

September 21, 2021

New York State Court Enforces Federal Forum Provision and Dismisses Securities Act Claims Against All Defendants—Including Underwriters

In the wake of the Supreme Court's holding in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, which held that state courts have concurrent jurisdiction over claims brought under the Securities Act of 1933 (the "Securities Act"), many corporations began adopting a federal forum provision ("FFP") in their charters, requiring Securities Act claims to be brought in federal court. Those charter provisions have been upheld in a number of California state courts. In a recent decision, a New York court for the first time reached the same conclusion.

On August 31, 2021, a New York State court dismissed claims brought under the Securities Act because the defendant-issuer's charter contained an FFP requiring Securities Act claims to be brought in federal court. The decision in *Hook v. Casa Systems, Inc.*¹ is the first in New York—and the first in any state court outside California—to enforce an FFP, and continues a pattern of FFP enforcement that bodes well for corporations that have adopted FFPs to avoid the risk and cost of duplicative Securities Act litigation in state courts. The decision is also notable because it dismissed the Securities Act claims as to *all* defendants, including the underwriters of Casa's IPO who were not parties to the corporate charter containing the FFP.

Federal Forum Provisions

An FFP provides that claims brought against the company under the Securities Act may only be brought in federal district courts. In March 2020, the Delaware Supreme Court held in *Salzberg v. Sciabacucchi* that FFPs included in corporate charters are facially valid under Delaware law.² Subsequently, several judges in California enforced FFPs and dismissed Securities Act claims improperly filed in state court, including in cases arising out of the IPOs of [Restoration Robotics](#), [Uber](#), [Dropbox](#),³ and [Sonim Technologies](#).⁴ These decisions all enforced FFPs based on application of California law, and it remained to be seen whether state courts outside California would similarly enforce such provisions.

The New York State Supreme Court Enforces an FFP as to All Defendants Under New York Law

On August 31, 2021, in *Casa*, Judge Margaret Chan of the New York State Supreme Court granted a motion to dismiss Securities Act claims arising out of the IPO of Casa Systems, Inc. ("Casa"), due to an FFP in Casa's charter.⁵ The FFP provided that "the

¹ No. 654548/2019, Order on Motion to Dismiss (N.Y. Sup. Ct. Sept. 12, 2021).

² 227 A.3d 102 (Del. 2020).

³ *In re Dropbox, Inc. Sec. Litig.*, No. 19CIV05089, Order on Motion to Dismiss (Cal. Super. Ct. Dec. 4, 2020).

⁴ *In re Sonim Tech., Inc. Sec. Litig.*, No. 19CIV05564, Order on Motion to Dismiss (Cal. Super. Ct. Dec. 7, 2020).

⁵ No. 654548/2019, Order on Motion to Dismiss (N.Y. Sup. Ct. Sept. 12, 2021).

federal district courts of the United States of America shall, to the fullest extent permitted by law, be the sole and exclusive forum for the resolution of any complaint asserting a cause of action under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring or holding any interest in shares of capital stock of the Corporation shall be deemed to have notice of [this provision].” The *Casa* court held that, if Delaware law applied (where Casa is chartered), the FFP was enforceable under the holding in *Salzberg*. The court further held that the outcome would not change if New York law were applied because a forum selection clause is presumptively valid under New York law absent proof that its enforcement would be unreasonable and unjust or that the clause is invalid due to fraud, and plaintiff made no such showing. The court also rejected plaintiff’s constitutional arguments, holding that the FFP did not violate the Supremacy Clause based on U.S. Supreme Court precedent, and that the Commerce Clause was not implicated because forum selection provisions are process-oriented and not substantive.

Significantly, the *Casa* court dismissed claims asserted against *all* defendants, including the IPO underwriters, explaining that under both Delaware and New York law “non-signatories may be bound by or enforce a forum selection clause.” The court also held that the plain language of Casa’s FFP applied to “any complaint asserting a cause of action arising under the Securities Act,” including against non-signatories.⁶

Impact of the *Casa* Decision

In 2020, 80% of state court Securities Act class actions were filed in New York or California.⁷ The decision in *Casa*, taken together with the prior decisions from California state courts, 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 reflects the growing consensus among state courts that FFPs can be enforced to dismiss claims against *all* defendants, including non-signatories to a company’s charter, like IPO underwriters. 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 *Casa*. Although certain issues surrounding FFPs remain unresolved—such as whether courts will enforce FFPs that are adopted without shareholder vote in a company’s bylaws—the growing trend of FFP enforcement is good news for corporations and represents a key step in the path to restoring Securities Act lawsuits to federal courts and reducing litigation costs and insurance premiums.

* * *

⁶ *Id.* at 6.

⁷ *Securities Class Action Filings: 2020 Year in Review*, Comerstone Research, at 4.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content.

Susanna M. Buerge
+1-212-373-3553
sbuerge@paulweiss.com

Geoffrey R. Chepiga
+1-212-373-3421
gchepiga@paulweiss.com

Andrew J. Ehrlich
+1-212-373-3166
aehrlich@paulweiss.com

Daniel J. Kramer
+1-212-373-3020
dkramer@paulweiss.com

Gregory F. Laufer
+1-212-373-3441
glaufer@paulweiss.com

Jane B. O'Brien
+1-202-223-7327
jobrien@paulweiss.com

Richard A. Rosen
+1-212-373-3305
rrosen@paulweiss.com

Audra J. Soloway
+1-212-373-3289
asoloway@paulweiss.com

Securities Litigation & Enforcement Practice Management Associate Daniel S. Sinnreich and Associate Eliza Strong contributed to this Client Alert.