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Wong v. Restoration Robotics: California Appellate Court Upholds Federal Forum Selection Provision for Securities Act Claims

On April 28, 2022, the Court of Appeals of California, First District, upheld a corporate charter provision requiring shareholders to file Securities Act of 1933 (“Securities Act”) lawsuits in federal court. This is the second appellate decision, in addition to a handful of trial court decisions,¹ supporting corporate charter federal forum selection provisions.

FEDERAL FORUM SELECTION PROVISIONS

The Securities Act allows plaintiffs the choice of filing in state court or federal court and bars removal to federal court if a state forum is chosen.² In passing the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), Congress amended the Securities Act to limit securities class actions under state law. However, in *Cyan Inc v. Beaver County Employees Retirement Fund*, the Supreme Court held that “SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations. Neither did SLUSA authorize removing such suits from state to federal court.”³

In the wake of this ruling and a proliferation of securities class actions filed in state courts, corporations responded by adopting federal forum selection provisions designating federal courts as the exclusive forums for Securities Act claims.

PROCEDURAL POSTURE

Restoration Robotics, incorporated in Delaware and headquartered in California, conducted an initial public offering in 2017. Attendant to that IPO, Restoration Robotics adopted an amended Certificate of Incorporation that provided that “Unless the Corporation consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of



1933, as amended. Any person or entity purchasing or otherwise acquiring any interest in any security of the Corporation shall be deemed to have notice of and consented to this Article VIII.”⁴ The putative class action, filed in 2017 by a shareholder, alleged that Restoration Robotics had failed to disclose material facts in violation of sections 11, 12(a)(2), and 15 of the Securities Act.⁵ The trial court initially denied Restoration Robotics’ motion to dismiss, following a Delaware Chancery Court’s ruling in *Sciabacucchi v. Salzberg* that found federal forum selection provisions to be facially invalid.⁶ However, Restoration Robotics filed a renewed motion to dismiss after *Salzberg* was reversed by the Delaware Supreme Court in 2018.⁷ That motion to dismiss was granted on *forum non conveniens* grounds, holding that the mandatory federal forum selection provision was valid and enforceable and, thus, California state courts did not have jurisdiction.⁸

OPINION

Following the trial court’s decision, the appeal was swift and vigorously argued. The shareholders argued that to enforce the federal forum selection provision violated the intent of the removal bar in section 77v(a) and the anti-waiver provision in section 77n of the Securities Act. The California appeals court rejected both arguments, finding that the text of these provisions did not expressly prohibit a federal forum selection provision that was enacted by Restoration Robotics’ board of directors and shareholders, and was disclosed to investors. Moreover, relying on *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (holding that a plaintiff’s decision to litigate Securities Act claims can be overridden by an arbitration provision), the appeals court reasoned that “[i]f, despite the grant of concurrent jurisdiction to state and federal courts in section 77v(a), 1933 Act claims can be adjudicated outside of any court by the terms of a forum selection provision that requires arbitration, we are hard pressed to see why the claims cannot be adjudicated in a federal court by the terms” of a federal forum selection provision.⁹ Similarly, in accordance with the holding of *Rodriguez*, the appeals court held that section 77n does not apply to the concurrent jurisdiction provision of the Securities Act and does not bar forum selection arrangements.¹⁰

The California appeals court also rejected shareholders’ Commerce Clause arguments, finding that there was no state action as is required to bring a Commerce Clause claim and that, even if there had been state action, performing a balancing test, any burden on interstate commerce is slight compared to the benefits provided by an agreed-upon litigation forum.¹¹ The appeals court likewise rejected the argument that Delaware’s consent to forum selection provisions is a violation of the Supremacy Clause.¹²

Finally, following the Delaware Supreme Court’s *Salzberg* decision, the Court found Restoration Robotics’ federal forum selection provision to be valid under Delaware law.¹³ And in response to shareholders’ argument that the forum selection provision was unenforceable because it violated investors’ reasonable expectations and was buried in 154 pages of disclosures, the appeals court reasoned that the “weakness of these arguments is reflected in [shareholders] failure to cite any case authority to support them. Forum selection clauses have long been in existence, and the fact that this one is innovative does not mean it is not binding.”¹⁴ Likewise, the appeals court rejected the argument that the federal forum selection provision was either procedurally or substantively unconscionable.¹⁵

IMPLICATIONS

The Court’s decision in *Restoration Robotics* should give comfort to corporations that have adopted federal forum selection provisions, as similar challenges in other forums are likely to be similarly decided. Indeed, since *Salzberg* was decided, no court has refused to enforce a federal forum selection provision.¹⁶ Moreover, this opinion gives thorough treatment to the most viable arguments to challenge federal forum selection provisions and rejects each one in turn, which will serve as persuasive precedent in other jurisdictions.



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¹ *Salzberg v. Sciabacucchi*, 227 A.3d 102, 115-123 (Del. 2020) (holding that federal forum provisions requiring claims brought under section 11 of the Securities Act to be litigated in federal court are facially valid under Delaware law); *In re Uber Technologies, Inc. Securities Litigation*, No. CGC-19-579544 (Cal. Super. Ct. Nov. 16, 2020); *In re Dropbox, Inc. Securities Litigation*, No. 19-CIV-05089 (Cal. Super. Ct. Dec. 4, 2020); *In re Sonim Technologies, Inc. Securities Litigation*, No. 19-CIV-05564 (Cal. Super. Ct. Dec. 7, 2020); *Volonte v. Domo, Inc.*, 2021 WL 1960296 (D. Utah Apr. 13, 2021); *Hook v. Casa Systems, Inc.*, 2021 WL 3884063 (N.Y. Sup. Ct. Aug. 30, 2021); *Panther Partners v. Casa Systems Inc., et. al.*, No. 654585/2019 (N.Y. Sup. Ct. Oct. 20, 2021); *Shen v. Casa Systems, Inc.*, 2020 WL 8839637 (Mass. Sup. Ct. Jan. 11, 2020).

² 15 U.S.C. § 77v(a).

³ *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1078 (2018).

⁴ *Wong v. Restoration Robotics, Inc.*, No. A161489, 2022 WL 1261423, at *2 (Cal. Ct. App. Apr. 28, 2022).

⁵ *Id.*

⁶ *Id.* at *3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at *5.

¹⁰ *Id.* at *6–7.

¹¹ *Id.* at *7–10.

¹² *Id.* at *10–13.

¹³ *Id.* at *13–14.

¹⁴ *Id.* at *14.

¹⁵ *Id.* at *16.

¹⁶ Brief for Chamber of Commerce of the United States of America as Amici Curiae Supporting Respondents, *Wong v. Restoration Robotics, Inc.*, 2022 WL 1261423, at *24.