FAQS RE: FFPS
FREQUENTLY ASKED QUESTIONS ABOUT FEDERAL FORUM PROVISIONS

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Federal Forum Provisions (FFPs) direct all Securities Act litigation filed in state court to federal court. Delaware's Supreme Court has ruled that FFPs are facially valid. To date, each state court that has addressed the merits of the question has enforced the FFP before it as lawful and reasonable.

Questions regarding FFP mechanics nonetheless abound, and this Article addresses the most common FAQs about FFPs. In particular, corporations should consider adopting an FFP now. Waiting has no benefit. Publicly traded corporations can most conveniently adopt an FFP in the form of a bylaw. Privately held entities face potential Securities Act liability in connection with registration violations and section 12(a)(2) liability and can adopt FFPs either as charter or bylaw provisions. We view the charter-bylaw distinction as a matter of close-to-indifference. It is also reasonable for corporations chartered outside of Delaware to adopt FFP provisions,

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inasmuch as most state courts draw substantial guidance from Delaware precedent.

A California trial court recently held that claims against underwriters were not covered by the FFP at issue in that matter. We disagree and welcome California Court of Appeals review of that issue. Other California trial courts have disagreed, as well, finding that substantially identical FFPs do apply to underwriters. However, an essentially costless revision of the form of FFP considered by the California trial courts would eliminate any risk, and we provide two alternative forms of FFP that achieve that result. Corporations with FFPs already in their charters can adopt an additional bylaw to address this risk, or they can amend their charters.

Some FFPs designate a specific federal district court, typically the district in which the corporate headquarters is located, as the venue in which litigation is to proceed. Arguably, federal law governing venue will likely cause the case to proceed in the headquarters district in any event, so companies considering specifying a certain federal district court in the FFP should weigh the risks and rewards of such a provision. For certain foreign issuers, designating a specific federal district court, such as the Southern District of New York, as the venue for all Securities Act claims can be sensible.

Large Securities Act liabilities often also arise in the context of registered debt offerings. Companies should therefore consider including FFPs in the indentures in debt offerings as well.

Jury trial waivers are common in depositary agreements and indentures. To avoid enforceability challenges based on these waivers, particularly in California, these agreements and indentures should either include a severability provision, or the corporation should be prepared, if necessary, to stipulate not to enforce the jury waiver in federal court when moving to enforce an FFP in California or in other states hostile to such waivers.

I. INTRODUCTION

In 2018, the United States Supreme Court in *Cyan, Inc. v. Beaver County Employees Retirement Fund* held that state courts have concurrent jurisdiction over putative class actions asserting claims pursuant to the Securities Act of 1933 (Securities Act),[1] and that those claims are not removable to

[1] 15 U.S.C. §§ 77a–77aa (2019).

federal court.[2] This seemingly technical point of procedure has profound implications for the conduct of Securities Act litigation on a national basis.

Cyan established that plaintiffs could file federal Securities Act claims in state court with no possibility of removal to federal court. Neutral principles, however, counsel that judicial resources are most efficiently allocated if claims are resolved by the forum that has a comparative advantage in addressing the underlying disputes. In general, state courts have a comparative advantage in resolving state law claims, and federal courts have a comparative advantage in resolving federal claims.[3] This principle is salient in federal Securities Act litigation. *Cyan*, however, precludes removal as the mechanism for causing Securities Act litigation to be resolved in federal court.

Cyan also gives plaintiffs license to file duplicative Securities Act class claims in federal and state court. This duplicative litigation imposes costs on corporate defendants that harm the very shareholders on whose behalf the lawsuits are purportedly filed. Such litigation also squanders judicial resources, as state and federal judges are called upon to adjudicate largely overlapping claims. In addition, unless the conflict is eliminated early in the proceedings, corporate defendants face the challenge of potentially conflicting state and federal court rulings.

The proliferation of duplicative state and federal court Securities Act litigation,[4] combined with the increase in federal Securities Act claims filed exclusively in state court,[5]

[2] Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061, 1066 (2018).

[3] *See, e.g.*, Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 VA. L. REV. 1769, 1774 (1992).

[4] *See* Michael Klausner, Jason Hegland, Carin LeVine & Jessica Shin, *State Section 11 Litigation in the Post-*Cyan *Environment (Despite* Sciabacucchi*)*, 75 BUS. LAW. 1769, 1775 fig.2 (2020) (calculating that the percentage of Securities Act cases that had concurrent filings in state and federal courts increased from seventeen percent to forty-nine percent after *Cyan*).

[5] *See id.* at 1775 figs.1 & 2.

led one of the authors of this article, Professor Grundfest, to propose that corporations adopt federal forum provisions (FFPs).[6] These provisions, which plaintiffs prefer to call "Grundfest Clauses,"[7] are adopted either as charter provisions or bylaws, and designate the federal courts as the exclusive forums for litigation arising under the Securities Act.[8] FFPs are based on the insight that, while *Cyan* precludes removal as a mechanism for shifting Securities Act litigation from state to federal court, *Cyan* does not preclude the adoption of forum selection provisions as a substitute mechanism for causing federal Securities Act claims to be heard in federal court.[9]

Requiring shareholders to file solely in a federal court avoids conflicting rulings, reduces litigation expense, and

6 Joseph A. Grundfest, The Rock Ctr. for Corp. Governance, Stanford L. Sch., Section 11 Forum Selection 6 (May 16, 2016) (on file with the Columbia Business Law Review).

7 Plaintiffs in *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020), and in every California state court opinion addressing the enforceability of FFPs, call FFPs Grundfest Clauses. *See, e.g.*, Plaintiffs' Opposition to Defendants' Motion To Dismiss at 9, *In re* Tintri, Inc. Sec. Litig., No. 17-CIV-04312 (Cal. Super. Ct. filed Sept. 20, 2017); Plaintiffs' Opposition to Defendants' Motion To Dismiss on the Ground of Inconvenient F. Pursuant to C.C.P. 418.10(A)(2) & 410.30 at 10, *In re* Uber Techs., Inc. Sec. Litig., No. CGC-19-579544 (Cal. Super. Ct. Nov. 16, 2020), *appeal dismissed* No. A161872 (Cal. Ct. App. Jan. 27, 2021) (mem.); Plaintiffs' Opposition to Defendants' Motion To Dismiss for F. Non Conveniens at 8, *In re* Dropbox, Inc. Sec. Litig., No. 19-CIV-05089 (Cal. Super. Ct. Dec. 4, 2020), *appeal docketed* No. A161603 (Cal. Ct. App. Dec. 18, 2020); Plaintiffs' Opposition to Defendants' Renewed Motion To Dismiss at 6, Wong v. Restoration Robotics, Inc., No. 18-CIV-02609, 2020 Cal. Super. LEXIS 227 (Cal. Super. Ct. Sept. 1, 2020), *appeal docketed* No. A161489 (Cal. Ct. App. Dec. 2, 2020); Plaintiffs' Memorandum of Points & Auths. in Opposition to the Arlo Defendants' Motion To Stay at 9, *In re* Arlo Techs., Inc. S'holder Litig., No. 18CV339231 (Cal. Super. Ct. filed Dec. 11, 2018); Plaintiffs' Opening Brief in Support of His Motion for Summary Judgment at 19, Sciabacucchi v. Salzberg, No. 2017-0931, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018), *rev'd*, 227 A.3d 102.

8 *See, e.g.*, Joseph A. Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and* Sciabacucchi, 75 BUS. LAW. 1319, 1322 (2019–20).

9 *See id.* at 1340.

promotes the efficiency of judicial administration. Thus, not surprisingly, companies conducting public securities offerings—especially initial public offerings (IPOs) that too often draw Securities Act litigation—began readily adopting FFPs in their governing documents.[10] Just as predictably, shareholder plaintiffs began challenging FFPs.[11]

This Article summarizes the litigation related to FFPs to date and describes how, since the Delaware Supreme Court held that FFPs are facially valid under the Delaware General Corporation Law, other state courts have enforced FFPs. In sum, as of the date of this Article, four state trial courts, all in California, have addressed the enforcement of FFPs on the merits. Those courts have unanimously concluded that FFPs are enforceable under California law.[12] The single trial court that has refused to enforce an FFP explained that defendants were late in filing their motion to dismiss and did not reach the merits of FFP enforceability under California law.[13] This Article then addresses certain frequently asked questions about how best to craft FFPs in light of these rulings, whether companies can broaden their use beyond charters and bylaws, and how FFPs interact with other frequently-used contract provisions that protect issuers against vexatious litigation.

[10] *See* Joseph A. Grundfest, *Federal Forum Provisions: Historical Development and Future Evolution* 13 (The Rock Ctr. for Corp. Governance, Stanford L. Sch., Working Paper No. 242, Dec. 2, 2019) (on file with the Columbia Business Law Review), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3497126; Dhruv Aggarwal, Albert H. Choi & Ofer Eldar, *Federal Forum Provisions and the Internal Affairs Doctrine*, 10 HARV. BUS. L. REV. 383, 386 (2020).

[11] *See, e.g.*, Aggarwal et al., *supra* note 10, at 386–87 (describing one such challenge); *supra* note 7 (collecting cases).

[12] *See infra* Section II.B. Since submission of this article, a Utah trial court has also enforced an FFP on grounds substantially similar to those cited by the California trial courts. *See generally* Volonte v. Domo, Inc., No. 190401778, 2021 WL 1960296 (Utah Dist. Ct. Apr. 13, 2021). The plaintiffs have appealed. Notice of Appeal – Civil (Not Interlocutory), Volonte v. Domo, Inc., No. 190401778, 2021 WL 1960296 (Utah Dist. Ct. Apr. 13, 2021).

[13] *See infra* note 29.

II. BACKGROUND ON FFP VALIDITY AND ENFORCEABILITY

A. FFPs Are Facially Valid for Delaware Corporations

The version of the FFP at issue in *Sciabacucchi*, and a form often used in charter and bylaw provisions, provides:

> Unless the Company 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. Any person or entity purchasing or otherwise acquiring any interest in any security of [the Company] shall be deemed to have notice of and consented to [this provision].[14]

In 2018, as companies increasingly adopted FFPs, stockholders of three Delaware-chartered corporations brought facial challenges to the validity of FFPs in the Delaware courts.[15] They argued that the Delaware statute governing the contents of charters of Delaware corporations did not permit FFPs.[16] Specifically, section 102(b)(1) of the Delaware General Corporation Law provides that Delaware corporations may adopt

> [a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders . . . if such provisions are not contrary to the laws of this State.[17]

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[14] *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 109 (Del. 2020) (alterations in original) (quoting Sciabacucchi v. Salzberg, No. 2017-0931, 2018 WL 6719718, at *6 (Del. Ch. Dec. 19, 2018), *rev'd*, 227 A.3d 102).

[15] *Id.*

[16] *Id.*

[17] DEL. CODE ANN. tit. 8, § 102(b)(1) (2021).

The stockholders argued that section 102(b)(1) permitted only provisions governing the "internal affairs" of the corporation—the rights of "stockholders *qua* stockholders" governed by Delaware law—and that Securities Act claims related to "external" matters—namely the disclosures of the corporation and its board of directors to would-be purchasers of its stock as required by federal law.[18] The Delaware Court of Chancery agreed and concluded that FFPs were facially invalid.[19]

The Delaware Supreme Court, however, reversed and concluded that FFPs were facially permissible under section 102(b)(1).[20] The court reasoned that section 102(b)(1) was not as limited as the chancery court had concluded and that FFPs fell within the statute's plain, broad language. Because FFPs involve Securities Act claims, they

> involve a type of securities claim related to the management of litigation arising out of the Board's disclosures to current and prospective stockholders in connection with an IPO or secondary offering. The drafting, reviewing, and filing of registration statements by a corporation and its directors [as required by the Securities Act] is an important aspect of a corporation's management of its business and affairs and of its relationship with its stockholders.[21]

Although the requirements for IPOs and secondary offerings and the "drafting, reviewing and filing of registration statements" are governed by federal, not Delaware, law, a provision "that seeks to regulate the forum in which such 'intra-corporate' litigation can occur is a provision that addresses the 'management of the business'

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[18] *Cf. Sciabacucchi*, 2018 WL 6719718, at *1 (internal quotation marks omitted) (quoting Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 952 (Del. Ch. 2013)) (summarizing and accepting this reasoning without directly attributing it to plaintiffs).

[19] *Id.* at *3.

[20] Salzberg v. Sciabacucchi, 227 A.3d 102, 109 (Del. 2020).

[21] *Id.* at 114; *see also id.* at 125–26 (rejecting the chancery court's "narrow[ing] [of] the definition of 'internal affairs'").

and the 'conduct of the affairs of the corporation'" within the meaning of section 102(b)(1).[22]

The court rejected plaintiffs' argument that FFPs ran afoul of the federal policy permitting Securities Act claims to be brought in either state or federal courts. Among other things, the court observed that the United States Supreme Court, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, had "upheld an arbitration provision in a brokerage firm's standard customer agreement" requiring arbitration of Securities Act claims, thereby establishing that "federal law has no objection to provisions that preclude state litigation of Securities Act claims."[23] The court explained:

> In enforcing the provision, the [Supreme] Court described it as "in effect, a specialized kind of forum selection clause" that "should not be prohibited under the Securities Act, since they, like the provision for concurrent jurisdiction [of federal and state courts], serve to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise."[24]

This was "forceful support for the notion that FFPs do not violate federal policy by narrowing the forum alternatives available under the Securities Act."[25]

The *Salzberg* court further reasoned that federal law generally treats forum selection clauses as valid and "only den[ies] enforcement of them to the limited extent necessary to avoid some fundamentally inequitable result or a result contrary to positive law."[26] It concluded that "[t]he logic underlying the validity of traditional contractual forum-

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[22] *Id.* at 114 (quoting tit. 8, § 102(b)(1)).

[23] *Id.* at 132 (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 482–83 (1989)).

[24] *Id.* (second alteration in original) (quoting *Rodriguez de Quijas*, 490 U.S. at 482–83).

[25] *Id.*

[26] *Id.* (internal quotation marks omitted) (quoting Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 949 (Del. Ch. 2013)).

selection clauses has some force in this stockholder-approved charter context."[27]

While the Delaware Supreme Court found FFPs valid *on their face* under the Delaware General Corporation Law,[28] Delaware's sister states would have to decide whether to enforce FFPs on an *as-applied* basis.

B. State Courts Have, to Date, Enforced FFPs as Applied

Since the Delaware Supreme Court affirmed the facial validity of FFPs, corporations with FFPs in their governing documents have sought to enforce those FFPs in state court actions asserting Securities Act claims. Stockholder plaintiffs have disputed such enforcement. To date, four decided cases, all in California state courts, address FFP enforceability on the merits. As noted above, one Utah state court has likewise issued a decision on the merits, reasoning similarly to the California courts discussed herein. All conclude that FFPs are enforceable. In one instance, a California court did not enforce an FFP exclusively because the defendant was tardy in filing its motion to dismiss.[29] That court expressed no view as to the enforceability of FFPs.

[27] *Id.* at 133.

[28] *Id.* at 131–32.

[29] On December 11, 2020, a judge of the San Mateo County Superior Court denied a motion to dismiss based on an FFP in *In re Tintri, Inc. Securities Litigation*. Order Denying the Tintri Defendants' Motion To Dismiss at 1, *In re* Tintri, Inc. Sec. Litig., No. 17-CIV-04312 (Cal. Super. Ct. filed Sept. 20, 2017). However, in doing so, the court did not conclude that the FFP was invalid or otherwise unenforceable. Instead, the court concluded that the defendants waived their right to enforce it by waiting too long to bring their motion. *Id.* at 7. The *Tintri* decision thus reinforces the need to act promptly to enforce an FFP once a Securities Act complaint is filed in state court.

1. *Wong v. Restoration Robotics*

The first decision to enforce an FFP in a charter came on September 1, 2020, in *Wong v. Restoration Robotics, Inc.*[30] When considering whether to enforce the FFP at issue, the San Mateo County Superior Court applied California law governing the enforcement of mandatory contractual forum selection clauses.[31] Under this legal rubric, courts are required to enforce a forum selection clause unless the plaintiff shows the clause is unreasonable or unconscionable.[32] While the court concluded that the FFP was "procedurally unconscionable" because the charter was an "adhesion 'contract'" to investors in Restoration Robotics' IPO, and because the FFP was "buried in a prolix printed form" in the company's offering documents, the FFP was not substantively unconscionable.[33] Rather, the FFP protected the corporation, its directors, and its officers from duplicative state and federal litigation, and it did not impair the plaintiffs' substantive rights.[34] The plaintiffs could assert the federal securities claim in federal court in the same manner they could have asserted the same claim in state court, and the federal court would protect the plaintiffs' rights under the Securities Act just as any state court would.[35]

The court rejected the plaintiffs' various arguments that the FFP violated federal or state law. For example, it rejected the claim that the FFP was somehow "unconstitutional under the Commerce Clause and under the Supremacy Clause of the U.S. constitution," concluding that such arguments were better brought as a "declaratory relief action in federal court" rather than raised in opposition to a motion to dismiss for forum non conveniens.[36]

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30 No. 18-CIV-02609, 2020 Cal. Super. LEXIS 227 (Sept. 1, 2020), *appeal docketed* No. A161489 (Cal. Ct. App. Dec. 2, 2020).

31 *See id.* at *26–28.

32 *Id.* at *56–57.

33 *Id.* at *35–38.

34 *Id.* at *37–38.

35 *Id.*

36 *Id.* at *49–51.

Moreover, section 14 of the Securities Act provides: "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the [Securities and Exchange] Commission shall be void."[37] The plaintiffs argued that the FFP violated section 14 by requiring a stockholder to waive his or her right under section 22 of the Securities Act to bring a suit in state court.[38] The *Restoration Robotics* court also rejected this argument. The only authority the plaintiffs cited for it was *Wilko v. Swan*, in which the United States Supreme Court held that section 14 forbade waivers of both the substantive requirements of the Securities Act and its procedural provisions, such as concurrent state and federal jurisdiction.[39] However, the Supreme Court expressly overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, when it concluded, in the context of enforcing an arbitration provision, that the concurrent state and federal jurisdiction provision in the Securities Act could be waived.[40] Given the ruling in *Rodriguez de Quijas*, the plaintiffs did not meet their burden to show "state [court] jurisdiction is 'unwaivable' under the

[37] 15 U.S.C. § 77n (2019).

[38] *Restoration Robotics*, 2020 Cal. Super. LEXIS 227, at *52. Section 22 gives federal district courts jurisdiction, "concurrent with State . . . courts, except as [to certain class actions], of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." 15 U.S.C. § 77v(a).

[39] *See Restoration Robotics*, 2020 Cal. Super. LEXIS 227, at *52; Wilko v. Swan, 346 U.S. 427, 434–35 (1953) ("[T]he right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act." (quoting 15 U.S.C. § 77n (1952))), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

[40] *Rodriguez de Quijas*, 490 U.S. at 481 ("Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that § 14 is properly construed to bar any waiver of these provisions."), *overruling Wilko*, 346 U.S. 427; *see also Restoration Robotics*, 2020 Cal. Super. LEXIS 227, at *52–53 (finding that *Rodriguez de Quijas* precluded application of *Wilko*).

federal Securities Act."[41] The plaintiffs filed a notice of appeal on November 23, 2020.[42]

While the court enforced the FFP as to the company, it denied without prejudice the joinder of the underwriter and venture capital defendants, concluding that they failed to show on the record before the court that they were entitled to enforce the FFP as to the claims against them.[43] On October 2, 2020, the underwriters and venture capital defendants filed renewed motions to dismiss, arguing, among other things, that (1) "the plain language of the FFP," applying to "any complaint asserting a cause of action . . . under the Securities Act of 1933," made the FFP applicable to them;[44] (2) the venture capital investors, as stockholders of the company, were "parties to the intra-corporate contract containing the FFP";[45] (3) California law does not limit the enforcement of forum selection clauses to "parties/signatories to the agreement containing the clause" but also permits enforcement by those who are "closely related to the transaction giving rise to enforcement of the" FFP or are third-party beneficiaries;[46] and that (4) failure to enforce the FFP "would deprive Restoration Robotics of the purpose and benefit of such a provision, *i.e.*, to avoid unnecessary and duplicative costs in multiple actions, to prevent waste of

41 *Restoration Robotics*, 2020 Cal. Super. LEXIS 227, at *53.

42 Notice of Appeal/Cross-Appeal (Unlimited Civil Case) at 1, Wong v. Restoration Robotics, Inc., No. 18-CIV-02609, 2020 Cal. Super. LEXIS 227 (Cal. Super. Ct. Sept. 1, 2020), *appeal docketed* No. A161489 (Cal. Ct. App. Dec. 2, 2020).

43 *Restoration Robotics*, 2020 Cal. Super. LEXIS 227, at *2.

44 *See* Underwriter Defendants' & Venture Cap. Defendants' Joint Notice of Motion and Renewed Motion To Dismiss Plaintiffs' Complaint Pursuant to CCP §§ 1008(b) & 410.30 & Memorandum of Points & Auths. in Support Thereof at 9, Wong v. Restoration Robotics, Inc., No. 18-CIV-02609, 2020 Cal. Super. LEXIS 227 (Cal. Super. Ct. Sept. 1, 2020) (emphasis omitted), *appeal docketed* No. A161489 (Cal. Ct. App. Dec. 2, 2020).

45 *See id.*.

46 *See id.* at 9–10, 19 (first citing Lu v. Dryclean-U.S.A. of Cal., Inc., 11 Cal. App. 4th 1490, 1494 (Cal. Ct. App. 1992); and then citing Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 (9th Cir. 1988)).

judicial and party resources, and to preclude inconsistent judgments, among others."[47]

On February 3, 2021, the court granted the motion as to the venture capital defendants, concluding that, as stockholders of Restoration Robotics sued "in their capacity as and [in connection with] their conduct as controlling shareholders," they were parties to the certificate of incorporation entitled to enforce its provisions.[48]

However, as to the underwriter defendants, the court denied the motion. In doing so, the court did not consider the plain language of the FFP independently or address the underwriters' argument that the plain language required the plaintiffs to litigate claims against them in federal court.[49] Instead, the court reasoned that the underwriters were not parties to the certificate of incorporation and had failed to show that they were intended third-party beneficiaries of the certificate of incorporation.[50] Concluding that it should look at the certificate of incorporation as a whole and not "only the two-sentence long FFP," the court stated that

> a reading of the [certificate of incorporation] reflects that it was *not* made for the benefit of the Underwriters—it was made for the benefit of the corporation and its officers and directors—and perhaps its shareholders. The Underwriter Defendants are not mentioned at all in the Certificate of Incorporation.[51]

The court rejected the argument that the underwriters were closely related to the contract—and therefore able to enforce the FFP—because they were parties to the transactions giving rise to the Securities Act claims covered

47 *Id.* at 10.

48 Case Mgmt. Ord. #12, at 2, Wong v. Restoration Robotics, Inc., No. 18-CIV-02609, 2020 Cal. Super. LEXIS 227 (Cal. Super. Ct. Sept. 1, 2020) (emphasis omitted), *appeal docketed* No. A161489 (Cal. Ct. App. Dec. 2, 2020).

49 The court treated the FFP language only superficially and only as an element of its third-party beneficiary analysis. *See id.* at 5–7.

50 *Id.* at 3.

51 *Id.* at 5–6.

by the FFP. The court reasoned that the underwriters were not "closely related" to the certificate of incorporation as a whole or to the parties to the litigation outside the context of the litigation, that "Plaintiffs' claims are *not* based upon contract," and that "Plaintiffs' claims against the Underwriter Defendants do not arise from the Certificate of Incorporation."[52] The court did not explain why these considerations were relevant given that, by its plain language, the FFP did not require the plaintiff to assert contract claims or claims arising out of the Certificate of Incorporation for the FFP to apply.[53]

The court denied the underwriters' motion to stay the case while a related federal action proceeded.[54] The court did not address the inefficiencies and potential for conflicting rulings or judgments created by requiring underwriters to defend claims in state court while all other parties to the exact same claims litigated in federal court. Nor did the court consider the extra costs its ruling could impose on companies that adopt FFPs precisely to avoid duplicative litigation in state and federal courts. Companies are typically contractually obligated to indemnify their underwriters for costs related to claims arising under the Securities Act.[55] Requiring the underwriters to defend the claims in an entirely separate proceeding from the company would reduce the opportunity for coordination and multiply the defense costs ultimately borne by the company. These considerations did not appear to figure into the court's analysis.

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[52] *Id*. at 11.

[53] *See* Defendants' Notice of Motion & Motion To Dismiss Plaintiff's Complaint for Violations of the Fed. Sec. L., or in the Alt., To Stay at 1, Wong v. Restoration Robotics, Inc., No. 18-CIV-02609, 2020 Cal. Super. LEXIS 227 (Cal. Super. Ct. Sept. 1, 2020) (setting forth the FFP), *appeal docketed* No. A161489 (Cal. Ct. App. Dec. 2, 2020).

[54] Case Mgmt. Ord. #12, *supra* note 48, at 3.

[55] *See* Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L.Q. 491, 519–20 (2001); Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 370–73 (2013) (discussing common indemnity arrangements between issuers and underwriters).

2. *In re Uber Technologies, Inc. Securities Litigation*

Six weeks after the decision in *Restoration Robotics*, the San Francisco County Superior Court in *In re Uber Technologies, Inc. Securities Litigation* likewise applied California law to enforce an FFP in a charter.[56] The court employed largely the same reasoning as employed in *Restoration Robotics*, except that the court concluded that the underwriter defendants plainly could enforce the FFP. The FFP applied "broadly . . . to '*any complaint* asserting a cause of action . . . under the Securities Act,'" without excluding defendants who were "non-signator[ies]" to the charter.[57] The court concluded, "To hold otherwise would be to permit a plaintiff to sidestep a valid forum selection clause."[58] The plaintiff filed a notice of appeal on December 16, 2020.[59]

3. *In re Dropbox, Inc. Securities Litigation* and *In re Sonim Techs., Inc., Securities Litigation*

Next, on December 4, 2020, the San Mateo County Superior Court, in *In re Dropbox, Inc. Securities Litigation*, addressed an FFP in a company's bylaws, as opposed to its charter.[60] The court enforced the clause, including as to the underwriter defendants, based on its plain language.[61] First,

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[56] *In re* Uber Techs., Inc. Sec. Litig., No. CGC-19-579544, at 14 (Cal. Super. Ct. Nov. 16, 2020), *appeal dismissed* No. A161872 (Cal. Ct. App. Jan. 27, 2021) (mem.).

[57] *Id.* (quoting Declaration of Emily V. Griffen in Support of Defendants' Motion To Dismiss on the Ground of Inconvenient F. Pursuant to C.C.P. 418.10(A)(2) & 410.30 at 81, *In re* Uber Techs., Inc. Sec. Litig., No. CGC-19-579544, at 14 (Cal. Super. Ct. Nov. 16, 2020), *appeal docketed* No. A161872 (Cal. Ct. App. Jan. 27, 2021)).

[58] *Id.* (internal quotation marks omitted) (quoting Lu v. Drycleaner-U.S.A. of Cal., Inc., 11 Cal. App. 4th 1490, 1494 (Cal. Ct. App. 1992)).

[59] Notice of Appeal/Cross-Appeal (Unlimited Civil Case) at 1, *In re* Uber Techs., Inc. Sec. Litig., No. CGC-19-579544, at 14 (Cal. Super. Ct. Nov. 16, 2020), *appeal dismissed* No. A161872 (Cal. Ct. App. Jan. 27, 2021) (mem.).

[60] *In re* Dropbox, Inc. Sec. Litig., No. 19-CIV-05089, at 2 (Cal. Super. Ct. Dec. 4, 2020), *appeal docketed* No. A161603 (Cal. Ct. App. Dec. 18, 2020).

[61] *See generally id.*

as did the court in *Restoration Robotics*, the court concluded that the FFP did not violate section 14 of the Securities Act, which forbids agreements to waive compliance with the Securities Act. [62] The court reasoned that in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the United States Supreme Court held that "[t]here is no sound basis for construing the prohibition in [the Securities Act's anti-waiver provision] on waiving 'compliance with any provision' of the Securities Act to apply to these procedural provisions."[63] Thus, the *Dropbox* court reasoned, "[t]he analysis in *Rodriguez* compels a conclusion in this context that a party may waive the right to have an action decided in state court and instead may agree to have cases decided exclusively in federal court."[64]

Second, the court concluded that the plaintiffs had not met their burden of showing that the FFP was "unfair or unreasonable."[65] While the bylaws were an adhesion contract, which established "some degree of procedural unconscionability," the "Plaintiffs fail[ed] to introduce any evidence that the FFP was outside their reasonable expectations."[66] No facts "demonstrate[d] that the federal courts will diminish Plaintiffs' substantive rights."[67]

The court further observed that California courts had upheld "far more limiting" forum selection provisions in "non-negotiated contract[s] of adhesion," including one that designated a single federal district court as the proper venue.[68] In contrast, "Dropbox's FFP selects *any* suitable

[62] *Id.* at 5–7.

[63] *Id.* at 5–6 (second alteration in original) (emphasis omitted) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481–82 (1989)).

[64] *Id.* at 6.

[65] *Id.* at 11.

[66] *Id.* at 14 (citing Sanchez v. Valencia Holding Co., 61 Cal. 4th 899, 915 (2015)).

[67] *Id.* at 11.

[68] *Id.* at 8 n.6 (citing Korman v. Princess Cruise Lines, Ltd., 32 Cal. App. 5th 206, 210, 217 (2019)).

federal court for Securities Act claims."[69] The court concluded that the law was the same regardless of whether the FFP was in a corporate charter or the bylaws.[70] By purchasing Dropbox stock, the plaintiffs agreed to be bound by the bylaw.[71] The plaintiffs filed a notice of appeal on December 15, 2020.[72]

Finally, on December 7, 2020, the same judge who decided *Dropbox* issued an order in *In re Sonim Technologies, Inc., Securities Litigation.*[73] In enforcing the FFP in that matter, the judge simply incorporated by reference her order from *Dropbox*.[74]

To the extent that they enforced the FFPs, each of these courts reached the correct conclusion. However, dicta in these cases may warrant further discussion. For example, each court examined whether Delaware or California law applied to the question of the FFP's enforceability.[75] Arguably, pursuant to the internal affairs doctrine, Delaware law should apply. The internal affairs doctrine requires courts to apply the law of the state of incorporation to "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."[76] A lawsuit challenging the representations of officers and directors to stockholders arguably falls within the plain definition of "internal affairs": it is "peculiar" to the relationships among the corporation, its officers and directors, and its stockholders.[77] So too is the question of whether to enforce a

69 *Id.*

70 *Id.* at 11 n.8.

71 *Id.* at 11–12.

72 Notice of Appeal/Cross-Appeal (Unlimited Civil Case) at 1, *In re* Dropbox, Inc. Sec. Litig., No. 19-CIV-05089 (Cal. Super. Ct. Dec. 4, 2020), *appeal docketed* No. A161603 (Cal. Ct. App. Dec. 18, 2020).

73 No. 19-CIV-05564 (Cal. Super. Ct. Dec. 7, 2020).

74 *Id.* at 2.

75 *See, e.g.*, *Dropbox*, No. 19-CIV-05089, at 4–5.

76 Edgar v. MITE Corp., 457 U.S. 624, 645 (1982); *see also* McDermott Inc. v. Lewis, 531 A.2d 206, 214 (Del. 1987) (similar).

77 *See* Grundfest, *supra* note 8, at 1328–29. While the plain language defining "internal affairs" encompasses Securities Act claims, it is not clear that the Delaware Supreme Court would conclude that Securities Act claims fall within that language. No party in *Salzberg* argued that Securities Act

corporate charter or bylaw adopted pursuant to Delaware law and governing a suit among the corporation, its officers and directors, and its stockholders. However, each of the courts decided to apply California law. The courts in *Restoration Robotics* and *Uber* each concluded that the internal affairs doctrine did not apply because the Securities Act claim did not address "internal affairs" but "intracorporate affairs."[78] The *Dropbox* court decided it was not necessary to reach the question because "California and United States Supreme Court authority" supported enforcement of the FFP in any event.[79]

Additionally, each court addressed whether the FFP was procedurally unconscionable and found a degree of procedural unconscionability because the FFP was one-sided or was somehow "buried" within the company's "prolix" registration statement.[80] Certain amici in the *Dropbox* matter even contended that the mutual assent needed to form a contract was lacking because stockholders were unlikely to read the bylaws among the "hundreds of pages of exhibits" attached to the registration statement.[81]

claims were "internal affairs" claims, and, as such, the Court did not directly address the question. *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 120 n.79 (Del. 2020). However, it appears that the court indirectly rejected the "internal affairs" characterization because Securities Act claims arise under federal law and do not necessarily implicate claims arising under the Delaware General Corporation Law or the Delaware common law of fiduciary duties. *See id.*

78 *See* Wong v. Restoration Robotics, Inc., No. 18-CIV-02609, 2020 Cal. Super. LEXIS 227, at *27 (Cal. Super. Ct. Sept. 1, 2020) (stating that Securities Act claims are an "intracorporate affair," not an "internal affair," under *Salzberg*), *appeal docketed* No. A161489 (Cal. Ct. App. Dec. 2, 2020); *In re* Uber Techs., Inc. Sec. Litig., No. CGC-19-579544, at 5 (Cal. Super. Ct. Nov. 16, 2020) (same), *appeal dismissed* No. A161872 (Cal. Ct. App. Jan. 27, 2021) (mem.).

79 *Dropbox*, No. 19-CIV-05089, at 4–5.

80 *See Restoration Robotics*, 2020 Cal. Super LEXIS 227, at *35–36; *Uber*, No. CGC-19-579544, at 12–13; *Dropbox*, No. 19-CIV-05089, at 14.

81 Amicus Brief of Former SEC Chairman Harvey L. Pitt & Twenty L. Professors in Support of Opposition to Motion To Dismiss for F. Non Conveniens at 21, *In re* Dropbox, Inc. Sec. Litig., No. 19-CIV-05089 (Cal.

However, in each instance, the FFP—and the charter and bylaws more generally—were adopted in accordance with Delaware law and presented in accordance with Securities and Exchange Commission regulations for offering documents.[82] The argument that this Delaware- and SEC-sanctioned presentation of the FFP to investors is procedurally unconscionable or renders the bylaws unenforceable could apply to *any* charter or bylaw provision adopted according to Delaware law and—if disclosure is required—filed in accordance with SEC rules, including provisions governing the election of directors, stockholder meetings and stockholder votes, indemnification of directors, and many other corporate functions. Therefore, it could mean that every routinely-enforced charter or bylaw of every publicly traded corporation is unenforceable in California. If this were the law, it would make corporate governance unmanageable.

Appeals have been filed in *Restoration Robotics*,[83] *Uber*,[84] and *Dropbox*,[85] but it will likely be months before the California Court of Appeal hears these issues.[86]

Super. Ct. Dec. 4, 2020), *appeal docketed* No. A161603 (Cal. Ct. App. Dec. 18, 2020).

[82] *See, e.g.*, 17 C.F.R. § 229.601 (2021) (describing how exhibits, including charters and bylaws, should be submitted with registration statements); *id.* §§ 229.10–.1406 (regulating the filing of forms under the Securities Act and other statutes); U.S. SEC. & EXCH. COMM'N, FORM S-1 (2021), https://www.sec.ogv/files/forms-1.pdf [https://perma.cc/3ZCF-GQCQ].

[83] Notice of Appeal/Cross-Appeal (Unlimited Civil Case), *supra* note 42, at 1.

[84] Notice of Appeal/Cross-Appeal (Unlimited Civil Case), *supra* note 59, at 1.

[85] Notice of Appeal/Cross-Appeal (Unlimited Civil Case), *supra* note 72, at 1.

[86] Plaintiffs in the *Sonim* matter have waived their right to appeal. Joint Stipulation & Ord. Regarding Plaintiffs' Waiver of Appeal & Defendants' Waiver of Costs at 1, *In re* Sonim Techs., Inc., Sec. Litig., No. 19-CIV-05564 (Cal. Super. Ct. Dec. 7, 2020).

III. FREQUENTLY ASKED QUESTIONS REGARDING FFPS

The rulings to date have raised among corporations and their counsel certain frequently asked questions about how best to craft FFPs, whether companies can broaden their use beyond charters and bylaws, and how they may interact with other frequently-used contract provisions that protect issuers against vexatious litigation. The remainder of this Article addresses these frequently asked questions.

A. Should Corporations Explicitly State in Their FFPs That the Provision Applies to Parties Who Are Frequently Sued Along with the Corporation, Such as Underwriters, Providers of Venture Capital, and Auditors?

The current standard language is, we believe, unambiguous and broad enough to encompass all parties to the litigation. As for providers of venture capital, they often become parties to the charter or bylaw by virtue of the equity interests they take in the company, which are reason enough to permit them to enforce the FFP.[87] As for non-parties such as underwriters and auditors, as the *Uber* court observed, the standard FFP states that "*any complaint* asserting a cause of action arising under the Securities Act of 1933" must be brought in federal court, which necessarily includes all parties named in the complaint.[88] As a matter of efficiency, it only makes sense to enforce the FFP as to all defendants rather than splitting up the case.

However, the court in *Restoration Robotics* nevertheless denied the underwriters' motion to enforce without

[87] For arguments venture capital defendants have made for enforcement, see *supra* notes 44–47 and accompanying text.

[88] *In re* Uber Techs., Inc. Sec. Litig., No. CGC-19-579544, at 14 (Cal. Super. Ct. Nov. 16, 2020) (internal quotation marks omitted) (quoting Declaration of Emily V. Griffen in Support of Defendants' Motion To Dismiss on the Ground of Inconvenient F. Pursuant to C.C.P. 418.10(A)(2) & 410.30, *supra* note 57, at 81), *appeal dismissed* No. A161872 (Cal. Ct. App. Jan. 27, 2021) (mem.).

considering the plain language of the FFP except to say that the certificate of incorporation as a whole did not specifically mention the underwriters.[89] While we believe that this question was wrongly decided in *Restoration Robotics*, we recognize that there is an easy drafting fix that should take the question off the table even under the logic of that opinion. In particular, to remove all possible doubt, companies might consider including language along the following lines:

> Unless the Company 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 *against any person in connection with any offering of the Company's securities, including, without limitation and for the avoidance of doubt, any auditor, underwriter, expert, control person, or other defendant.* Any person or entity purchasing or otherwise acquiring any interest in any security of the Company shall be deemed to have notice of and consented to this Provision. *This Provision shall be enforceable by any party to a complaint covered by this Provision.*[90]

An alternative approach is:

> Unless the Company 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, *regardless of whether such complaint also involves parties other than the Company (including, but not limited to, any*

[89] Wong v. Restoration Robotics, Inc., No. 18-CIV-02609, 2020 Cal. Super. LEXIS 227, at *2 (Cal. Super. Ct. Sept. 1, 2020), *appeal docketed* No. A161489 (Cal. Ct. App. Dec. 2, 2020).

[90] The emphasis indicates nontrivial alterations to the standard FFP. *See, e.g.*, *id.* at *38 (giving a standard provision); Salzberg v. Sciabacucchi, 227 A.3d 102, 109 (Del. 2020) (quoting Sciabacucchi v. Salzberg, No. 2017-0931, 2018 WL 6719718, at *6 (Del. Ch. Dec. 19, 2018), *rev'd*, 227 A.3d 102) (same).

> *underwriters or auditors retained by the Company).* Any person or entity purchasing or otherwise acquiring any interest in any security of the Company shall be deemed to have notice of and consented to this Provision. *This Provision shall be enforceable by any party to a complaint covered by this Provision.*

Either iteration addresses a non-existent ambiguity and resolves the supposed issue by clearly encompassing underwriters, auditors, venture capital investors, and others within the scope of the FFP's coverage. For those who prefer a "belt and suspenders" approach—notwithstanding that it should not be necessary—there does not appear to be much harm in including the language. Also, as explained below, companies with FFPs in their charters that do not include this language can incorporate this new language, if they choose to, through the adoption or amendment of an FFP bylaw.

B. Should an FFP Not Just Designate Federal Court, but a Particular Federal Court Venue?

Some companies have designated their home forum as the appropriate federal court for Securities Act claims. For example, Galecto, Inc.—as reflected in Amended and Restated Bylaws filed in connection with an October 22, 2020 Form S-1/A amendment to an October 7, 2020 registration statement—included a bylaw that provided:

> [u]nless the Corporation consents in writing to the selection of an alternative forum, to the fullest extent permitted by law, the United States District Court for the District of Delaware shall be the sole and exclusive forum for resolving any complaint asserting a cause of action arising under the Securities Act of 1933, as amended.[91]

Galecto, Inc. is a Delaware corporation with its headquarters in Copenhagen, Denmark.[92]

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91 Galecto, Inc., Amendment No. 1 to Form S-1 Registration Statement (Form S-1/A), at exhibit 3.5, art. VI, § 8 (Oct. 22, 2020).

92 *Id.* at 5.

For a further example, the Amended and Restated Bylaws of Pliant Therapeutics, Inc., filed in connection with a May 26, 2020 Form S-1/A amendment to a May 11, 2020 registration statement, provided, "unless the Corporation consents in writing to the selection of an alternative forum, the United States District Court for the Northern District of California shall be the sole and exclusive forum for resolving any action asserting a claim arising under the Securities Act."[93] Pliant Therapeutics, Inc. is a Delaware corporation based in South San Francisco, California.[94] Other companies have included similar bylaw provisions designating their home forums.[95]

Limiting suits to a company's home forum(s) should be reasonable. After all, it is reasonable for corporations to be sued where they are headquartered or incorporated, and shareholders should not claim burden if asked to file suit in the state where the company in which they have invested is located or incorporated.

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[93] Pliant Therapeutics, Inc., Amendment No. 1 to Form S-1 Registration Statement (Form S-1/A), at exhibit 3.4, art. VI, § 8 (May 26, 2020).

[94] *Id.* at 7.

[95] *See, e.g.*, Alfi, Inc., Amendment No. 1 to Form S-1 Registration Statement (Form S-1/A), at exhibit 3.4, art. VII, § 7.06(b) (Feb. 9, 2021) (providing, for a Delaware corporation based in Miami Beach, Florida, "[u]nless the Corporation consents in writing to the selection of an alternative forum, the federal district courts of the United States of America located in the Southern District of Florida shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933"); Checkmate Pharms., Inc., Amendment No. 1 to Form S-1 Registration Statement (Form S-1/A), at exhibit 3.4, art. VI, § 8 (Aug. 3, 2020) (providing, for a Delaware corporation based in Cambridge, Massachusetts, "[u]nless the Corporation consents in writing to the selection of an alternate forum, the United Stated District Court for the District of Massachusetts shall be the sole and exclusive forum for resolving any complaint asserting a cause of action arising under the Securities Act"); Aptinyx Inc., Amendment No. 1 to Form S-1 Registration Statement (Form S-1/A), at exhibit 3.5, art. 6, § 6.8 (June 11, 2018) (providing, for a Delaware corporation based in Evanston, Illinois, "[u]nless the Corporation consents in writing to the selection of an alternative forum, the United States District Court for the Northern District of Illinois shall be the sole and exclusive forum for resolving any complaint asserting a cause of action arising under the Securities Act of 1933, as amended").

At the same time, to the extent that the FFP limits a plaintiff's choice of venue, it introduces incremental risk based on some of the recent case law, although we view that risk as small. Each of the courts that has enforced an FFP noted that the clause did not introduce any inconvenience to the plaintiff because the FFP permitted the plaintiff to select the venue.[96] If an FFP restricts the plaintiff's choice of venue, even to the company's home venue, shareholder plaintiffs may argue increased inconvenience. Further, Institutional Shareholder Services (ISS) has recommended in its most recent Proxy Voting Guidelines that stockholders vote for an FFP that permits suit in "the district courts of the United States," but that stockholders "[v]ote against provisions that restrict the forum to a particular federal district court."[97]

Ultimately, designating a corporation's home venue in an FFP may be unnecessary given the availability of venue transfer provisions under federal law. Venue statutes, including those governing venue for Securities Act claims and permitting transfer for the convenience of the parties and witnesses, often provide a basis for making the company's home forum the proper venue for a lawsuit in the absence of a specific designation in an FFP.[98] Companies would have to

96 *See* Wong v. Restoration Robotics, Inc., No. 18-CIV-02609, 2020 Cal. Super. LEXIS 227, at *37–38 (Cal. Super. Ct. Sept. 1, 2020), *appeal docketed* No. A161489 (Cal. Ct. App. Dec. 2, 2020); *In re* Uber Techs., Inc. Sec. Litig., No. CGC-19-579544, at 14 (Cal. Super. Ct. Nov. 16, 2020), *appeal dismissed* No. A161872 (Cal. Ct. App. Jan. 27, 2021) (mem.); *In re* Dropbox, Inc. Sec. Litig., No. 19-CIV-05089, at 15 (Cal. Super. Ct. Dec. 4, 2020), *appeal docketed* No. A161603 (Cal. Ct. App. Dec. 18, 2020); *In re* Sonim Techs., Inc., Sec. Litig., No. 19-CIV-05564, at 15 (Cal. Super. Ct. Dec. 7, 2020).

97 *See* INSTITUTIONAL S'HOLDER SERVS., UNITED STATES PROXY VOTING GUIDELINES: BENCHMARK POLICY RECOMMENDATIONS 25 (2020) (internal quotation marks omitted), https://www.issgovernance.com/file/policy/latest/americas/US-Voting-Guidelines.pdf [https://perma.cc/79E6-Z7RV].

98 *See, e.g.*, 15 U.S.C. § 77v(a) (2019) (permitting venue for Securities Act cases where "the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein"); 28 U.S.C. § 1404(a) (2019) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought[.]").

engage in additional motion practice, however, and risk a court denying the transfer.

An FFP that restricts the venue to a location *other than* the company's home forum may support an argument that the FFP is less reasonable, especially if it increases inconvenience for the plaintiffs. When California courts consider a forum non conveniens motion—the procedural mechanism courts use to analyze forum selection clauses—they give some deference to the plaintiff's choice of forum if the plaintiff is a California citizen.[99] To the extent an FFP designating a particular federal district deprived a California-resident plaintiff of a California-based forum without any obvious reason for the selection of that forum, there is some risk a California court might conclude this renders the FFP less reasonable.

An exception, however, should exist for foreign private issuers that include FFPs in their depositary agreements governing their American Depositary Shares (ADSs). When there is no United States headquarters or other obvious venue, absent selection of a particular forum, foreign private issuers risk being sued anywhere in the United States, subject to the personal jurisdiction requirements of the Fourteenth Amendment of the United States Constitution. Foreign private issuers therefore often select the courts of New York as the appropriate forum for any suit brought by investors arising out of or related to their depositary agreement or their ADSs, and some courts have found these New York forums to be most convenient and appropriate.[100] Accordingly, it should be entirely reasonable for foreign private issuers to extend that selection to FFPs by designating, for example, the United

99 *See, e.g.*, Thomson v. Cont'l Ins. Co., 427 P.2d 765, 768 (Cal. 1967).

100 *See, e.g.*, Case Management Ord. #3, at 4–8, *In re* Pinduoduo Sec. Litig., No. 18-CIV-04256 (Cal. Super. Ct. dismissed Apr. 21, 2021) (staying based on forum non conveniens Securities Act action against issuer based in the People's Republic of China in favor of litigation in the United States District Court for the Southern District of New York); Ord. Granting Defendant RYB Educ.'s Alt. Motion To Stay for F. Non Conveniens & Underwriter Defendants' Joinders, at 4–8, Qian v. RYB Educ., Inc., No. 17-CIV-05494 (Cal. Super. Ct. dismissed Nov. 2, 2020) (same).

States District Court for the Southern District of New York as the appropriate venue for Securities Act claims.[101]

Thus, in deciding whether to designate a particular venue in their FFPs, companies should consider whether the risk of judicial error is worth potential additional litigation complexity and risk. While choosing a particular federal district court should be defensible if that court bears a rational relationship to the venue that would likely result under the application of federal law in any matter, a careful cost-benefit calculus is in order, particularly at this early stage of the doctrine's development.

C. Should a Corporation Include the FFP in the Charter or the Bylaws?

Whether the FFP is adopted as a charter provision or a bylaw should not affect its enforceability because courts have applied the same law to both.[102] Thus, whether to adopt a bylaw or a charter provision depends on the circumstances of the company considering the FFP. Charter provisions require stockholder approval, whereas bylaws are typically adopted by the board of directors without stockholder approval if the company's charter so permits.[103]

While the *Restoration Robotics* and *Uber* courts referenced the fact that stockholders approved the charter provisions in those cases when discussing enforceability,[104] neither court

101 *See, e.g.*, Lufax Holding Ltd, Amendment No. 2 to Form F-1 Registration Statement (Form F-1/A), at 75–76 (Oct. 22, 2020) (making such a designation); *see also id.* exhibit 4.3, § 7.6 (making such a designation in a depositary agreement).

102 *See* Sciabacucchi v. Salzberg, No. 2017-0931, 2018 WL 6719718, at *1 (Del. Ch. Dec. 19, 2018) (applying law regarding bylaws to FFPs in certificates of incorporation), *rev'd on other grounds*, 227 A.3d 102 (Del. 2020); *In re* Dropbox, Inc. Sec. Litig., No. 19-CIV-05089, at 11 n.8 (Cal. Super. Ct. Dec. 4, 2020), *appeal docketed* No. A161603 (Cal. Ct. App. Dec. 18, 2020).

103 *See* DEL. CODE ANN. tit. 8, §§ 109(a), 242(b) (2021).

104 Wong v. Restoration Robotics, Inc., No. 18-CIV-02609, 2020 Cal. Super. LEXIS 227, at *38, *appeal docketed* No. A161489 (Cal. Ct. App. Dec. 2, 2020); *In re* Uber Techs., Inc. Sec. Litig., No. CGC-19-579544, at 12 (Cal.

treated stockholder approval as dispositive. Nor should they have. If the corporation's charter permits the adoption of bylaw amendments by the directors without stockholder approval, then stockholders are on notice of the potential for changed bylaws when they invest in the company. Courts repeatedly have enforced board-adopted bylaws on that very basis.[105] Placing an FFP in a bylaw, as opposed to a charter, should therefore be no less reasonable.[106]

Corporations engaged in IPOs often elect to adopt FFPs as charter provisions,[107] but they can also adopt an FFP bylaw after the fact. Putting the FFP in the charter allows the company to point to stockholder approval as evidence of reasonableness,[108] but the bylaw approach offers greater flexibility because it permits, if necessary, easier adoption, amendment, or removal by the board without the need for shareholder approval.

D. When Should the FFP Be Adopted?

The best time to adopt an FFP is now.

Companies that are currently private but anticipating an IPO, should certainly adopt an FFP prior to any IPO. Many Securities Act claims arise out of statements the company makes in connection with its IPO,[109] so having the FFP in

Super. Ct. Nov. 16, 2020), *appeal dismissed* No. A161872 (Cal. Ct. App. Jan. 27, 2021) (mem.).

105 *See, e.g.*, Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 956–57 (Del. Ch. 2013); Drulias v. 1st Century Bancshares, Inc., 241 Cal. Rptr. 3d 843, 853 (Cal. Ct. App. 2018).

106 Notably, however, ISS's 2021 Proxy Voting Guidelines state, "unilateral adoption (without a shareholder vote) of [an FFP] will generally be considered a one-time failure under the Unilateral Bylaw/Charter Amendments policy." INSTITUTIONAL S'HOLDER SERVS., *supra* note 97, at 25.

107 *See supra* note 10.

108 *See Restoration Robotics*, 2020 Cal. Super LEXIS 227, at *38; *Uber*, No. CGC-19-579544, at 12.

109 *See* Laurie Smilan & Nicki Locker, *Courts Cut Shareholders Slack on Section 11 Claims*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 17, 2020), https://corpgov.law.harvard.edu/2020/05/17/courts-cut-shareholders-slack-on-section-11-claims/ [https://perma.cc/8G2V-64AW] ("In the past several years, the number of claims filed against newly public companies

place at the time of the IPO protects against duplicative state and federal court litigation over the same issues. Adoption prior to an IPO also eliminates the shopworn argument that a later-adopted FFP somehow is an attempt to retroactively apply an FFP to claims arising out of the IPO. Regardless of whether a company adopts the FFP prior to an IPO, any so-called "retroactivity" argument should not be successful so long as the FFP was adopted before the claims at issue were filed.[110]

Even if a private company does not intend to conduct an IPO, an FFP can still be helpful. Private companies may experience Securities Act litigation over, for example, the validity of a private placement exemption or whether registration of their securities is required.[111] The litigation need not be based on section 11[112] or section 12(a)(2)[113] of the Securities Act—provisions governing liability for registration statements and public offerings of securities—for the FFP to apply. To assure that any such claims are litigated in federal rather than state court, it makes sense to adopt an FFP now.

Publicly traded firms should certainly adopt the FFP prior to their next registered offering, but there is no downside in adopting the provision now. Immediate adoption eliminates

under Section 11 of the Securities Act . . . has increased exponentially." (citing CORNERSTONE RSCH., SECURITIES CLASS ACTION FILINGS: 2019 YEAR IN REVIEW 24–28 (2020), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review [https://perma.cc/AA2A-N8T4])).

110 *See Drulias*, 241 Cal. Rptr. 3d at 854 (rejecting that argument that a forum selection bylaw was invalid because it was adopted "after the alleged wrongdoing" (first citing North v. McNamara, 47 F. Supp. 3d 635, 644 (S.D. Ohio 2014); then citing City of Providence v. First Citizens BancShares, Inc., 99 A.3d 229, 241 (Del. Ch. 2014); and then citing *In re* CytRxCorp. S'holder Derivative Litig., No. CV 14-6414, 2015 U.S. Dist. LEXIS 176966, at *16 (C.D. Cal. Oct. 30, 2015))).

111 *See* 15 U.S.C. § 77*l*(a)(1) (2019) (permitting suits in connection with offers or sales of securities sold in violation of the registration requirements of the Securities Act).

112 *Id.* § 77k.

113 *Id.* § 77*l*(a)(2).

the risk of ministerial oversight in the rush to register and file.

E. Should Corporations Include FFPs in Indentures, so as To Cover Claims Arising from Debt Offerings?

Securities Act litigation regularly arises not just from stock offerings, but also from debt offerings.[114] The standard FFP language provides that "[a]ny 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 provision."[115] The FFP on its face therefore applies to claims from debt investors.

Holders of debt securities nonetheless may argue that they are not similarly situated to a corporation's shareholders and should not be considered parties to charters and/or bylaws.[116] Thus, out of an abundance of caution, it may be prudent for companies to include an FFP in the indenture agreement—a contract to which the debt investor is a party—just like any forum selection clause. In fact, courts have long enforced forum selection clauses in indentures.[117]

F. Is an FFP Enforceable if a Jury Trial Is Not Available in the Selected Forum?

At one level, as applied to publicly traded common stock, this is a trick question. Jury trials are generally available in federal court,[118] and the standard form FFP does not contain

114 *See, e.g.*, *In re* Countrywide Fin. Corp. Sec. Litig., 588 F. Supp. 2d 1132, 1142 (C.D. Cal. 2008); *In re* WorldCom, Inc. Sec. Litig., 294 F. Supp. 2d 392, 397–98 (S.D.N.Y. 2003).

115 *See supra* note 14 and accompanying text (discussing similar language).

116 *See* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 956 (Del. Ch. 2013) (describing "the contractual framework established by [Delaware law] for Delaware corporations and their stockholders," which recognizes bylaws and charters as binding contracts on stockholders).

117 *See, e.g.*, Argonaut P'ship v. Bankers Tr. Co., Nos. 96 CIV. 1970, 96 CIV. 2222, 1997 WL 45521, at *13 (S.D.N.Y. Feb. 4, 1997).

118 *See* FED. R. CIV. P. 38(b).

a jury trial waiver.[119] However, while jury trial waivers do not commonly appear in charters or bylaws, they are often included in depositary agreements and indentures.[120] The presence of a jury trial waiver may contribute to enforcement risk in certain jurisdictions, including California.

In *Handoush v. Lease Finance Group, LLC*,[121] the California Court of Appeal refused to enforce a forum selection clause in a contract that also included a pre-suit jury trial waiver. The court reasoned that under California law jury trial waivers violate a strong public policy and are unenforceable.[122] Because the contract at issue had a New York choice of law clause, and because the jury trial waiver would be enforced by a New York court, the California court refused to honor the forum selection clause that the court believed would result in depriving the plaintiff of his right to a jury trial in violation of California policy.[123]

Without our endeavoring to address all of the issues raised by the *Handoush* decision—including its implications for forum selection clauses generally when they select a forum that does not provide for a jury trial—corporations should recognize that the interaction of a jury trial waiver with an FFP can introduce enforcement risk in California court, particularly because jury trial waivers are potentially enforceable in federal court.[124]

Companies seeking to enforce in California state court an FFP including a jury trial waiver should therefore consider making any jury trial waiver severable or stipulating not to enforce it in federal court when moving to enforce an FFP.

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119 *See supra* note 14 and accompanying text (giving a typical FFP).

120 *See, e.g.*, Lufax Holding Ltd, *supra* note 101, exhibit 4.3, § 7.6 (depositary agreement); Provident Fin. Servs., Inc., Registration Statement (Form S-3ASR), at exhibit 4.1, § 1.12 (Nov. 6, 2020) (indenture).

121 254 Cal. Rptr. 3d 461 (Cal. Ct. App. 2019).

122 *Id.* at 464.

123 *Id.*

124 *See* Merrill Lynch & Co. v. Allegheny Energy, Inc., 500 F.3d 171, 188 (2d Cir. 2007) (observing that a contractual waiver is enforceable if made "knowingly, intentionally, and voluntarily" (citing Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977)).

IV. CONCLUSION

Federal Forum Provisions (FFPs) direct all Securities Act litigation filed in state court to federal court. Delaware's Supreme Court has ruled that FFPs are facially valid. To date, each state court that has addressed the merits of the question has enforced the FFP before it as lawful and reasonable.

Questions regarding FFP mechanics nonetheless abound, and this Article addresses the most common FAQs about FFPs. In particular, corporations should consider adopting an FFP now. Waiting has no benefit. Publicly traded corporations can most conveniently adopt an FFP in the form of a bylaw. Privately held entities face potential Securities Act liability in connection with registration violations and section 12(a)(2), and can adopt FFPs either as charter or bylaw provisions. We view the charter-bylaw distinction as a matter of close-to-indifference. It is also reasonable for corporations chartered outside of Delaware to adopt FFP provisions, since most state courts draw substantial guidance from Delaware precedent.

A California trial court recently held that claims against underwriters were not covered by the FFP at issue in that matter. We disagree and welcome California Court of Appeals review of that issue. Other California trial courts have disagreed, as well, finding that substantially identical FFPs do apply to underwriters. However, an essentially costless revision of the form of FFP considered by the California trial courts would eliminate any risk, and we provide two alternative forms of FFP that achieve that result. Corporations with FFPs already in their charters can adopt an additional bylaw to address this risk, or they can amend their charters.

Some FFPs designate a specific federal district court, typically the district in which the corporate headquarters is located, as the venue in which litigation is to proceed. Arguably, federal law governing venue will likely cause the case to proceed in the headquarters district in any event, so companies considering specifying a certain federal district court in the FFP should weigh the risks and rewards of such a provision. For certain foreign issuers, designating a specific federal district court, such as the Southern District of New

York, as the venue for all Securities Act claims can be sensible.

Large Securities Act liabilities often also arise in the context of registered debt offerings. Companies should therefore consider including FFPs in the indentures in debt offerings as well.

Jury trial waivers are common in depositary agreements and indentures. To avoid enforceability challenges based on these waivers, particularly in California, these agreements and indentures should either include a severability provision, or the corporation should be prepared, if necessary, to stipulate not to enforce the jury waiver in federal court when moving to enforce an FFP in California or in other states hostile to such waivers.