 transaction.” *Cal-State*, 12 Cal. App. 4th at 1679. Neither condition prevails here.

13 Delaware courts are open to plaintiff and fully capable of adjudicating this case. A Delaware  
14 court is empowered to award Plaintiff all of the relief to which he is entitled under Delaware law.  
15 And, as a matter of California statute, U.S. Supreme Court precedent, and hornbook choice-of-law  
16 principles, plaintiff’s breach-of-fiduciary-duty action against 1st Century’s directors is governed by  
17 Delaware law because, as plaintiff acknowledges, 1st Century is a Delaware corporation. *See* Compl  
18 ¶ 9; *Villari v. Mozilo*, 208 Cal. App. 4th 1470, 1479 n.9 (2012) (“Corporations Code section 2116

19 <sup>6</sup> Because the bylaw applies to “any *action* asserting a claim of breach of a fiduciary duty owed  
20 by any director [or] officer . . . of the Corporation to the Corporation or the Corporation’s  
21 stockholders . . . any action asserting a claim governed by the internal affairs doctrine” (Oswell Ex.  
22 E (emphasis added)), the bylaw requires dismissal of the *entire action* as against *all* defendants. A  
23 plaintiff cannot defeat a forum-selection provision simply by adding claims against additional  
24 parties, especially those whose conduct is “closely related” to the underlying claims. *See Lu*, 11 Cal.  
App. 4th 1494 (“To hold otherwise would be to permit a plaintiff to sidestep a valid forum selection  
clause simply by naming a closely related party who did not sign the clause as a defendant.”); *see*  
*also* 8 Del. Code § 115 (authorizing forum-selection bylaws to cover any claim “based upon a  
violation of a duty by a current or former director or officer or stockholder in such capacity”).

25 <sup>7</sup> Despite being styled a “motion to stay or dismiss for forum non conveniens pursuant to Code  
26 of Civil Procedure sections 410.30 and 418.10,” convenience factors do not apply when seeking to  
27 enforce a mandatory forum selection clause, such as here. *See Berg v. MTC Elecs. Techs.*, 61 Cal.  
28 App. 4th 349, 358 (1998) (“In California, the procedure for enforcing a forum selection clause is a  
motion to stay or dismiss for forum non conveniens pursuant to Code of Civil Procedure sections  
410.30 and 418.10, but a motion based on a forum selection clause is a special type of forum  
non conveniens motion. The factors that apply generally to a forum non conveniens motion do not  
control in a case involving a mandatory forum selection clause.” (internal citations removed)).

1 codifies [the internal affairs doctrine] in California.”); *Edgar*, 457 U.S. at 645–46 (only the state of  
2 incorporation “should have the authority to regulate a corporation’s internal affairs”). Plaintiff’s  
3 near-uniform citation to Delaware law in its preliminary injunction motion confirms that Delaware  
4 law governs his claims. (See Memo. ISO PI App., filed May 26, 2016, at 7–14.)

5 Nor can it be said that the bylaw’s designation of Delaware as the exclusive forum for  
6 disputes such as this one lacks “some rational basis.” *Cal-State*, 12 Cal. App. 4th at 1679. As  
7 explained above, Delaware law governs breach-of-fiduciary duty claims asserted against the directors  
8 of a Delaware corporation. 1st Century’s stockholders are geographically dispersed, united only by  
9 their decision to invest in a Delaware corporation. 1st Century’s selection of Delaware as the  
10 exclusive forum for suits like this one is thus eminently sensible. That choice ensures that duplicative  
11 shareholder suits will proceed in Delaware so that they can be consolidated with pending litigation  
12 raising the same claims. See *Chevron*, 73 A.3d at 944. That choice ensures that any and all corporate  
13 internal affairs litigation proceeds in the courts of the one state whose courts can authoritatively  
14 interpret and apply the governing law. See *id.* at 951 (forum-selection bylaws “channe[l] internal  
15 affairs cases into the courts of the state of incorporation, providing for the opportunity to have  
16 internal affairs cases resolved authoritatively by [the Delaware] Supreme Court”).

17 It makes no difference that 1st Century’s forum-selection bylaw was adopted concurrently  
18 with the merger plaintiff seeks to challenge. The Oregon Supreme Court’s *Roberts* decision and the  
19 Superior Court’s decisions in *Oplink* and *RealD* are all directly on point. In those cases, as in this  
20 one, the plaintiff claimed that the directors of a Delaware corporation had breached their fiduciary  
21 duties in connection with approving a merger. See *Roberts*, 358 Or. at 416; *Oplink*, No. RG14-  
22 750111, slip op. at 2; *RealD*, No. BC608309, slip op. at 1–2 (following *Roberts*). And in those cases,  
23 the directors had approved the merger agreement and adopted a forum-selection bylaw at the same  
24 time—just as 1st Century’s directors did here. The plaintiffs argued that enforcement of the bylaw  
25 would be unreasonable because the bylaw had been “adopt[ed] . . . contemporaneously with the  
26 merger.” *Roberts*, 358 Or. at 416; see *Oplink*, No. RG14-750111, slip. op. at 3; *RealD*, No.  
27 BC608309, slip op. at 1. In each case, the court disagreed, noting that the Delaware Court of  
28 Chancery had rejected the identical argument shortly before. See *Roberts*, 358 Or. at 420–23, 425

1 (citing *City of Providence v. First Citizens BancShares*, 99 A.3d 229, 241 (Del. Ch. 2014)); *Oplink*,  
2 No. RG14-750111, slip. op. at 3 (same); *RealD*, No. BC608309, slip op. at 1–2. Federal district  
3 courts in California and Ohio have come to the same conclusion: “the timing of a forum-selection  
4 clause’s adoption does not dictate the clause’s validity.” *In re CytRX*, 2015 WL 9871275, at \*5; *see*  
5 *North*, 47 F. Supp. 3d at 644; *see also Butorin v. Blount*, 106 F. Supp. 3d 833, 838 (S.D. Tex. 2015).

6 **C. Plaintiff’s Contention that 1st Century’s Bylaw is Not Enforceable is Baseless.**

7 Plaintiff alleged in his original Complaint that “it would be unfair and prejudicial” to require  
8 plaintiff to—in the words of the Delaware Chancery Court—“play by the rules of the company in  
9 which [he] chose to invest.” (Compl. ¶¶ 41.) Each of his allegations, however, are contrary to law  
10 and fact—presumably why they were removed wholesale in the Amended Complaint.

11 *First*, plaintiff contends that 1st Century’s forum-selection bylaw is against the public policy  
12 of California, and therefore unenforceable, because Cal. Corp. Code § 2116 purportedly “reflect[s] a  
13 policy choice by the California legislature to provide a California forum for such suits.” (Compl. ¶¶  
14 41, 46.) But plaintiff’s conclusion that the forum-selection provision should not be enforced here  
15 does not follow from the statutory language. Just because suits like this “*may* be enforced in courts  
16 of this state,” does not necessarily mean that California citizens are prohibited from contracting away  
17 venue in California. They are not, and in fact regularly do so. *See, e.g., Smith, Valentino & Smith,*  
18 *Inc. v. Superior Ct.*, 17 Cal. 3d 491, 495 (1976) (“Although California has a public policy in favor of  
19 access to its courts by resident plaintiffs, this is not thwarted by allowing residents to surrender this  
20 right voluntarily in the course of negotiations.”).

21 *Second*, plaintiff contends that the forum selection bylaw was adopted “after much of the  
22 wrongdoing complained of.” (Compl. ¶ 41.) But, as explained above, this argument has been  
23 uniformly rejected where, as here, the company’s certificate of incorporation gives the board  
24 authority to adopt a forum-selection bylaw. (*See* Pt. I.A, *supra*.) As one court aptly noted, “[t]he fact  
25 that the shareholders are unsatisfied with the consequences of the application of the terms to which  
26 they agreed is an insufficient basis upon which to find the bylaw so inequitable that it should not be  
27 enforced.” *North*, 47 F. Supp. 3d at 643; *see also City of Providence*, 99 A.3d at 241 (finding  
28 “contention that the Forum Selection Bylaw cannot be enforced because it seeks to regulate the forum

1 for asserting claims that arose before it was adopted is unpersuasive” and “simply a dressed-up  
2 version of the ‘vested-right’ doctrine that was soundly rejected in . . . *Chevron*”).

3 *Third*, plaintiff contends that it was somehow improper for 1st Century to adopt the bylaw  
4 without a dedicated shareholder vote. (Compl. ¶¶ 42–43.) But 1st Century, a Delaware corporation,  
5 had no obligation to under Delaware law to seek stockholder approval of its forum bylaw. At the  
6 time of the bylaw amendment, Delaware courts had made clear that when a board is “authorized . . .  
7 to unilaterally adopt bylaws, it follows that [board-adopted] bylaws are not contractually invalid  
8 simply because” they “lac[k] the contemporaneous assent of the stockholders.” *Chevron*, 73 A.3d at  
9 956. 1st Century’s certificate of incorporation, which shareholders *did* vote on, gave the board  
10 unilateral authority to adopt the bylaw. *See Butorin*, 106 F. Supp. 3d at 842 (“Butorin cannot argue  
11 that he was not on notice that the certificate of incorporation allowed the board to unilaterally change  
12 the bylaws at the time the Forum Selection Bylaw was enacted.”).

13 *Fourth*, plaintiff contends that the “only reason” for adopting the bylaw was “to venue  
14 litigation involving the transaction with Midland in director-friendly Delaware, a jurisdiction that is  
15 known for its lax standards.” (Compl. ¶ 44.) But these accusations are entirely unsupported and  
16 contrary to plain fact. Delaware courts are well known for their expertise in corporate law and  
17 willingness to administer strong remedies for corporate wrongdoing. *See, e.g., RBC Capital Markets,*  
18 *LLC v. Jervis*, 2015 WL 7721882, at \*1, \*46 (Del. Nov. 30, 2015) (upholding damages of \$76 million  
19 against financial advisor for aiding and abetting a breach of fiduciary duty in merger); *In re Dole*  
20 *Foods Co. S’holder Litig.*, 2015 WL 5052214, at \*1–2 (Del. Ch. Aug. 27, 2015) (awarding damages  
21 of \$148 million against controlling stockholder for disloyal conduct in merger). If Delaware’s  
22 standards of corporate conduct were as lax as plaintiff alleges, investors’ continued willingness to  
23 invest in Delaware corporations would make little sense. (*See* [https://corp.delaware.gov/aboutagency](https://corp.delaware.gov/aboutagency.shtml)  
24 [.shtml](https://corp.delaware.gov/aboutagency.shtml) (64% of Fortune 500 companies are incorporated in Delaware).)

25 *Fifth*, plaintiff appears to contend that it would be more convenient for this action to be heard  
26 in California. (Compl. ¶ 45.) That contention, even if it were true, does not support his  
27 circumvention and attempted invalidation of the bylaw: “[N]either inconvenience nor additional  
28 expense in litigating in the selected forum is part of the test of unreasonability.” *Cal-State*, 12 Cal.

1 App. 4th at 1679 (citing *Smith*, 17 Cal. 3d at 496); *see also Berg*, 61 Cal. App. 4th at 358 (“The  
2 factors that apply generally to a forum non conveniens motion do not control in a case involving a  
3 mandatory forum selection clause.”). Nor does it matter that plaintiff is an alleged California  
4 resident. *See Lu*, 11 Cal. App. 4th at 1493 (citing *Smith*, 17 Cal. 3d at 496) (enforcing out-of-state  
5 forum-selection provision where “both of the plaintiffs reside in California”).

6 Because none of plaintiff’s allegations help him meet his “heavy burden” of showing that  
7 enforcement of the bylaw would be unreasonable, the case should be dismissed. *Id.*

8 **D. Plaintiff’s Contention that the 1st Century Defendants Consented to this**  
9 **Forum is Preposterous.**

10 1st Century’s forum-selection bylaw states that actions like this one shall be brought in a  
11 Delaware “[u]nless [1st Century] consents in writing to the selection of an alternative forum.” (Ex. E  
12 at Art. VII, § 5.) Plaintiff does not dispute—and cannot dispute—that his claims against the 1st  
13 Century Defendants fall within the scope of the bylaw, and it is equally undisputed that the 1st  
14 Century Defendants never “consented in writing to the selection of an alternative forum” before (or  
15 after) plaintiff filed suit in California.<sup>8</sup> Beginning with their very first filing in this action—their  
16 opposition to plaintiff’s application for a preliminary injunction—the 1st Century Defendants have  
17 consistently objected to suit in this forum based on 1st Century’s duly adopted forum-selection  
18 bylaw. (*See, e.g., Opp. to PI App. at 5–7* (“Plaintiff cannot prevail on the merits of his claims  
19 because he may not litigate them in this Court. 1st Century’s forum selection bylaw requires Plaintiff  
20 to file any claims for breach of fiduciary duty related to the proposed transaction in Delaware.”).)  
21 And the 1st Century Defendants have done so in accordance with California’s procedural rules and  
22 the Court’s orders. On June 9, 2016, just three days after the 1st Century Defendants filed their  
23 opposition to plaintiff’s application for a preliminary injunction, the Court stayed any “motions for  
24 change of venue . . . until a date is set at the First Case Management Conference for such filings and  
25 hearings.” (Order at 5.) Per CRC 3.725, the parties filed a case management conference statement  
26 15 days before the first conference, proposing a briefing schedule for 1st Century’s motion “to move

27 \_\_\_\_\_  
28 <sup>8</sup> Plaintiff’s only purported justification for filing this case in the incorrect forum were the  
specious arguments discussed above. (*See Pt. I.C., supra.*)

1 the Action to Delaware.” (CMS at 4.) The Court entered that schedule, pursuant to which the 1st  
2 Century Defendants bring this motion. The 1st Century Defendants thus moved to transfer venue at  
3 the first possible opportunity under the schedule set by the Court.

4 Plaintiff now contends, conceding that filing this action in California was improper *ab initio*,  
5 that “*subsequent to the filing of this Action*, all Defendants . . . have explicitly or implicitly consented  
6 in writing to venue in this Court, including by filing a motion (jointly with Plaintiff) for preliminary  
7 approval of a class-wide settlement of this Action.” (FAC ¶ 7 (emphasis added).) This allegation is  
8 demonstrably false and further evidence of gamesmanship that the Court should not countenance.<sup>9</sup>

9 No defendant here has “explicitly or implicitly consented in writing to venue in this Court.”  
10 To the contrary, the 1st Century Defendants have consistently argued that this case should be  
11 dismissed in favor of Delaware. And rather than consent to venue in California, the 1st Century  
12 Defendants have consistently reserved all of their defenses—including their rights under the  
13 Delaware forum-selection bylaw. At each step, plaintiff has been on notice of or agreed to these  
14 reservations. For example, in mid-May 2016, when plaintiff stated he intended to file an Amended  
15 Complaint, the parties entered into a stipulation extending time for the 1st Century Defendants to  
16 respond and/or file a demurrer to an amended complaint. The parties agreed that “[i]n entering into  
17 this stipulation, both Plaintiff and Defendants do not waive any right, claim, or defense.” (Stip. and  
18 Order, entered May 24, 2016, at 2.) As another example, when plaintiff lodged under seal the  
19 Amended Complaint—which, paragraph after paragraph, quotes information provided to plaintiff on  
20 an “attorneys’ eyes only” and “for settlement purposes only” basis—the 1st Century Defendants  
21 responded pursuant to CRC 2.550 and 2.551 but respectfully requested that the Court not rule on the  
22 motion until after they had a chance to brief this motion to dismiss. (Mot. to Seal, filed Jan. 26, 2017,  
23 at 1 n.1 (requesting a hearing date on or after April 7, 2017).)

24 Yet another fatal flaw in plaintiff’s waiver claim is that, in connection with the parties’  
25 attempts to settle the litigation in advance of the preliminary injunction hearing, the parties agreed

26 \_\_\_\_\_  
27 <sup>9</sup> For example, plaintiff complains that the 1st Century Defendants’ attempt to settle this action  
28 is proof of consent to venue, but ignores that he exerted undue pressure on Defendants to settle by  
waiting to file his application for preliminary injunction until he could notice the injunction hearing  
just one business day before the shareholder vote.

1 that seeking court approval of the proposed settlement would not serve as consent to venue in  
2 California. *Cf. Promotional Prods. Grp., Inc. v. Sunset Golf, LLC*, 2010 WL 3212991, at \*12 (Ohio  
3 Ct. App. Aug. 13, 2010) (party waived jurisdiction defense because she “never challenged the court’s  
4 personal jurisdiction on the multiple occasions she came before the court”). In the stipulation of  
5 settlement, executed on June 10, 2016, plaintiff agreed that “[i]f the settlement does not receive Final  
6 Approval, the parties shall revert to their respective litigation positions *as if this Stipulation never*  
7 *existed.*” (Stip. of Settlement, filed Aug. 8, 2016, ¶ 15 (emphasis added).) Because the settlement  
8 did not receive Court approval, the parties have now accordingly “revert[ed] to their respective  
9 litigation positions as if this Stipulation never existed.” The 1st Century Defendants have thus  
10 preserved their position that this action was filed in the wrong state and should be dismissed.<sup>10</sup>

11 Finally, plaintiff’s contention that enforcing 1st Century’s forum-selection bylaw following  
12 the Court’s rejection of the proposed settlement “would constitute forum shopping or judge  
13 shopping” (FAC ¶ 4) is more than a bit rich—and also nonsensical. It is plaintiff who knowingly  
14 disregarded and violated the bylaw and filed this action in California rather than in Delaware, based  
15 on the stated belief that Delaware had “lax standards.” (Compl. ¶ 44.) Plaintiff then sought to  
16 obscure those purportedly “lax standards” from this Court, by failing to disclose important Delaware  
17 precedent in his brief seeking approval of the settlement. (Order, entered Nov. 21, 2016, at 5 (“The  
18 Court also finds it very troubling that—despite urging that Delaware law governs the materiality of  
19 the disclosures in this case—plaintiff does not discuss or even acknowledge a crucial new published  
20 opinion by the Delaware Court of Chancery on this subject.”).) There is no plausible grounds to  
21 conclude that 1st Century is “judge shopping” by seeking to enforce the forum bylaw.

## 22 CONCLUSION

23 For the foregoing reasons, the Court should dismiss this action on the basis of 1st Century’s  
24 mandatory and valid Delaware forum-selection bylaw.

25  
26 <sup>10</sup> Plaintiff’s contention is contrary to California’s strong public policy favoring settlement. *See,*  
27 *e.g., Aviation Data, Inc. v. Am. Express Travel Related Servs. Co.*, 152 Cal. App. 4th 1522, 1533, 62  
28 Cal. Rptr. 3d 396, 404 (2007) (recognizing that “a party generally does not waive its right to arbitrate  
by invoking the judicial forum to pursue settlement” but ultimately affirming waiver where it was  
undisputed that the defendant made affirmative misrepresentations in the settlement notice).

1 Dated: February 27, 2017

Respectfully submitted,

2 By: /s/ Adam S. Paris

3 Adam S. Paris  
4 Jackson S. Trugman  
5 SULLIVAN & CROMWELL LLP  
6 1888 Century Park East  
7 Los Angeles, California 90067-1725  
8 Telephone: (310) 712-6600  
9 Facsimile: (310) 712-8800

10 Laura Kabler Oswell  
11 SULLIVAN & CROMWELL LLP  
12 1870 Embarcadero Road  
13 Palo Alto, California 94303  
14 Telephone: (650) 461-5600  
15 Facsimile: (650) 461-5700

16 *Attorneys for 1st Century Bancshares, Inc.,*  
17 *Alan I. Rothenberg, William W. Brien, M.D.,*  
18 *Dave Brooks, Jason P. DiNapoli, Eric M.*  
19 *George, Alan D. Levy, Barry D. Pressman,*  
20 *Robert A. Moore, Lewis N. Wolff, Nadine*  
21 *Watt, and Stanley R. Zax*