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## **A Second California State Court Enforces Federal Forum Provision and Dismisses Securities Act Claims Against All Defendants—Including Underwriters**

Last week a California state court became the second in the country to dismiss claims brought under the Securities Act of 1933 (the “Securities Act”) because the defendant-issuer’s charter contained a federal forum provision (an “FFP”) requiring Securities Act claims to be brought in federal court. The decision in *In Re Uber Technologies, Inc. Securities Litigation*<sup>1</sup> is the second to find that an FFP is enforceable under California law, but the first to dismiss the Securities Act claims against *all* defendants, including the underwriters of Uber’s IPO who were not parties to the corporate charter. The decision signals a pattern of FFP enforcement that is a welcome development for corporations that have adopted FFPs to eliminate costly and often duplicative Securities Act litigation in state courts.

### **The Burden of State Court Securities Act Cases and the Adoption of FFPs**

As we have discussed [previously](#), the securities plaintiffs’ bar has significantly increased the number of Securities Act class actions filed in state courts since the Supreme Court determined that such claims are not removable to federal court in *Cyan, Inc. v. Beaver County Employees Retirement Fund*.<sup>2</sup> State courts are generally perceived as more favorable forums for plaintiffs due to more lenient pleading standards and, according to some courts, the lack of certain statutory protections for defendants. This phenomenon has increasingly forced companies to defend parallel, simultaneous lawsuits in both state and federal courts that cannot be consolidated or even coordinated, which increases the potential for inconsistent state holdings on federal securities laws issues and imposes substantial costs on companies. For example, in 2019, insurance premiums for companies going public more than doubled compared to 2018 when *Cyan* was decided.<sup>3</sup>

To counter the increase in state and multi-jurisdictional Securities Act claims, corporations began adopting FFPs in their charters. FFPs provide that federal district courts are the exclusive forum for any lawsuit brought against the corporation asserting claims under the Securities Act. In March 2020, the Delaware Supreme Court held in *Salzberg v. Sciabacucchi* that FFPs included in corporate charters are facially valid

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<sup>1</sup> No. CGC-19-579544, Order on Motion to Dismiss (Cal. Super. Ct. Nov. 16, 2020).

<sup>2</sup> 138 S. Ct. 1061 (2018).

<sup>3</sup> Nicki Locker & Laurie Smilan, *Carving Out IPO Protections*, Harvard Law School Forum on Corporate Governance (Feb. 25, 2020); Judy Greenwald, *Ruling Drives Up D&O Costs*, Business Insurance (Dec. 3, 2018).

under Section 102(b)(1) of the Delaware General Corporation Law.<sup>4</sup> In September 2020, in *Wong v. Restoration Robotics, Inc.*, a California state court became the first court in the country to dismiss claims brought under the Securities Act because the issuer's corporate charter contained an FFP.<sup>5</sup> (See our alert discussing the *Restoration Robotics* decision [here](#).) Significantly, although the court in *Restoration Robotics* dismissed claims against the issuer and its officers and directors, it did not dismiss claims against the underwriters of the company's IPO and certain venture capital defendants because they were neither parties nor signatories to the corporate charter containing the FFP.<sup>6</sup>

### **The California Superior Court Enforces an FFP as to All Defendants under California Law**

Following the decision in *Restoration Robotics*, on November 16, 2020, a second California state judge granted a motion to dismiss Securities Act claims in *Uber Technologies* based on an FFP in Uber's charter.<sup>7</sup> The FFP provided that federal courts "shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act."<sup>8</sup> The court first found that the FFP was valid under California law because it did not contravene the Securities Act's concurrent jurisdiction and anti-removal protections or the Supreme Court's decision in *Cyan*.<sup>9</sup> The court also determined that the FFP was enforceable under California law because plaintiffs knew or should have known when they purchased Uber stock that the company's charter—which was approved by shareholder vote—was binding on shareholders and required Securities Act claims to be litigated in federal court.<sup>10</sup> The court also found that the FFP was not substantively unconscionable because its purpose was to protect the corporation from spending time, money and effort defending competing lawsuits in state and federal court, and because the FFP did not eliminate the substantive protections provided by the Securities Act or create additional expense or inconvenience for shareholders.<sup>11</sup> Finally, because Uber's FFP applies to "any complaint" asserting Securities Act claims, the court dismissed "the entire complaint," including the claims "against the non-signatory Underwriter Defendants."<sup>12</sup>

<sup>4</sup> 2020 WL 1280785, at \*4.

<sup>5</sup> No. 18CIV02609, Order on Motion to Dismiss 31 (Cal. Super. Ct. Sept. 1, 2020).

<sup>6</sup> *Id.* at 2–3.

<sup>7</sup> No. CGC-19-579544, Order on Motion to Dismiss 14 (Cal. Super. Ct. Nov. 16, 2020).

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 10.

<sup>10</sup> *Id.* at 11.

<sup>11</sup> *Id.* at 13–14.

<sup>12</sup> *Id.* at 14.

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**Impact of the *Uber Technologies* Decision**

Together with *Restoration Robotics*, the *Uber Technologies* decision suggests that Delaware corporations should be able to rely on FFPs to avoid the risk and financial burden of litigating Securities Act claims in state courts or multiple jurisdictions. The decision also suggests that some state courts will be willing to enforce FFPs and dismiss Securities Act complaints in their entirety, including claims asserted against underwriters and other defendants who were not parties to the corporate charter. Corporations that anticipate going public should strongly consider adopting FFPs in their charters, and should consider drafting an FFP that broadly applies to “any complaint” arising under the Securities Act, like the FFP at issue in *Uber Technologies*. Companies that adopt FFPs should also bear in mind the factors cited favorably in *Uber Technologies* and *Restoration Robotics*, including that the FFPs at issue were approved by shareholders and did not restrict Securities Act claims to a particular federal venue.

While the pattern of California courts enforcing FFPs is encouraging, it remains to be seen whether courts outside of California will adopt the reasoning in *Restoration Robotics* and *Uber Technologies* and enforce FFPs, and whether other courts that do enforce FFPs will do so against non-signatories to a corporate charter. It is also unclear whether courts will enforce FFPs that are adopted without shareholder vote in a company’s bylaws. Nonetheless, *Uber Technologies* is a welcome victory for corporations—and IPO underwriters—and another key step in the path to restoring Securities Act lawsuits to federal courts and reducing litigation costs and insurance premiums.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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