

No. A161489

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION TWO

---

SUNNY C. WONG,

*Plaintiff-Appellant,*

v.

RESTORATION ROBOTICS, INC.,

*Defendant-Respondent.*

---

Appeal from the Superior Court of the State of California  
for the County of San Mateo,  
The Honorable Marie S. Weiner  
Case No. 18CIV02609

---

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF  
IN SUPPORT OF RESPONDENT & AMICUS CURIAE BRIEF IN  
SUPPORT OF RESPONDENT**

---

John W. Spiegel  
(State Bar No. 78935)  
MUNGER, TOLLES & OLSON LLP  
John.Spiegel@mto.com  
350 South Grand Avenue  
Fiftieth Floor  
Los Angeles, California 90071-3426  
Telephone: (213) 683-9152  
Facsimile: (213) 687-3702

Elaine J. Goldenberg  
(*Pro hac vice* pending)  
MUNGER, TOLLES & OLSON LLP  
Elaine.Goldenberg@mto.com  
601 Massachusetts Ave., NW  
Suite 500 East  
Washington, DC 20001  
Telephone: (202) 220-1114  
Facsimile: (202) 220-2300

*Attorneys for Amicus Curiae*  
**Chamber of Commerce of the United States of America**

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

In accordance with California Rule of Court, rule 8.208(e), Amicus Curiae Chamber of Commerce of the United States of America states that there are no interested entities or persons.

DATED: October 20, 2021

MUNGER, TOLLES & OLSON LLP

By: /s/ Elaine J. Goldenberg

Elaine J. Goldenberg

*Attorney for* Amicus Curiae

Chamber of Commerce of the

United States of America

## TABLE OF CONTENTS

	<b>Page</b>
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS .....	2
TABLE OF CONTENTS .....	3
TABLE OF AUTHORITIES.....	4
APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF .....	9
INTEREST OF AMICUS CURIAE.....	9
INTRODUCTION.....	11
ARGUMENT .....	12
I. FFPs Have A Variety Of Beneficial Effects .....	12
A. After The Supreme Court’s Decision In <i>Cyan</i> , Patterns Of Securities Act Litigation Changed In Harmful Ways .....	12
B. FFPs Ameliorate Those Harms And Create A Number Of Economically Beneficial Effects.....	18
C. Plaintiff’s Argument That FFPs Are Not Beneficial Lacks Merit .....	25
II. Contrary To Plaintiff’s Argument, FFPs Do Not Violate Federal Securities Law .....	26
CONCLUSION .....	30
CERTIFICATE OF WORD COUNT .....	31
PROOF OF SERVICE .....	32
SERVICE LIST .....	33

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>STATE CASES</b>	
<i>In re Dropbox, Inc. Securities Litigation</i> (A161603, app. pending) .....	24
<i>Pivotal Software v. Superior Court of California</i> (S.Ct., Aug. 23, 2021, No. 20-1541).....	14
<i>Salzberg v. Sciabacucchi</i> (Del. 2020) 227 A.3d 102 .....	passim
<i>In re Sonim Technologies, Inc. Sec. Litig.</i> (Super. Ct. San Mateo County, Dec. 7, 2020, No. 19-CIV-05564) < <a href="https://www.dandodiary.com/wp-content/uploads/sites/893/2020/12/Sonim-Technologies.pdf">https://www.dandodiary.com/wp-content/uploads/sites/893/2020/12/Sonim-Technologies.pdf</a> > .....	24
<i>In re Uber Technologies, Inc. Sec. Litig.</i> (Super. Ct. S.F. County, Nov. 16, 2020, No. CGC-19-579544) < <a href="https://bit.ly/3sCpIO9">https://bit.ly/3sCpIO9</a> >.....	24
<i>Volonte v. Domo, Inc.</i> (Utah Dist. Ct., Apr. 13, 2021, No. 190401778) 2021 WL 1960296.....	24
<b>FEDERAL CASES</b>	
<i>Atl. Coast Line R. Co. v. Burnette</i> (1915) 239 U.S. 199.....	26
<i>Barton v. Barr</i> (2020) 140 S.Ct. 1442 .....	21
<i>Blue Chip Stamps v. Manor Drug Stores</i> (1975) 421 U.S. 723 .....	16
<i>Bond v. United States</i> (2014) 572 U.S. 844.....	27
<i>Carcieri v. Salazar</i> (2009) 555 U.S. 379.....	26

<i>Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</i> (1994) 511 U.S. 164.....	16, 18
<i>CompuCredit Corp. v. Greenwood</i> (2012) 565 U.S. 95.....	28
<i>Conn. Nat’l Bank v. Germain</i> (1992) 503 U.S. 249.....	26
<i>Cyan, Inc. v. Beaver County Employees Retirement Fund</i> (2018) 138 S.Ct. 1061.....	12, 13, 27, 29
<i>Dodd v. United States</i> (2005) 545 U.S. 353.....	26
<i>EEOC v. Abercrombie &amp; Fitch Stores, Inc.</i> (2015) 575 U.S. 768.....	29
<i>Merrill Lynch, Pierce, Fenner &amp; Smith Inc. v. Dabit</i> (2006) 547 U.S. 71.....	18
<i>Michigan v. Bay Mills Indian Cmty.</i> (2014) 572 U.S. 782.....	27
<i>Rodriguez de Quijas v. Shearson/American Express, Inc.</i> (1989) 490 U.S. 477.....	11, 27, 28
<i>Schueneman v. Arena Pharm., Inc.</i> (S.D.Cal., June 12, 2020, No. 3:10-CV-01959-CAB-(BLM)) 2020 WL 3129566.....	22
<i>SEC v. Tambone</i> (1st Cir. 2010) 597 F.3d 436.....	18
<i>Shearson/American Express, Inc. v. McMahon</i> (1987) 482 U.S. 220.....	27
<i>In re WageWorks, Inc., Sec. Litig.</i> (N.D.Cal., June 1, 2020, No. 18-CV-01523-JSW) 2020 WL 2896547.....	21
<b>STATE STATUTES</b>	
Delaware’s General Corporation Law § 102(b).....	19

## **FEDERAL STATUTES**

15 U.S.C. § 77n .....	26, 27
15 U.S.C. § 77v .....	21
15 U.S.C. § 77v(a).....	26, 29
15 U.S.C. § 78aa.....	22
Securities Litigation Uniform Standards Act of 1998 (112 Stat. 3227) .....	12

## **STATE RULES**

California Rule of Court, Rule 8.200(c).....	9
--	---

## **FEDERAL REGULATIONS**

17 C.F.R. § 240.10b-5 .....	22
-----------------------------	----

## **LEGISLATIVE MATERIALS**

Sen.Rep. No. 104-98, 1st Sess. (1995).....	18
--	----

## **OTHER AUTHORITIES**

Aggarwal <i>et al.</i> , <i>Federal Forum Provisions and the Internal Affairs Doctrine</i> (2020) 10 Harv. Bus. L.Rev. 383 .....	23
Aufses <i>et al.</i> , <i>New York Court Joins Other State Courts in Dismissing Securities Act Claims in Favor of Federal Forum Provision</i> (Sept. 28, 2021) JDSupra < <a href="https://www.jdsupra.com/legalnews/new-york-court-joins-other-state-courts-6980004/">https://www.jdsupra.com/legalnews/new-york-court-joins-other-state-courts-6980004/</a> >.....	24
Barlyn, <i>D&amp;O Insurance Costs Soar as Investors Run to Court Over IPOs</i> (June 18, 2019) Insurance Journal, < <a href="https://www.insurancejournal.com/news/national/2019/06/18/529691.htm">https://www.insurancejournal.com/news/national/2019/06/18/529691.htm</a> >.....	17
Cornerstone Research, <i>Securities Class Action Filings: 2019 Year in Review</i> (2020).....	21
Cornerstone Research, <i>Securities Class Action Filings: 2020 Year in Review</i> (2021) < <a href="https://bit.ly/3yaOki7">https://bit.ly/3yaOki7</a> >.....	20

Cornerstone Research, <i>Securities Class Action Filings: 2021 Midyear Assessment</i> (2021) < <a href="https://bit.ly/3zb1CfO">https://bit.ly/3zb1CfO</a> > .....	20
DiMasi <i>et al.</i> , Innovation in the Pharmaceutical Industry: New Estimates of R&D Costs (2016) 47 J. Health Econ. 20.....	18
Frankel, <i>The Sciabacucchi Effect: Delaware Ruling on Forum Provisions Is ‘Stabilizing’ D&amp;O Insurance Market</i> (Mar. 16, 2021) Reuters, < <a href="https://www.reuters.com/article/legal-us-otc-d-o/the-sciabacucchi-effect-delaware-ruling-on-forum-provisions-is-stabilizing-do-insurance-market-idUSKBN2B82S8">https://www.reuters.com/article/legal-us-otc-d-o/the-sciabacucchi-effect-delaware-ruling-on-forum-provisions-is-stabilizing-do-insurance-market-idUSKBN2B82S8</a> >.....	17
Grundfest, <i>The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi</i> (2020) 75 Bus. Law. 1319 .....	13
Grundfest, <i>The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi</i> (2019) Rock Center for Corporate Governance, Working Paper No. 241, < <a href="https://www.ssrn.com/abstract=3448651">https://www.ssrn.com/abstract=3448651</a> >.....	23
Horton, <i>Spotify’s Direct Listing: Is It a Recipe for Gatekeeper Failure?</i> (2019) 72 SMU L.Rev. 177 .....	17
Huskins, <i>Will D&amp;O Insurance Rates End the IPO Party?</i> (Jan. 15, 2020).....	16
ISS, <i>Americas: Proxy Voting Guidelines, Updates for 2021</i> (Nov. 12, 2020) < <a href="https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf">https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf</a> > .....	23
Klausner <i>et al.</i> , <i>State Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi)</i> (2020) 75 Bus. Law. 1769.....	13, 14
Laide, <i>Companies’ Response to Delaware Supreme Court Upholding Federal Forum Provisions</i> (Nov. 11, 2020) Harvard Law School Forum on Corporate Governance < <a href="https://corpgov.law.harvard.edu/2020/11/11/companies-response-to-delaware-supreme-court-upholding-federal-forum-provisions/">https://corpgov.law.harvard.edu/2020/11/11/companies-response-to-delaware-supreme-court-upholding-federal-forum-provisions/</a> > .....	19

Locker & Smilan, <i>Carving Out IPO Protections</i> (Feb. 25, 2020) .....	15
U.S. Chamber Institute For Legal Reform, Containing The Contagion: Proposals To Reform The Broken Securities Class Action System (Feb. 2019), < <a href="https://instituteforlegalreform.com/wp-content/uploads/media/Securites-Class-Action-System-Reform-Proposals.pdf">https://instituteforlegalreform.com/wp-content/uploads/media/Securites-Class-Action-System-Reform-Proposals.pdf</a> > .....	15
U.S. Chamber Institute for Legal Reform, Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation (Feb. 2014), < <a href="https://instituteforlegalreform.com/research/economic-consequences-the-real-costs-of-u-s-securities-class-action-litigation/">https://instituteforlegalreform.com/research/economic-consequences-the-real-costs-of-u-s-securities-class-action-litigation/</a> > .....	16, 18
U.S. Courts, <i>Statistical Tables for the Federal Judiciary</i> (2021) table C-5 < <a href="https://www.uscourts.gov/statistics/table/c-5/statistical-tables-federal-judiciary/2021/06/30">https://www.uscourts.gov/statistics/table/c-5/statistical-tables-federal-judiciary/2021/06/30</a> > .....	22
U.S. Risk, <i>State of the Public D&amp;O Market</i> < <a href="https://www.usrisk.com/2021/06/state-of-the-public-do-market/">https://www.usrisk.com/2021/06/state-of-the-public-do-market/</a> > .....	16
Winter, <i>Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America</i> (1993) 42 Duke L.J. 945.....	18



## **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

In accordance with California Rule of Court, rule 8.200(c), Amicus Curiae Chamber of Commerce of the United States of America respectfully requests leave to file the attached Brief of Amicus Curiae in Support of Respondent.

No party or counsel for a party authored any part of this proposed amicus brief and no party other than amicus, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

### **INTEREST OF AMICUS CURIAE**

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation’s business community—and this is just such a case. Private securities litigation imposes a significant burden on the Chamber’s members and adversely affects their access to capital markets. Chamber members have adopted, or may consider adopting, charter provisions that require stockholders to bring claims under the Securities Act of 1933 (“Securities Act”) in federal court only. The Chamber and its members thus have a strong interest in the question presented here: whether such federal forum provisions (“FFPs”) are enforceable as a matter of federal and state law.

DATED: October 20, 2021

By: /s/ Elaine J. Goldenberg

Elaine J. Goldenberg

(*Pro hac vice* pending)

MUNGER, TOLLES & OLSON LLP

Elaine.Goldenberg@mto.com

601 Massachusetts Ave., NW

Suite 500 East

Washington, DC 20001

Telephone: (202) 220-1114

Facsimile: (202) 220-2300

John W. Spiegel

(State Bar No. 78935)

MUNGER, TOLLES & OLSON LLP

John.Spiegel@mto.com

350 South Grand Avenue

Fiftieth Floor

Los Angeles, California 90071-3426

Telephone: (213) 683-9152

Facsimile: (213) 687-3702

*Attorneys for Amicus Curiae*  
Chamber of Commerce of the  
United States of America

## INTRODUCTION

Plaintiff dismisses with little discussion the idea that federal forum provisions (“FFPs”) are “beneficial,” characterizing arguments along those lines as “strawmen at best.” (Reply Br. 50.) Plaintiff is wrong. In fact, as empirical data confirms, FFPs are highly beneficial in a variety of ways. FFPs address and ameliorate a number of very serious practical problems created by recent shifts in the way that plaintiffs litigate Securities Act claims, while continuing to provide such plaintiffs with access to a speedy, expert, congressionally endorsed judicial forum in which those claims can be heard and decided. And, in doing so, FFPs lift a burden that has fallen on corporations and shareholders alike and provide greater access to the capital markets, thus creating widely beneficial economic effects. That is no doubt why shareholders appear to favor the adoption of FFPs and to regard them as creating real economic value.

Plaintiff also insists that any benefits associated with FFPs are irrelevant because Congress has already acted to bar such forum-selection arrangements. That is flatly incorrect. Plaintiff points to the anti-waiver and anti-removal provisions of the Securities Act, but neither provision has any application to FFPs. The anti-waiver provision has been definitively interpreted by the Supreme Court not to apply to forum-selection provisions, (see *Rodriguez de Quijas v. Shearson/American Express, Inc.* (1989) 490 U.S. 477 (*Rodriguez*)), and the anti-removal provision says nothing about an arrangement under which certain claims must be brought in federal court in the first instance or suffer dismissal. Plaintiff is therefore left to make assertions about what Congress must have wanted in this context given the existence of those two inapplicable provisions, and to suggest that somehow the two provisions examined together are greater than the sum of their parts. But zero plus zero is still zero. As the Supreme Court has made clear beyond question, plaintiff’s purpose-driven approach, which invites judicial

speculation about how Congress would have legislated if it ever *had* enacted a provision that encompassed FFPs, is not a permissible way of interpreting a federal statute.

## **ARGUMENT**

### **I. FFPs Have A Variety Of Beneficial Effects**

#### **A. After The Supreme Court’s Decision In *Cyan*, Patterns Of Securities Act Litigation Changed In Harmful Ways**

In recent years, the patterns of Securities Act litigation changed dramatically, thus giving rise to tremendous expense and uncertainty for businesses and their shareholders. In particular, corporations subject to Securities Act claims frequently faced simultaneous suits in state and federal court, thus increasing litigation costs and risking inconsistent rulings. Those increased costs made it harder for corporations to obtain directors and officers (“D&O”) liability insurance to protect corporate directors and officers from personal liability, and eventually led to a serious D&O coverage crisis. The result of those changes was to increase the costs associated with initial public offerings (“IPOs”)—a state of affairs that created particular difficulties for smaller companies contemplating a stock issuance that would make their shares available for ownership by the public. And all of those burdens, taken together, inflicted more general economic damage, inhibiting growth and diverting corporate resources away from economically beneficial uses.

1. Several years ago, in *Cyan, Inc. v. Beaver County Employees Retirement Fund* (2018) 138 S.Ct. 1061 (*Cyan*), the Supreme Court considered the effects of the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”) (112 Stat. 3227) on state-court jurisdiction over class actions alleging only Securities Act violations. (See *Cyan*, 138 S.Ct. at p. 1073 [explaining that the Securities Act addresses only “securities offerings” and not “all trading of securities”].) Leading up to the Supreme Court’s

decision, some courts had ruled that SLUSA deprived state courts of jurisdiction over class-action claims asserting violations of the Securities Act. But the Supreme Court disagreed. The Court held that SLUSA did not “strip state courts of jurisdiction over class actions alleging violations of only the Securities Act of 1933.” (*Id.* at p. 1066.) The Court also held that when such an action is filed in state court, the defendant may not remove the action to federal court. The Securities Act contains a removal bar, and the Court concluded that the limited exception SLUSA added to that bar does not apply to Securities Act claims and so does not “empower defendants to remove such actions from state to federal court.” (*Ibid.*)

*Cyan* had demonstrable effects in the real world: plaintiffs began litigating Securities Act cases in a different and much more burdensome way. For one thing, “the filing of 1933 Act cases in state courts escalated.” (*Salzberg v. Sciabacucchi* (Del. 2020) 227 A.3d 102, 114-115 (*Sciabacucchi*); see also, e.g., Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi* (2020) 75 Bus. Law. 1319, 1322.) In 2019, for example, “[t]he number of state 1933 Act filings . . . increased by 40 percent from 2018.” (*Sciabacucchi*, 227 A.3d at pp. 102, 114-115, citing Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review* (2020) p. 4, citations and internal quotation marks omitted.)

In addition, there was an extraordinary explosion in the incidence of parallel state and federal Securities Act cases against a single defendant based on a single nucleus of fact. From 2011 to 2013, defendants faced such parallel claims in only 7 percent of cases. (See Klausner *et al.*, *State Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi)* (2020)

75 Bus. Law. 1769, 1775 (hereafter Klausner).)<sup>1</sup> Between 2014 and March 2018, when the Supreme Court decided *Cyan*, that number grew to some degree, but defendants faced parallel Securities Act claims in state and federal court only 17 percent of the time. (See *ibid.*) Between the decision in *Cyan* and December 31, 2019, however, the situation was very different. An extraordinary 49 percent of all Securities Act claims filed during that period were filed in both state and federal court. (*Ibid.*; see also, e.g., Washington Legal Found. Amicus Br. 11, *Pivotal Software v. Superior Court of California* (S.Ct., Aug. 23, 2021, No. 20-1541) [examining large group of post-*Cyan* Securities Act cases filed in state court and finding that 41 of the 99 state-court cases examined involved a parallel Securities Act action filed in federal court and that a small number of law firms represented plaintiffs in many of those parallel cases]; *Sciabacucchi, supra*, 227 A.3d at pp. 114-115.)

All told, if cases involving parallel state and federal filings are included in the calculus, in the year and a half after *Cyan* fully 71 percent of Securities Act cases were filed in state court—whereas in the four years before *Cyan* only 35 percent of such cases were filed in state court. (See Klausner, 75 Bus. Law. at pp. 1775-1776; see also *Sciabacucchi, supra*, 227 A.3d at pp. 114-115.) Put another way, just 29 percent of Securities Act cases commenced in the post-*Cyan* period were filed only in federal court. (Klausner, 75 Bus. Law. at pp. 1775-1776.) That is a significant drop from earlier periods. (*Ibid.* [noting that Securities Act cases were filed only in

---

<sup>1</sup> Klausner’s article derives its statistics from the Stanford Securities Litigation Analytics database and encompasses “securities class actions filed in federal and state court against publicly traded companies between January 1, 2011, and December 31, 2019, that allege misstatements or omissions related to public offerings of securities in violation of either section 11 or 12 of the Securities Act.” (Klausner, 75 Bus. Law. at p. 1771, fn. 7.)

federal court 88 percent of the time between 2011 and 2013 and 65 percent of the time between 2014 and the date of the *Cyan* decision].) And none of those changes can be explained away by looking to the overall number of initial public offerings made during the relevant timeframe. (*Ibid.*)

2. Those shifts imposed a tremendous and harmful burden on corporations and their shareholders—one with economic effects extending far beyond the stock offerings that are the subject of Securities Act claims.

First, when corporate defendants must defend against state *and* federal Securities Act suits based on the same nucleus of fact, and often must do so simultaneously, Securities Act litigation becomes “considerably more complicated and expensive” for those defendants. (Locker & Smilan, *Carving Out IPO Protections* (Feb. 25, 2020) Harvard Law School Forum on Corporate Governance (hereafter Locker) <<https://corpgov.law.harvard.edu/2020/02/25/carving-out-ipo-protections>>; see also *ibid.* [noting that such parallel Securities Act litigation makes settlement more difficult as well, “both because a settlement with plaintiffs in one forum runs the risk of a challenge by the separate set of plaintiffs in the second forum, and because state cases may have to be settled even if the parallel federal case is dismissed”].) Matters are made even worse by the fact that a defendant fighting such a “multi-front war,” (U.S. Chamber Institute For Legal Reform, *Containing The Contagion: Proposals To Reform The Broken Securities Class Action System* (Feb. 2019) p. 12 <<https://instituteforlegalreform.com/wp-content/uploads/media/Securites-Class-Action-System-Reform-Proposals.pdf>>), risks inconsistent rulings from the state and federal courts in question.

Moreover, because the cost of securities litigation to corporations and stockholders is generally high to begin with, all of that extra complexity and expense simply worsened an already difficult situation. As the Supreme Court has observed, securities cases present a “danger of vexatiousness

different in degree and in kind from that which accompanies litigation in general.” (*Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* (1994) 511 U.S. 164, 189 (*Central Bank*), citation omitted; see generally *Blue Chip Stamps v. Manor Drug Stores* (1975) 421 U.S. 723, 741 [noting the danger of permitting a securities plaintiff “with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value”].) The time and effort that a corporate defendant spends defending against securities litigation, including meritless securities litigation, drains away corporate value that would otherwise be realized by shareholders. (See, e.g., U.S. Chamber Institute for Legal Reform, *Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation* (Feb. 2014) at p. 5 (hereafter *Economic Consequences*) <<https://instituteforlegalreform.com/research/economic-consequences-the-real-costs-of-u-s-securities-class-action-litigation/>>.)

Second, those increased costs created a crisis in the market for directors and officers (“D&O”) insurance coverage. Corporations must carry such coverage in order to attract and retain directors and officers, who may face personal liability under the Securities Act. But in the wake of *Cyan*, as defendants’ costs associated with Securities Act litigation rose, the cost of such insurance increased four-fold. (See Huskins, *Will D&O Insurance Rates End the IPO Party?* (Jan. 15, 2020) Woodruff Sawyer (hereafter Huskins) <<https://woodruffswayer.com/do-notebook/do-insurance-rates-ending-ipo-party/>> [“unprecedented rates of litigation against IPO companies,” including parallel suits in state and federal courts, led to “unprecedented costs for D&O insurance for IPO companies” and then “increasing premiums for D&O insurance for all companies”]; see also, e.g., U.S. Risk, *State of the Public D&O Market* <<https://www.usrisk.com/2021/06/state-of-the-public-do-market/>>.) Insurers also



“chopp[ed] coverage limits and requir[ed] IPO clients to pick up more costs before a policy kicks in,” as well as “requiring companies to pay a percentage of the eventual loss.” (Barlyn, *D&O Insurance Costs Soar as Investors Run to Court Over IPOs* (June 18, 2019) Insurance Journal <<https://www.insurancejournal.com/news/national/2019/06/18/529691.htm>>; see also Frankel, *The Sciabacucchi Effect: Delaware Ruling on Forum Provisions Is ‘Stabilizing’ D&O Insurance Market* (Mar. 16, 2021) Reuters (hereafter Frankel) <<https://www.reuters.com/article/legal-us-otc-d-o/the-sciabacucchi-effect-delaware-ruling-on-forum-provisions-is-stabilizing-do-insurance-market-idUSKBN2B82S8>> [stating that D&O insurance “deductibles quintupled”].) Those changes made D&O insurance cost-prohibitive for some companies and significantly drained the resources of others.

Third, the increased costs associated with an offering of securities to the public and any associated lawsuits put a drag on IPOs and even secondary offerings. Issuers became more reluctant to go public, or looked to mechanisms other than traditional IPOs if available. (See, e.g., Huskins [“[T]he cost of D&O insurance for an IPO company has already become so high that, for some companies, going public no longer makes sense.”]; Locker [noting possibility of self-help strategies and direct listings in lieu of an IPO].) When a company decides to offer shares to the public through an alternative mechanism like direct listing, certain investor protections may sometimes be lost because underwriters no longer serve a gate-keeping function. (See, e.g., Horton, *Spotify’s Direct Listing: Is It a Recipe for Gatekeeper Failure?* (2019) 72 SMU L.Rev. 177, 202-212 [in IPO context, underwriters have incentives to evaluate whether “the securities of this particular issuer” should “be offered to the public in the first instance” and whether “the proposed offering” will “prove profitable to . . . its investor clientele”].)

Finally, when defendants must bear the burden of the various

difficulties described above, the economy as a whole suffers. As the Supreme Court has observed, “uncertainty and excessive litigation can have ripple effects.” (*Central Bank, supra*, 511 U.S. at p. 189.) Expending time and resources in litigating and settling duplicative securities cases and grappling with difficulties in obtaining D&O insurance not only negatively affects defendant corporations and their shareholders; it also more generally increases the cost of capital, discourages beneficial economic activity, and otherwise inflicts economic damage that is ultimately “passed along to the public.” (*SEC v. Tambone* (1st Cir. 2010) 597 F.3d 436, 452-453 (conc. opn. of Boudin); see generally Sen.Rep. No. 104-98, 1st Sess., pp. 4, 8, 14 (1995); Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America* (1993) 42 Duke L.J. 945, 948 [“Unnecessary civil . . . liability diminishes the return to, and increases the cost of, capital.”], cited in *Central Bank, supra*, 511 U.S. at p. 189; cf. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit* (2006) 547 U.S. 71, 81 [abusive securities litigation may be “used to injure ‘the entire U.S. economy,’” citation omitted].) For example, a pharmaceutical company that expends funds to cover those kinds of costs thereby has fewer funds available to invest in the extraordinarily costly process of research and development of beneficial medications. (See, e.g., Economic Consequences, at pp. 20-21; DiMasi *et al.*, Innovation in the Pharmaceutical Industry: New Estimates of R&D Costs (2016) 47 J. Health Econ. 20, 31.) And corporations in other economic sectors are similarly unable to deploy their resources in economically and socially beneficial ways.

**B. FFPs Ameliorate Those Harms And Create A Number Of Economically Beneficial Effects**

In light of all of the problems discussed above, some companies began including in certificates of incorporation or corporate bylaws FFPs designating federal court as the exclusive forum for claims under the

Securities Act. A number of companies with recent IPOs have taken that path. (See Laide, *Companies' Response to Delaware Supreme Court Upholding Federal Forum Provisions* (Nov. 11, 2020) Harvard Law School Forum on Corporate Governance <<https://corpgov.law.harvard.edu/2020/11/11/companies-response-to-delaware-supreme-court-upholding-federal-forum-provisions/>>.)

1. By directing all claims under the Securities Act into federal court, FFPs address and ameliorate the various harms above—and, in doing so, benefit corporations, shareholders, and the public. FFPs eliminate the possibility of parallel state and federal Securities Act suits, as well as the risk of inconsistent outcomes in state and federal court. They thereby relieve defendants of the costs and burdens associated with defending against parallel suits. In doing so, they bring the costs associated with D&O insurance down and remove an obstacle to proceeding with an IPO. And, more generally, they enable corporations to concentrate resources and effort on delivering value to shareholders rather than defending against a wave of duplicative and inefficient Securities Act litigation.

Examining the consequences of the Delaware Supreme Court's March 18, 2020, decision upholding the validity of FFPs under Delaware law provides some empirical proof that FFPs actually yield all of those benefits. In *Salzberg v. Sciabacucchi* (Del. 2020) 227 A.3d 102, that court—in the first case involving a challenge to an FFP—concluded that FFPs are facially valid under Section 102(b) of Delaware's General Corporation Law. (*Id.* at p. 114.) The court explained that Delaware corporation law “allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise.” (*Id.* at p. 116.) The court also observed that FFPs do not violate federal law or policy. (*Id.* at pp. 132-134.)

In the wake of that decision, the price of D&O insurance for companies about to go public began “stabilizing.” (Frankel.) Analysts directly attributed the new “calm in the market” to the Delaware Supreme Court’s decision “allow[ing] corporations to adopt provisions requiring shareholders to bring Securities Act claims in federal court.” (*Ibid.*; see also *ibid.* [employee at D&O insurance brokerage opining that “there is a straight line from the lower risk of liability and defense costs from state-court IPO litigation to a newly stable market for D&O insurance” and referring to FFPs as a “magic pill”]; Greenwald, ‘Federal Forum’ Ruling Could Cut Defense Costs, *D&O Rates* (Mar. 24, 2020) Business Insurance <<https://www.businessinsurance.com/article/20200324/NEWS06/912333675/%E2%80%98Federal-forum%E2%80%99-ruling-could-cut-defense-costs,-D&O-rates-Matthew-B-Salzberg,-e>>.)

In addition, duplicative state-court Securities Act filings went down. Of “24 [Securities Act] suits filed after *Sciabacucchi*, 14 were filed only in federal court, reversing the trend of more Section 11 class actions being filed in state court,” and “only 8% of cases in 2020 were filed in state court alone—down from 24% in 2019.” (Frankel; see Cornerstone Research, *Securities Class Action Filings: 2021 Midyear Assessment* pp. 1, 12, 14 (2021) <<https://bit.ly/3zb1CfO>>; see also pp. 13-15, *supra* [providing pre-*Sciabacucchi* statistics].)<sup>2</sup>

---

<sup>2</sup> Statistics covering the period after the COVID-19 pandemic began may be affected by the unusual events of the pandemic—for instance, the number of Securities Act cases declined overall during that period. (See Cornerstone Research, *Securities Class Action Filings: 2021 Midyear Assessment* pp. 1, 21; Cornerstone Research, *Securities Class Action Filings: 2020 Year in Review* (2021) p. 1 <<https://bit.ly/3yaOki7>>.) Still, the increase in federal-only filings is notable. (See Cornerstone Research, *Securities Class Action Filings: 2021 Midyear Assessment* pp. 12, 14.)

2. As plaintiff appears to acknowledge, (Reply Br. 49-50), FFPs create those positive benefits without inflicting any meaningful negative consequences on Securities Act plaintiffs, because a federal forum is fully adequate for litigation of any plaintiff's claims under the Securities Act.

Congress affirmatively provided that federal district courts have jurisdiction over claims under the Securities Act. (See 15 U.S.C. § 77v.) If Congress had believed that there was some significant disadvantage associated with litigation in a federal venue, Congress presumably would have written the jurisdictional provision differently, or would have amended the jurisdictional provision at some later date. (Cf., e.g., *Barton v. Barr* (2020) 140 S.Ct. 1442, 1453.) Congress's choice to select and retain federal court as an available venue for Securities Act litigation necessarily demonstrates the acceptability of such a venue.

Moreover, as a practical matter, there is no reason to believe that plaintiffs' securities-law rights cannot be vindicated successfully in federal court. It is almost always true that the federal court where a plaintiff would bring a Securities Act case is located not far from the relevant state court, is just as accessible to witnesses and to counsel as the state court is, and draws from a jury pool very similar to the one from which the state court draws. And, more generally, Securities Act claims have been successfully litigated by plaintiffs in federal courts, including federal courts in California, for many decades. (See, e.g., *In re WageWorks, Inc., Sec. Litig.* (N.D.Cal., June 1, 2020, No. 18-CV-01523-JSW) 2020 WL 2896547, at p. \*9 [denying motion to dismiss Securities Act claims]; Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review* (2020) p. 16 [dismissal rate for federal securities class actions is approximately 50 percent] <<https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review>>.) Although federal court procedures are of course somewhat different than state court procedures, plaintiffs certainly have a

full and fair opportunity to be heard in federal court, where—by any measure—litigation is efficient, just, and reasonably speedy. (See, e.g., U.S. Courts, *Statistical Tables for the Federal Judiciary* (2021) table C-5 <<https://www.uscourts.gov/statistics/table/c-5/statistical-tables-federal-judiciary/2021/06/30>> [for one-year period ending June 30, 2021, median time from filing to case disposition in Northern District of California was 7.6 months].)

Finally, to avoid duplicative litigation, it makes far more sense to select federal court as the exclusive venue for Securities Act claims than to select state court as the exclusive venue for those claims. Plaintiffs may bring Securities Act claims together with other securities-law claims, under different statutes, over which federal courts have *exclusive* jurisdiction—for instance, claims under Rule 10b-5, which is promulgated under the Securities Act of 1934 and proscribes fraud in connection with securities transactions. (See 15 U.S.C. § 78aa [giving federal courts “exclusive” jurisdiction over Rule 10b-5 claims and any other claims that arise from the Securities Act of 1934 or “the rules and regulations thereunder”]; 17 C.F.R. § 240.10b-5; see also, e.g., *Schueneman v. Arena Pharm., Inc.* (S.D.Cal., June 12, 2020, No. 3:10-CV-01959-CAB-(BLM)) 2020 WL 3129566, at p. \*1 [discussing case involving both a Securities Act claim and a Rule 10b-5 claim].) A complaint in a case involving a Rule 10b-5 claim cannot be brought in state court, and an FFP could not legally require it to be brought there. Federal court is therefore the only choice of forum that decreases the possibility of parallel, overlapping state-court and federal-court litigation of federal securities-law claims.

3. Given that FFPs confer benefits on shareholders and others without any downside, it is not surprising that shareholders recognize the value of FFPs and favor their inclusion in corporate charters.

When the Delaware Chancery Court initially considered FFPs, it found—in the decision later reversed by the Delaware Supreme Court in *Sciabacucchi*—that FFPs were impermissible. The effect of that decision on stock prices for companies with FFPs in their charters demonstrates that stockholders value FFPs and are willing to pay for that value. One study determined that the Delaware Chancery Court’s decision was “associated with a large negative stock price effect for companies that had FFPs in their charters.” (Aggarwal *et al.*, *Federal Forum Provisions and the Internal Affairs Doctrine* (2020) 10 Harv. Bus. L.Rev. 383, 383.) According to that study, the price of those issuers’ equity securities meaningfully decreased at the relevant time—a decrease that is likely attributable to the issuance of the decision. (*Id.* at pp. 429-432, tables 6-9; see *id.* at p. 409 [noting that, using a two-day event window, there was a stock price effect of approximately 7 percent, which “suggests that the decision reduced the total market capitalization of a firm” with an FFP “by 7 percent”]; Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi* pp. 24-25 (2019) Rock Center for Corporate Governance, Working Paper No. 241 (hereafter Grundfest) <<https://www.ssrn.com/abstract=3448651>> [discussing Aggarwal study].) And certainly it is clear that the FFP-hostile Chancery Court decision did not “*positively* affect[] the stock price” of issuers with FFPs. (a, italics added.)

Institutional Shareholder Services Inc., the influential proxy advisory firm that advises hedge funds, mutual funds, and similar organizations on shareholder votes, has directly expressed the view that FFPs have value for shareholders. Late last year, that firm issued a policy recommendation to “[g]enerally vote for federal forum selection provisions in the charter or bylaws that specify ‘the district courts of the United States’ as the exclusive forum for federal securities law matters.” (ISS, *Americas: Proxy Voting Guidelines, Updates for 2021*, p. 19 (Nov. 12, 2020) <<https://www.iss.com>>)

issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf>.)

It is also not surprising that every court that has considered whether FFPs are valid and enforceable has concluded that they are. In *Sciabacucchi*, in the course of upholding FFPs as valid under Delaware law, the Delaware Supreme Court expressed the view that other states should similarly uphold FFPs because of “[t]he need for uniformity and predictability” and because FFPs “do not violate principles of horizontal sovereignty.” (*Sciabacucchi, supra*, 227 A.3d at pp. 135-137.) In California, every trial court to have addressed an FFP has enforced it. (See *In re Uber Technologies, Inc. Sec. Litig.* (Super. Ct. S.F. County, Nov. 16, 2020, No. CGC-19-579544) <<https://bit.ly/3sCpIO9>>; *In re Dropbox, Inc. Securities Litigation* (A161603, app. pending); *In re Sonim Technologies, Inc. Sec. Litig.* (Super. Ct. San Mateo County, Dec. 7, 2020, No. 19-CIV-05564) <<https://www.dandodiary.com/wp-content/uploads/sites/893/2020/12/Sonim-Technologies.pdf>>.) And courts in other states have done the same. In both New York and in Utah, trial courts have recently ruled that FFPs are valid and must be enforced. (See *Aufses et al., New York Court Joins Other State Courts in Dismissing Securities Act Claims in Favor of Federal Forum Provision* (Sept. 28, 2021) JDSupra <<https://www.jdsupra.com/legalnews/new-york-court-joins-other-state-courts-6980004/>> [discussing New York trial court decision in *Hook v. Casa Systems, Inc.*]; *Volonte v. Domo, Inc.* (Utah Dist. Ct., Apr. 13, 2021, No. 190401778) 2021 WL 1960296, at p. \*6.) This Court should reach the same result.



### C. Plaintiff's Argument That FFPs Are Not Beneficial Lacks Merit

Plaintiff only glancingly acknowledges those important policy issues. But plaintiff does briefly argue that parallel state and federal litigation is not a real problem and that FFPs are not necessary. Those arguments lack merit.

As an initial matter, plaintiff contends that parallel litigation can be fully dealt with by means of courts “managing their dockets to prevent inconsistent verdicts and inefficiencies,” such as by staying a later-filed case “pending the outcome of the first-filed case.” (Reply Br. 18.) But general docket management issues are within the discretion of the particular court that is handling a particular case, and some courts simply do not choose to stay litigation entirely in favor of a case pending in another judicial system, regardless of which case was filed first. Moreover, even if parallel cases do move forward *seriatim* rather than at the same time, the costs and burdens on the defendant are nevertheless weighty ones. The mere prospect that there may be some “docket management” in parallel cases thus does nothing to dispel the systemic harms (see pp. 12-18, *supra*) that FFPs have effectively addressed. Indeed, the post-*Cyan* problems surrounding D&O insurance, which reflected a market response to those harms, demonstrate that courts’ docket management is hardly a panacea.

Plaintiff also argues that FFPs must not be necessary because Securities Act claims have long been resolved without the benefit of FFPs. (See Reply Br. 18.) But that argument ignores the fact that the harmful shifts in plaintiffs’ strategy for litigating such claims are of recent vintage. (See pp. 12-15, *supra*.) FFPs may not have had significant benefits in an era in which most Securities Act claims were filed solely in federal court and D&O insurance was not overly expensive and difficult to obtain—but they do have significant benefits now. Plaintiff also suggests that Congress would have taken some action itself to deal with parallel state and federal Securities Act

cases if they were truly so burdensome. But there is no need for Congress to do so when private parties can deal effectively with those burdens through private arrangements that select a single judicial forum for resolution of Securities Act claims. And, of course, if Congress ever decided to override FFPs through legislation, Congress would be free to do so.

## **II. Contrary To Plaintiff’s Argument, FFPs Do Not Violate Federal Securities Law**

Plaintiff also insists that policy arguments are irrelevant in this case because Congress already determined that plaintiffs *must* be allowed to bring Securities Act claims in state court, regardless of whether plaintiffs independently cede their ability to do so. (See Reply Br. 50-51.) That argument is premised on the Securities Act’s anti-waiver and anti-removal provisions. (See 15 U.S.C. § 77n [“Any 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 Commission shall be void.”]; 15 U.S.C. § 77v(a) [“[N]o case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”].)

Plaintiff’s argument is wrong—and not just wrong, but badly wrong. The Supreme Court has made clear time and time again that if the text of a federal statutory provision is unambiguous, the task of interpreting that provision is at an end. (See, e.g., *Carcieri v. Salazar* (2009) 555 U.S. 379, 387 [where federal “statutory text is plain and unambiguous,” a court “must apply the statute according to its terms”]; *Dodd v. United States* (2005) 545 U.S. 353, 357 [a court “must presume” that Congress “says in a statute what it means and means in a statute what it says there,” quoting *Conn. Nat’l Bank v. Germain* (1992) 503 U.S. 249, 253-254]; see also generally *Atl. Coast Line R. Co. v. Burnette* (1915) 239 U.S. 199, 201 [state court addressing federally created rights must adhere to the “limit[s]” of those rights].) After all,

Congress does not pursue every statutory purpose to its uttermost. Rather, Congress lays out whatever limitations it has in mind in the words that it writes, so that its enactments go “so far and no further.” (*Cyan, supra*, 138 S.Ct. at p. 1073, quoting *Michigan v. Bay Mills Indian Cmty.* (2014) 572 U.S. 782, 794.) And Congress legislates against the backdrop of those fundamental interpretive principles. (See generally *Bond v. United States* (2014) 572 U.S. 844, 857.)

A text-focused examination of the provisions on which plaintiff relies reveals that they are simply inapplicable here. As for the anti-waiver provision, which voids an arrangement “binding any person acquiring any security to waive compliance” with any part of the Securities Act (15 U.S.C. § 77n), the Supreme Court has already held in *Rodriguez* that the provision is inapplicable to procedural arrangements like forum-selection clauses. (See *Rodriguez, supra*, 490 U.S. at p. 481 [“[T]he right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that [the anti-waiver provision] is properly construed to bar any waiver of these provisions.”]; see also *Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220 [reaching same conclusion as to a different securities statute].) Plaintiff’s effort to distinguish *Rodriguez*, in which the forum-selection provision at issue was an arbitration clause, lacks any force. According to plaintiff, arbitration is different, because an arbitration agreement adds an available forum for resolving a dispute between the parties under the Securities Act whereas an FFP “removes available forums for resolving a dispute under the 1933 Act.” (Reply Br. 20-21.) But *Rodriguez* did not turn on any such distinction. The Supreme Court gave a number of independent reasons why the Securities Act provision conferring concurrent jurisdiction on state and federal courts is not covered by the anti-waiver provision. And, in the course of discussing a case in which the Court had previously found an anti-waiver provision in a different securities law

inapplicable to an arbitration agreement, the Court indicated dubiousness that anything about the number of available fora “make[s] any difference at all” to the analysis. (*Rodriguez, supra*, 490 U.S. at p. 482.)

In any event, in practice an FFP provides a would-be plaintiff scope for obtaining resolution of a Securities Act claim that is just as wide—if not wider—than the scope that an arbitration agreement affords. Parties who agree to arbitrate Securities Act claims consent to forgo a merits resolution in *any* court, thus narrowing the available fora for resolution of that dispute down to one: arbitration. An FFP likewise provides for only one forum for resolution: federal court, a judicial forum. Nothing in *Rodriguez* suggests that the anti-waiver provision is inapplicable when a Securities Act plaintiff gives up entirely any right to judicial resolution on the merits, but swings into action to bar an FFP that permits a Securities Act plaintiff to bring suit in federal court. (See *CompuCredit Corp. v. Greenwood* (2012) 565 U.S. 95, 102.)

The anti-removal provision is, if anything, even less relevant to FFPs. As this case illustrates, when an FFP applies and a plaintiff nevertheless seeks to bring a Securities Act claim in state court, the proper remedy is not removal of the action to federal court; it is dismissal of the action for failure to abide by a binding forum-selection provision. Defendant here did not seek to remove this case, because it had no need to do so. The fact that a federal statute prevents removal of state-court Securities Act claims to federal court is therefore entirely beside the point.

Plaintiff asserts that Congress, having barred removal, could not possibly have wanted to “permit[] this obvious loophole to exist.” (Reply Br. 11; see *id.* at p. 17.) But Congress wrote a provision that addresses only removal and says nothing at all about a private forum-selection arrangement that restricts certain claims to a federal forum. There is no warrant to hypothesize about whether the Congress that enacted the anti-removal

provision would have addressed FFPs if that Congress had thought about the issue. (See *Cyan, supra*, 138 S.Ct. at p. 1073.) In any event, it would be perfectly rational for Congress to prevent a defendant from overriding a plaintiff’s choice of forum through removal while at the same time giving full effect to a forum-selection provision. A plaintiff necessarily has *notice* of a forum-selection provision before bringing suit—and a plaintiff who knows that such a provision exists can choose not to enter or remain in any relationship that would be governed by the provision. That makes forum selection a very different matter than removal.

Plaintiff also appears to suggest that the anti-removal provision somehow takes on greater breadth if read in conjunction with the anti-waiver provision or the provision that, as a background principle, gives state and federal courts concurrent jurisdiction over Securities Act claims. (See, e.g., Reply Br. 12-13.) That contention is mystifying. Nothing about those other provisions changes the fact that the anti-removal provision is limited to barring removal, which is not at issue in an FFP case. And nothing about those other provisions has anything at all to say about a forum-selection clause like an FFP, which—like an arbitration clause—simply reflects a binding procedural arrangement for resolving disputes in particular cases. Plaintiff therefore gains no ground by trying to somehow add all of these irrelevant provisions together.

In the end, plaintiff’s argument boils down to a plea for this Court to “add words to the law” that Congress wrote. (*EEOC v. Abercrombie & Fitch Stores, Inc.* (2015) 575 U.S. 768, 774.) Indeed, the nature of plaintiff’s plea is laid bare by plaintiff’s repeated description of the anti-removal provision as a guarantee that “the decision over which forum to use rests entirely with the plaintiff” (Reply Br. 15; see, e.g., *id.* at pp. 10, 12)—a description that bears essentially no resemblance to Congress’s much more modest bar on “remov[al]” of claims from state to federal court (15 U.S.C. § 77v(a)). But

editing the text of the Securities Act to (effectively) insert a new anti-forum-selection-clause provision is not a permissible mode of federal statutory interpretation. Plaintiff's argument that the Securities Act renders FFPs unenforceable therefore must be rejected.

### CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

DATED: October 20, 2021

/s/ Elaine J. Goldenberg

Elaine J. Goldenberg

*(Pro Hac Vice pending)*

MUNGER, TOLLES & OLSON LLP

Elaine.Goldenberg@mto.com

601 Massachusetts Ave., NW

Suite 500 East

Washington, DC 20001

Telephone: (202) 220-1114

Facsimile: (202) 220-2300

John W. Spiegel

(State Bar No. 78935)

MUNGER, TOLLES & OLSON LLP

John.Spiegel@mto.com

350 South Grand Avenue

Fiftieth Floor

Los Angeles, California 90071-3426

Telephone: (213) 683-9152

Facsimile: (213) 687-3702

*Attorneys for Amicus Curiae*  
Chamber of Commerce of the  
United States of America

## CERTIFICATE OF WORD COUNT

In accordance with California Rule of Court 8.204(C), I certify that this Amicus Brief, including headings, footnotes, and quotations, but excluding cover information, application for leave to file, tables, signature blocks, certificate of word count, certificate of interested entities or persons, and proof of service, contains 5767 words as calculated using the Word Count function of Microsoft Word, which was used to prepare this brief.

DATED: October 20, 2021

MUNGER, TOLLES & OLSON LLP

By: /s/ Elaine J. Goldenberg

Elaine J. Goldenberg

*Attorney for* Amicus Curiae

Chamber of Commerce of the

United States of America

**PROOF OF SERVICE**

**Wong v. Restoration Robotics, Inc.  
A161489**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 350 South Grand Avenue, Fiftieth Floor, Los Angeles, CA 90071-3426.

On October 20, 2021, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT AND AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address *Marilyn.ogaldez@mto.com* to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

**BY ELECTRONIC SERVICE:** I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 20, 2021, at Los Angeles, California.

/s/ Marilyn Ogaldez  
Marilyn Ogaldez



**SERVICE LIST**

**Wong v. Restoration Robotics, Inc.  
A161489**

**Via TrueFiling**

Thomas C. Goldstein  
GOLDSTEIN & RUSSELL P.C.  
7475 Wisconsin Avenue, Suite 850  
Bethesda, MD 20814  
Telephone: (202) 362-0636  
Facsimile: (866)574-2033  
tgoldstein@goldsteinrussell.com

Andrew S. Love  
ROBBINS GELLER RUDMAN  
& DOWD LLP  
One Montgomery Street, Suite  
1800 San Francisco, CA 94104  
Telephone: (415) 288-4545  
Facsimile: (415) 288-4534  
alove@rgrdlaw.com

James I. Jaconette  
ROBBINS GELLER RUDMAN &  
DOWD LLP  
655 West Broadway, Suite 1900  
San Diego, CA 92101-8498  
Telephone: (619) 231-1058  
Facsimile: (619) 231-7423  
jamesj@rgrdlaw.com

Samuel H. Rudman  
ROBBINS GELLER RUDMAN  
& DOWD LLP  
58 South Service Road, Suite 200  
Melville, NY 11747  
Telephone: (631) 367-7100  
Facsimile: (631) 367-1173  
srudman@rgrdlaw.com

Frank J. Johnson  
Chase M. Stern  
JOHNSON FISTEL, LLP  
655 West Broadway, Suite 1400  
San Diego, CA 92101  
Telephone: (619) 230-0063  
Facsimile: (619) 255-1856  
frankj@johnsonfistel.com  
cstern@johnsonfistel.com

Matthew Rawlinson  
Daniel R. Gherardi  
LATHAM & WATKINS LLP  
140 Scott Drive  
Menlo Park, CA 94025  
Telephone: (650) 328-4600  
Facsimile: (650) 463-2600  
matt.rawlinson@lw.com  
daniel.gherardi@lw.com

Gavin M. Masuda  
Nicholas Rosellini  
LATHAM & WATKINS LLP  
505 Montgomery Street  
Suite 2000  
San Francisco, CA 94111  
Telephone: (415) 391-0600  
Facsimile: (415) 395-8095  
gavin.masuda@lw.com  
nick.rosellini@lw.com

**Via Electronic Mail**

Honorable Marie S. Weiner  
San Mateo Superior Court  
Department 2  
Located at Courtroom 2E  
400 County Center  
Redwood City, CA 940631  
complexcivil@sanmateocourt.org

Melissa Arbus Sherry  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004  
Telephone: (202) 637-2200  
Facsimile: (202) 637-2201  
melissa.sherry@lw.com