

Calif. Panel Sides With Robotics Biz In Investor's Forum Fight

By Sarah Jarvis

Law360 (May 2, 2022, 7:44 PM EDT) -- A California appellate court has ruled an investor's lawsuit against the manufacturer of a robotics system used in hair transplant procedures must be fought in federal court, finding a forum selection provision in the company's certificate of incorporation is enforceable despite the plaintiff's preference to stay in state court.

The panel behind Thursday's decision in favor of Restoration Robotics Inc. rejected plaintiff Sunny C. Wong's argument that a Golden State trial court was wrong to decline jurisdiction over his securities claims against the company in September 2020.

The appellate panel affirmed that Restoration's federal forum provision doesn't violate the Securities Act, which generally allows a plaintiff to choose whether to file suit in state or federal court and prohibits removing state court cases to federal court.

Melissa Arbus Sherry of Latham & Watkins LLP, counsel for Restoration, said in a statement she's thrilled with the court's decision, adding that it will "likely serve as a watershed moment and critical endorsement of companies' battle against costly duplicative federal and state court securities litigation."

Counsel for Wong didn't respond to a request for comment Monday.

The appeal stemmed from California state Judge Marie Weiner's September 2020 ruling, in which she found Restoration's use of the federal forum provision wasn't "unjust or unreasonable." The provision bars investors from taking claims under the Securities Act to state court.

Judge Weiner acknowledged such provisions are meant to circumvent the high court's ruling in *Cyan Inc. v. Beaver County Employees Retirement Fund*, which found federal and state courts have concurrent jurisdiction over class actions based on Securities Act claims. But she said the relatively novel federal forum provision doesn't disrupt shareholders' substantive rights to due process.

Judge Weiner's order followed a Delaware Supreme Court ruling in March 2020 that found its state incorporation law does not prohibit companies from adopting federal forum provisions, or FFPs, for Securities Act claims.

That holding was not binding on courts in other states, leaving Judge Weiner to take up the question of FFP enforceability in the 2018 investor suit alleging Restoration Robotics violated the Securities Act by issuing a misleading registration statement before going public in October 2017.

Wong's class action complaint alleged the company's registration statement mischaracterized its liquidity and capital needs, and failed to disclose that its implantation technology needed substantial work before it would be commercially viable. When his complaint was filed, Restoration stock traded at less than 50% of the initial public offering sales price, the appellate panel noted.

In its decision, the panel referred to the company as Restoration but noted it was acquired by Venus Concept Ltd. in 2019 and that the post-merger company is called Venus Concept Inc. Restoration is incorporated in Delaware and headquartered in California.

The trial court had ruled that Wong failed to show the FFP was unenforceable, unconscionable, unjust or unreasonable, granting the company's motion to dismiss. Counsel for Restoration told Law360 in the wake of Judge Weiner's order that the ruling was the first of its kind since the Delaware Supreme Court's decision.

On appeal, Wong argued that Restoration's FFP violates the Securities Act and shouldn't be enforced because it is unfair and unreasonable. He also argued Delaware's statutory scheme allowing the FFP violated the U.S. Constitution's commerce and supremacy clauses.

But the panel found FFPs don't violate the Securities Act, the federal constitution or California law, Restoration's counsel at Latham noted in a Friday client alert. The firm called the decision a significant win for corporations and shareholders "hoping to stem the tide of duplicative litigation arising from securities offerings — particularly in cases brought in California state court."

In its ruling, the appellate panel found, among other things, that Delaware has a legitimate interest in allowing its corporations to include FFPs in their certificates of incorporation, saying "any burden on interstate commerce from the inclusion of an FFP does not exceed the benefits provided by the statute."

Latham & Watkins said the California appellate panel was facing "a slew of challenges" to FFPs under federal and California law but rejected them all. The firm also noted that consolidated federal litigation against Restoration was settled in May 2021.

Judges Marla J. Miller, Therese M. Stewart and Cindee F. Mayfield sat on the panel.

Wong is represented by Andrew S. Love and James I. Jaconette of Robbins Geller Rudman & Dowd LLP, Thomas C. Goldstein, Molly Runkle and Charles H. Davis of Goldstein & Russell PC, and Mark C. Molumphy, Tyson C. Redenbarger and Noorjahan Rahman of Cotchett Pitre & McCarthy LLP.

Restoration is represented by Melissa Arbus Sherry, Matt Rawlinson, Nick Rosellini and Daniel Gherardi of Latham & Watkins LLP.

The case is Sunny C. Wong v. Restoration Robotics Inc., case number A161489, in the Court of Appeal for the State of California, First Appellate District.

--Editing by Kristen Becker.