

THE IMPACT OF FORUM SELECTION BYLAWS ON SECURITIES
EXCHANGE ACT SECTION 14(A) SHAREHOLDER DERIVATIVE
SUITS

BY: ANDREW J. CZERKAWSKI*

I. INTRODUCTION	274
II. BACKGROUND AND KEY TERM DEFINITIONS.....	275
III. LEE'S UNDERLYING THEORY	279
IV. THE NINTH CIRCUIT AFFIRMS	282
V. THE NINE-SEVEN SPLIT.....	286
VI. PRACTICAL IMPLICATIONS.....	287

I. INTRODUCTION

Axiomatically, the law's description fundamentally differs from the law's proscription.¹ Equally self-evident, no courts staying within their appropriate role endeavor to shatter Hume's guillotine.² Such a Sisyphean task fares better in the capable hands of our elected representatives. And, perhaps unlike most legal authorship, this Note invades not the province thereof. Thus, it neither needs to, nor shall, propose policy, advocate reform, or proffer resolutions tantamount to bench legislation. Rather, with a brief examination of the matter's critical aspects, this Note merely aims to suggest an organic and meaningful interpretation of the focus opinion itself and its practical effects. Prudence minimally demands, and thus the consideration's scope includes, discussed respectively: the central opinion's key at-play component background definitions; the plaintiff's theory's backdrop and procedural posture; the underlying rationale and holding; the ostensible circuit split; and the potentially board-friendly practical ramifications.

Predicated on surprisingly simple underlying logic, the relatively recent Ninth Circuit affirmation in *Lee v. Fisher*³ allowed a board of directors, through an adopted forum selection bylaw, to effectively preclude a shareholder's derivative Securities Exchange Act of 1934 Section 14(a) claim. But, penned so recently the ink still has yet to dry, the opinion should not evade scrutiny. Its particular judgment implicates and exposes an inherent tension fundamentally rooted in: the federal legislature's will, intent, and goals; and whether, via judicial enforcement, parties' own private agreements can escape that weighty gravitational pull.

The fulcrum on which the principal inquiries at hand pivot centers on the intersection between procedural underpinnings, statutory interpretation, a plaintiff's ability to bring a derivative claim under long-standing securities regulations, and the court's appropriate role in opining on the necessity thereof.⁴ Imperative to adequately understanding how and

¹ Stated otherwise, the question of what the law *is* differs from what the law *ought* to be.

² See David Hume, A TREATISE OF HUMAN NATURE, Book III Part I Section I (1739), <https://oll.libertyfund.org/title/bigge-a-treatise-of-human-nature> (last visited Dec. 6, 2022) (describing how one cannot make the logical leap from descriptive premises to proscriptive conclusions). As Chief Justice John Marshall forcefully asserted, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

³ 34 F.4th 777 (9th Cir. 2022) (*Lee II*).

⁴ See generally *id.*; *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1089 (9th Cir. 2018); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1295 (9th Cir. 1998); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

why the Ninth Circuit ended up where it did, and the decision's resulting practical consequences, is an initial survey of the underlying suit's surrounding key terms' meanings—even if elementary—and the layers of principles baked into the posture, background, and cause of action.

II. BACKGROUND AND KEY TERM DEFINITIONS

Plaintiff Noelle Lee owned and held shares of The Gap, Inc. (“The Gap”).⁵ Generally, a shareholder (or, depending sometimes on the particular court or jurist, a stockholder) is a person, including both a natural and non-natural person⁶ (*i.e.*, entities) that has, as the term itself suggests, purchased or otherwise beneficially owns shares of a corporation's issued stock.⁷ A person that acquires a corporation's stock receives an equity interest in that corporation.⁸

With over 3,000 brick-and-mortar store locations worldwide, The Gap (including its well-known subsidiaries Old-Navy, Banana Republic, and Athleta) is a globally present retail and online clothier.⁹ A Delaware corporation¹⁰ headquartered in San Francisco,¹¹ The Gap's shares trade principally on the NYSE.¹² And with 2021's net sales around \$17 billion,¹³ a smidgen over 5,500 record shareholders,¹⁴ and roughly eleven million of its outstanding shares daily changing public hands,¹⁵ a reasonable person may fairly assert that The Gap is no small operation. Thus, The Gap's

⁵ *Lee II*, 34 F.4th at 779.

⁶ *See, e.g.*, *Adv. Video Tech., LLC v. HTC Corp.*, 103 F. Supp. 3d 409, 419 (S.D.N.Y. 2015) (discussing Delaware authority on corporations as shareholders).

⁷ *See, e.g.*, *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1349 (11th Cir. 2011) (defining shareholders); *Strougo v. Hollander*, 111 A.3d 590, 598, 600 (Del. Ch. 2015) (noting that stockholders, when they buy stock, assent to corporate bylaws as part of an “inherently flexible” contract) (internal quotations omitted).

⁸ *See, e.g.*, *Strougo*, 111 A.3d at 598 (discussing a stockholders' equity interest in a corporation in which she owns stock).

⁹ THE GAP, INC., 2021 ANNUAL REPORT 1, 30 (2021), https://s24.q4cdn.com/508879282/files/doc_financials/2022/ar/2021-Gap-Inc.pdf

¹⁰ THE GAP, INC., AMENDED AND RESTATED CERTIFICATE OF INCORPORATION 1, <https://rb.gy/xqmjcd> (last visited March 3, 2023). Due to unwieldy formatting, the shortened appended URL directs to The Gap's website.

¹¹ 2021 ANNUAL REPORT, *supra* note 9, at 4.

¹² 2021 ANNUAL REPORT, *supra* note 9, at 24.

¹³ THE GAP, INC., QUARTERLY FINANCIAL SUMMARY Q1 2022 4 https://s24.q4cdn.com/508879282/files/doc_financials/2022/q1/2022-Q1-QFS.pdf

¹⁴ 2021 ANNUAL REPORT, *supra* note 9, at 24; THE GAP, INC., AMENDED AND RESTATED BYLAWS 3, <https://rb.gy/eqdnpm> (last visited March 3, 2023). Due to unwieldy formatting, the shortened appended URL directs to The Gap's website.

¹⁵ WALL STREET JOURNAL, *The Gap, Inc. NYSE Market Quote*, <https://www.wsj.com/market-data/quotes/GPS> (last visited July 15, 2022) (showing a sixty-five day trading average of eleven million daily but a past year one day high water mark of about thirty-three million).

board-level business and internal governance decisions affect a vast number of putative shareholder plaintiffs and thereby exposes the board to a commensurate level of potential derivative liability.

The relationship between a corporation and its shareholders is fundamentally contractual in nature.¹⁶ Consequently, a person's shareholder status generally affords her not only a certain amount of ownership interest, but also, with respect to the corporation in which she owns shares, the enjoyment of various reasonable expectations and rights.¹⁷ Often among others such as receiving dividends and inspecting the corporate books and records,¹⁸ one of the primary attending rights afforded to shareholders includes the right to vote (if voting rights attach to that particular stock class) on various corporate matters—most notably the election of directors and fundamental changes such as mergers.¹⁹ But the entity's certificate of incorporation (charter), the general corporation law of the state of incorporation (by default),²⁰ any shareholder agreements, and the entity's adopted bylaws, together, generally govern a shareholder's specifically enjoyed benefits and rights.²¹

As Chief Justice John Marshall famously described, a corporation exists invisibly, artificially, and intangibly as a mere “creature of law.”²² Thus, it possesses only the properties conferred unto it by the instrument giving rise to its creation.²³ And since two of the most important objectives of its creation are, *inter alia*, the properties of immortality and individuality, the power to manage its own affairs follows as incident to its very existence.²⁴ For more than a century, Delaware courts have frequently and emphatically reiterated this cardinal, bedrock corporate governance principle: the board manages a corporation's business and affairs.²⁵

¹⁶ *Strougo*, 111 A.3d at 597; *Kun v. Fulop*, 71 A.D.3d 832, 834 (N.Y. App. Div. 2010).

¹⁷ *See, e.g., Argo Data Res. Corp. v. Shagrithaya*, 380 S.W.3d 249, 265 (Tex. App. 2012) (highlighting shareholder's reasonable expectations and rights).

¹⁸ *Id.*

¹⁹ DEL. CODE ANN. tit. 8, §§ 211(b), 251(c).

²⁰ *See Middleburg Training Ctr., Inc. v. Firestone*, 477 F. Supp. 2d 719, 725 (E.D. Va. 2007) (describing the character of the shareholder-corporation contract and its component pieces).

²¹ *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013).

²² *Trs. of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

²³ *Id.*

²⁴ *Id.*

²⁵ DEL. CODE ANN. tit. 8, § 141(a); *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1047 (Del. 2021); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993); *Paramount Commc'ns, Inc. v. Time., Inc.*, 571 A.2d 1140, 1150 (Del. 1989); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986); *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1353 (Del.

It is long settled that the board of a corporation organized under Delaware's General Corporation Law retains the power to create and adopt bylaws "relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."²⁶ Generally, a corporation's bylaws are rules that establish the *process and procedures*—as opposed the *substantive* merits²⁷—governing the corporation's internal operations, management, and business decisions.²⁸ In conjunction with the entity's other governing documents, a corporation's bylaws functionally operate as a binding contract between and among the corporate officers, directors, and shareholders.²⁹ Accordingly, when interpreting bylaws, courts generally apply contract construction and interpretation principles.³⁰

One particular clause sometimes contained (and even recommended)³¹ in Delaware corporations' bylaws is a forum selection clause.³² A typical forum selection clause may designate the Delaware Court of Chancery, or some other federal or state court located in the State

1985) (noting the board's authority to adopt a poison pill in the face of a hostile takeover); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 953 (Del. 1985); *Rosenblatt v. Getty Oil Co.*, 493 A.3d 929, 943 (Del. 1985); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981) (describing 141(a) as the "fount of directorial powers."); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Lehrman v. Cohen*, 222 A.2d 800, 808 (Del. 1966); *Lippman v. Kehoe Stenograph Co.*, 102 A. 988, 992 (Del. 1918).

²⁶ *Lawson v. Household Fin. Corp.*, 152 A. 723, 726 (Del. 1930); DEL. CODE ANN. tit. 8, § 109(a)–(b). But once the board issues shares, the shareholders must approve any subsequent bylaw changes unless the charter specifically confers unto the board unilateral power. *See id.*

²⁷ *Kaufman v. Alexander*, 62 F. Supp. 3d 395, 403 (D. Del. 2014); *see also* DEL. CODE ANN. tit. 8, § 109(a).

²⁸ *See, e.g., Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. Ct. App. 2004) (explaining bylaws' role and purpose in corporate governance).

²⁹ *Boilermakers*, 73 A.3d at 939.

³⁰ *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) (finding the bylaw at issue invalid because corporate bylaws are interpreted by their commonly accepted meaning unless clear context or a special legal phrase requires differently, and the bylaws conflicted with the charter with respect to director terms and voting rights).

³¹ Charles M. Nathan, LATHAM & WATKINS, *Designating Delaware as the Exclusive Jurisdiction for Intra-Corporate Disputes*, HLS FORUM ON CORP. GOV. (May 11, 2010), <https://corpgov.law.harvard.edu/2010/05/11/designating-delaware-as-the-exclusive-jurisdiction-for-intra-corporate-disputes/#comments> (recommending Delaware companies adopt the Court of Chancery as their exclusive forum for litigating intra-corporate disputes predicated on the Court of Chancery's superiority in handling corporate matters).

³² *See, e.g., Boilermakers*, 73 A.3d at 942 (noting Chevron corporation and FedEx corporation, both Delaware entities headquartered in other states, adopted almost identical forum selection clauses designating internal dispute litigation to take place in a Delaware forum, and how more than 250 publicly traded corporations have adopted similar clauses over the last three years); *Seafarers Pension Plan v. Bradway*, 23 F.4th 714, 718 (7th Cir. 2022) (describing Boeing's almost identical forum selection bylaw designating the Delaware Court of Chancery as the exclusive forum for shareholder derivative actions brought against the Boeing company).

of Delaware, as the exclusive forum for litigating disputes arising from internal corporate governance conflicts.³³ Of the aforementioned species of internal conflicts, boards may choose to specifically delineate, within the language of the clause itself, the kinds of matters falling within the particular provision's scope.³⁴ Enumerating the contemplated dispute types, these provisions typically include “any derivative action or proceeding brought on behalf of the Corporation . . . any action asserting a . . . breach of fiduciary duty . . . any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or . . . any action asserting a claim governed by the internal affairs doctrine.”³⁵ And since it is long settled³⁶ that a Delaware corporation's bylaws maintain status tantamount to a contract binding its officers, directors, and stockholders³⁷—the contents of which the court charges investors with constructive knowledge³⁸—stockholders are, therefore, theoretically bound to bring any clause-covered action in the particular designated forum: as previously stated, either the Court of Chancery or some other forum located in Delaware.

In or around 2014, well before the instant focus case, The Gap's board of directors amended The Gap's bylaws and adopted the still-in-effect forum selection clause; the clause's language virtually mirrors those of other similarly situated Delaware entities.³⁹ Thus, it takes neither an undue nor unreasonable stretch of the imagination to fathom how many companies have positioned themselves to require potentially legions of shareholder litigants to bring their disputes in Delaware courts.

³³ *Boilermakers*, 73 A.3d at 942–43.

³⁴ *Id.*

³⁵ *Id.* at 942 (quoting the Chevron corporation's forum selection bylaw).

³⁶ See *Boilermakers*, 73 A.3d at 942 n.7 (acknowledging the same proposition's eighty year existence).

³⁷ *Id.* at 942–43; *Rosenbaum v. CytoDyn Inc.*, No. CV 2021-0728, 2021 WL 4775140, at *15 (Del. Ch. Oct. 13, 2021) (reiterating Delaware law in interpreting the nature of a corporation's bylaws and the construal of the broader contract to which investors become party).

³⁸ *Boilermakers*, 73 A.3d at 939 (asserting investors know about their contractual binds when they purchase stock in a Delaware corporation).

³⁹ See *id.* at 941–44 (quoting the language used in Chevron's and FedEx's forum selection bylaws); see also *Seafarers*, 23 F.4th at 718 (quoting the forum selection provision's language used in Boeing's bylaws); AMENDED AND RESTATED BYLAWS, *supra* note 14, at 22; THE GAP, INC., AMENDED AND RESTATED BYLAWS (Feb. 1, 2015), <https://www.sec.gov/Archives/edgar/data/39911/000003991114000162/november2014bylaws.htm> (SEC archived version) (including no forum selection provision at this point in time).

III. LEE'S UNDERLYING THEORY

The Gap's forum selection bylaw specifically contemplated the nature of plaintiff Lee's underlying theory.⁴⁰ Specifically, Lee brought a shareholder derivative suit on behalf of The Gap against the individual members of The Gap's board of directors.⁴¹ Generally, the ability to bring a derivative suit exists and follows from stock ownership itself because a shareholder plaintiff is entitled to "recover what belongs to the corporation, because as a co-owner, it also belongs to him."⁴² A derivative suit allows a shareholder to "step into the corporation's shoes" and seek a remedy otherwise unavailable on her own.⁴³ In essence, the shareholder's suit is predicated "on a cause of action *derived* from the corporation."⁴⁴

But courts scrutinize shareholder derivative suits with a hesitant eye on the grounds that, if left unchecked, derivative suits threaten to "undermine the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders."⁴⁵ And because a derivative suit "inherently impinges upon the directors' power to manage the affairs of the corporation," certain prerequisites are imposed on a shareholder before she obtains the right to derivatively sue.⁴⁶ To give boards an "opportunity to address an alleged wrong without litigation and to control any litigation which does occur," shareholders must "first exhaust intracorporate remedies by making a demand on the directors to obtain the action [the shareholder desires]."⁴⁷

⁴⁰ *Lee II*, 34 F.4th at 777.

⁴¹ *Lee v. Fisher*, No. 20-CV-06163, 2021 WL 1659842, at *1 (N.D. Cal. Apr. 27, 2021) (*Lee I*) (naming The Gap as an additional nominal defendant); THE GAP, INC., *Board of Directors*, <https://www.gapinc.com/en-us/about/leadership/board-of-directors> (last visited Dec. 6, 2022).

⁴² *Howe v. Bank of N.Y. Mellon*, 783 F. Supp. 2d 466, 474 (S.D.N.Y. 2011).

⁴³ *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 528 (1984) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949)).

⁴⁴ *Daily*, 464 U.S. at 528 (citing *Cohen*, 337 U.S. at 548) (emphasis added).

⁴⁵ *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988) (citing *Daily*, 464 U.S. at 531).

⁴⁶ *Kaplan*, 540 A.2d at 730; *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *Calma v. Templeton*, 114 A.3d 563, 574 (Del. Ch. 2015).

⁴⁷ *Kaplan*, 540 A.2d at 730; Del. Ch. Ct. R. 23.1 (providing that a shareholder plaintiff must, *inter alia*, particularly allege any efforts the plaintiff made in attempting to receive the desired action from the board of directors, why she failed to get that desired action, or why the plaintiff made no effort in the first place); *see also* *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008) (noting that if a shareholder plaintiff fails to comply with Court of Chancery Rule 23.1, the shareholder must establish that the pre-suit demand would be futile); *Calma*, 114 A.3d at 574 (describing the two tests under Delaware law for establishing derivative pre-suit demand futility and stating the plaintiff must "impugn . . . at least half of the directors in office's ability"

Plaintiff Lee's underlying theory in her derivative suit rests on the board of director's alleged failure to achieve a certain level of diversity⁴⁸ amongst its ranks—that The Gap's board is “all-white [sic]” and consistently refuses “to appoint Black or other minority individuals to the Board and management positions.”⁴⁹ More specifically, Lee alleged, *inter alia*, The Gap's board of directors “made false statements to shareholders in [The Gap's] proxy statements about the level of diversity it had achieved” in violation of Section 14(a) of the Securities Exchange Act of 1934 (codified under 15 U.S.C. § 78n(a)), and its attendant regulation under 17 C.F.R. § 240.14a-9(a).⁵⁰

A shareholder who enjoys voting rights may choose to exercise that right either personally or by proxy; a proxy designation gives to another one person's right of authority.⁵¹ A voting proxy creates, in essence, an agency relationship where a record shareholder, in her stead, usually by executing a written instrument, appoints and transfers the right and authority to vote her shares of stock to another person.⁵² Because not all shareholders entitled to vote attend every shareholder meeting, directors of large publicly traded corporations may choose to solicit proxies from

to consider the demand impartially); *Beneville v. York*, 769 A.2d 80, 82 (Del. Ch. 2000) (noting how members of the board of directors could be found incapable of impartially considering a pre-suit demand because they either had an interest in the underlying transaction, or if they did not have an interest, could not independently act from the members that did).

⁴⁸ These kinds of lack-of-diversity actions are recently popular with activist shareholder plaintiffs and are brought mainly by one particular firm—Bottini & Bottini—who also represented the instant shareholder plaintiff Noelle Lee. See, e.g., Rebekah Parker, *Diversity Lawsuits Lose Momentum, but Companies Must Practice What Their Inclusion Statements Preach*, JDSUPRA, (Jan. 20, 2022), <https://www.jdsupra.com/legalnews/diversity-lawsuits-lose-momentum-but-276705>; *Court Dismisses Board Diversity Suit Against Facebook Directors*, PAUL|WEISS, (March 24, 2021), <https://www.paulweiss.com/practices/litigation/securities-litigation/publications/court-dismisses-board-diversity-suit-against-facebook-directors?id=39643>; *Shareholder Derivative Litigation Concerning Diversity in Corporate Leadership Is an Emerging Trend*, JONES|DAY (Sept. 2020), <https://www.jonesday.com/en/insights/2020/09/shareholder-derivative-litigation-concerning-diversity-in-corporate-leadership-is-an-emerging-trend>; *Lee II*, 34 F.4th at 779.

⁴⁹ Defs.' Mot. to Dismiss Pl.'s Verified S'holder Derivative Compl. at 3, *Lee I*, 2021 WL 1659842 (Dkt. No. 48).

⁵⁰ *Lee II*, 34 F.4th at 779; 15 U.S.C § 78n(a) (providing in pertinent part: “[i]t shall be unlawful for any person . . . to solicit . . . any proxy or consent or authorization in respect of any [registered] security”); 17 C.F.R. § 240.14a-9(a) (providing in pertinent part: “[n]o [proxy] solicitation . . . which . . . is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any [earlier] statement . . . which has become false or misleading [shall be made].”)

⁵¹ See *Manson v. Curtis*, 119 N.E. 559, 561 (N.Y. 1918) (defining a proxy).

⁵² See, e.g., *Aveta Inc. v. Cavallieri*, 23 A.3d 157, 168–69 (Del. Ch. 2010) (characterizing a proxy as an agency relationship); see also *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999) (noting the requirements of an effective proxy).

the absent or passive shareholders if they seek a specific shareholder vote outcome.⁵³ These proxy solicitation materials the board sends to shareholders—proxy statements—are generally subject to disclosure requirements under state law, and, if the corporation is registered with the SEC and publicly traded, federal law, concerning the adequacy of informing the shareholders about the matters for which the board seeks their votes.⁵⁴ And, as a policy prerogative, through 15 U.S.C. § 78n(a) and 17 C.F.R. § 240.14a-9(a), the federal legislature, at a minimum, implied a federal private cause of action for including false or misleading statements therein.⁵⁵

⁵³ Stroud v. Grace, 606 A.2d 75, 87 (Del. 1992).

⁵⁴ *Id.* at 86 (observing that, because the “realities of modern corporate life have all but gutted the myth that shareholders in large publicly held companies personally attend their annual meetings[,]” the fate of modern stockholder votes lie at the “mercy of the proxy instrument.”) (internal quotations omitted).

⁵⁵ See *J.I. Case Co. v. Borak*, 377 U.S. 426, 1559-60 (1964) (observing one of Section 14(a)’s “chief purposes is the protection of investors, which certainly implies the availability of judicial relief where necessary to achieve that result.”) (internal quotations omitted); see also *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 694 (3d Cir. 1979) (recognizing implied private causes of action for violations of title 15 chapter 78). *But cf.* Brief for Professors Joseph A. Grundfest & Mohsen Manesh as Amici Curiae Supporting Defendants-Appellees, *Lee II* (Trans. ID: 12595357) (*G&M*); Letter for Leo E. Strine, Jr. et al. as Amici Curiae Supporting Defendants-Appellees, *Lee II* (Trans. ID: 12596863) (*Letter*). Corporate and securities law scholars, Professors Grundfest and Manesh filed an *Amici Curiae* Brief in support of The Gap’s board on appeal. *G&M* at 1–2. Their brief urged the Ninth Circuit to dismiss Lee’s complaint “for lack of a cognizable derivative right of action and therefore standing” and contended that the United States Supreme Court, if faced with a circuit split (in this case, with the Seventh Circuit) would agree with their position, deny the existence of an implied Section 14(a) derivative private cause of action, and enforce The Gap’s forum selection bylaw. *G&M* at 21.

And collectively submitting a letter to the Ninth Circuit as *amici curiae* also supporting The Gap’s defending board of directors: former Chief Justices of the Delaware Supreme Court Leo E. Strine, Jr. and Myron T. Steele; former Justices of the Delaware Supreme Court Henry duPont Ridgely and Jack B. Jacobs; former Chancellors of the Delaware Court of Chancery William B. Chandler III and Andre G. Bouchard; and former Vice Chancellors of the Delaware Court of Chancery John W. Noble, Donald F. Parsons, and Joseph R. Slight III concurred with Professors Grundfest and Manesh’s contentions. *Letter* at 1–3. The group of renowned, eminent Delaware jurists (quite frankly, an all-star team if there ever was one) posited that:

- (1) the remedies available in this derivative action are duplicative of the remedies available in Delaware derivative actions;
- (2) the federal derivative claim at issue in this litigation is contingent on Delaware law both for its existence and for the definition of its critical metes and bounds;
- (3) where a stockholder claims that a false or misleading disclosure impaired the stockholder’s right to cast an informed vote, that claim is direct, not derivative;
- (4) Delaware General Corporate Law Section 115 is irrelevant to the validity of the forum selection provision at issue in this litigation; and
- (5) the forum selection provision at issue in this litigation is enforceable under Delaware law.

Letter at 2–3. One would be hard pressed to find more collective jurisprudential wisdom, knowledge, or expertise in so few pages. Nevertheless, first, merely because a derivative federal cause of action duplicates the *remedies* available in Delaware derivative actions does not entail

Lee initially brought suit in the United States District Court for the Northern District of California.⁵⁶ But, dismissing on *forum non conveniens* grounds through the vehicle of The Gap's forum selection bylaw, the district court never reached the merits.⁵⁷

IV. THE NINTH CIRCUIT AFFIRMS

On appeal, the Ninth Circuit ultimately disagreed with Lee and affirmed the district court's dismissal.⁵⁸ Lee contended that the court should not enforce The Gap's forum selection bylaw because enforcement thereof would completely bar her ability to bring her Section 14(a) derivative claim "in any court."⁵⁹ But the Ninth Circuit noted that forum selection clauses create strong presumptions "in favor of transferring a case" and should be transferred "unless extraordinary circumstances

the plaintiff enjoys all the same potential benefits otherwise available to a party litigating in a federal forum (for example, the federal procedural rules or a federal court's expertise in deciding federal law, not to mention the Court of Chancery's lack of juries). Stated otherwise, a putative derivative plaintiff loses the benefits of the federal legislature's policy choice in designating federal courts as the exclusive forum having jurisdiction over Section 14(a) claims. Second, no self-evident reasons reveal themselves explaining why federal courts neither could nor should fashion and utilize their own reasoning in shaping the contours of an implied federal derivative cause of action; the federal claim co-exists with any similar state claim, and neither mutually excludes the other. Third, if a misleading proxy impairs one shareholder's vote, thereby theoretically harming the shareholder directly, all shareholders suffer the same harm on the grounds that the same proxy informs all shareholders' votes. The aggregate impaired vote harms the proper operation of the corporate democracy. *See Schnell v. Christ-Craft Indus., Inc.*, 285 A.2d 437, 439 (1971) (finding an inequitable usurpation of the corporate democratic machinery). The usurpation of the corporate democratic process impairs its proper function and thus harms the corporation itself. A shareholder, to repair the corporation's injury, thus deserves to sue on behalf of the entity derivatively. *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (articulating the two-pronged test for determining whether a shareholder's claim is direct or derivative: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"). Fourth, a corporation's bylaws under DGCL Section 115 must comply with "applicable jurisdictional requirements[.]" Here, the applicable jurisdictional requirement stems directly from the Exchange Act's exclusive federal jurisdiction provision: only federal courts may hear and adjudicate Section 14(a) claims. The Delaware Court of Chancery may not. Thus, a forum selection clause designating the Court of Chancery as the exclusive forum for litigating derivative claims conflicts with the Exchange Act's exclusive jurisdiction provision. The Gap's forum selection bylaw, fifth and finally, is (as one might contend) thus, as particularly applied to derivative Section 14(a) claims, unenforceable under Delaware law.

⁵⁶ *Lee I*, 2021 WL 1659842.

⁵⁷ The District Court dismissed the case under Fed. R. Civ. P. 12(b)(6). *Lee I*, 2021 WL 1659842 at 1, 6.

⁵⁸ *Lee II*, 34 F.4th at 782.

⁵⁹ *Id.* at 780.

unrelated to the convenience of the parties clearly disfavor a transfer.”⁶⁰ And the plaintiff bears the burden to make the necessary showing of extraordinary circumstances.⁶¹ Despite her contentions, Lee failed to meet her burden.⁶²

Of the ways a plaintiff might show extraordinary circumstances, the court focused on whether enforcing The Gap’s forum selection bylaw “would contravene strong public policy.”⁶³ Enforcing a forum selection bylaw contravenes public policy if a “statute or judicial decision” from the forum where the suit is initially brought “clearly states strong public policy rendering the clause unenforceable.”⁶⁴ Pointing to both the Security Exchange Act’s antiwaiver provision (codified under 15 U.S.C. § 78cc(a)),⁶⁵ and the Exchange Act’s exclusive federal jurisdiction provision (codified under 15 U.S.C. § 78aa(a)),⁶⁶ Lee posited that these federal statutory provisions demonstrated “proof of strong public policy” and that The Gap’s forum selection bylaw contravened them, thus rendering it unenforceable.⁶⁷ The court disagreed and reasoned that the Securities Exchange Act antiwaiver provision neither explicitly states nor “contains a clear declaration of federal policy” and “the strong federal policy in favor of enforcing forum-selection clauses [supersedes] antiwaiver provisions in state [and federal] statutes, regardless [where the clause points].”⁶⁸

But the court improperly isolated the pertinent federal statutory sections from one another and therefore arrived at an erroneous conclusion. The Exchange Act’s antiwaiver statutory section expressly contemplates the invalidity of contractual provisions purporting to bind a person to “waive compliance with any provision of this chapter”—it renders them void.⁶⁹ The section title itself reads: “Validity of contracts.”⁷⁰ And corporate bylaws are, in essence, contracts between a corporation’s

⁶⁰ *Id.* (citing *Atl. Marine Constr. Co., Inc., v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 52 (2013)).

⁶¹ *Lee II*, 34 F.4th at 780.

⁶² *Id.* at 782.

⁶³ *Id.* at 781.

⁶⁴ *Lee II*, 34 F.4th at 781 (citing *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1089, 1090 (9th Cir. 2018) (internal quotations omitted)).

⁶⁵ 15 U.S.C. § 78cc(a) (providing in pertinent part: “[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.”).

⁶⁶ 15 U.S.C. § 78aa(a) (providing in pertinent part: “[t]he district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter”).

⁶⁷ *See Lee II*, 34 F.4th at 781.

⁶⁸ *Id.* (citing *Advanced China Healthcare*, 901 F.3d at 1090) (noting the policy of ensuring parties get the benefit of their bargain with respect to forum selection clauses).

⁶⁹ *See* 15 U.S.C. § 78cc(a).

⁷⁰ *Id.*

officers, directors, and shareholders.⁷¹ The Exchange Act's exclusive federal jurisdiction provision creates, at the minimum, an implied duty on any putative shareholder plaintiff: in order to comply with the statutory scheme and pursue a private Section 14(a) cause of action, the shareholder plaintiff, as a legislatively enacted federal policy prerogative, *must* bring her suit in federal court. Stated otherwise, Congress chose to give federal courts exclusive jurisdiction over Section 14(a) claims and thus requires that shareholder plaintiffs bring them therein. The Exchange Act's antiwaiver provision, in *conjunction* with the Exchange Act's exclusive federal jurisdiction provision, taken together and as a whole, creates a nonwaivable mandate to pursue private Section 14(a) claims: plaintiffs are *obligated*—i.e., have a *duty*—to bring them in federal court. The Gap's forum selection bylaw thereby functionally operates as a contractual provision binding shareholder plaintiffs to waive compliance with their statutory obligation to pursue their Section 14(a) claims in federal court. The Gap's forum selection bylaw both directly and indirectly contravenes the Exchange Act's strong public policy and is therefore, under the Ninth Circuit's own reasoning, unenforceable.⁷²

In other words, the federal legislature has decided that any kind of contract purportedly waiving away a person's compliance with the Exchange Act's statutory scheme in pursuing a private Section 14(a) cause of action—in this particular situation, the implied obligation to bring the suit in federal court—is void. On the other hand, the parties contracted to do so. Yet, even if a court wishes to give parties the benefit of their bargain, Congress has mandated that they cannot. A court then, in affording greater weight to private parties' intent against Congress's will, ostensibly allows subtle federal securities law circumvention. Whether in its infinite wisdom, or complete lack thereof, Congress enacted the statutory provisions at hand. Further clarification of its intent thereon, at this point, requires either additional federal legislation or a resolution from the United States Supreme Court.

Moreover, in response to Lee's contention that the Exchange Act's exclusive federal jurisdiction provision demonstrated strong evidence of public policy, the contravention thereof warranted finding the forum selection bylaw unenforceable, the Ninth Circuit again disagreed.⁷³ It reasoned that even though the provision vests federal courts with exclusive

⁷¹ *Boilermakers*, 73 A.3d at 939.

⁷² *But see Seafarers*, 23 F.4th at 728 (Easterbrook, J. dissenting) (noting an identical forum selection bylaw does not preclude a shareholder plaintiff from bringing a *direct* Section 14(a) claim in federal court, because the forum selection bylaw only applies to derivative claims).

⁷³ *Lee II*, 34 F.4th at 781.

jurisdiction over Section 14(a) claims, The Gap’s forum selection bylaw does “not force the Delaware Court of Chancery to adjudicate [the claim].”⁷⁴ Enforcing the forum selection bylaw only results in a federal court dismissal.⁷⁵ The Ninth Circuit relied on *Shearson/Am. Express, Inc. v. McMahon*⁷⁶ for the proposition that parties may waive the Exchange Act’s exclusive federal jurisdiction provision.⁷⁷ But *Shearson* revolved around the ability to arbitrate federal securities violations and addressed not the total preclusion of a private cause of action.⁷⁸ Thus, the Ninth Circuit’s reliance on this proposition is misplaced and inapplicable. Nevertheless, the court found that The Gap’s bylaw contravened no “express statutory policy of the [exclusive jurisdiction provision].”⁷⁹

But the court’s conclusion results from its own tautological non-sequitur. Given federal courts’ exclusive jurisdiction, a shareholder plaintiff pursuing a derivative Section 14(a) violation claim must necessarily bring the claim in federal court. Plaintiffs cannot bring them elsewhere because, as the Ninth Circuit even recognized,⁸⁰ non-federal courts cannot adjudicate the exclusively federal jurisdiction claims. The forum selection bylaw’s designated forum, the Delaware Court of Chancery, a state court, in turn cannot adjudicate the claim—the exclusive federal jurisdiction provision forbids it. The forum selection bylaw, *a priori*, does not, and cannot, force it to do so.

Regardless of their analytic truth value,⁸¹ the foregoing premises are nonetheless irrelevant to, and have no bearing on, whether the forum selection bylaw’s *effects* contravene federal public policy—a more appropriate metric for consideration. Without bordering on the absurd, a court cannot separate the clause itself from its effects. The clause simply serves as the method by which a drafting party achieves some desired effect or outcome. Nowhere does The Gap’s forum selection bylaw contemplate giving up—waiving—a right or ability to bring a derivative

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ 482 U.S. 220, 228.

⁷⁷ *Lee II*, 34 F.4th at 781.

⁷⁸ *See Shearson*, 482 U.S. 220, at 227–28 (holding the exchange act’s antiwaiver provision did not “reach so far” as to prohibit arbitrating Exchange Act section 10(b) claims).

⁷⁹ *Lee II*, 34 F.4th at 781.

⁸⁰ *Id.*

⁸¹ *See, e.g.*, Immanuel Kant, *THE CRITIQUE OF PURE REASON*, Introduction Part IV (1787), <https://www.gutenberg.org/files/4280/4280-h/4280-h.htm> (last visited, Feb. 10, 2023) (describing analytically true statements as those in which the subject’s predicate “covertly” follows from the conception of the subject itself).

suit for violations of federal securities regulations; the scope of the bylaw's express language certainly does no such thing.⁸²

The ultimate practical effect results in a paradigmatic example of a catch-22. To comply with the Exchange Act's exclusive jurisdiction provision, a shareholder plaintiff must necessarily bring the derivative Section 14(a) claim in federal court. And the federal court must in turn dismiss on the grounds of the forum selection bylaw. The forum selection bylaw designates an incompetent (lack of jurisdiction) forum (for instance, the Court of Chancery—a state court) unable to adjudicate the claim. Given the shareholder plaintiff actually refiles, the incompetent court must then necessarily dismiss on the grounds of its incompetence. This closed loop utterly and completely bars the shareholder plaintiff from pursuing her derivative Section 14(a) claim. No one may rationally assert that federal Congress's legislative intent in enacting investor-friendly securities regulations contemplated that the judiciary may preclude persons seeking private remedies under the protection thereof via the interpretation and operation of procedural minutiae. By considering the federal provisions in isolation from one another, the Ninth Circuit confused the policy gestalt and lost the forest for the trees.

V. THE NINE-SEVEN SPLIT

On the other hand, in what can reasonably be called a sister case, the Seventh Circuit recognized this conundrum. In *Seafarers Pension Plan v. Bradway*,⁸³ the court honed in on the Delaware Court of Chancery's own previously expressed rationale.⁸⁴ The Court of Chancery, in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, intimated that if a board of directors contended that a shareholder plaintiff waived her right to bring a claim under the Securities Exchange Act of 1934, “such a waiver would be inconsistent with the antiwaiver provisions of that Act[.]”⁸⁵ But the *Boilermakers* court spoke somewhat hypothetically and restrained its holding, declining to “wade deeper into imagined situations involving multiple ‘ifs.’”⁸⁶ Though the Seventh Circuit recognized that the Court of Chancery limited itself so as “not to risk issuing an advisory opinion,” the *Seafarers* court nevertheless opined that Delaware—the transferee forum state—would “not look kindly” on a board's attempt, by

⁸² AMENDED AND RESTATED BYLAWS, *supra* note 14, at 22. Thus, at a minimum, the shareholders are not expressly bargaining for it.

⁸³ 23 F.4th 714.

⁸⁴ *Id.* at 723.

⁸⁵ *Boilermakers*, 73 A.3d at 962.

⁸⁶ *Id.*

invoking a forum selection bylaw, to “close the courthouse doors” on a shareholder plaintiff and prevent her from bringing a derivative federal securities violation claim.⁸⁷

Yet, the Ninth Circuit neither entertained nor was amenable to the same reasoning. Although it noted the law of the transferee forum state “is not irrelevant in determining whether the [forum selection] clause is enforceable,” the court only considered whether Lee would “have some reasonable recourse” in the Court of Chancery.⁸⁸ Lee failed to identify any Delaware law showing she “could not get any relief” if she refiled her suit there.⁸⁹ But the Ninth Circuit neither considered nor explained any potentially applicable strengths or weaknesses of alternative causes of action under state law as opposed to federal law, and it failed to describe any other potentially available “reasonable recourse.” And the court afforded no corresponding due policy weight in consideration thereof. Enforcing The Gap’s forum selection bylaw wholly deprived Lee of her ability to bring an exclusively federally cognizable securities violation claim. The Ninth Circuit erred when it failed to consider whether alternative reasonable recourse tolerated circumventing federally legislated public policy.

Lee, however, left something on the table, so to speak. She did not raise, and thus waived, the argument that the *Seafarers* plaintiff successfully made.⁹⁰ There, the *Seafarers* plaintiff contended, and the court agreed and concluded, that Section 115 of the Delaware General Corporation Law “does not authorize use of a forum-selection bylaw to avoid what should be exclusive federal jurisdiction over . . . the Exchange Act.”⁹¹ In that way, the Ninth and Seventh Circuits pass each other like ships in the night.

VI. PRACTICAL IMPLICATIONS

In conclusion, as it currently stands,⁹² boards may be able to reduce their potential liability stemming from Securities Exchange Act of 1934 Section 14(a) shareholder derivative suits brought in United States district

⁸⁷ *Seafarers*, 23 F.4th at 724.

⁸⁸ *Lee II*, 34 F.4th at 782 (citing *Advanced China Healthcare*, 901 F.3d at 1089 n.6).

⁸⁹ *Lee II*, 34 F.4th at 782.

⁹⁰ *Id.*

⁹¹ *Seafarers*, 23 F.4th at 721.

⁹² As of October 22, 2022, the Ninth Circuit vacated the three-judge panel opinion and ordered the case reheard en banc. *Lee on behalf of The Gap, Inc v. Fisher*, 54 F.4th 608 (9th Cir. 2022).

courts (minimally, in the Ninth Circuit's districts).⁹³ But to utilize *Lee v. Fisher* as a shield against these derivative claims, if so inclined, the first step requires amending any current bylaws to either adopt a forum selection clause (if none) and/or designate therein a state court as the exclusive forum for litigating intra-corporate disputes. A prudent hedge suggests enumerating, within the provision's language, the specific types of claims covered by the clause—making sure to include all derivative actions. Because shareholder plaintiffs *must* necessarily bring their Section 14(a) claims in federal court, boards in turn can invoke their forum selection bylaws and force a *forum non conveniens* dismissal. And since the forum selection bylaw designates a forum unable (for lack of subject matter jurisdiction) to adjudicate the Section 14(a) derivative claim, shareholder plaintiffs are functionally blocked. Thus, boards may potentially reduce exposure arising from derivative claims predicated on a theory of alleged misleading proxy solicitations under federal securities law.

On the other hand, boards may nevertheless still wish to tread carefully. Many Delaware corporations likely already designate the Court of Chancery as their exclusive intra-corporate litigation forum. And even though the Court of Chancery cannot actually adjudicate Section 14(a) derivative claims on the merits, shareholder plaintiffs will likely pursue equivalent state claims, nonetheless. And in litigating those claims, boards risk drawing the Court of Chancery's ire. The Seventh Circuit already astutely pointed out that "Delaware law would not look kindly" on a board of director's attempt to preclude a shareholder's federal securities fraud claim.⁹⁴

Delaware courts twice test director conduct: once in law, again in equity.⁹⁵ Mere "legal authorization" cleanses not boards' inequity-tainted actions.⁹⁶ Directors of Delaware corporations enjoy broad managerial authority because the law in turn charges them with unyielding, inveterate, and uncompromising fiduciary duties⁹⁷ and demands scrupulous, preemptory, and inexorable adherence thereto.⁹⁸ And while the court

⁹³ Though the *Lee II* decision of course binds only these districts, it may nevertheless prove successfully persuasive in other circuits if couched in the same way.

⁹⁴ *Seafarers*, 23 F.4th at 724.

⁹⁵ *Coster v. UIP Companies*, 255 A.3d 952, 960 (Del. 2021); *Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 96 (Del. 2021); *In re Investors Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1222 (Del. 2017); see *Schnell*, 285 A.2d at 439 (declaring that legal permissibility does not entail categorical equitability).

⁹⁶ *Bäcker*, 246 A.3d at 97–98.

⁹⁷ See *id.* at 97; *Technicolor*, 634 A.2d at 360; *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

⁹⁸ *Guth*, 5 A.2d at 510.

enshrouds board decisions with a cloak of presumptive deference, it will not hesitate to pierce it and expose directors to the cold bite of heightened scrutiny.⁹⁹ Thus, before adopting such a forum selection bylaw, a board must exercise phronesis,¹⁰⁰ prompting earnest, good faith consideration.¹⁰¹

⁹⁹ See *Investors Bancorp*, 177 A.3d at 1217 (discussing entire fairness review in the context of directors fixing their own compensation); *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1371 (describing Delaware's three different levels of scrutiny when reviewing directors' actions); *Technicolor*, 634 A.2d at 361 (describing how a plaintiff shareholder may rebut the business judgment rule); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661 (Del. 1988) (demanding the board proffer a "compelling justification" for impeding a stockholder vote); *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986) (Allen, Chancellor) ("Because the effect of the proper invocation of the business judgment rule is so powerful and the standard of entire fairness so exacting," the threshold standard of review determination frequently determines the litigation's outcome); Andrew J. Czerkawski, *Court of Chancery Expands MFW to Conflicted Controller Executive Compensation Awards*, DEL. J. CORP. L.: BLOG (forthcoming 2023) (discussing entire fairness review in the context of controlling shareholder-executive compensation awards); Dennis J. Block et al., *Chancellor Allen, The Business Judgment Rule, and the Shareholders' Right to Decide*, 17 DEL. J. CORP. L. 785, 789–92 (1992).

¹⁰⁰ See Aristotle, NICOMACHEAN ETHICS, Book VI (350 B.C.E), <http://classics.mit.edu/Aristotle/nicomachaen.6.vi.html> (last visited Feb. 10, 2023) (describing practical wisdom).

¹⁰¹ The *Seafarers* plaintiff filed a companion action in the Court of Chancery in July of 2020. *Bench Ruling Tr. at 4*, *Seafarers Pension Plan v. Robert A. Bradway*, C.A. No. 2020-0556-MTZ (Del. Ch. 2020), Dkt. No. 49 (*Bench Ruling*). The plaintiff sought declaratory judgment asserting Boeing's forum selection bylaw's invalidity. *Id.* at 4. The defendants moved to dismiss, but Vice Chancellor Zum stayed the case pending the federal appeal. *Id.* at 6.

Though the Court of Chancery never reached the merits, the parties settled and included for consideration: a \$6.25 million D&O insurance payment to the corporation, enhanced proxy disclosures, and an amended forum selection bylaw allowing shareholders to file derivative claims in either the United States District Court for the District of Delaware—the company's state of incorporation—or the United States District Court for the Eastern District of Virginia—the company's headquarters. *Bench Ruling* at 8. Though the Vice Chancellor recognized the current Seventh-Ninth Circuit split, the Court of Chancery found "that the director defendants had a good faith basis in believing the forum selection clause did not run afoul of Delaware law or federal law and that enforcement of the bylaw was not in breach of their fiduciary duties" and approved the settlement. *Id.* at 13, 19. Thus, at least for the time being, Delaware boards can proactively reduce derivative Section 14(a) exposure if the directors preemptively take the necessary steps to amend or include in their bylaws a forum selection provision exclusively designating the Court of Chancery for all intra-corporate—including derivative—disputes. Failure to timely do so, especially if facing even the slightest possibility of litigation based on or around misleading proxy statements, may deprive boards of ever having the chance. In other words, the boat is likely soon leaving the harbor, and dilatory boards may miss it.

*3L, Delaware Law School, czerkawski.andrew@gmail.com, 267.438.5138

