

California Court Upholds Exclusive Federal Forum Charter Provision

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On September 1, 2020, Judge Marie S. Weiner of the San Mateo County, California Superior Court held that an exclusive federal forum provision was enforceable under California law. See *Wong v. Restoration Robotics, Inc.*, No. 18CIV02609 (Cal. Super. Ct., Sept. 1, 2020). This is the first California decision to evaluate the enforceability of a Delaware charter provision requiring shareholder claims under the Securities Act of 1933 (Securities Act) to be brought exclusively in federal court since the Delaware Supreme Court held that such provisions are facially valid in *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

Restoration Robotics is a Delaware company with an exclusive federal forum provision in its charter. After a company shareholder brought Securities Act claims in state court against the company and certain of its directors, officers, underwriters and investors, the defendants moved to enforce the federal forum provision and dismiss the case. Relying on a then current decision from the Delaware Court of Chancery, which held that Delaware law does not permit companies to adopt federal forum provisions, the court initially denied the motion. However, the defendants sought reconsideration when the Delaware Supreme Court reversed the Court of Chancery in *Salzberg*, and held that federal forum provisions are facially valid under Delaware law.

The court granted the motion in part and dismissed the plaintiff's claims against the company and its directors and officers. After considering and rejecting several potential analytical frameworks, including those applicable to enforcement of arbitration provisions and settlement releases, the court determined that exclusive federal forum provisions are most analogous to mandatory forum selection clauses, particularly charter and bylaw provisions requiring that internal corporate claims be brought in the company's state of incorporation. Applying recent California decisions enforcing forum selection clauses in corporate governance documents, the court held that the plaintiff had failed to demonstrate that enforcing Restoration Robotics' exclusive federal forum provision would be unreasonable, since the plaintiff would have the same substantive rights in federal court.

However, the court declined to dismiss the plaintiff's claims against Restoration Robotics' underwriters and investors. Those defendants did not make a separate argument that they were entitled to benefit from the federal forum provision, and instead filed joinders to Restoration Robotics' motion. The court held that the underwriters and investors had failed to show that they had standing to invoke rights conferred by Restoration Robotics' charter, and denied their motions without prejudice.

Despite finding the exclusive federal forum provision enforceable as to the company and its directors and officers, the court expressed the view that such provisions "circumvent" the policies embodied by the Securities Act, which permits plaintiffs to bring suit in either state or federal court. However, the court declined to consider the plaintiff's argument that, by permitting corporations to adopt charter provisions regulating shareholder claims that allegedly do not stem from internal corporate affairs, the Delaware Legislature and courts may be impermissibly regulating interstate commerce in violation of the federal Constitution's Commerce Clause. The court concluded that the argument needed to be pursued in a separate case.

Wong is significant as the first California decision to enforce an exclusive federal forum provision since *Salzberg*. Securities class action plaintiffs often file separate actions premised on the same factual allegations in state and federal court, with Securities Act claims filed in California state court and Exchange Act (Securities Exchange Act of 1934) claims filed in federal court. Under the decision of the Supreme Court in

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Cyan, Inc. v. Beaver County Employees Retirement Fund, 138 S. Ct. 1061 (2018), state courts have concurrent jurisdiction over Securities Act actions, and such actions may not be removed to federal court. This effectively prevents the separate state and federal actions from being consolidated. After the *Cyan* decision, multiple companies adopted exclusive federal forum provisions to concentrate securities litigation in the federal courts, where consolidating overlapping claims filed in different jurisdictions is procedurally possible. If other California courts (or courts in other states) follow San Mateo County's lead and find these provisions enforceable, securities litigation defendants may have greater ability to avoid the burden and expense of duplicative litigation on

overlapping claims in different jurisdictions.

In the wake of *Salzberg and Wong*, corporations considering going public and other corporations that may be the target of securities lawsuits may wish to consider adding an exclusive federal forum provision to their corporate charters. Additionally, foreign corporations with American depositary shares listed on a U.S. stock exchange may wish to consider adding language to their deposit agreements requiring Securities Act claims to be brought in federal court. Companies should consult with outside counsel when considering whether to adopt such a federal forum provision.