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Forum Selection Provisions and the Preclusion of Derivative Claims Under Section 14(a) of the Securities Exchange Act: Should Federal Courts Intervene?

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FORUM SELECTION PROVISIONS AND THE PRECLUSION OF DERIVATIVE CLAIMS UNDER SECTION 14(A) OF THE SECURITIES EXCHANGE ACT: SHOULD FEDERAL COURTS INTERVENE?

*Noah P. Mathews**

This Note examines whether a forum selection provision in a corporation's bylaws that requires shareholders to bring derivative claims in the Delaware Court of Chancery is enforceable when invoked by directors to dismiss derivative claims under the Securities Exchange Act (the "Exchange Act")—claims over which federal courts have exclusive jurisdiction. In Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, the U.S. Court of Appeals for the Seventh Circuit held that enforcing this type of bylaw would violate the act's antiwaiver provision, which voids any stipulation that allows a person to waive compliance with the act. In* Lee ex rel. Gap, Inc. v. Fisher*, the U.S. Court of Appeals for the Ninth Circuit disagreed and held that the federal policy of enforcing forum selection provisions trumped any issues related to the Exchange Act's antiwaiver provision. This Note proposes that courts should not mediate this issue with a primary focus on the Exchange Act's antiwaiver provision, which inherently frames the issue in terms of the shareholder's substantive right to bring derivative claims under the act. Instead, this Note argues that the propriety of enforcing a forum selection provision that precludes derivative claims under the Exchange Act is a function of whether the directors breached their fiduciary duties by invoking the forum selection provision.*

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INTRODUCTION

In December 2019, Seafarers Pension Plan filed a derivative suit that quickly became a "puzzle at [the] intersection of state corporation law, federal securities law, and federal jurisdiction and venue rules."[1] At the time, the suit was one of many filed against Boeing and its directors in connection with the Boeing 737 MAX catastrophe.[2] This suit, however, centered on a novel, intricate question about the application of a forum selection provision (FSP)[3] in Boeing's bylaws to a derivative claim under the Securities Exchange Act of 1934[4] (the "Exchange Act").

1. Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714, 728 (7th Cir. 2022).

2. *See* Oral Argument at 12:48, Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714 (7th Cir. 2022) (No. 20-2244), https://media.ca7.uscourts.gov/sound/2020/ds.20-2244.20-2244_11_30_2020.mp3 [https://perma.cc/3S8A-A2P5]. *See generally* David Shepardson & Eric M. Johnson, *U.S. Lifts Boeing 737 MAX Flight Ban After Crash Probes, Tough Hurdles Remain*, REUTERS (Nov. 18, 2020, 12:04 AM), https://www.reuters.com/article/us-boeing-737max/u-s-lifts-boeing-737-max-flight-ban-after-crash-probes-tough-hurdles-remain-idUSKBN27Y0FU [https://perma.cc/5BQG-KVQT] (summarizing the events following the first Boeing 737 MAX crash).

3. This Note uses the term "FSP" to refer to forum selection clauses in a corporation's charter ("charter FSP") and in a corporation's bylaws ("bylaw FSP").

4. Ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78qq).

As the pension provider for roughly 26,000 U.S. merchant marines,[5] Seafarers owned shares of Boeing and alleged that the company's directors issued false and misleading proxy statements to shareholders.[6] Along with other alleged misstatements related to corporate risk management, the pension plan claimed that Boeing's directors failed to disclose facts related to the 737 MAX's development, the grounding of the 737 MAX by the Federal Aviation Administration after two crashes involving the jet, and the subsequent investigations into the crashes.[7] All of this, Seafarers argued, provided Boeing with a formidable suit under the Exchange Act against the company's own directors.[8]

Typically, a corporation's board of directors is responsible for the corporation's litigation decisions, including the decision whether to bring a suit or to refrain from bringing a suit "on the corporation's behalf."[9] But when a shareholder raises sufficient doubt about the board's impartiality with respect to a litigation decision, the shareholder can bring the suit on the corporation's behalf as a derivative suit.[10]

In its derivative suit, Seafarers alleged that Boeing had violated the Exchange Act, claims under which can only be brought in federal court.[11] Accordingly, Seafarers filed its complaint in the U.S. District Court for the Northern District of Illinois.[12] However, Boeing's bylaw required shareholders to file any derivative suit in the Delaware Court of Chancery,[13] and the directors promptly invoked the bylaw to dismiss Seafarers's suit.[14] Thus, if enforced, the bylaw would have prevented Seafarers from pursuing its derivative claim in *any* court.[15] This, Seafarers argued, would violate the

5. *SIU Profile*, SEAFARERS INT'L UNION, https://www.seafarers.org/about/siu-information/siu-profile/ [https://perma.cc/N4B8-59YB] (last visited Apr. 3, 2023); SEAFARERS AFL-CIO, FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT (2022), https://olmsapps.dol.gov/query/orgReport.do?rptId=806121&rptForm=LM2Form [https://perma.cc/Z7ZA-M6YP].

6. *See* Verified Stockholder Derivative Complaint at 182–205, Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, No. 19 C 8095, 2020 WL 3246326 (N.D. Ill. June 8, 2020), ECF No. 7.

7. *See id.* at 215–17.

8. *See id.*

9. Diep *ex rel.* El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners, L.L.C., 280 A.3d 133, 149 (Del. 2022); *see also In re* Ltd., Inc. S'holders Litig., No. CIV.A. 17148, 2002 WL 537692, at *3 (Del. Ch. Mar. 27, 2002).

10. *See, e.g.*, Schoenmann v. Irvin, No. 2021-0326, 2022 WL 1792976, at *14 (Del. Ch. June 2, 2022); *see also* Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 421–22 (2006).

11. *See* 15 U.S.C. § 78aa (providing federal courts with exclusive jurisdiction over Exchange Act claims); Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714, 717 (7th Cir. 2022).

12. Verified Stockholder Derivative Complaint, *supra* note 6, at 1.

13. The Delaware Court of Chancery is "a non-jury trial court that serves as Delaware's court of original and exclusive equity jurisdiction, and adjudicates a wide variety of cases involving trusts, real property, guardianships, civil rights, and commercial litigation." *Court of Chancery: Judicial Officers*, DEL. CTS., https://courts.delaware.gov/chancery/judges [https://perma.cc/XMY8-YJDE] (last visited Apr. 3, 2022).

14. *See Seafarers*, 23 F.4th at 717–18.

15. *See id.* at 718.

Exchange Act because the act itself voids "contractual waivers of compliance with the requirements of the [a]ct."[16] Nonetheless, the district court enforced Boeing's bylaw and dismissed the case.[17]

A divided panel of the U.S. Court of Appeals for the Seventh Circuit reversed the district court's decision and held that a bylaw FSP cannot preclude derivative Exchange Act claims.[18] Yet, the debate continues in other circuits; in fact, shortly after the Seventh Circuit's decision in *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*,[19] the U.S. Court of Appeals for the Ninth Circuit held in *Lee ex rel. Gap, Inc. v. Fisher*[20] that bylaw FSPs can preclude derivative Exchange Act claims.[21] Five months later, the Ninth Circuit voted to rehear the case en banc.[22]

This Note advocates that federal courts facing the issue at the heart of *Seafarers* and *Lee* should generally enforce the bylaw FSP. Though doing so temporarily precludes a shareholder's claim, this approach can channel the bylaw dispute—a dispute that fundamentally implicates director self-interest and the balance of power between directors and shareholders—into a more appropriate process. If a court enforces the FSP, the shareholder can attack the directors' use of the FSP by bringing another suit against them for breaches of their fiduciary duties of loyalty.[23] This process balances directors' managerial autonomy with the shareholders' ability to police and punish director malfeasance with legitimate derivative Exchange Act claims.[24]

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16. *Id.* at 720 (citing 15 U.S.C. § 78cc(a)).

17. *See id.* at 717.

18. *See id.* at 728.

19. 23 F.4th 714 (7th Cir. 2022).

20. 34 F.4th 777 (9th Cir.), *reh'g en banc granted*, 54 F.4th 608 (9th Cir. 2022).

21. *Id.* at 782.

22. *See* Lee *ex rel.* Gap, Inc. v. Fisher, 54 F.4th 608 (9th Cir. 2022). The Ninth Circuit heard oral argument en banc on December 12, 2022. *Status of Pending En Banc Cases*, U.S. CTS. FOR THE NINTH CIR. (Mar. 31, 2023), https://www.ca9.uscourts.gov/en-banc/ [https://perma.cc/F3JP-EMG9]; Martina Barash, *Gap Shareholder Suit's Viability Argued Before Full 9th Circuit*, BLOOMBERG L. (Dec. 12, 2022, 8:17 PM), https://news.bloomberglaw.com/litigation/gap-shareholder-suits-viability-argued-before-full-9th-circuit [https://perma.cc/3U6Z-MQYF].

23. *See infra* Part IV.C. This Note's discussion of corporate law focuses on Delaware for several reasons. First and foremost, Boeing and Gap, the corporations in *Seafarers* and *Lee*, are both incorporated in Delaware and designated the Delaware Court of Chancery as the exclusive forum for derivative litigation in their bylaws. *See Lee*, 34 F.4th at 779; *Seafarers*, 23 F.4th at 717; The Gap, Inc., Annual Report (Form 10-K) (Mar. 15, 2022); The Boeing Co., Annual Report (Form 10-K) (Jan. 31, 2022). Second, Delaware is the most important jurisdiction for American corporate law. *See* William J. Moon, *Delaware's Global Competitiveness*, 106 IOWA L. REV. 1683, 1693 (2021) (noting that Delaware is "the juridical home to over 66 percent of Fortune 500 companies and roughly half of all publicly traded companies in the United States").

24. Because *Seafarers* and *Lee* dealt with claims under section 14(a) of the Exchange Act, this Note will focus on section 14(a), which governs proxy statements. However, the issue presented in these cases could extend to other derivative claims under the Exchange Act (e.g., claims under section 10(b)). *See* Ann M. Lipton, *Inside Out (or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, WAKE FOREST L. REV. (forthcoming 2022) (manuscript at 35 n.218), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4256316 [https://perma.cc/Z2FU-VVNG].

Part I of this Note will provide a brief primer on shareholder derivative litigation and the Exchange Act. Part II will then document recent Delaware court decisions and Delaware statutory amendments that bear on the validity of bylaw FSPs. Part III will explain the recent decisions in the Seventh and Ninth Circuits regarding the applicability of bylaw FSPs to derivative Exchange Act claims. And finally, Part IV will suggest that federal courts facing this issue need not worry about slamming the courthouse door shut on shareholders. If directors invoke an FSP to improperly insulate themselves from derivative Exchange Act claims, a shareholder's most suitable recourse is not an appeal to federal policy—it is a suit against the directors for breach of the fiduciary duty of loyalty.

I. SHAREHOLDER DERIVATIVE LITIGATION AND THE SECURITIES EXCHANGE ACT

Delaware law provides a corporation's board of directors with wide latitude to manage the affairs of the corporation in the shareholders' interests.[25] However, their conduct is not free from oversight.[26] Part I.A provides background on shareholder derivative litigation, a mechanism that allows shareholders to divest the board of decision-making authority over a corporation's legal claims. Part I.B discusses the Exchange Act, specifically section 14(a) and its application to directors, as well as private rights of action under section 14(a).

A. Shareholder Derivative Litigation

Derivative suits are one of "a variety of litigation options to police the behavior of corporate managers."[27] In particular, derivative litigation allows a shareholder to sue on behalf of the corporation in which they own stock.[28] In this way, a derivative suit, like a class action, is a form of representative litigation.[29] However, in a derivative suit, a shareholder asserts a claim in which "the real party in interest" is the corporation, not the individual shareholder or the shareholders as a class.[30] In a derivative suit, a shareholder unilaterally "step[s] into the corporation's shoes" and "seek[s] in its right the restitution [that the shareholder] could not demand on [their] own."[31]

25. *See* DEL. CODE ANN. tit. 8, § 141(a) (2023); United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1047 (Del. 2021).

26. *See infra* notes 38–73 and accompanying text.

27. Jessica Erickson, *The Lost Lessons of Shareholder Derivative Suits*, 77 WASH. & LEE L. REV. 1131, 1136 (2020).

28. *See id.* at 1136–37.

29. *See* Jessica Erickson, *The Gatekeepers of Shareholder Litigation*, 70 OKLA. L. REV. 237, 241 (2017).

30. *Id.* at 264; *see also* NL Indus., Inc. v. MAXXAM, Inc. (*In re* MAXXAM, Inc./Federated Dev. S'holders Litig.), 698 A.2d 949, 956 (Del. Ch. 1996) ("A derivative claim belongs to the corporation, not to the shareholder plaintiff who brings the action."); Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?*, 66 TENN. L. REV. 81, 82–83 (1998).

31. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1949).

Importantly, because a shareholder's derivative claim is, by definition, based on an injury to the corporation in which the shareholder owns shares, the corporation is the direct beneficiary of any recovery.[32] As such, a shareholder derivative claim is a legal claim that fundamentally belongs to the corporation itself, *not* to the shareholder-plaintiff.[33]

In providing a mechanism for shareholders to assert the claims of the corporation, derivative litigation flips the corporate structure on its head.[34] The Delaware General Corporation Law (DGCL) vests a board of directors with the authority to manage the corporation's "business and affairs."[35] Under this authority, boards are responsible for a wide range of activities: they appoint officers who are responsible for day-to-day corporate operations (e.g., the chief executive officer (CEO)), they set compensation levels for directors and officers, they decide whether to distribute dividends to shareholders, they formulate corporate strategy, and they disseminate information about the corporation's finances.[36] And just as a board has authority over the distribution of dividends, it also has authority over all corporate claims, since any potential legal claim asserting a right of the corporation is an asset that belongs to the corporation.[37]

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32. *See* Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251, 1262–63 (Del. 2021); Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1035 (Del. 2004) (explaining that whether a stockholder's claim is direct or derivative depends on "[w]ho suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy"); *see also* Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 351 (Del. 1988) ("[A]ny damages recovered in [a derivative] suit are paid to the corporation." (quoting ROBERT CHARLES CLARK, CORPORATE LAW 639–40 (1986))).

33. *See* Kennedy v. Venrock Assocs., 348 F.3d 584, 589 (7th Cir. 2003) (stating that a derivative suit is "an asset of the corporation"). Under Delaware law, corporations are distinct legal entities that possess powers that are independent of those held by individuals who serve as their directors and officers or hold their shares. *See* DEL. CODE ANN. tit. 8, § 122 (2023) (listing the specific powers of a corporation); Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) ("[I]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.").

34. *See* Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 530 (1984) ("[D]erivative actions . . . [can], if unconstrained, 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."); *In re* Activision Blizzard, Inc. S'holder Litig., 124 A.3d 1025, 1044 (Del. Ch. 2015); *see also* Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 143 (2017) (noting that shareholders are permitted to control corporate claims "only in the most extreme circumstances").

35. DEL. CODE ANN. tit. 8, § 141(a); *see also* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 559 (2003) ("[T]he vast majority of corporate decisions are made by the board of directors alone, or by managers acting under delegated authority from the board of directors.").

36. *See* DEL. CODE ANN. tit. 8, §§ 122, 141(a); *see also* Regina F. Burch, *The Myth of the Unbiased Director*, 41 AKRON L. REV. 509, 517–18 (2008) (cataloging the board's decision-making authority under the DGCL).

37. *See* Spiegel v. Buntrock, 571 A.2d 767, 773 (Del. 1990) ("The decision to bring a law suit or to refrain from litigating a claim on behalf of a corporation is a decision concerning the management of the corporation."); *In re* EZCORP Inc. Consulting Agreement Derivative Litig., 130 A.3d 934, 943 (Del. Ch. 2016); *Activision*, 124 A.3d at 1044 ("A corporate claim is an asset of the corporation, so authority over the claim ordinarily rests with the board of directors.").

In exercising its authority, a board is generally protected by the business judgment rule, which protects the board's business decisions "[a]bsent an abuse of discretion."[38] The business judgment rule provides a strong presumption that, in making a business decision, the directors "acted on an informed basis, in good faith[,] and in the honest belief that the action taken was in the best interests of the company."[39] Under this presumption, courts typically do not "get involved in any type of substantive review of a Board decision,"[40] unless the court cannot attribute the decision to "any rational business purpose."[41] However, a board's decision-making authority under the business judgment rule is not limitless. Not only do shareholders elect members of the board,[42] but they can also sue directors for violations of the DGCL[43] and for equitable violations such as a breach of the fiduciary duties of care and loyalty to the corporation and its shareholders.[44] Under the duty of care, directors must inform themselves of all material information reasonably available to them when managing the corporation's affairs.[45] And under the duty of loyalty, directors must put the interests of the corporation and its shareholders before their own self-interest when managing the corporation's affairs.[46]

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38. Orman v. Cullman, 794 A.2d 5, 20 (Del. Ch. 2002) (alteration in original) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled in part on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)); *see also* Brehm v. Eisner (*In re* Walt Disney Co. Derivative Litig.), 906 A.2d 27, 52 (Del. 2006); William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859, 870 (2001) (explaining that Delaware's business judgment rule creates a presumption that "(i) a decision was made by directors who (ii) were disinterested and independent, (iii) acted in subjective good faith, and (iv) employed a reasonable decision making process").

39. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled in part on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

40. Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U. J.L. & BUS. 27, 46 (2017). The business judgment rule is based on the oft-cited adage that "judges are not business experts." Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

41. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

42. *See* DEL. CODE ANN. tit. 8, § 211(b) (2023).

43. *See, e.g.*, Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342, 385–86 (Del. Ch. 2004) (evaluating a claim that a board exceeded its authority under DGCL section 271).

44. *See, e.g.*, Paramount Commc'ns Inc. v. QVC Network Inc. (*In re* Paramount Commc'ns Inc. S'holders' Litig.), 637 A.2d 34, 48–50 (Del. 1994); *see also* Bäcker v. Palisades Growth Cap. II, L.P., 246 A.3d 81, 96–97 (Del. 2021) ("[D]irector action[s] [are] 'twice-tested,' first for legal authorization, and second [for] equity." (second, third, and fourth alterations in original) (quoting *In re* Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1222 (Del. 2017))); Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993) ("[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders.").

45. *See* Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985); *see also* McKenna *ex rel.* Robison Energy Fund Mgmt., LLC v. Singer, No. 11371, 2017 WL 3500241, at *15 (Del. Ch. July 31, 2017).

46. *See* Metro Storage Int'l LLC v. Harron, 275 A.3d 810, 842 (Del. Ch. 2022); *see also* Claire A. Hill & Brett H. McDonnell, Stone v. Ritter *and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1779 (2007); Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 525 (2016). The duty of loyalty also requires that directors act with a good faith belief that their "actions are in the corporation's best interest." Stone *ex rel.*

Just as a suit for a breach of a fiduciary duty can check a board's decision-making authority, a derivative suit is a mechanism that can check the board's exercise of discretion with respect to litigation management.[47] In particular, derivative litigation provides recourse to shareholders[48] who believe that a corporation's directors have failed to pursue a valuable claim on the corporation's behalf.[49] In some cases, derivative litigation serves to simply notify the board that it has failed to prosecute a viable corporate claim.[50] More often, however, shareholders bring derivative suits because they believe that the board cannot make an impartial decision with respect to the claim.[51]

As fiduciaries with control over the corporation's affairs, the board is charged with exercising its business judgment for the benefit of the corporation and its shareholders.[52] In the context of litigation management, this requires that boards weigh the costs and benefits of litigation and initiate claims when doing so provides value to the corporation and its shareholders.[53] But when a corporation's claim is premised on director misbehavior, directors are intrinsically reticent to initiate the suit because doing so could create personal liability and jeopardize their position on the board.[54] Therefore, given that the board is responsible for the everyday

AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) (quoting Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)).

47. *See* Arthur R. Pinto, *Corporate Governance: Monitoring the Board of Directors in American Corporations*, 46 AM. J. COMPAR. L. 317, 341 (1998) (noting that derivative litigation serves as a "monitoring device[] that keep[s] managers in check").

48. Derivative litigation is of particular use to minority shareholders who, unlike majority shareholders, do not have the power to oust a corporation's directors for failing to bring a claim. *See* Daniel R. Fischel, *The Demand and Standing Requirements in Stockholder Derivative Actions*, 44 U. CHI. L. REV. 168, 168 (1976).

49. *See, e.g.*, Spiegel v. Buntrock, 571 A.2d 767, 771–72 (Del. 1990).

50. *See, e.g.*, Busch *ex rel.* Richardson Elecs., Ltd. v. Richardson, No. 2017-0868, 2018 WL 5970776, at *1 (Del. Ch. Nov. 14, 2018); *see infra* notes 64–66 and accompanying text.

51. *See* Erickson, *supra* note 29, at 241, 263–64; Alice Hong, Note, *The Case for Do-over Derivative Shareholders Suits in Delaware Chancery Court*, 94 N.Y.U. L. REV. 1284, 1292 (2019) ("[S]hareholders rarely make a demand, viewing demand futility as the only viable option [when] seeking to bring a derivative suit.").

52. *See* Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984), *overruled in part on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000); *supra* note 46 and accompanying text.

53. *See* AIG Ret. Servs., Inc. *ex rel.* New Cal. Life Holdings, Inc. v. Barbizet, No. CIV.A. 974, 2006 WL 1980337, at *7 (Del. Ch. July 11, 2006) ("The complaint alleges that the director defendants refused to authorize a lawsuit . . . even though they knew that bringing the lawsuit would be in the best interests of [the corporation]. This allegation is sufficient to support a claim for breach of fiduciary duty against the director defendants . . . ."); George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 269 (2014).

54. *See* Erickson, *supra* note 27, at 1142; Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 8 (2015) (noting that shareholders use derivative litigation when directors "are the wrong-doers and therefore not eager to bring claims against themselves").

affairs of the corporation,[55] valuable claims belonging to the corporation against its directors have the potential to go unpursued.[56]

Derivative suits provide shareholders with the ability to fill this void.[57] They are a mechanism for prosecuting corporate claims when directors' fiduciary duties conflict with their personal interests in avoiding legal liability and reputational harm.[58] A shareholder does not "bring [a derivative suit] because his rights have been directly violated, or because the cause of action is his."[59] The shareholder "is permitted . . . to maintain the action *solely to prevent an otherwise complete failure of justice*."[60] In this way, derivative suits provide shareholders with agency to vindicate the rights of the corporation that may (and likely would) otherwise lay dormant.[61] Thus, derivative claims are most often brought against a corporation's directors and officers.[62]

To balance the board's managerial autonomy with a shareholder's desire to police director misconduct through derivative litigation, courts require shareholders to show that their encroachment on director freedom is warranted.[63] More specifically, the shareholder plaintiff must "allege with particularity" their effort to obtain board action on the requested litigation and the reason that the board rejected their demand or, if the shareholder failed to demand action from the board, their reason for not doing so.[64] If a shareholder makes a demand of the board, courts view this demand as an admission that the board is disinterested with respect to the management of the requested litigation.[65] As such, a board's refusal of a shareholder's

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55. *See supra* notes 35–41 and accompanying text.

56. *See* Schoon v. Smith, 953 A.2d 196, 201–02 (Del. 2008) (explaining that derivative litigation permits shareholders to sue on the corporation's behalf to prosecute managerial malfeasance); Zapata Corp. v. Maldonado, 430 A.2d 779, 784 (Del. 1981) ("The right of a stockholder to file a bill to litigate corporate rights is, therefore, solely for the purpose of preventing injustice where it is apparent that material corporate rights would not otherwise be protected." (quoting Sohland v. Baker, 141 A. 277, 282 (Del. 1927))).

57. *See* George S. Geis, *Information Litigation in Corporate Law*, 71 ALA. L. REV. 407, 419 (2019).

58. *See* Geis, *supra* note 53, at 270–71 ("[W]here the legal problem relates directly to top managerial action or inaction[,] corporate law does not trust the inside representatives with unqualified discretion." (citing STEPHEN M. BAINBRIDGE, CORPORATE LAW 187 (2d ed. 2009))).

59. *Schoon*, 953 A.2d at 202 (emphasis omitted) (quoting 4 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1095, at 278 (5th ed. 1941)).

60. *Id.* (quoting 4 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1095, at 278 (5th ed. 1941)).

61. *See supra* notes 52–56 and accompanying text.

62. *See* Geis, *supra* note 53, at 273 ("[N]early every shareholder derivative claim involves allegations of wrongdoing by the inside directors themselves."); Anne Tucker Nees, *Who's the Boss?: Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 214 n.56 (2010).

63. *See* Diep *ex rel.* El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners, L.L.C., 280 A.3d 133, 149–50 (Del. 2022).

64. DEL. CH. CT. R. 23.1(a).

65. *See* Andersen v. Mattel, Inc., No. 11816, 2017 WL 218913, at *3 (Del. Ch. Jan. 19, 2017) (citing Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan v. Andreotti, No. 9714, 2015 WL 2270673, at *24 (Del. Ch. May 8, 2015), *aff'd*, 132 A.3d 748 (Del. 2016));

litigation demand is subject to the business judgment rule and can only be reversed for a lack of good faith or for a deficiency in the board's inquiry into the matter.[66] However, a shareholder can also proceed with a derivative suit by showing that a demand of the board "would be futile."[67] To do so, the shareholder must demonstrate that the board cannot exercise valid business judgment in considering the shareholder's demand because a conflict of interest "sterilizes their discretion."[68]

In *United Food & Commercial Workers Union & Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg*,[69] the Delaware Supreme Court held that courts should ask three questions of each director when evaluating demand futility: First, did "the director receive[] a material personal benefit from the alleged misconduct that is the subject of the litigation demand"?[70] Second, does the director "face[] a substantial likelihood of liability on any of the claims that [are] the subject of the litigation demand"?[71] Third, does "the director lack[] independence from someone who received a material personal benefit from the alleged misconduct that [is] the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand"?[72] If the answer to any of these questions is "yes" for at least half of the members of the board, then demand is futile, and a shareholder can proceed with their derivative suit.[73]

Even if a shareholder successfully pleads demand futility, the board does not lose complete control of the claim. Under DGCL section 141(c), the board can appoint a special litigation committee (SLC) consisting of disinterested and independent members of the board, and it can delegate its authority over the litigation to the SLC.[74] Often, the board will appoint

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see also John C. Coffee, Jr., *New Myths and Old Realities: The American Law Institute Faces the Derivative Action*, 48 BUS. LAW. 1407, 1413 (1993).

66. *See Diep*, 280 A.3d at 150; Drachman *ex rel.* BioDelivery Scis. Int'l, Inc. v. Cukier, No. 2019-0728, 2021 WL 5045265, at *6 (Del. Ch. Oct. 29, 2021); *see also supra* notes 38–41, 45–46.

67. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1047 (Del. 2021).

68. *Id.* at 1056 (quoting Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984), *overruled in part on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)); *see also* Michael P. Dooley & E. Norman Veasey, *The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared*, 44 BUS. LAW. 503, 506 (1989).

69. 262 A.3d 1034 (Del. 2021).

70. *Id.* at 1059.

71. *Id*.

72. *Id*.

73. *Id.*

74. *See* DEL. CODE ANN. tit. 8, § 141(c)(1) (2023) ("The board of directors may . . . designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation . . . . Any such committee . . . shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation . . . ."); *see also* Obeid v. Hogan, No. 11900, 2016 WL 3356851, at *8 (Del. Ch. June 10, 2016) ("[A] board of directors possesse[s] the necessary authority under Section 141(a) of the DGCL to assert control over [a] derivative action . . . [by] delegat[ing] its authority to a committee of directors pursuant to Section 141(c) of the DGCL.").

independent[75] directors who took their positions on the board after the event that led to the litigation occurred.[76] Then, under this unconditional delegation of authority from the board, the SLC will investigate the claim and can move to dismiss the claim on behalf of the corporation if the SLC determines that its "continued maintenance is inimical to the Company's best interests."[77] Thus, even if a shareholder successfully pleads demand futility in a derivative suit, the board does not irrevocably cede all authority over the litigation.

Still, derivative litigation can be a useful tool to police and deter managerial misconduct.[78] Often, shareholders file derivative suits premised on a director's breach of their fiduciary duty,[79] but in some cases, shareholders use derivative litigation to assert a corporation's claims pursuant to the Exchange Act.[80]

B. The Securities Exchange Act and Section 14(a)

Enacted during the Great Depression, the Exchange Act is a statutory scheme designed to ensure "honest securities markets and thereby promote investor confidence."[81] The Exchange Act established the U.S. Securities and Exchange Commission (SEC) and provided the SEC with broad authority to oversee and regulate the national securities industry.[82]

In section 14(a) of the Exchange Act, Congress gave the SEC rulemaking authority to regulate the solicitation of proxy statements and made it unlawful

75. An independent director is a director who lacks a "material relationship" to the corporation "either directly or as a partner, shareholder or officer of an organization that has a relationship" with the corporation. NYSE LISTED CO. MANUAL § 303A.02(a)(i) (NYSE 2023), https://nyse.wolterskluwer.cloud/listed-company-manual [https://perma.cc/3392-GEN2]. In practice, director "[i]ndependence is a fact-specific determination made in the context of a particular case." Diep *ex rel.* El Pollo Loco Holdings, Inc. v. Trimaran Pollo Partners, L.L.C., 280 A.3d 133, 152 (Del. 2022) (alteration in original) (quoting Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1049 (Del. 2004)).

76. *See, e.g.*, *In re* Primedia, Inc. S'holders Litig., 67 A.3d 455, 466 (Del. Ch. 2013); *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 923 (Del. Ch. 2003).

77. *Obeid*, 2016 WL 3356851, at *10 (quoting Zapata Corp. v. Maldonado, 430 A.2d 779, 781 (Del. 1981)).

78. *See* Geis, *supra* note 53, at 270–71; Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1774 (2004).

79. *See, e.g.*, *In re* Chemours Co. Derivative Litig., No. 2020-0786, 2021 WL 5050285, at *11 (Del. Ch. Nov. 1, 2021); Firemen's Ret. Sys. of St. Louis *ex rel.* Marriott Int'l, Inc. v. Sorenson, No. 2019-0965, 2021 WL 4593777, at *1 (Del. Ch. Oct. 5, 2021).

80. *See infra* notes 86–100 and accompanying text.

81. United States v. O'Hagan, 521 U.S. 642, 658 (1997); *see* 78 CONG. REC. S2264 (Feb. 9, 1934) (statement of President Franklin D. Roosevelt) ("[I]t should be our national policy to restrict, as far as possible, the use of [securities and commodities] exchanges for purely speculative operations."); *see also* Franklin A. Gevurtz, *The Complex Dualisms of Corporations and Democracy*, 14 NE. U. L. REV. 365, 389 (2022).

82. *See The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry [https://perma.cc/4834-APNJ] (last visited Apr. 3, 2023).

to solicit proxy statements in violation of the SEC's rules.[83] In doing so, Congress sought to "promote 'the free exercise of the voting rights of [shareholders]' by ensuring that" proxy solicitations would contain adequate and accurate information.[84] Under this authority, the SEC adopted Rule 14a-9, which prohibits material misstatements or omissions in proxy materials.[85]

Under section 14(a), both the SEC and private actors have standing to bring claims based on deficient proxy materials.[86] Although the Exchange Act only explicitly provides the SEC with enforcement authority for violations of section 14(a),[87] the U.S. Supreme Court held in *J.I. Case Co. v. Borak*[88] that section 14(a) contained an implied private right of action as well.[89] In fact, the Court in *Borak* specifically stated that section 14(a) establishes a private right of action for both derivative and direct suits.[90] The Court found an implied private right of action based on section 14(a)'s purpose of preventing management from using misleading or deficient proxy statements to obtain shareholder authorization for corporate action, and based on the explicit reference to the "protection of investors" in section 14(a)'s

83. 15 U.S.C. § 78n(a); *see also* SEC v. Shanahan, 646 F.3d 536, 546 (8th Cir. 2011). A proxy statement is a statement issued by a corporation when soliciting shareholder votes. *See* Scott Hirst, *Frozen Charters*, 34 YALE J. ON REGUL. 91, 103 (2017).

84. TSC Indus., Inc. v. Northway Inc., 426 U.S. 438, 444 (1976) (quoting Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 381 (1970)).

85. 17 C.F.R. § 240.14a-9(a) (2023) ("No solicitation subject to this regulation shall be made by means of any proxy statement . . . containing any statement which, at the time and in the light of the circumstances under which it is made, 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 statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."); *see* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1086 (1991).

86. *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 25 (1977).

87. *See* 15 U.S.C. § 78u(d).

88. 377 U.S. 426 (1964).

89. *Id.* at 430–32. The U.S. Supreme Court has since acknowledged that *Borak* was decided during an "*ancien regime*" under which courts were far more willing to imply private causes of action, but it has not rejected *Borak*'s substantive holding with respect to private rights of action under section 14(a). Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) (quoting Alexander v. Sandoval, 532 U.S. 275, 287 (2001)); *see* Enzo Biochem, Inc. v. Harbert Discovery Fund, LP, No. 20-cv-9992, 2021 WL 4443258, at *5–7 (S.D.N.Y. Sept. 27, 2021). Indeed, Chief Justice Roberts stated that, if the Court were to hear *Borak* today, it would "not be decided the same way." Oral Argument at 34:06, Emulex Corp. v. Varjabedian, 139 S. Ct. 1407 (2019) (No. 18-459), https://www.oyez.org/cases/2018/18-459 [https://perma.cc/LBZ2-FCPT]. Despite this trend and significant criticism of *Borak*, this Note takes as given the ability of all private litigants to pursue actions, direct and derivative, under section 14(a). *See, e.g.*, *Va. Bankshares*, 501 U.S. at 1110 (Scalia, J., concurring) ("I think [private claims under section 14(a) were] never enacted by Congress, and hence the more narrow we make it . . . the more faithful we are to our task." (citation omitted)); Mohsen Manesh & Joseph A. Grundfest, Abandoned and Split but Never Reversed: *Borak* and Federal Court Derivative Litigation 45–56 (Nov. 8, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4274616 [https://perma.cc/Z9ZE-HJPF] ("*Borak* is an antique of a bygone era, its rationale having since been expressly rejected by the Court's subsequent precedents.").

90. *Borak*, 377 U.S. at 431.

text.[91] The Court further explained the importance of derivative suits to section 14(a)'s enforcement, saying that "[t]o hold that derivative actions are not within the sweep of the section would . . . be tantamount to a denial of private relief."[92]

Therefore, under *Borak*, violations of section 14(a) can generate two distinct private causes of action, sometimes for the same misstatement or omission in proxy materials.[93] First, individual shareholders may pursue direct claims under section 14(a). In this type of suit, a shareholder's claim rests on the injury flowing from the "deceit practiced on him alone."[94] For instance, a shareholder might claim that they relied on a specific misstatement in proxy materials when casting their vote and, as a result, were deprived of their right to an informed vote under section 14(a).[95] Second, an individual shareholder may pursue a derivative claim under section 14(a) on behalf of the corporation itself.[96] With this suit, the corporation's claim rests on the injury resulting from the "deceit practiced on the stockholders as a group,"[97] which typically stems from corporate action taken pursuant to a deceptive proxy solicitation.[98] For example, if directors issue proxy materials with a proposal for a new executive compensation plan but make false statements about how stock option eligibility will be calculated, a derivative section 14(a) claim would hinge on the injury flowing from the eventual stock option issuances, which would improperly divert the corporation's assets to the corporation's executives.[99] In other words, a

91. *See id.* at 431–32 (citing 15 U.S.C. § 78n).

92. *Id.* at 432.

93. *See* Zhou v. Faraday Future Intelligent Elec. Inc., No. 21-cv-09914, 2022 WL 13800633, at *13 (C.D. Cal. Oct. 20, 2022) ("The fact that uninformed votes on the merger may have a negative impact on the company does not alter shareholders' standing to bring [section 14(a)] claims in connection with their individual right to a fully informed vote."); *In re* Bank of Am. Corp. Sec. Derivative & Emp. Ret. Income Sec. Act (ERISA) Litig., 757 F. Supp. 2d 260, 292 (S.D.N.Y. 2010) ("[M]aterial omissions from a proxy statement could directly injure the corporation as well as the corporation's shareholders."); *see also* Dowling v. Narragansett Cap. Corp., 735 F. Supp. 1105, 1113 (D.R.I. 1990).

94. *Borak*, 377 U.S. at 432.

95. *See, e.g.*, N.Y.C. Emps.' Ret. Sys. v. Jobs, 593 F.3d 1018, 1022–23 (9th Cir. 2010) (reversing a district court's decision to dismiss a shareholder's direct suit under section 14(a) that alleged that they were "deprived of the right to a fully informed vote"), *overruled in part on other grounds by* Lacey v. Maricopa County, 693 F.3d 896 (9th Cir. 2012); *see also* Yamamoto *ex rel.* Invs. Fin., Inc. v. Omiya, 564 F.2d 1319, 1326 (9th Cir. 1977) ("[A] shareholder who alleges a deceptive or misleading proxy solicitation is entitled to bring both direct and derivative suits. The former action protects the shareholders' interest in 'fair corporate suffrage.'"); Manesh & Grundfest, *supra* note 89, at 63–66.

96. *See* Pearl v. Gen. Tire & Rubber Co. (*In re* Gen. Tire & Rubber Co. Sec. Litig.), 726 F.2d 1075, 1082 (6th Cir. 1984) ("In many instances, derivative actions are the only means of private redress for a § 14(a) violation."); *cf.* Freedman v. MagicJack Vocaltec Ltd., 963 F.3d 1125, 1131–38 (11th Cir. 2020) (dismissing a shareholder's direct section 14(a) class action suit because the claim was "derivative in nature").

97. *Borak*, 377 U.S. at 432.

98. *See, e.g.*, Bartlinski *ex rel.* Sanchez Energy Corp. v. Sanchez, 39 F. Supp. 3d 862, 864–65 (S.D. Tex. 2014); *In re* Affymetrix Derivative Litig., No. C 06-05353, 2008 WL 5050147, at *2, *6–7 (N.D. Cal. Mar. 31, 2008).

99. *Cf.* Emps. Ret. Sys. of St. Louis v. Jones, No. 20-cv-04813, 2021 WL 1890490, at *8, *17 (S.D. Ohio May 11, 2021) (rejecting defendant directors' motion to dismiss a derivative

direct section 14(a) claim rests on the direct harm to a shareholder resulting from deficient proxy materials, whereas a derivative section 14(a) claim rests on the direct harm to the corporation that stems from deficient proxy materials.[100]

Notably, the Exchange Act vests federal courts with exclusive jurisdiction over claims under the act.[101] Moreover, Congress included an antiwaiver provision in section 29(a) of the Exchange Act, which voids "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision" of the Exchange Act, including SEC rules under the act.[102] As the Supreme Court explained in *Shearson/American Express Inc. v. McMahon*,[103] this antiwaiver provision "only prohibits waiver of the substantive obligations imposed by the Exchange Act."[104] Furthermore, the Court declared that the Exchange Act's antiwaiver provision's fundamental concern is "whether the agreement 'weaken[s] [an individual's] ability to recover under the [Exchange] Act.'"[105] Courts generally understand the antiwaiver provision to forbid the enforcement of agreements whereby a party releases any future claims under the Exchange Act, as doing so would allow the counterparty to shirk their substantive obligations under the act.[106] Thus, a contractual agreement runs afoul of the Exchange Act's antiwaiver provision when the individual is left with "inadequate . . . protect[ion]" of their substantive rights under the Exchange Act.[107]

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section 14(a) claim in which a shareholder alleged that the directors made false statements in proxy materials about the corporation's compensation structure and its ability to facilitate effective governance); Shaev v. Baker, No.16-cv-05541, 2017 WL 1735573, at *15–16 (N.D. Cal. May 4, 2017) (denying defendant's motion to dismiss a derivative section 14(a) claim premised on material misstatements and omissions in proxies related to illegal sales practices and ineffective corporate controls); *In re* Zoran Corp. Derivative Litig., 511 F. Supp. 2d 986, 1015–16 (N.D. Cal. 2007) (denying a defendant's motion to dismiss a derivative section 14(a) claim premised on deficient proxy materials related to backdated stock options).

100. *See Borak*, 377 U.S. at 432.

101. 15 U.S.C. § 78aa.

102. *Id.* § 78cc(a).

103. 482 U.S. 220 (1987).

104. *Id.* at 228; *see also* Peter Giovine, Note, *Arbitration and FINRA's Customer Code: A Tailored Approach to When a Forum Selection Clause May Supersede FINRA Rule 12200*, 91 FORDHAM L. REV. 993, 1001–02 (2022).

105. *McMahon*, 482 U.S. at 230 (first and third alterations in original) (quoting Wilko v. Swan, 346 U.S. 427, 432 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989)); *see also* Harsco Corp. v. Segui, 91 F.3d 337, 343 (2d Cir. 1996); Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1, 20 (2012).

106. *See* Pasternack v. Shrader, 863 F.3d 162, 172–73 (2d Cir. 2017); Vacold LLC v. Cerami, 545 F.3d 114, 122 (2d Cir. 2008); Jill I. Gross, *The Customer's Nonwaivable Right to Choose Arbitration in the Securities Industry*, 10 BROOK. J. CORP. FIN. & COM. L. 383, 389–90 (2016) ("Congress sought to preclude any entity or individual from circumventing the full force of the new federal securities laws by . . . contracting around their . . . statutory duties and obligations."); *see also* John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 IOWA L. REV. 127, 148–49 (2022).

107. *McMahon*, 482 U.S. at 229.

II. DELAWARE'S EMBRACE OF FORUM SELECTION PROVISIONS

Bylaw FSPs are a relatively new development in Delaware corporate law. In 2013, the Delaware Court of Chancery held for the first time in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*[108] that a board-adopted bylaw FSP was facially valid under the DGCL.[109] Within roughly a year of *Boilermakers*, more than 700 publicly traded corporations adopted FSPs.[110] Then, in 2015, the Delaware General Assembly adopted DGCL section 115 and codified the *Boilermakers* court's validation of FSPs.[111] Part II.A details the *Boilermakers* decision and the Delaware General Assembly's subsequent codification of the decision. Part II.B explains the Delaware Supreme Court's endorsement of charter FSPs for federal claims in *Salzberg v. Sciabacucchi*.[112] Finally, Part II.C discusses the *Boilermakers* and *Salzberg* courts' guidance for plaintiffs seeking to bring as-applied challenges to a corporation's FSP.

A. Boilermakers*, the Facial Validity of Forum Selection Provisions, and DGCL Section 115*

In *Boilermakers*, the Delaware Court of Chancery heard challenges from shareholders of both Chevron and FedEx concerning the facial validity of both corporations' bylaw FSPs.[113] Both the Chevron and FedEx boards unilaterally adopted bylaws that restricted the forum in which shareholders could bring four types of suits: derivative suits, suits alleging breaches of fiduciary duties, suits arising out of the DGCL, and suits related to the corporation's internal affairs.[114] The plaintiff shareholders argued that the DGCL did not permit such a bylaw.[115]

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108. 73 A.3d 934 (Del. Ch. 2013).

109. *See id.* at 939.

110. *See* Sciabacucchi v. Salzberg, No. 2017-0931, 2018 WL 6719718, at *9 (Del. Ch. Dec. 19, 2018), *rev'd*, 227 A.3d 102 (Del. 2020).

111. *See* Jack B. Jacobs, *New DGCL Amendments Endorse Forum Selection Clauses and Prohibit Fee-Shifting*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 17, 2015), https://corpgov.law.harvard.edu/2015/06/17/new-dgcl-amendments-endorse-forum-selection-clauses-and-prohibit-fee-shifting/ [https://perma.cc/EV3W-KCW6].

112. 227 A.3d 102 (Del. 2020).

113. *See Boilermakers*, 73 A.3d at 938. For reference, FedEx's bylaw reads:

> Unless the Corporation consents in writing to the selection of an alternative forum, the [Delaware Court of Chancery] shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine.

Id. at 942.

114. *See id.* at 942–43.

115. *See id.* at 938. The plaintiffs also argued that the bylaws were invalid because the board unilaterally adopted them. *Id.* The court explained that, because the shareholders themselves voted to ratify charter provisions allowing each board to unilaterally adopt bylaws, such bylaws "are part of [the] inherently flexible contract between the stockholders and the corporation." *Id.* at 957.

The court held that both corporations' bylaws regulated proper subject matter under DGCL section 109(b).[116] Section 109(b) provides that bylaws may contain any provision "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."[117] The court considered it "a matter of easy linguistics" that Chevron's and FedEx's bylaws fell within the scope of DGCL section 109(b).[118] The court found that the bylaws addressed the rights of stockholders "because they regulate[d] where stockholders [could] exercise their right to bring certain internal affairs claims against the corporation and its directors and officers," and they "plainly relate[d] to the conduct of the corporation by channeling internal affairs cases into [Delaware] courts."[119]

The court emphasized that the validity of the bylaws turned on the fact that they regulated the corporations' internal affairs,[120] which the court defined as the "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."[121] The court reasoned that bylaws relating to the forum of internal affairs claims were proper because they were "procedural [and] process-oriented [in] nature,"[122] and they were included within a corporation's authority to "set 'self-imposed rules and regulations [that are] deemed expedient for its convenient functioning.'"[123] To further make its point, the court distinguished internal affairs claims by providing an example of a purely external affairs claim—a shareholder's personal injury claim against the corporation—and explained that section 109(b) did *not* authorize bylaws for such claims.[124] Moreover, the court likened Chevron's and FedEx's bylaws to rules related to shareholder meetings or board committees and found that the bylaws were fundamentally process-oriented because they simply regulated "where stockholders may file suit, not whether the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation."[125] As a result, the court found that the bylaws regulated claims that were central to the relationship between the directors and shareholders and were thus comfortably within the scope of DGCL section 109(b).[126]

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116. *See id.* at 954.
117. DEL. CODE ANN. tit. 8, § 109(b) (2023).
118. *See Boilermakers*, 73 A.3d at 950–51.
119. *See id.* at 951.
120. *See id.* at 951–52 ("[B]ecause the [bylaw FSPs] address internal affairs claims, the subject matter of the actions the bylaws govern relates quintessentially to 'the corporation's business, the conduct of its affairs, and the rights of its stockholders [*qua* stockholders].'" (third alteration in original) (quoting DEL. CODE ANN. tit. 8, § 109(b) (2023))).
121. *Id.* at 953 n.85 (quoting Edgar v. MITE Corp., 457 U.S. 624, 645 (1982)).
122. *Id.* at 951 (quoting CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 235 (Del. 2008)).
123. *Id.* (alteration in original) (quoting Gow v. Consol. Coppermines Corp., 165 A. 136, 140 (Del. Ch. 1933)).
124. *See id.* at 952.
125. *Id.* (emphasis omitted).
126. *See id.* at 952, 954.

The Delaware Court of Chancery also speculated about the application of bylaw FSPs that required shareholders to bring exclusively federal causes of action in state court.[127] But because Chevron's FSP did not implicate this issue and FedEx's FSP would apply for the most part to state causes of action, the court found it "inappropriate and unconvincing as a way" to challenge the facial validity of bylaw FSPs.[128] Accordingly, the chancery court stated unambiguously that neither Chevron's nor FedEx's bylaws attempted to "foreclose a plaintiff from exercising any statutory right of action created by the federal government."[129] But the court also provided a rough road map for plaintiffs suing directors or officers of companies with bylaws that would preclude a *direct* federal cause of action that grants exclusive jurisdiction to federal courts.[130] Using a section 14(a) claim against FedEx and its directors as an illustration,[131] the court explained that such a plaintiff should file their claim in federal court and challenge a defendant's motion to dismiss on two grounds[132]: First, the court suggested that the federal claim for false solicitation of proxies would fall outside the scope of FedEx's bylaw entirely.[133] Second, the court suggested that if the bylaw *did* apply to the section 14(a) claim, the plaintiff could argue that "the bylaw waived the stockholder's rights under the" Exchange Act and thus violated the act's antiwaiver provision.[134] But given that the court was evaluating facial challenges to the corporations' FSPs, and thus did not need to decide the issue in this instance, it "decline[d] to wade deeper into imagined situations involving multiple 'ifs.'"[135]

Two years after *Boilermakers*, the Delaware General Assembly codified the decision in DGCL section 115.[136] Section 115 authorizes FSPs in

127. *See id.* at 961–63. Indeed, at the oral argument for defendants' motion for judgment on the pleadings, the chancellor spent significant time discussing this issue. *See* Transcript of Oral Argument on Defendants' Motion for Judgment on the Pleadings at 25–30, Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013) (Nos. 7220 & 7238).

128. *Boilermakers*, 73 A.3d at 961.

129. *Id.* at 962.

130. *Id.* Though he did not state it explicitly, then Chancellor Leo H. Strine, Jr.'s hypothetical did not pertain to derivative claims under federal law, which FedEx's bylaw *did* cover. *See id.* at 942 ("[T]he [Delaware Court of Chancery] shall be the sole and exclusive forum for (i) *any* derivative action or proceeding brought on behalf of the Corporation." (emphasis added)); *supra* text accompanying note 114; *infra* text accompanying note 133.

131. The court used FedEx's bylaw as an example because it limited internal affairs claims solely to the Delaware Court of Chancery, whereas Chevron's bylaw was amended to allow these claims in both federal and Delaware state courts. *See Boilermakers*, 73 A.3d at 942, 961–62.

132. *See id.* at 962.

133. *See id.* ("Thus, FedEx's bylaw is consistent with what has been written about similar forum selection clauses addressing internal affairs cases: '[Forum selection] provisions do not purport to regulate a stockholder's ability to bring a securities fraud claim or any other claim that is not an intra-corporate matter.'" (alteration in original) (quoting Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 370 (2013))).

134. *Id.*

135. *Id.*

136. DEL. CODE ANN. tit. 8, § 115 (2023); *see* Andrew Holt, *Protecting Delaware Corporate Law: Section 115 and Its Underlying Ramifications*, 5 AM. U. BUS. L. REV. 209,

charters and bylaws for "internal corporate claims."[137] The section defines "internal corporate claims" as derivative or direct claims "(i) that are based upon a violation of a duty by a current or former director[,] officer[,] or stockholder in such capacity, or (ii) as to which [the DGCL] confers jurisdiction upon the Court of Chancery."[138] However, section 115 only authorizes FSPs that designate "any or all . . . courts in" Delaware as the exclusive jurisdiction for internal corporate claims and prohibits FSPs that strip Delaware courts of jurisdiction over internal corporate claims.[139] In other words, section 115 authorizes charter and bylaw FSPs for internal corporate claims so long as the FSP does not prohibit litigation of these claims in Delaware state courts.[140]

Moreover, the synopsis of the bill introducing the legislation stated that "[s]ection 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction" or "intended to limit or expand the jurisdiction of the [Delaware] Court of Chancery or the [Delaware] Superior Court."[141] Though the synopsis itself is not binding law, the Delaware legislature appeared to recognize then Chancellor Leo E. Strine, Jr.'s concern in *Boilermakers* and clarified that section 115 was not intended to prevent plaintiffs from exercising their federal statutory rights.[142]

In 2020, the Delaware Supreme Court tackled an issue related to *Boilermakers* in the context of DGCL section 102(b)(1)—section 109(b)'s counterpart for charter provisions.[143] In the process, the court clarified DGCL section 115 and its relationship to other parts of the DGCL.

B. Salzberg *and the Scopes of DGCL Sections 102(b)(1), 109(b), and 115 in the Context of Forum Selection Provisions*

In *Salzberg*, the Delaware Supreme Court held that an FSP for claims under the Securities Act of 1933[144] (the "Securities Act") adopted in a

210 (2016) (explaining that section 115 "statutorily sanctioned exclusive forum selection clauses—so long as the selected forum is Delaware"); Jacobs, *supra* note 111 (explaining that section 115 was adopted to codify *Boilermakers* and to abrogate another Delaware Court of Chancery decision that "upheld the validity of a Delaware corporation's board-adopted [bylaw FSP] that designated North Carolina . . . as the exclusive forum for litigating internal corporate claims").

137. DEL. CODE ANN. tit. 8, § 115.

138. *Id.*

139. *Id.*

140. *See* Jacobs, *supra* note 111.

141. S.B. 75, 148th Gen. Assemb., Reg. Sess. (Del. 2015).

142. *See supra* notes 129–35 and accompanying text. Nonetheless, as the *Boilermakers* court explained, "The most important consideration . . . in interpreting a statute is the words the General Assembly used in writing it." Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 950 (Del. Ch. 2013) (citing New Cingular Wireless PCS v. Sussex Cnty. Bd. of Adjustment, 65 A.3d 607, 611 (Del. 2013)).

143. DEL. CODE ANN. tit. 8, § 102(b)(1).

144. 15 U.S.C §§ 77a–77bbbb. The Securities Act governs securities offerings and requires "companies offering securities to the public to make 'full and fair disclosure' of relevant information." Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061, 1066 (2018) (quoting Pinter v. Dahl, 486 U.S. 622, 646 (1988)).

corporation's charter was valid under DGCL section 102(b)(1)—section 109(b)'s analogue for charter provisions.[145] Though the court's holding was limited to FSPs in a corporation's charter requiring shareholders to bring Securities Act claims in federal court, the court provided a detailed discussion regarding the scopes of DGCL sections 102(b)(1) and 115.[146] Moreover, given sections 102(b)(1) and 109(b)'s substantial textual overlap and the functional similarity between charter and bylaw provisions, *Salzberg* is relevant to assessing the validity of bylaw FSPs.[147]

The *Salzberg* plaintiffs challenged the facial validity of FSPs in three corporations' charters.[148] In these provisions, each corporation designated federal district courts as the exclusive forum for claims arising out of the Securities Act.[149] The plaintiffs sought declaratory judgment from the Delaware Court of Chancery, arguing that the FSPs violated Delaware law, and the court granted their motions.[150] In granting relief, the court of chancery relied heavily on *Boilermakers* and held that a corporation's "constitutive documents . . . cannot bind" shareholders to a particular forum for claims unrelated to the "rights or relationships that were established by or under" Delaware law.[151] Accordingly, the court held that—because claims under the Securities Act are federal, not state, causes of action—the federal FSPs were facially invalid.[152]

The Delaware Supreme Court reversed and held that the federal FSPs were facially valid under Delaware law.[153] In its analysis, the court adopted a broad, enabling interpretation of DGCL section 102(b)(1).[154] Section 102(b)(1) provides that a corporation's charter may include "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation," as well as "any provision creating, defining, limiting[,] and regulating the powers of the corporation, the directors, and the

145. *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 115–16 (Del. 2020); *infra* note 147.

146. *See Salzberg*, 227 A.3d at 116–32.

147. *See* Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. U. L. REV. 501, 517 n.86 (2021) (explaining that *Salzberg*'s analysis of charter provisions under DGCL section 102(b)(1) should be read to extend to bylaw provisions under DGCL section 109(b)). *Compare* DEL. CODE ANN. tit. 8, § 102(b)(1) (2023) ("[T]he [charter] may . . . contain . . . [a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders."), *with id.* § 109(b) ("The bylaws may contain any provision . . . 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.").

148. *Salzberg*, 227 A.3d at 109.

149. *Id.* The provisions were a response to *Cyan, Inc. v. Beaver County Employees Retirement Fund*, in which the Supreme Court held that individuals can bring Securities Act claims in state and federal court. 138 S. Ct. 1061, 1078 (2018).

150. *See Salzberg*, 227 A.3d at 112.

151. *See* Sciabacucchi v. Salzberg, No. 2017-0931, 2018 WL 6719718, at *3 (Del. Ch. Dec. 19, 2018), *rev'd*, 227 A.3d 102 (Del. 2020).

152. *See id.*

153. *See Salzberg*, 227 A.3d at 137–38.

154. *See id.* at 113–31.

stockholders."[155] The court found that a federal FSP could be classified as a provision related to the "management of the business" and "the conduct of the" corporation's affairs, or as a provision "creating, defining, limiting[,] and regulating" shareholder power.[156] Therefore, the court held that the FSPs were facially valid under section 102(b)(1).[157]

The court also explained that DGCL section 115 was only a slight modification of section 102(b)(1).[158] In particular, the court found that section 115 "simply clarifie[d] that *for certain claims*,"[159] namely internal corporate claims,[160] "Delaware courts may be the only forum, but they cannot be excluded as a forum."[161] As a result, the court held that section 115 "does not address the propriety of [FSPs] applicable to other types of claims."[162] The court found that, unlike section 115, section 102(b)(1) was not limited to internal affairs and covered everything up to and including "intra-corporate affairs," which the court defined as corporate conduct "that is situated on [the] continuum" between the *Boilermakers* definition of internal affairs and the *Boilermakers* definition of external affairs.[163] In this way, the court built on *Boilermakers* and clarified that certain claims, like those brought under the Securities Act, are not purely internal or external.[164] The court stated that these intracorporate claims, though arising out of federal law and beyond the scope of DGCL section 115, fell within DGCL section 102(b)(1) because they were related to the corporation-shareholder relationship.[165]

Though the court did not squarely address the scope of DGCL section 109(b), which governs bylaw provisions, its rejection of the chancery court's decision is telling. In its explanation of why the lower court improperly restricted the scope of section 102(b)(1), the Delaware Supreme Court admonished the lower court's suggestion that *Boilermakers*—and thus section 115, which codified the decision—confined the scope of section 109(b) to internal affairs claims.[166] Moreover, as the court explained in a

155. DEL. CODE ANN. tit. 8, § 102(b)(1) (2023).
156. *Salzberg*, 227 A.3d at 113–15.
157. *See id.* at 116.
158. *See id.* at 119–20, 131.
159. *Id.* at 118.
160. Under *Salzberg*, internal corporate claims are synonymous with internal affairs claims. *See id.* at 131 fig.1.
161. *Id.* at 118.
162. *Id.* at 119.
163. *Id.* at 125; *see also id.* at 130–31; *supra* notes 120–24 and accompanying text. Like the *Boilermakers* court, the *Salzberg* court defined internal affairs as "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." *Salzberg*, 227 A.3d at 126–27 (emphasis omitted) (quoting Edgar v. MITE Corp., 457 U.S. 624, 645 (1982)); *see supra* Part II.A. Similarly, following *Boilermakers*, the *Salzberg* court used "a tort claim for personal injury suffered by the plaintiff on the premises of the company" as an example of an external claim. *Salzberg*, 227 A.3d at 124; *see supra* Part II.A.
164. *See Salzberg*, 227 A.3d at 113–14, 119, 125.
165. *See id.* at 124–25, 131 fig.1.
166. *See id.*; Manesh, *supra* note 147, at 517 n.86.

later case, section 109(b), like section 102(b)(1), permits "virtually any provision that is related to [a] corporation's governance."[167]

Neither the Delaware Court of Chancery in *Boilermakers* nor the Delaware Supreme Court in *Salzberg* foreclosed the possibility that some FSPs may be invalid under certain circumstances. Indeed, the *Salzberg* court invited plaintiffs to bring as-applied challenges to charter and bylaw FSPs, calling them "an important safety valve in the enforcement context."[168]

C. As-Applied Challenges to Forum Selection Provisions

In rejecting plaintiffs' facial challenges to FSPs in *Salzberg* and *Boilermakers*, Justice Karen L. Valihura and then Chancellor Strine openly acknowledged that facially valid FSPs might operate inequitably under a particular set of facts.[169] Both Justice Valihura and then Chancellor Strine noted that facially valid charter and bylaw provisions "will not be enforced if adopted or used for an inequitable purpose."[170]

To challenge a specific application of a bylaw or charter FSP, plaintiffs have two options. First, a plaintiff can argue that the bylaw's application would be unreasonable under the U.S. Supreme Court's *The Bremen v. Zapata Off-Shore Co.*[171] test.[172] Under *Bremen*, courts give facially valid forum selection clauses "as much effect as possible"[173] and uphold forum selection clauses unless (1) their enforcement would be "unreasonable and unjust";[174] (2) their enforcement would be contrary to a statutory or judicially created public policy of the forum where the plaintiff files suit;[175] or (3) the forum selection clause is the product of fraud, undue influence, or a gross disparity in bargaining power.[176] Moreover, the *Bremen* Court offered two scenarios in which the application of a forum selection clause might be unreasonable and unjust. The enforcement of a forum selection clause could be unreasonable and unjust if litigating "in the contractual forum [would] be so gravely difficult and inconvenient that [the plaintiff would] for all practical

167. Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 1217 (Del. 2021); *see also* Mohsen Manesh & Joseph A. Grundfest, The Corporate Contract and Shareholder Arbitration 30 (Oct. 22, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4214943 [https://perma.cc/9JZ4-8G7L]. *See generally* Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996) (explaining that the DGCL "is a broad enabling act which leaves latitude for substantial private ordering").

168. *Salzberg*, 227 A.3d at 135.

169. *See id.*; Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 949 (Del. Ch. 2013).

170. *Salzberg*, 227 A.3d at 135; *see Boilermakers*, 73 A.3d at 958.

171. 407 U.S. 1 (1972).

172. *See Boilermakers*, 73 A.3d at 958–59; *Salzberg*, 227 A.3d at 135; *see also* Ingres Corp. v. CA, Inc., 8 A.3d 1143, 1145–46 (Del. 2010) (explaining that Delaware courts embrace the analysis in *Bremen* to address as-applied challenges to FSPs).

173. *Salzberg*, 227 A.3d at 132 (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)).

174. *Bremen*, 407 U.S. at 15.

175. *Id.*

176. *Id.* at 12–13, 15.

purposes be deprived of his day in court."[177] Alternatively, the enforcement of a forum selection clause could be unreasonable and unjust if it designated a particularly inconvenient, faraway forum.[178] *Bremen* reflects a strong federal policy that federal courts generally will not exercise jurisdiction over a suit in defiance of the parties' contractual agreement to litigate disputes in a different forum.[179]

The second way a plaintiff can challenge a specific application of a charter or bylaw FSP is by arguing that the directors are using the provision "for improper purposes inconsistent with [their] fiduciary duties."[180] For instance, in *Schnell v. Chris-Craft Industries, Inc.*,[181] the Delaware Supreme Court invalidated a board-enacted bylaw amendment that pushed back the date of the corporation's annual shareholder meeting.[182] After determining that the board adopted the bylaw to entrench itself in office by "obstructing the legitimate efforts of dissident stockholders . . . to undertake a proxy contest against" them, the Delaware Supreme Court invalidated the bylaw and held that "inequitable action does not become permissible simply because it is legally possible."[183] Thus, under the *Schnell* doctrine, a plaintiff fighting the enforcement of an FSP can seek equitable relief from the Delaware Court of Chancery based on a board's utilization of "the corporate machinery and Delaware Law" for improper purposes.[184] In this way, the *Schnell* doctrine polices actions that are valid under the DGCL but that are taken for an inequitable purpose or in a manner inconsistent with fiduciary duties.[185]

Delaware courts often employ *Schnell* to evaluate board actions that, though valid under the DGCL, undermine an impending shareholder vote and thus serve to entrench the incumbent board by undermining the effective use

177. *Id.* at 18.

178. *Id.* at 17.

179. *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 63–64, 66 (2013); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring) ("[A] valid forum-selection clause is given controlling weight in all but the most exceptional cases."); *see also* Tanya J. Monestier, *Damages for Breach of a Forum Selection Clause*, 58 AM. BUS. L.J. 271, 276–77 (2021); Matthew J. Sorensen, Note, *Enforcement of Forum-Selection Clauses in Federal Court After* Atlantic Marine, 82 FORDHAM L. REV. 2521, 2531 (2014).

180. Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 958 (Del. Ch. 2013); *see also* Salzberg v. Sciabacucchi, 227 A.3d 102, 135 (Del. 2020) ("Charter and bylaw provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose." (citing ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014))).

181. 285 A.2d 437 (Del. 1971).

182. *Id.* at 438–40.

183. *Id.* at 439.

184. *Id.*

185. *See id.*; *see also* Bäcker v. Palisades Growth Cap. II, L.P., 246 A.3d 81, 96–97, 109 (Del. 2021); Giuricich v. Emtrol Corp., 449 A.2d 232, 239 (Del. 1982).

of the corporate franchise.[186] However, *Schnell* is not so limited.[187] Indeed, *Schnell* applies to any action by a fiduciary that "threaten[s] the fabric of the [DGCL]" or improperly manipulates the DGCL.[188] For instance, the Delaware Court of Chancery employed *Schnell* to invalidate a controlling shareholder–adopted bylaw because the bylaw was inconsistent with the controlling shareholder's fiduciary duty of loyalty to the corporation.[189] Similarly, the Delaware Court of Chancery invoked *Schnell* when a board of directors delisted a corporation's shares to force the minority shareholders to sell their shares at an unfair price.[190] Therefore, as then Chancellor Strine noted in *Boilermakers*, the *Schnell* doctrine is a broad doctrine—one that evaluates actions according to the fiduciary duties of care and loyalty.[191] In other words, *Schnell* polices "otherwise lawful action . . . tainted by" a breach of the fiduciary duties of care and loyalty.[192]

III. FEDERAL COURTS' VARYING APPROACHES TO FORUM SELECTION PROVISIONS THAT PRECLUDE DERIVATIVE SECTION 14(A) CLAIMS

In 2022, both the Seventh and Ninth Circuits heard as-applied challenges to bylaw FSPs unilaterally adopted by boards of directors.[193] In both cases, plaintiffs brought derivative suits under section 14(a) of the Exchange Act, and the boards of directors moved to dismiss based on bylaw FSPs limiting derivative suits to Delaware courts.[194] In both cases, the lower courts granted defendants' motions.[195] However, the circuits came to different conclusions about the plaintiffs' as-applied challenges.[196] Part III.A details the Seventh

186. *See, e.g.*, MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1131–32 (Del. 2003) (invalidating board-adopted bylaws that increased the size of the board and allowed directors to "impede an effective exercise of the shareholder's franchise in a contested election of directors"); *see* Mary Siegel, *The Illusion of Enhanced Review of Board Actions*, 15 U. PA. J. BUS. L. 599, 616 (2013) (noting that "[m]ost, but not all, cases" involving the *Schnell* doctrine involved "board attempts to frustrate the shareholder vote").

187. *See* Mary Siegel, *Why Delaware Courts Should Abolish the* Schnell *Doctrine*, 5 AM. U. BUS. L. REV. 159, 168–79 (2016) (cataloging Delaware courts' application of the *Schnell* doctrine and finding that "Delaware courts have held that other mechanisms that entrench directors in office . . . violate the *Schnell* doctrine").

188. Ala. By-Prods. Corp. v. Neal, 588 A.2d 255, 258 n.1 (Del. 1991).

189. *See* Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1080–82 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005).

190. *See* Hamilton v. Nozko, No. 13014, 1994 WL 413299, at *6 (Del. Ch. July 27, 1994).

191. *See* Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 954 (Del. Ch. 2013); *see also* Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of* Schnell v. Chris-Craft, 60 BUS. LAW. 877, 904 (2005) ("[A] determination that legally permitted action should be enjoined requires the court to find that there was a specific breach of an equitable duty . . . . [A]t minimum, [this] requires the court to articulate why the directors did not fulfill their fiduciary duties in the circumstances they confronted.").

192. Strine, *supra* note 191, at 880.

193. *See* Lee *ex rel.* Gap, Inc. v. Fisher, 34 F.4th 777, 779–80 (9th Cir.), *reh'g en banc granted*, 54 F.4th 608 (9th Cir. 2022); Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714, 718 (7th Cir. 2022).

194. *See Lee*, 34 F.4th at 779–80; *Seafarers*, 23 F.4th at 717–18.

195. *See Lee*, 34 F.4th at 780; *Seafarers*, 23 F.4th at 718.

196. *See infra* Parts III.A–B.

Circuit's decision in *Seafarers*, and Part III.B details the Ninth Circuit panel's decision in *Lee*.

A. The Seventh Circuit's Approach

In *Seafarers*, the Seventh Circuit held that a bylaw FSP that required shareholders to bring all derivative claims in Delaware court did not apply to Exchange Act derivative claims.[197] Seafarers sued Boeing's directors in federal court on behalf of the company under section 14(a) of the Exchange Act.[198] In particular, the plaintiff alleged that, between 2017 and 2019, Boeing's current and former officers and directors disseminated materially false and misleading proxy materials regarding the Boeing 737 MAX.[199] As a result of these deficient proxies, the plaintiff further alleged that the shareholders improperly reelected directors who failed to adequately oversee the development of the 737 MAX and that the shareholders erroneously voted down a proposal to bifurcate Boeing's CEO and chairman positions.[200] The plaintiff argued that, as a result of these elections and decisions, Boeing itself directly suffered harm.[201] The directors moved to dismiss based on the doctrine of forum non conveniens,[202] pointing to an FSP in Boeing's bylaws that designated the Delaware Court of Chancery as the exclusive forum for derivative suits, unless the corporation consented to another forum.[203]

The district court granted the directors' motion to dismiss.[204] Because it found that neither *Bremen*'s "unreasonable and unjust" prong nor its "fraud or overreach" prong applied, the district court examined whether the FSP contravened a "strong [federal] public policy"—namely the Exchange Act's antiwaiver provision.[205] The court looked to the Seventh Circuit's decision in *Bonny v. Society of Lloyd's*,[206] which upheld an agreement requiring American investors in a British company to litigate all business disputes against the company in London under English law, despite the investors' argument that the agreement prospectively waived their access to remedies under federal securities law.[207] Relying on *Bonny*, the district court held that Boeing's FSP did not contravene the public policy of the Exchange Act's

197. *See Seafarers*, 23 F.4th at 717.
198. *See id.*
199. *See id.*
200. *See id.* at 719–20.
201. *See id.*
202. Forum non conveniens is "a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined." Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 429 (2007) (quoting Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994)).
203. *See Seafarers*, 23 F.4th at 717–18.
204. *See* Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, No. 19 C 8095, 2020 WL 3246326, at *4 (N.D. Ill. June 8, 2020), *rev'd*, 23 F.4th 714 (7th Cir. 2022).
205. *See id.* at *2–3.
206. 3 F.3d 156 (7th Cir. 1993).
207. *See id.* at 159–62.

antiwaiver provision, given Seafarers's ability to bring claims in Delaware that covered "precisely" the allegations in its complaint.[208]

Reversing the lower court, the Seventh Circuit first held that the application of the bylaw violated Delaware law for two reasons.[209] First, the court found that Boeing's bylaw FSP violated Delaware law because it did not respect the Exchange Act's exclusive-jurisdiction provision.[210] Regarding Delaware law, the court looked to DGCL section 115, which codified *Boilermakers*,[211] rather than section 109(b) because it found section 115 to be a more specific statutory provision in the context of Boeing's bylaw.[212] The court then noted that DGCL section 115 requires that all bylaw FSPs be "consistent with applicable jurisdictional requirements."[213] Relying on section 115's synopsis, which stated that section 115 was "not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction," as well as the Exchange Act's antiwaiver provision and federal venue requirement, the court read section 115 to prevent bylaws from barring Exchange Act claims.[214] Since Boeing's bylaw would prevent any federal court from hearing Seafarers's exclusively federal claim, the Seventh Circuit held that such an application was inconsistent with DGCL section 115.[215] And even though it did not credit defendants' argument that DGCL section 109(b) governed rather than section 115, the court noted that section 109(b) contains the limitation "not inconsistent with law," which it found to be additional evidence that Delaware law would not support the application of Boeing's bylaw.[216] In particular, the court intimated that, if section 109(b) authorized Boeing's bylaw, it would run afoul of the Exchange Act's antiwaiver provision.[217]

Second, the Seventh Circuit held that the application of Boeing's bylaw would be improper because it found that DGCL section 115 requires bylaw FSPs to allow shareholders to bring derivative claims in Delaware state *and* federal courts.[218] Pointing to the first half of section 115, which authorizes bylaws that require shareholders to bring internal corporate claims in "any or all of the courts in this State,"[219] the Seventh Circuit reasoned that if a bylaw restricted where a shareholder could bring a claim, it needed to designate both the federal and state courts in Delaware (as opposed to just Delaware state courts).[220]

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208. *Seafarers*, 2020 WL 3246326, at *2.
209. *See* Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714, 720–22 (7th Cir. 2022).
210. *See id.* at 720.
211. *See supra* Part II.A.
212. *Seafarers*, 23 F.4th at 721.
213. *Id.* at 720 (quoting DEL. CODE ANN. tit. 8, § 115 (2023)).
214. *Id.* (quoting S.B. 75, 148th Gen. Assemb., Reg. Sess. (Del. 2015)).
215. *Id.*
216. *Id.* at 721–22 (quoting DEL. CODE ANN. tit. 8, § 109(b) (2023)).
217. *See id.*
218. *See id.* at 720–21.
219. *Id.* at 720 (quoting DEL. CODE ANN. tit. 8, § 115 (2023)).
220. *See id.* at 721.

The Seventh Circuit then held that the application of Boeing's bylaw to the plaintiff's derivative section 14(a) claim violated the Exchange Act's antiwaiver provision.[221] Specifically, the Seventh Circuit held that, despite the presence of alternative remedies under Delaware law, the Exchange Act's antiwaiver provision did not allow the directors to invoke an FSP that could bar all the derivative section 14(a) suits by Boeing's shareholders.[222] Indeed, in examining the Exchange Act's antiwaiver provision, the court found that the provision prevented parties from "opting out of . . . federal law[] in favor of state law," notwithstanding any substantial overlap between the two.[223]

The court then distinguished *Seafarers* from *Bremen* and *Bonny* by pointing to the distinctly international nature of those cases.[224] The court explained that the reasonableness analysis for the forum selection provisions in those cases hinged on the "international nature" of the transactions and the need for "predictability in international business transactions."[225] Indeed, the court argued that *Bonny* allowed for the enforcement of a forum selection clause that waived Exchange Act claims only because of the importance of predictability in international commerce.[226] Given that Boeing's bylaw FSP was purely domestic, and thus did not implicate these international commerce–related interests, the court held that the enforcement of the FSP would violate the Exchange Act's antiwaiver provision and fail any balancing under *Bremen*.[227]

Judge Frank H. Easterbrook dissented.[228] First, he disagreed with the majority's contention that the plaintiff had been "deprived" of a substantive right to enforce section 14(a) because it could still bring direct claims under section 14(a).[229] As such, Judge Easterbrook objected to the majority's finding that derivative section 14(a) claims are inherently linked to the Exchange Act's antiwaiver provision.[230] Thus, Judge Easterbrook argued, the application of Boeing's bylaw to shareholder derivative claims under section 14(a) was compatible with the Exchange Act's antiwaiver provision.[231]

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221. *See id.* at 720, 727.
222. *See id.*
223. *Id.* at 727.
224. *See id.* at 724–28.
225. *Id.* at 726. *Bremen* was an admiralty case that involved an FSP pointing to the Royal Courts of Justice in London in an agreement between an American corporation and its German counterparty. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2 (1972).
226. *See Seafarers*, 23 F.4th at 727 ("There is no hint in *Bonny* that the same logic and result would apply to a domestic transaction's forum-selection clause that had the effect of waiving federal securities rights and remedies and leaving the investor to only state-law remedies.").
227. *See id.* at 727 ("The anti-waiver provision of Section 29(a) does not invite a determination of whether state law offers alternative remedies that might be deemed sufficient against an inchoate standard. Non-waiver is woven into the public policy of the federal securities laws because it is the express statutory law.").
228. *See id.* at 728 (Easterbrook, J., dissenting).
229. *Id.* at 729.
230. *Id.*
231. *Id.* at 729–30.

Second, Judge Easterbrook disagreed with the majority's understanding of the Exchange Act's exclusive-jurisdiction requirement.[232] In his view, the exclusive-jurisdiction requirement was not part of the "[a]ct's substantive standards."[233] Thus, Judge Easterbrook argued that a waiver of the exclusive-jurisdiction requirement did not run afoul of the Exchange Act's antiwaiver provision, which only covers the act's substantive obligations.[234] In effect, Judge Easterbrook asserted that shareholders were free to enter into contracts, such as bylaw FSPs like Boeing's, that waive their right to bring Exchange Act claims in federal court.[235] Moreover, Judge Easterbrook argued that the derivative section 14(a) claim could proceed in chancery court because "there is no such thing as a derivative section 14(a) claim divorced from state corporate law."[236] Under *Kamen v. Kemper Financial Services, Inc.*,[237] derivative federal securities law claims utilize the derivative litigation procedures from the corporation's state of incorporation unless the federal statutory scheme delineates a process for derivative suits.[238] Given that a derivative section 14(a) claim is inextricably linked to state law, Judge Easterbrook argued that federal courts never truly hold exclusive jurisdiction over them.[239] Judge Easterbrook reasoned from this that courts could split derivative claims into two pieces, with the derivative portion of the claim proceeding in state court and the subsequent substantive portion of the claim proceeding in federal court.[240]

Finally, Judge Easterbrook disagreed with the majority's reading of DGCL section 115.[241] In particular, he read section 115's authorization of bylaws requiring shareholders to bring certain claims "in any or all of the courts in this State," along with the section's prohibition of bylaws that prevent shareholders from bringing "such claims in [Delaware state] courts," as authorizing corporations to adopt FSPs pointing exclusively to the Delaware Court of Chancery.[242] Though it did not fully adopt Judge Easterbrook's approach, the Ninth Circuit in *Lee* also disagreed with the *Seafarers* majority's reasoning.

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232. *See id.* at 730.
233. *Id.*
234. *See id.*; *supra* note 104 and accompanying text.
235. *See Seafarers*, 23 F.4th at 730 (Easterbrook, J., dissenting).
236. *Id.* at 732.
237. 500 U.S. 90 (1991).
238. *See id.* at 108–09 ("[W]here a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate *state* law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute."). For example, if a shareholder brings a derivative suit in a federal court against a Pennsylvania corporation, the court will use Pennsylvania's demand futility rules. *See, e.g.*, Garber v. Lego, 11 F.3d 1197, 1200–03 (3d Cir. 1993). Not surprisingly, the Exchange Act does not prescribe a procedure for derivative litigation. *See supra* Part I.B. (documenting that the Exchange Act does not explicitly provide for its enforcement via derivative suits).
239. *See Seafarers*, 23 F.4th at 730 (Easterbrook, J., dissenting).
240. *See id.*
241. *See id.* at 731.
242. *See id.* at 731–32 (quoting DEL. CODE ANN. tit. 8, § 115 (2023)).

B. The Ninth Circuit's Approach

In *Lee*, the Ninth Circuit split with the Seventh Circuit's decision in *Seafarers* and held that a bylaw FSP that required shareholders to bring derivative claims in Delaware courts could apply to derivative claims premised on section 14(a) of the Exchange Act.[243] Lee, a Gap shareholder, brought a derivative suit against the company's directors under section 14(a) in the U.S. District Court for the Northern District of California.[244] Lee alleged that Gap, its officers, and its directors disseminated false proxy statements regarding the level of diversity across Gap's leadership roles.[245] Moreover, Lee alleged that the proxy statements failed to disclose that Gap was engaged in several "unlawful and discriminatory business practices."[246]

In response, defendants moved to dismiss based on forum non conveniens by invoking a bylaw that required shareholders to bring "any derivative action" in the Delaware Court of Chancery.[247] The district court, echoing the Ninth Circuit in *Sun v. Advanced China Healthcare, Inc.*,[248] declared that the "strong federal policy in favor of enforcing [FSPs] supersedes" antiwaiver provisions in federal statutes, irrespective of what jurisdiction the FSP points to.[249] Applying the *Bremen* factors, the district court held that Lee did not demonstrate that the FSP's application would "contravene a strong public policy of the forum in which" she brought suit.[250] Like the district court in *Seafarers*, the district court in *Lee* found that, because Lee could pursue equivalent remedies in Delaware, the FSP did not violate the Exchange Act's antiwaiver provision.[251] As a result, the court granted the directors' motion to dismiss.[252]

Lee appealed, arguing that the preclusion of her derivative section 14(a) claim violated the federal public policy codified in the Exchange Act's antiwaiver and exclusive-jurisdiction provisions.[253] After analyzing the FSP under the framework of *Bremen* and its progeny *Atlantic Marine Construction Co. v. United States District Court*,[254] the Ninth Circuit affirmed the district court's ruling.[255] In *Atlantic Marine*, the U.S. Supreme

243. *See* Lee *ex rel.* Gap, Inc. v. Fisher, 34 F.4th 777, 782 (9th Cir.), *reh'g en banc granted*, 54 F.4th 608 (9th Cir. 2022).
244. *See id.* at 779.
245. *See id.*
246. Appellant's Opening Brief at 6, Lee *ex rel.* Gap, Inc. v. Fisher, 34 F.4th 777 (9th Cir. 2022) (No. 21-15923), 2021 WL 4824549.
247. *Lee*, 34 F.4th at 779.
248. 901 F.3d 1081 (9th Cir. 2018).
249. Lee v. Fisher, No. 20-cv-06163, 2021 WL 1659842, at *3 (N.D. Cal. Apr. 27, 2021) (quoting Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081, 1090 (9th Cir. 2018)), *aff'd sub nom.* Lee *ex rel.* Gap, Inc. v. Fisher, 34 F.4th 777 (9th Cir. 2022), *reh'g en banc granted*, 54 F.4th 608 (9th Cir. 2022).
250. *Id.* at *3.
251. *Id.* at *3–5.
252. *Id.* at *6.
253. *See* Lee *ex rel.* Gap, Inc. v. Fisher, 34 F.4th 777, 780–81 (9th Cir.), *reh'g en banc granted*, 54 F.4th 608 (9th Cir. 2022).
254. 571 U.S. 49 (2013).
255. *See Lee*, 34 F.4th at 782.

Court explained that, in a standard case not involving a forum selection clause, a district court considering a motion to dismiss for forum non conveniens should evaluate both private- and public-interest factors to determine whether a transfer would be more convenient for the parties involved and would promote "the interest of justice."[256] But the Court clarified that because a forum selection clause represents the parties' agreement as to the most proper forum, a district court facing a motion to dismiss for forum non conveniens in the context of a forum selection clause should only consider public-interest factors.[257] Furthermore, the Court explained that "[b]ecause those factors will rarely defeat a transfer motion," a valid forum selection clause should almost always apply.[258]

To identify public-interest factors under *Atlantic Marine*, the Ninth Circuit looked to *Bremen*.[259] In particular, the court focused on situations that the *Bremen* Court explained should counter the strong federal interest in enforcing FSPs: when enforcement is unreasonable and unjust given the inconvenience of the selected forum, when enforcement is contrary to public policy, or when the FSP is the product of fraud or undue influence.[260] Given that Lee based her appeal on the Exchange Act's antiwaiver and exclusive-jurisdiction provisions, the court analyzed Lee's *Bremen* argument solely under the public policy prong.[261]

First, the Ninth Circuit responded to Lee's argument that the bylaw FSP violated federal public policy because of the Exchange Act's antiwaiver provision.[262] Finding that a "strong federal policy in favor of enforcing [FSPs] . . . supersede[s] antiwaiver provisions" in state and federal statutes, the court rejected Lee's reliance on the Exchange Act's antiwaiver provision.[263] Moreover, the court discounted the Exchange Act's antiwaiver provision as an expression of federal policy.[264] Contrasting the Exchange Act's antiwaiver provision with a state antiwaiver provision that voided the waiver of "any . . . statutory rights,"[265] the court found that the Exchange Act's antiwaiver provision, which voids the waiver of "compliance,"[266] did

256. *Atl. Marine*, 571 U.S. at 62–63 (quoting 28 U.S.C. § 1404(a)).

257. *See id.* at 64. Put simply, a court should not consider any private-interest factors. *See* Sorensen, *supra* note 179, at 2560 ("[A] valid forum-selection clause transforms the analysis because all private interests will weigh in favor of dismissal and only overwhelming public interests will prevent it.").

258. *Atl. Marine*, 571 U.S. at 64. Though *Atlantic Marine* involved a motion to transfer a case from one federal district court to another, the Court specifically noted that the same standard applies to "motions to dismiss for *forum non conveniens* in cases involving valid forum-selection clauses pointing to state or foreign forums." *Id.* at 66 n.8.

259. *See Lee*, 34 F.4th at 780.

260. *See id.*; *supra* notes 173–78 and accompanying text.

261. *Lee*, 34 F.4th at 781.

262. *See id.*

263. *See id.* (second alteration in original) (quoting Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081, 1090 (9th Cir. 2018)).

264. *See id.*

265. *See id.* (citing Gemini Techs., Inc. v. Smith & Wesson Corp., 931 F.3d 911, 916 (9th Cir. 2019)).

266. 15 U.S.C. § 78cc(a).

not express a strong federal policy of preserving all Exchange Act causes of action.[267] Thus, the court held that the enforcement of Gap's FSP did not run afoul of the Exchange Act's antiwaiver provision.[268]

Second, the court held that the Exchange Act's exclusive-jurisdiction provision did not constitute "a clear statutory declaration" of federal policy.[269] Because the bylaw did not require shareholders to bring Exchange Act claims in state court and instead required claims to be dismissed in federal court, the court found that the enforcement of Gap's bylaw did not contravene the Exchange Act's exclusive-jurisdiction provision.[270] In this way, the court viewed the Exchange Act's exclusive-jurisdiction provision simply as a requirement that no nonfederal courts adjudicate Exchange Act claims.[271] The court also noted that, as the Supreme Court explained in *McMahon*, the Exchange Act's exclusive-jurisdiction requirement is not substantive in nature and is thus waivable.[272] As such, the court held that the enforcement of the bylaw FSP did not implicate the act's exclusive-jurisdiction provision.[273]

In its decision, the court also explained that Delaware law, as the law of the selected forum, was not irrelevant to the court's public policy analysis under *Bremen*.[274] The court clarified that a lack of adequate alternative remedies under Delaware law would weigh against enforcing the bylaw FSP.[275] However, the court noted that Lee failed to show that she would be unable to get any relief in the Delaware Court of Chancery for the directors' alleged wrongdoing.[276]

On October 24, 2022, the Ninth Circuit agreed to rehear the case en banc and vacated the panel's decision.[277] The court heard arguments en banc on December 12, 2022.[278]

IV. FEDERAL COURTS SHOULD GENERALLY DEFER TO DELAWARE

Part IV concludes by assessing these divided rulings and proposes that federal courts should generally enforce FSPs that preclude derivative section 14(a) claims and allow Delaware courts to mediate the issue via shareholder suits for breach of fiduciary duty. Part IV.A argues that the Seventh Circuit misinterpreted DGCL section 115 and instead should have looked to section 109(b). Part IV.B further argues that *Bremen* is ill-suited to evaluate

267. *See Lee*, 34 F.4th at 781.
268. *See id.*
269. *See id.*
270. *See id.*
271. *See id.*
272. *See id.*; *supra* notes 103–07 and accompanying text.
273. *See Lee*, 34 F.4th at 781. The court also rejected Lee's contention that federal courts have an unflagging obligation to hear cases within their exclusive jurisdiction and held that Lee had waived any DGCL-based argument. *See id.* at 782.
274. *See id.* at 782.
275. *See id.*
276. *See id.*
277. Lee *ex rel.* Gap, Inc. v. Fisher, 54 F.4th 608 (9th Cir. 2022).
278. *See* Barash, *supra* note 22.

as-applied challenges to FSPs that preclude shareholder derivative suits under section 14(a) of the Exchange Act. Part IV.C then advocates for a Delaware-centric solution: if directors invoke a bylaw FSP to improperly block a derivative section 14(a) claim, shareholders should sue directors in Delaware for breach of the fiduciary duty of loyalty under *Schnell*.

A. DGCL Section 109(b) Authorizes Boeing's and Gap's Forum Selection Provisions

The Seventh Circuit in *Seafarers* incorrectly evaluated Boeing's bylaw under DGCL section 115 and should have instead examined section 109(b)'s broad grant of authority. Indeed, the court recognized the potential relevance of section 109(b) but, using the principle of statutory construction that specific provisions prevail over general provisions (the "General/Specific Canon"),[279] it analyzed Boeing's bylaw under section 115.[280] But section 115 is not simply more specific than section 109(b); instead, section 115 is a small restriction of a corporation's broad power to adopt charter and bylaw provisions under sections 102(b)(1) and 109(b).[281] Therefore, the Seventh Circuit not only improperly applied the General/Specific Canon, but it also failed to apply the principle of statutory construction that two provisions should be interpreted in a way that renders them compatible, not contradictory (the "Harmonious-Reading Canon").[282]

Section 109(b) provides corporations with expansive authority to adopt bylaws so long as they are "not contrary to Delaware law."[283] Like section 102(b)(1), which governs charter provisions, section 109(b) permits provisions related to the business or affairs of the corporation as well as provisions related to the rights or powers of the corporation, shareholders, directors, officers, and employees.[284] Indeed, both sections 102(b)(1) and 109(b) use nearly identical language in their broad grants of authority.[285] Based on text alone, section 109(b)'s scope should be read to match that of section 102(b)(1)'s as outlined in *Salzberg*.[286] Therefore, just like section 102(b)(1), section 109(b) extends to intracorporate claims and is not limited to internal corporate claims as defined by section 115.[287]

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279. *See* Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714, 721 (7th Cir. 2022) (citing Turnbull v. Fink, 668 A.2d 1370, 1377 (Del. 1995)); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 183–88 (2012).

280. *See supra* Part III.A.

281. *See supra* Parts I.A–B.

282. *See* Turnbull v. Fink, 668 A.2d 1370, 1377 (Del. 1995) ("[A] court will attempt to harmonize two potentially conflicting statutes dealing with the same subject."); SCALIA & GARNER, *supra* note 279, at 180–82. Indeed, the Seventh Circuit seemed to recognize that it was eschewing the Harmonious-Reading Canon. *See Seafarers*, 23 F.4th at 724 ("In future cases, Delaware courts may address broader questions such as whether Section 109(b) would authorize a bylaw that violates Section 115 . . . .").

283. Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 1222 (Del. 2021).

284. *See* DEL. CODE ANN. tit. 8, § 109(b) (2023); *supra* notes 147, 166–67 and accompanying text.

285. *See supra* notes 147, 166–67 and accompanying text.

286. *See supra* notes 147, 158–67 and accompanying text.

287. *See supra* Part II.B.

Additionally, just as section 115 only slightly restricts section 102(b)(1)'s broad grant of authority to adopt charter provisions, section 115 only slightly restricts section 109(b)'s broad grant of authority to adopt bylaws.[288] Although *Salzberg* dealt primarily with section 102(b)(1),[289] the court's decision confirms this reading of section 109(b). In its explanation of why the chancery court improperly restricted the scope of section 102(b)(1), the Delaware Supreme Court rejected the idea that *Boilermakers*, and thus section 115, defined the outer limits of section 109(b).[290] Citing *Boilermakers*, the Delaware Supreme Court rejected the idea that section 115 altered section 109(b)'s broad grant of authority concerning intracorporate claims.[291] Instead, the court found that section 115 does not address intracorporate claims. Indeed, this idea was crucial to the court's central holding that section 115 did not limit section 102(b)(1).[292] In this way, *Salzberg* implicitly acknowledged sections 102(b)(1) and 109(b)'s parity.[293]

The Delaware General Assembly adopted section 115 in part to codify *Boilermakers*, but it did not intend to neutralize section 109(b) in doing so.[294] Section 115 regulates a set of permissible bylaws authorized by section 109(b): those dealing with internal corporate claims, which are derivative or direct claims based on "a violation of a duty by a current or former director[,] officer[,] or stockholder" and those arising out of the DGCL.[295] Section 115 authorizes bylaws that require internal corporate claims to be brought "solely and exclusively in any or all" courts in Delaware (both state and federal courts) and *prohibits* bylaws that strip Delaware state courts of jurisdiction over such claims.[296] When read in conjunction with section 109(b), section 115 stands for two propositions: (1) a corporation's power to adopt bylaws includes, but is not limited to, internal corporate claims, and (2) a bylaw cannot strip Delaware courts of jurisdiction over internal corporate claims.[297] Beyond this, section 115 does not in any way restrict the scope of section

288. *See supra* Part II.B.

289. *See supra* Part II.B.

290. *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 123–25 (Del. 2020).

291. *See id.*; *see also* Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714, 731–32 (7th Cir. 2022) (Easterbrook, J., dissenting) ("Yet *Salzberg* directs courts to look outside § 115 unless the bylaw does something that § 115 forbids—and § 115 forbids only provisions that block litigation in Delaware. Section 109(b) is a general grant of authority to adopt bylaws. Given the understanding of § 115 in *Salzberg*, § 109(b) is adequate to the task.").

292. *See Salzberg*, 227 A.3d at 130–31 ("[T]here is a category of matters that is situated on a continuum between the *Boilermakers* definition of 'internal affairs' and its description of purely 'external' claims. This conclusion logically follows [in part] from . . . Section 102(b)(1)'s plain language . . . ."); *id.* at 123 ("*Boilermakers* did not establish the outer limit of what is permissible under either Section 109(b) or Section 102(b)(1).").

293. *See id.* at 123–24.

294. *See Seafarers*, 23 F.4th at 732 (Easterbrook, J., dissenting); *Salzberg*, 227 A.3d at 117, 123.

295. DEL. CODE ANN. tit. 8, § 115 (2023).

296. *Id.*; *see Seafarers*, 23 F.4th at 731–32 (Easterbrook, J., dissenting); *Salzberg*, 227 A.3d at 119.

297. DEL. CODE ANN. tit. 8, §§ 109(b), 115; *see Salzberg*, 227 A.3d at 120; *supra* notes 136–40 and accompanying text.

109(b), which permits bylaw provisions that relate to intracorporate claims—the broad subset of claims inclusive of, but in no way limited to, internal corporate claims as defined in section 115.[298]

The Seventh Circuit held that the application of Boeing's bylaw violated section 115's requirement that bylaws adopted pursuant to section 115 be "consistent with applicable jurisdictional requirements."[299] To make sense of this clause, the Seventh Circuit relied heavily on the synopsis of the 2015 amendments to the DGCL, which stated that "[s]ection 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction."[300] But this analysis rests on erroneous logic. Section 115 only requires that corporations allow Delaware state courts to hear internal corporate claims—breach of fiduciary duty claims and claims under the DGCL—and requires that any bylaw FSP adopted pursuant to section 115 be consistent with applicable jurisdictional requirements.[301]

Derivative section 14(a) claims, which are premised on *federal* law, are not internal corporate claims; they are intracorporate claims.[302] As such, these claims fall squarely outside of section 115's province.[303] Because Boeing's authority to adopt bylaws for intracorporate claims flows entirely from section 109(b), the application of Boeing's bylaw to a derivative section 14(a) claim does not implicate section 115, and thus the section's "jurisdictional requirement" does not apply.[304] Additionally, section 109(b), like section 102(b)(1), authorizes corporations to adopt FSPs for intracorporate claims.[305] Therefore, the Seventh Circuit erred in holding that Boeing's bylaw violated DGCL section 115.[306]

B. Bremen *Is Inconclusive in the Context of Derivative Section 14(a) Claims*

As demonstrated by both the Seventh and Ninth Circuits, federal courts typically evaluate as-applied challenges to FSPs using the analysis in *Bremen*

298. *See Salzberg*, 227 A.3d at 120–32; Manesh, *supra* note 147, at 517 n.86.

299. *Seafarers*, 23 F.4th at 720 (quoting DEL. CODE ANN. tit. 8, § 115 (2023)).

300. S.B. 75, 148th Gen. Assemb., Reg. Sess. (Del. 2015); *see supra* notes 214–15 and accompanying text.

301. DEL. CODE ANN. tit. 8, § 115.

302. *See id*. §§ 109(b), 115; *Salzberg*, 227 A.3d at 131 fig.1. *But see Seafarers*, 23 F.4th at 731 (Easterbrook, J., dissenting).

303. *See Salzberg*, 227 A.3d at 119 ("Section 115, read fairly, does not address the propriety of [FSPs] applicable to other types of claims. If [an FSP] purports to govern intra-corporate litigation of claims that do not fall within the definition of 'internal corporate claims,' we must look elsewhere . . . to determine whether the provision is permissible.").

304. *See Seafarers*, 23 F.4th at 731–32 (Easterbrook, J., dissenting); Lipton, *supra* note 24, at 34 (noting that the *Seafarers* court "misread[] Delaware law").

305. *See supra* notes 283–93.

306. As this Note previously discussed, DGCL section 109(b) prohibits bylaws that are "inconsistent with law." DEL. CODE ANN. tit. 8, § 109(b). This likely refers to the laws of Delaware, specifically the DGCL, not the laws of other jurisdictions. *See* Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 1222 (Del. 2021) (equating section 102(b)(1)'s limitation "not contrary to the laws of [Delaware]" and section 109(b)'s limitation "not inconsistent with law").

and its progeny, including *Atlantic Marine*.[307] However, the circuit courts came to different conclusions as to *Bremen*'s application to FSPs that preclude derivative section 14(a) claims.[308] And for good reason—*Bremen* does not cleanly map onto as-applied challenges to these types of FSPs for two reasons.

First, *Bremen* requires courts to weigh the strong federal policy in favor of enforcing valid FSPs against other interests.[309] Thus, when evaluating an as-applied challenge to an FSP that precludes derivative claims under the Exchange Act, courts must consider whether the FSP violates the Exchange Act's antiwaiver provision.[310] But the Exchange Act's antiwaiver provision expresses a federal policy of "compliance with" the substantive provisions of the Exchange Act.[311] In other words, the antiwaiver provision voids agreements that "license non-compliance" with the Exchange Act's substantive obligations.[312] Therefore, the Exchange Act's antiwaiver provision does not explicitly require that plaintiffs have access to all possible causes of action under the act to address violations.[313] Instead, given the provision's focus on compliance, whether an FSP violates the Exchange Act's antiwaiver provision hinges on "degree and context"[314] and requires an evaluation of the importance of the claim for ensuring Exchange Act compliance.[315] Still, when evaluating how an agreement affects "compliance," courts examine whether an agreement affects an individual's access to causes of action under the act.[316]

A derivative section 14(a) claim is just one cause of action shareholders utilize to address violations of section 14(a).[317] Indeed, violations of section

307. *See supra* Part III.

308. *See supra* Part III.

309. *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 64 (2013); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972); Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081, 1088 (9th Cir. 2018); Olde Homestead Golf Club v. Elec. Transaction Sys. Corp., 714 F. App'x 186, 189–90 (3d Cir. 2017); Phillips v. Audio Active Ltd., 494 F.3d 378, 392–93 (2d Cir. 2007); *supra* Part II.C.

310. 15 U.S.C. § 78cc(a).

311. *Id.*; *see supra* notes 102–07 and accompanying text.

312. Pasternack v. Shrader, 863 F.3d 162, 172 (2d Cir. 2017).

313. *See* Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714, 730 (7th Cir. 2022) (Easterbrook, J., dissenting).

314. Harsco Corp. v. Segui, 91 F.3d 337, 344 (2d Cir. 1996).

315. *Compare Pasternack*, 863 F.3d at 171–72 (declaring that a blanket waiver of all future Exchange Act claims was invalid under the act's antiwaiver provision), *with* Bonny v. Soc'y of Lloyd's, 3 F.3d 156, 161 (7th Cir. 1993) ("[S]everal remedies in England vindicate plaintiffs' substantive rights [under the Exchange Act] while not subverting the United States' policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors."), *and* Goodman v. Epstein, 582 F.2d 388, 402 (7th Cir. 1978) (explaining that a release of "mature, ripened" Exchange Act claims does not violate the act's antiwaiver provision).

316. *See supra* notes 102–07 and accompanying text.

317. *See, e.g.*, Shidler v. All Am. Life & Fin. Corp., 775 F.2d 917, 919 (8th Cir. 1985) (direct, individual section 14(a) claim); *In re* Bemis Co. Sec. Litig., 512 F. Supp. 3d 518, 523 (S.D.N.Y. 2021) (direct, class action section 14(a) claim); *see* J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964); *supra* Part I.B.

14(a) will almost always give rise to direct section 14(a) claims.[318] The SEC also has enforcement powers under the act and thus can ensure compliance with the act's substantive provisions as well.[319] Moreover, state law often provides shareholders with causes of action that are quite similar to those under the Exchange Act.[320] Indeed, in both *Seafarers* and *Lee*, the plaintiff shareholders possessed substantially similar remedies to a derivative section 14(a) action under state law.[321]

As the *Seafarers* and *Lee* decisions make clear, the question of whether the waiver of certain Exchange Act claims, in the presence of adequate alternative remedies, violates the act's antiwaiver provision is a difficult one. Indeed, the Seventh and Ninth Circuits agreed that, in the context of certain large, international business transactions, an agreement that waives all Exchange Act claims while preserving adequate alternative remedies in nonfederal forums does not violate the act's antiwaiver provision.[322] However, the circuit courts disagreed on whether this analysis applies to agreements in purely domestic transactions that waive certain Exchange Act claims but preserve other remedies, including other remedies under the Exchange Act itself.[323]

On one hand, the Exchange Act's antiwaiver provision only mandates "compliance" with the act.[324] Therefore, the presence of alternative causes of action to rectify violations of the Exchange Act could serve as a valuable deterrent against such violations.[325] On the other hand, losing any cause of action under the Exchange Act, even one that overlaps significantly with other causes of action, likely reduces the expected cost of noncompliance with the act.[326] Thus, absent additional guidance from the Supreme Court on the scope and nature of the Exchange Act's antiwaiver provision, the importance of derivative section 14(a) claims to the act's mandate of

318. *See supra* notes 93–95 and accompanying text; *see also* Manesh & Grundfest, *supra* note 89, at 66.

319. 15 U.S.C. § 78(u)(d); *see, e.g.*, SEC v. Shanahan, 646 F.3d 536, 546–47 (8th Cir. 2011).

320. *Compare* 17 C.F.R. § 240.10b-5 (2023) ("It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange . . . [t]o employ any device, scheme, or artifice to defraud . . . ."), *with* CONN. GEN. STAT. ANN. § 36b-4(1) (2023) ("No person shall, in connection with the offer, sale or purchase of any security, directly or indirectly: (1) Employ any device, scheme or artifice to defraud . . . .").

321. *See* Defendants-Appellees' Answering Brief at 38, Lee *ex rel.* Gap, Inc. v. Fisher, 34 F.4th 777 (9th Cir. 2022) (No. 21-15923), 2021 WL 5872640; Brief for the Appellees at 7, Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714 (7th Cir. 2022) (No. 20-2244), 2020 WL 6035988.

322. *See supra* Part III.

323. *See supra* Part III.

324. 15 U.S.C. § 78cc(a).

325. *See* Defendants-Appellees' Answering Brief, *supra* note 321, at 20, 31–38.

326. *Cf.* Thompson & Thomas, *supra* note 78, at 1774 (noting that derivative suits deter corporate wrongdoing "by their very existence"); William K. Sjostrom, Jr., *The Intersection of Fee-Shifting Bylaws and Securities Fraud Litigation*, 93 WASH. U. L. REV. 379, 403 (2015) (noting that bylaws that significantly disincentivize Exchange Act suits may violate the act's antiwaiver provision).

"compliance" remains unclear. As such, it is not apparent whether bylaw FSPs that preclude derivative section 14(a) claims violate the Exchange Act's antiwaiver provision.[327] Furthermore, even if the preclusion of derivative section 14(a) claims offends the act's mandate of "compliance," *Bremen* requires courts to weigh this issue against the strong federal preference for enforcing FSPs.[328] Therefore, *Bremen* is an inelegant framework for as-applied challenges to FSPs that preclude derivative section 14(a) claims.

Moreover, *Bremen* does not apply neatly to derivative claims. Because derivative claims by definition belong to the corporation and not the shareholders, a shareholder's inability to bring a derivative section 14(a) claim does not extinguish the claim.[329] A shareholder's inability to assert a derivative section 14(a) claim simply means that the authority to "speak[] for the corporation" remains with its board of directors.[330] In this way, the FSPs in *Seafarers* and *Lee* do not function like conventional waivers, which involve an individual releasing their personal right to seek remedies under the act.[331] Here, the bylaw FSPs are not blanket waivers whereby the corporation or shareholders release all of their future claims under the Exchange Act. Instead, the FSPs serve to regulate who can pursue a claim on behalf of the corporation—the directors or the shareholder plaintiff.[332] Therefore, FSPs governing derivative actions do not fall seamlessly into the *Bremen* test, which, in the antiwaiver context, typically looks at how an FSP affects the plaintiff's *own* statutory rights and remedies.[333]

Because of the indeterminacy of *Bremen* in the context of derivative section 14(a) claims, courts should generally follow the recognized preference in federal policy of enforcing FSPs[334]—even if the FSP works to preclude a shareholder's derivative claim under the Exchange Act. Though permitting the board greater discretion to block derivative claims poses structural dangers,[335] shareholders can overcome this obstacle with a different suit.

C. The Schnell *Doctrine Provides the More Appropriate Remedy*

Federal courts need not worry about allowing corporations to "opt out" of Exchange Act suits when enforcing bylaw FSPs that preclude derivative section 14(a) claims.[336] Given the nature of derivative litigation and the

327. *See supra* Part III.
328. *See supra* Part II.C.
329. *See supra* Part I.A.
330. *See* Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714, 729 (7th Cir. 2022) (Easterbrook, J., dissenting).
331. *See, e.g.*, Haynsworth v. Corp., 121 F.3d 956, 959–60 (5th Cir. 1997); Binn v. Bernstein, No. 17 Civ. 8594, 2018 WL 11222925, at *1–2 (S.D.N.Y. Aug. 7, 2018).
332. *Seafarers*, 23 F.4th at 729 (Easterbrook, J., dissenting).
333. *See, e.g.*, Bonny v. Soc'y of Lloyd's, 3 F.3d 156, 160–61 (7th Cir. 1993).
334. *See supra* note 179 and accompanying text.
335. *See supra* Part I.A.
336. Noah Feldman, Opinion, *Will Courts Prevent Investors from Holding Managers Accountable?*, BLOOMBERG (Dec. 12, 2022, 3:30 PM), https://www.bloomberg.com/opinion/articles/2022-12-12/ruling-for-gap-in-lee-v-fisher-could-stifle-shareholder-lawsuits

requirement that directors act in accordance with their fiduciary duties, the FSPs, if invoked, are not the end of the matter.[337]

Derivative suits are a procedural mechanism whereby shareholders take control of a corporate asset—a suit belonging to the corporation.[338] They exist to regulate the balance of power between shareholders and the board.[339] Thus, any provision that regulates shareholders' power to "step into the corporation's shoes" and initiate a suit on its behalf fundamentally implicates the relationship between directors and shareholders, which is primarily governed by state law.[340]

Bylaw FSPs that preclude shareholders from bringing a specific type of derivative claim when invoked are simply one additional layer sitting atop the traditional mechanisms that apply to derivative suits.[341] For example, if the defendants in *Lee* had not invoked Gap's bylaw, the case would have proceeded to the issue of demand futility.[342] Lee would have then had to prove that at least half of Gap's directors were not sufficiently impartial "to conduct [the] litigation on behalf of the corporation" due to a conflict of interest.[343] To do so, Lee would have had to show that at least half of the board (1) benefited materially from the alleged misconduct at the center of the litigation, (2) would face a considerable likelihood of liability if the litigation progressed, or (3) lacked independence from someone who either materially benefited from the alleged misconduct at the center of the litigation or would face a considerable likelihood of liability if the litigation progressed.[344] In essence, Lee would need to show that at least half of the directors had a conflict of interest such that they would be unable to exercise their normal business judgment with respect to the litigation demand.[345]

Of course, the defendant directors did invoke the bylaw in *Lee*.[346] In doing so, the board preserved its authority to manage the corporation's litigation

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[https://perma.cc/6YGA-CRX5]; *see also* Lipton, *supra* note 24 (manuscript at 35) (characterizing the holding in *Lee* to "explicitly authorize[] every publicly traded corporation to opt out of private Exchange Act liability").

337. *See* Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 958 (Del. Ch. 2013); *supra* Parts I.A, II.C.

338. *See supra* Part I.A.

339. *See* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95 (1991); *supra* Part I.A.

340. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1949); *see* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89–91 (1987) (explaining that "state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law" and thus must be respected); *supra* Part I.A.

341. *See supra* Part I.A.

342. *See* Appellant's Opening Brief, *supra* note 246, at 9.

343. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1049 (Del. 2021) (quoting Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984), *overruled in part on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)).

344. *See supra* Part I.A.

345. *See* Aronson v. Lewis, 473 A.2d 805, 815 (Del. 1984), *overruled in part on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

346. Lee *ex rel.* Gap, Inc. v. Fisher, 34 F.4th 777, 780 (9th Cir.), *reh'g en banc granted*, 54 F.4th 608 (9th Cir. 2022).

decisions.[347] However, because Lee brought the suit against the directors themselves, the directors' invocation of the bylaw necessarily raised the "specter that [the] board [was] acting primarily in its own interest[]" rather than in the interest of the corporation and its shareholders.[348] By sidestepping the question of demand futility in a derivative suit against them, the directors left the fundamental question of demand futility unanswered: did a majority of the directors have a conflict of interest that "sterilize[d] their discretion" to manage the litigation?[349]

In this way, the decision to invoke the bylaw FSP to preclude a derivative section 14(a) claim is best understood as a displacement of the demand futility analysis of *Zuckerberg*.[350] By actively displacing the demand futility process, the directors take affirmative action that implicates their fiduciary duties.[351] As such, the most appropriate way to challenge this decision is through a suit in the Delaware Court of Chancery for a breach of fiduciary duty under *Schnell*.[352] For instance, Lee could have alleged that Gap's directors breached their fiduciary duty of loyalty to the corporation and its shareholders by invoking the bylaw—a claim fundamentally about the directors' conflicts of interest with respect to the litigation decision.[353] In doing so, Lee could have argued that the defendant directors breached their fiduciary duty of loyalty by putting their own self-interest in avoiding reputational harm above the interests of the corporation and its shareholders.[354]

Delaware courts are familiar with this type of litigation, and it falls squarely within the *Schnell* doctrine.[355] *Schnell* guards against activity that, although technically permitted by the DGCL, is inconsistent with the

347. *See supra* notes 34–37, 47–73.

348. Unocal Corp. v Mesa Petrol. Co., 493 A.2d 946, 954 (Del. 1985).

349. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1059 (Del. 2021) (quoting Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984), *overruled in part on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)); *see supra* Part I.A.

350. *See supra* notes 64–73.

351. *See supra* Part I.A.

352. *See* Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 958 (Del. Ch. 2013) ("The plaintiff may also argue that, under *Schnell*, the [FSP] should not be enforced because [it] was being used for improper purposes inconsistent with the directors' fiduciary duties."); Grundfest & Savelle, *supra* note 133, at 401; *see also* Joseph A. Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and* Sciabacucchi, 75 BUS. LAW. 1319, 1336 (2020). Indeed, Seafarers sought this exact remedy in the Delaware Court of Chancery after the district court dismissed its suit. *See* Verified Class Action Complaint at 27, Seafarers Pension Plan v. Bradway, No. 2020-0556 (Del. Ch. dismissed Jan. 13, 2023), BL-1. But Vice Chancellor Morgan T. Zurn issued a stay in the proceedings in anticipation of the Seventh Circuit's decision. *See* Remarks of the Court Staying the Chancery Litigation at 7, Seafarers Pension Plan v. Bradway, No. 2020-0556 (Del. Ch. dismissed Jan. 13, 2023), BL-45.

353. *See* Verified Class Action Complaint, *supra* note 352, at 27 ("Acting in bad faith and in their own interest, the [directors] failed to fulfill their fiduciary duties by . . . invoking Boeing's unlawful [FSP] to protect themselves . . . .").

354. *See id.*; Grundfest & Savelle, *supra* note 133, at 401.

355. *See supra* notes 180–92 and accompanying text.

fiduciary duties of care and loyalty.[356] Since its inception, the *Schnell* doctrine has been invoked by Delaware courts to nullify board action taken pursuant to a board's valid authority when the court found that the board utilized that authority improperly.[357] Often, Delaware courts use *Schnell* to prevent "incumbent management from entrenching itself by taking action which, though legally possible, is inequitable"[358]—the type of action that is also at issue in both *Seafarers* and *Lee*.

In general, federal courts hearing as-applied challenges to bylaw FSPs that preclude derivative section 14(a) claims should defer to the judgment of Delaware courts on these matters.[359] Because the as-applied challenge necessarily implicates (1) the proper balance between directors and shareholders and (2) the directors' duty of loyalty, the challenge should largely depend on the directors' abilities to exercise their business judgment and on whether the directors have significant conflicts of interest.[360] This approach balances the board's interest in managing the corporation's litigation decisions with the shareholders' interest in accessing derivative section 14(a) claims to police and deter director misbehavior.[361] Therefore, as-applied challenges to bylaw FSPs that preclude derivative section 14(a) claims should, when possible, be resolved under the doctrines that govern the relationship between shareholders and directors—namely, the duty of loyalty under the *Schnell* doctrine.

CONCLUSION

Federal courts should not be afraid to enforce FSPs that temporarily preclude shareholders' derivative section 14(a) claims. Indeed, because these bylaw FSPs (1) are plainly valid under DGCL section 109(b) and (2) are challenging to analyze within the typical forum non conveniens analysis under *Bremen*, federal courts should defer to the strong federal policy of enforcing FSPs. Rather than slamming the courthouse door shut on shareholders, though, federal courts can center the dispute on the foundational issues at the heart of *Seafarers* and *Lee*: the balance of power between directors and shareholders in litigation management and the directors' fiduciary duties.

In the context of derivative section 14(a) claims, FSPs, if invoked by defendant directors, act as an additional layer atop the procedural hurdles that

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356. *See* Strine, *supra* note 191, at 880.

357. *See, e.g.*, Linton v. Everett, No. 15219, 1997 WL 441189, at *10 (Del. Ch. July 31, 1997); Lerman v. Diagnostic Data, Inc., 421 A.2d 906, 914 (Del. Ch. 1980); *see also* Grundfest & Savelle, *supra* note 133, at 401 n.367; Siegel, *supra* note 187, at 171–76.

358. Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985); *see supra* Part II.C.

359. *Cf.* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) (explaining that when federal law is silent, "the allocation of governing power within the corporation should" depend on state law). Federal courts will need to defer to Delaware courts on these issues not because federal courts are unequipped to identify breaches of fiduciary duties but rather because the bylaw FSPs that create the issue in the first place mandate that shareholders bring fiduciary duty claims in Delaware. *See, e.g.*, Appellant's Opening Brief, *supra* note 246, at 8.

360. *See supra* notes 341–52.

361. *See supra* Parts I.A–B.

already exist under *Zuckerberg*, which protect directors' autonomy with respect to the corporation's litigation decisions. By default, the board controls litigation decisions, and shareholders can only assert the corporation's claims if the board's discretionary decisions are tainted with self-interest. A board's invocation of a bylaw FSP to stifle a shareholder derivative claim presents the same concern—self-interest contaminating a director's ability to make a reasoned business decision in the corporation's best interest. Therefore, the proper way to mediate the issue at the center of *Seafarers* and *Lee* is through a claim involving the breach of the fiduciary duty of loyalty.