

# Analyzing federal forum provisions following ‘Salzberg’

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In 2020, the Delaware Supreme Court held in *Salzberg v. Sciabacucchi* that federal forum provisions (FFPs) requiring claims brought under Section 11 of the Securities Act of 1933 (Securities Act) to be litigated in federal court are facially valid under Delaware law. While *Salzberg* confirmed the facial validity of FFPs, which are normally stated in corporate bylaws or charters, the court acknowledged that “[p]erhaps the most difficult aspect of this dispute ... [is] whether [FFPs] will be respected and enforced by [Delaware’s] sister states.”

*While state courts have consistently enforced FFPs as to corporate defendants, courts have reached different conclusions as to defendants who are not signatories to the corporate bylaw or charter containing the FFP.*

Other questions remained open, such as whether FFPs would apply to defendants who are not signatories to the corporate bylaw or charter containing the FFP. In the wake of *Salzberg*, courts around the country have begun to address these issues, and a consensus is emerging. Courts have consistently enforced FFPs as to claims brought under the Securities Act. Notably, this question is different from the one addressed by the 7th U.S. Circuit Court of Appeals earlier this year in *Seafarers Pension Plan v. Robert A. Bradway et al.* — i.e., that a forum provision cannot obligate stockholders to bring derivative claims under the Securities Exchange Act of 1934 in Delaware state court.

So far, although courts have reached different conclusions as to whether FFPs apply to claims asserted against non-signatory defendants (such as underwriters, advisors or other third parties), the majority of courts have analyzed the plain language of the FFP in question and concluded that it encompasses such claims.

## Validity of FFPs

The majority of courts that have addressed FFPs to date have been in California. In September 2020, a California state court

addressed the enforceability of an FFP in *Wong v. Restoration Robotics, Inc.*, (2020 WL 605040 (Cal. Super. Ct. Sept. 1, 2020)). Applying California law, the court held that although the FFP was procedurally unconscionable because the corporation’s charter was an adhesion contract that was “buried in a prolix printed form” within the offering documents, the FFP was not substantively unconscionable.

The court held that the provision protected the corporation and its directors and officers from duplicative litigation and did not impair the plaintiffs’ substantive rights. The court also noted that plaintiffs could assert the federal securities claim in federal court, which was capable of protecting their rights.

Six weeks later, another California court decided *In re Uber Technologies, Inc. Securities Litigation*, (No. CGC-19-579544 (Cal. Super. Ct. Nov. 16, 2020)), and likewise applied California law to enforce an FFP in Uber’s corporate charter. The *Uber* court largely followed the reasoning of *Restoration Robotics*.

A few weeks after *Uber*, a California court again enforced an FFP in *In re Dropbox, Inc. Securities Litigation*, (No. 19-CIV-05089 (Cal. Super. Ct. Dec. 4, 2020)), which appeared in the company’s bylaws as opposed to its charter. The court concluded that the enforceability of the FFP was the same regardless of whether it was contained in a corporate charter or the corporation’s bylaws.

A few days later, the same judge who decided *Dropbox* issued an order in *In re Sonim Technologies, Inc. Securities Litigation*, (No. 19-CIV-05564 (Cal. Super. Ct. Dec. 7, 2020)), that incorporated by reference the prior order from *Dropbox* to enforce the FFP.

A California court enforced an FFP once again in September 2021 in *In re Arlo Technologies, Inc. Shareholder Litigation*, (No. 18-CV-339231 (Cal. Super. Ct. Sept. 9, 2021)). The court held that the FFP was not unreasonable and “the fact that Plaintiffs’ claims may be time-barred by the applicable statute of limitations and repose does not render the FFP unenforceable.”

Outside of California, state courts in Utah, New York and New Jersey have also upheld FFPs. In *Volonte v. Domo, Inc.*, (2021 WL 1960296 (Utah Dist. Ct. Apr. 13, 2021)), a Utah state court held that, under both Delaware and Utah law, the FFP bylaw was binding on shareholders and that forum selection clauses are presumptively valid and enforceable. On the question of whether the court should apply the FFP in that particular case, the court conducted a forum

non conveniens analysis and noted that the bylaw forum provision was entitled to heavy weight. The court concluded that enforcement of the FFP would not be contrary to public policy or unwarranted.

In the first case to address FFPs in New York, *Hook v. Casa Systems, Inc.*, (2021 WL 3884063 (N.Y. Sup. Ct. Aug. 30, 2021)), a Justice of the New York Commercial Division upheld an FFP in a corporation's charter. The court concluded that, applying either Delaware or New York law, the forum selection provision was prima facie valid unless shown to be unreasonable or unjust.

In so doing, like *Arlo Technologies*, the court rejected plaintiff's argument that enforcement of the forum selection provision was unreasonable due to the expiration of the statute of repose, which would render any subsequent action filed in federal action untimely, because the expiration was caused by the plaintiff's own delay. The same judge subsequently issued an identical decision when another Casa Systems stockholder challenged the company's FFP. (See *Panther Partners v. Casa Systems Inc., et. al.*, Index No. 654585/2019 (N.Y. Sup. Ct. Oct. 20, 2021)).

In *Shen v. Casa Systems, Inc.*, (2020 WL 8839637 (Mass. Sup. Ct. Jan. 11, 2020)), the Superior Court of Massachusetts considered the same FFP at issue in *Hook*. Because no appellate court had addressed whether Massachusetts or Delaware law applied to the FFP, however, the "[c]ourt decline[d] to resolve this novel choice of law issue." The court did note that "the Casa Defendants [were] likely correct that the FFP is facially valid in either instance," but ultimately dismissed the complaint for failure to state a claim.

Most recently, the Superior Court of New Jersey enforced an FFP in *Kuehl v. electroCore, Inc.*, (Dkt. No. L-001007-19 (N.J. Sup. Ct. Dec. 14, 2021)). The court applied Delaware law because the defendant company was a Delaware corporation but noted the result would be the same if New Jersey law had applied and held that the FFP required the action to be dismissed.

### Enforceability of FFPs as to non-signatories

While state courts have consistently enforced FFPs as to corporate defendants, courts have reached different conclusions as to defendants who are not signatories to the corporate bylaw or charter containing the FFP.

Numerous state courts have held that FFPs encompass claims brought against non-signatories. For instance, in *Uber*, the court held that the FFP applied "broadly...to any complaint asserting a cause of action...under the Securities Act," including

"non-signator[ies]" to the charter. As the court reasoned, to hold otherwise would "permit a plaintiff to sidestep a valid forum selection clause." *Arlo Technologies* followed the reasoning of *Uber* and in *Dropbox*, and the court dismissed claims against the underwriter defendants based on the "grounds of economy and efficiency."

Outside of California, courts have also enforced FFPs in connection with claims brought against non-signatories. In *Volonte*, the Utah court recognized that "it should avoid a decision that will result in multiple legal actions," holding that the FFP at issue was enforceable as to claims brought against an underwriter because of the relationship between the corporate defendant and the underwriter with respect to the IPO.

Similarly, in *Casa Systems*, the New York court held that under both New York and Delaware law, non-signatories may enforce a forum selection clause where the language of the FFP broadly encompassed claims asserted under the Securities Act. Likewise, in *electroCore*, the court held the FFP's broad language applied to all defendants and was intended to avoid the inefficiencies of duplicative litigation.

In *Restoration Robotics*, a California court dismissed the venture capital defendants on the ground that they were sued in their capacity as stockholders, and thus were parties to the corporation's charter and entitled to enforce its provisions. The court declined, however, to dismiss claims asserted against the underwriter defendants under the FFP. In so holding, the court did not address the underwriters' argument that the plain language of the FFP required plaintiffs to bring any Securities Act claims in federal court, instead focusing on whether the underwriters were parties to the charter or intended third-party beneficiaries.

### Conclusion

State courts around the country have continued to address issues relating to the enforceability and scope of FFPs. So far, courts have generally enforced FFPs, with a building consensus that they apply against non-signatory defendants as well. However, the validity of FFPs remains an issue of first impression for a number of states.

The opinions expressed in this article are those of the author(s) and do not necessarily reflect the views of Skadden or its clients.

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