IN THE SUPREME COURT OF THE STATE OF DELAWARE

MATTHEW B. SALZBERG, JULIE M.B. BRADLEY, TRACY BRITT COOL, KENNETH A. FOX, ROBERT P. GOODMAN, GARY R. HIRSHBERG, BRIAN P. KELLEY, KATRINA LAKE, STEVEN ANDERSON, J. WILLIAM GURLEY, MARKA HANSEN, SHARON MCCOLLAM, ANTHONY WOOD, RAVI AHUJA, SHAWN CAROLAN, JEFFREY HASTINGS, ALAN HENDRICKS, NEIL HUNT, DANIEL LEFF, and RAY ROTHROCK, Defendants Below-Appellants, - and - BLUE APRON HOLDINGS, INC., STITCH FIX, INC. and ROKU, INC., Nominal Defendants Below-Appellants, v. MATTHEW SCIABACUCCHI, on behalf of himself and all others similarly situated, Plaintiff Below-Appellee.	No. 346, 2019 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2017-0931-JTL

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

A long-standing hallmark of the Delaware General Corporation Law ("DGCL") is its broad and enabling nature. Delaware not only permits but encourages corporations to privately order their affairs in any number of ways to maximize firm value to benefit stockholders. 8 *Del. C.* § 102(b)(1) ("Section 102(b)(1)") embodies that ethos, allowing corporations to put into their charters "[a]ny provision for the management of the business" or "for the conduct of the affairs of the corporation" with the only express limitation that such provisions cannot be "contrary to the laws of this State." Not surprisingly, that text has remained largely unchanged for over 100 years.

At issue here is the effort by the three appellant corporations (and dozens of other Delaware companies) to adopt charter provisions intended to address a troubling trend in multi-forum litigation. The number of claims by current or former stockholders under Section 11 of the Securities Act of 1933 (the "'33 Act") challenging disclosures in the corporation's registration statements filed in state court has risen dramatically during the past decade, particularly after 2015. The reasons for this increase are varied, but are largely due to the fact that state court plaintiffs can avoid certain procedural hurdles and are subject to fewer dismissals than federal court plaintiffs. This results in real harm to companies, and by extension

stockholders, who bear the costs directly or through increased deductibles and insurance premiums.

To address this trend, these companies adopted a variant of the forum selection provisions adopted in the late-2000s and upheld in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), requiring current and former stockholders to bring '33 Act claims in federal court (the "Federal Forum Provisions" or "FFPs"). Just as the glut of multi-forum M&A litigation led companies to adopt forum selection provisions channeling fiduciary duty claims into the Court of Chancery, companies adopted FFPs to channel Section 11 claims into the federal courts, which are best suited to decide those cases. Indeed, as appellant Stitch Fix noted in its Registration Statement, it adopted both variants of forum selection provision side-by-side so "the Court of Chancery…and the federal district courts…will be the exclusive forums for substantially all disputes between us and our stockholders."

Despite the similarities in form and purpose to the provisions approved in *Boilermakers*, the trial court concluded in its December 19, 2018 memorandum opinion ("Opinion" or "Op.") that the FFPs were "ineffective" because they exceed the scope of Section 102(b)(1). Yet the Opinion did not meaningfully deal with the broad and enabling language of Section 102(b)(1). Indeed, the trial court brushed off the defendants' "ask" that the court "start with the plain language of Section

102(b)(1)," instead analyzing what it referred to as "first principles." Op. 38. The court then went on a historical journey to conclude Delaware corporations simply lack authority to regulate where stockholders can assert claims against companies and their officers and directors, even those relating to the board's internal processes and disclosures, that arise from other sources of law.

The trial court's analysis cannot withstand scrutiny. As explained below, the FFPs easily fall within the broad and enabling text of Section 102(b)(1) and are consistent with *Boilermakers* and this Court's opinion in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014). The court's discussion of Section 11 claims as "external" is divorced from the reality that those claims are principally brought by stockholders (i.e., people who buy stock are stockholders) and deal with the fundamental representations made by corporate officers and directors in a company's registration statement. Section 11 claims challenging a company's disclosures are far more like the fiduciary duty claims regulated by the bylaws approved in *Boilermakers* than the hypothetical products liability claim brought by a stockholder that the trial court relied upon to justify its conclusion.

More concerning, the Opinion's narrow construction of Section 102(b)(1)—which explicitly (and artificially) grafts the internal affairs doctrine, a choice-of-law principle, onto Section 102(b)(1)—could have profound effects on Delaware law, which frequently intersects with federal law. Nor is there any compelling concern

that upholding the FFPs would encroach on the federal domain: it can hardly be violative of federal law to direct federal securities claims ***into*** federal courts. If anything, the Opinion conflicts with federal law because the U.S. Supreme Court has held that parties can agree to forum selection provisions limiting where '33 Act claims can be brought. Yet, the trial court concluded that corporate constituents in Delaware cannot contract for that same result in a charter.

In any event, the court's justifications for characterizing the FFPs as "external," e.g., their hypothetical application to underwriters or debt securities, would at most justify not enforcing them "as applied" to particular Section 11 claims, not invalidating them facially as the trial court did. The court ignored clear Delaware authority recognizing that charter provisions are presumptively valid and that, in the context of a facial challenge, like this one, the plaintiff must show the FFPs "cannot operate lawfully or equitably under any circumstance." Here, there is no question that the intent of the FFPs, to regulate standard Section 11 claims by stockholders challenging the boards' pre-IPO disclosures, falls squarely within the scope of Section 102(b)(1). Therefore, this Court should reverse the trial court's Opinion and enter judgment in Appellants' favor.

SUMMARY OF ARGUMENT

1. Forum selection provisions regulating where current and former stockholders bring claims related to a company's disclosures in its registration statement—no matter what law governs those claims—plainly relate to the broad subject matter and types of relationships contemplated by Section 102(b)(1). Instead of applying the statutory text, the trial court concluded, based on a cramped reading of *Boilermakers* and so-called "first principles," that Section 102(b)(1) only permits charter provisions that regulate "internal affairs" claims. The court then concluded the FFPs governed only "external" relationships after considering a litany of hypotheticals and without ever considering the elements of Section 11 claims or the reality of who brings Section 11 claims and against whom. Those hypotheticals are not proper considerations in this case, where the Appellee must show the FFPs are facially invalid in any circumstance, rather than unenforceable "as applied" to a particular Section 11 claim (which this case does not involve).

2. The FFPs are also not "contrary to the laws of this State" so as to run afoul of Section 102(b)(1). The court erred by relying on its "first principles" to conclude the FFPs are impermissible under Section 102(b)(1) as encroaching on federal authority. Contracting to pre-select from among permissible forums does not run afoul of any state or federal law principles; to the contrary, U.S. Supreme Court authority permits parties to do just that. Moreover, mere interaction between

the state and federal regulatory regimes in a particular area does not place the area forever off limits to all state regulation, as numerous examples cited below attest. Unable to point to any particular law or policy that the FFPs violate, the trial court instead maintained they were inconsistent with the nebulous concept of "first principles." To the extent the court concluded this renders the FFPs contrary to Delaware law, that was error.

3. To the extent this Court does not reverse the Opinion, the trial court's $3 million award of attorneys' fees—equating to $11,262 per hour—to Appellee's counsel based on a "corporate benefit" theory ("Fee Award") contains numerous errors requiring reversal. Although the standard of review on appeal for fee awards is "abuse of discretion," the trial court should not get the benefit of a discretion-based standard where it exercised none. The trial court instead relied on its stated practice of awarding fees on a "winner-takes-all" basis, with the express intent to penalize the party it perceives less reasonable. This "baseball-style arbitration" approach was not consistent with the court's obligation to "craft a reasonable and equitable" fee award and should be reversed for that reason alone. *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 46 (Del. 2017). The court then compounded its error by misapplying *Sugarland* in numerous respects: (i) acknowledging it awarded fees not for the benefit conferred on the defendant corporations but rather for the perceived benefit of "creating precedent"; (ii) failing

to analyze the value of the benefit conferred against available precedent; (iii) failing to perform a cross-check to ensure Sciabacucchi's counsel did not receive a windfall; and (iv) awarding fees based on non-existent hours. For these reasons, the Fee Award must be reversed.

STATEMENT OF FACTS

I. PARTIES

Appellants Blue Apron Holdings, Inc. ("Blue Apron"), Roku, Inc. ("Roku"), and Stitch Fix, Inc. ("Stitch Fix") (collectively "Corporate Appellants") are Delaware corporations. In 2017, each of the Corporate Appellants filed registration statements with the Securities and Exchange Commission (the "SEC") for shares of their common stock and launched initial public offerings (the "IPOs"). Op. 12-13.

Before filing their registration statements, the Corporate Appellants and their stockholders adopted forum selection provisions in their charters designating the federal courts as the exclusive forum for claims arising under the '33 Act (in addition to provisions of the variety upheld in *Boilermakers*). *Id.*; A50; A84; A100. Roku and Stitch Fix adopted substantively identical provisions, which provide as follows:

> Unless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933.

Op. 13. Blue Apron's provision differed in that it provided that federal district courts would be the exclusive forum for '33 Act claims "to the fullest extent permitted by law." *Id.*

Appellee Matthew Sciabacucchi is a purported stockholder of each of the Corporate Appellants, having allegedly purchased shares pursuant to their respective

2017 registration statements. *Id.* Sciabacucchi has not brought Section 11 claims or any other claims related to appellants' IPOs; he only brings this facial challenge to the FFPs. A212.

II. THE '33 ACT AND SECTION 11 LITIGATION TRENDS

Congress passed the '33 Act to curb abusive and fraudulent conduct perpetrated by the individuals in control of corporations against purchasers of the stock of those corporations. *See Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018). Section 11 of the '33 Act prohibits issuers from making materially misleading statements or omissions in registration statements filed with the SEC, and provides purchasers with a cause of action against the corporation, its directors, anyone who signs the registration statement, and certain enumerated parties involved in drafting. *See* 15 U.S.C. § 77k(a).

Although the '33 Act gives state and federal courts concurrent jurisdiction over claims brought under the Act, the adoption of the Private Securities Litigation Reform Act ("PSLRA") in 1995 and the Securities Litigation Reform Act ("SLUSA") in 1998 created ambiguity about the removability of '33 Act claims and whether federal courts had exclusive jurisdiction over such claims. The potential importance of this uncertainty grew after 2010, as the number and costs of Section 11 claims filed against new public companies in state courts increased dramatically:

Number of '33 Act Complaints Filed by Court		
	2010	2018
Federal Only	**22**	**11**
State Only	**0**	**17**
Both State and Federal	**2**	**13**
Total	**24**	**41**

Cornerstone Research, *Securities Class Action Filings 2018 Year in Review*, fig.21 (2019) (A351). Moreover, the costs of state court litigation—measured in "maximum dollar loss"—nearly doubled from an average of $13.92 billion annually between 2010 and 2017 to $24.93 billion in 2018. *Id.* fig.19 (A349).

In 2018, the U.S. Supreme Court resolved the jurisdictional uncertainty created by SLUSA by holding that SLUSA barred removal of Section 11 actions to federal court and reaffirming concurrent jurisdiction of '33 Act claims. *Cyan*, 138 S. Ct. at 1069-78. *Cyan* seems to have accelerated the shift of Section 11 litigation from federal to state courts. Partial-year 2019 numbers confirm this trend, as three-quarters of new '33 Act cases were filed in state court in the first half of 2019. Cornerstone Research, *Securities Class Action Filings 2019 Mid-year Assessment*, fig.12 (2019) (A393).

The reasons for this shift are clear: plaintiffs' firms have greater leverage to extract larger settlements in Section 11 cases filed in state court. This is because, among other reasons: (i) state courts frequently do not apply the PSLRA's automatic discovery stay; (ii) there is no orderly process for consolidating related cases across state and federal courts; and (iii) state courts apply more lenient pleading standards,

resulting in more cases surviving motions to dismiss. *See* Joseph R. Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and* Sciabacucchi 16-19 (Working Paper 2019) (A435-38). The data confirms this—between 2011 and 2018, only 19% of Section 11 complaints filed in state court were dismissed, while 42% filed in federal court were dismissed. *Id*. That it is easier and more lucrative for plaintiffs to bring '33 Act claims has prompted a concomitant increase in D&O insurance premiums for IPOs. *See id.* at 19-23 (A438-42) (collecting sources). The result will be to make it more expensive for companies to conduct IPOs, raise capital, and operate as public companies, with the ultimate costs borne by stockholders and productive enterprise.

III. THE PRIVATE ORDERING SOLUTION

Even before *Cyan*, in response to this upward trend, companies began to adopt provisions designating the federal district courts as the exclusive forum for '33 Act claims modeled on the forum provisions approved in *Boilermakers*. *See* A34. Consistent with the view that such provisions were permissible under Delaware law, the SEC approved numerous registration statements detailing FFPs adopted before going public without comment. *Compare CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227 (Del. 2008) (SEC posed certified questions about the validity of a bylaw providing for indemnification in proxy contests).

IV. PROCEDURAL HISTORY

On December 29, 2017, Sciabacucchi filed this action seeking a declaration the FFPs were invalid. A103. The parties filed cross motions for summary judgment, and on December 19, 2018, the court issued its Opinion.

In the Opinion, the trial court first determined that *Boilermakers* and other "existing law"—including *ATP*, where this Court ***upheld*** the validity of a novel fee-shifting bylaw, and the 2015 amendments to the DGCL amending Sections 102 and 109 and adopting Section 115 ("2015 Amendments")—"indicate" the FFPs are "ineffective" because they do not regulate "internal affairs" claims. Op. 28-34. In support, the court reasoned the FFPs governed "external" relationships, listing a number of attributes of Section 11 claims that it maintained evidenced their external nature. Op. 35-37.

Recognizing that these authorities were not directly on point, the trial court separately concluded that the "same result derives" from what the court referred to as "first principles." Op. 38. Rather than take the defendants up on their "ask" to "start with the plain language of Section 102(b)(1)," the court concluded that "reasoning from first principles requires more fundamental starting points: the concept of the corporation and the nature of its constitutive documents." *Id*. The trial court never explained what precisely it meant by "first principles," other than to recite a series of basic propositions about the nature of the corporation and

reiterate its prior conclusion that "a federal claim under the 1933 Act is a clear example of an external claim." Op. 38-49. At no point did the court consider that Sciabacucchi brought a facial challenge, such that he had the burden to prove that the FFPs could not operate validly under *any* circumstances. *See infra* pp.30-32.

Sciabacucchi subsequently sought $3 million in fees on a "corporate benefit" theory, arguing that Delaware courts "routinely award[] seven-figure fees," $1 million is a seven-figure number, and there were three nominal defendants. A237. Appellants opposed the $3 million demand as not tied to the value of any "benefit" conferred and argued a *quantum meruit* approach was more appropriate, advocating for a 2x multiple, amounting to an award of $364,723 (with a hefty implied hourly rate of $1,369). A260.

On July 8, 2019, the trial court awarded the full $3 million. Among other things, the court acknowledged its award was not limited to any "corporate benefit" conferred on those companies, but was based on having "established a precedent" for Delaware corporations generally. Fee Award 10. Moreover, although the trial court recognized it was supposed to review the number of attorney hours as a cross-check, it reasoned that the implied hourly rate of $11,262.26 was reasonable by factoring in the hours it *predicted* would be spent on appeal without citing any authority for doing so. *Id.* 13-14.

ARGUMENT

I. THE TRIAL COURT ERRED BY CONCLUDING THE FEDERAL FORUM PROVISIONS ARE OUTSIDE THE SCOPE OF SECTION 102(B)(1).

A. Question Presented

Whether the Federal Forum Provisions fit within the scope of Section 102(b)(1)? A149-51; A182-97.

B. Scope of Review

"The construction or interpretation of a corporate certificate or by-law is a question of law subject to *de novo* review by this Court." *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990); *Activision Blizzard, Inc. v. Hayes*, 106 A.3d 1029, 1033-34 (Del. 2013) (reversing interpretation of charter provision after *de novo* review). Charters "are regarded as contracts between the shareholders and the corporation….A judicial interpretation of a contract presents a question of law that this Court reviews *de novo*." *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012). "[W]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language." *Del. Bay Surgical Servs., P.A. v. Swier*, 900 A.2d 646, 652 (Del. 2006) (quoting 1 *Del. C.* § 303). Importantly, "charter provisions are presumed to be valid, and the courts will construe [them] in a manner consistent with the law rather than strike [them] down." *Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc.*, 2018 WL 4057012, at *20 (Del. Ch. Aug. 27, 2018).

C. Merits of Argument

The trial court erred by failing to analyze the text of Section 102(b)(1) or consider the numerous Delaware authorities recognizing the broad, enabling scope of its language. The FFPs easily fall within the broad scope of Section 102(b)(1) and are consistent with *Boilermakers* and *ATP*. Moreover, the court's analysis of Section 11 claims as "external" is equally wanting and, in any event, the considerations the court identifies are at most "as applied" challenges that cannot overcome the presumptive facial validity of the FFPs.

1. The Federal Forum Provisions Are Authorized Under the Language of Section 102(b)(1).

Section 102 of the DGCL is the main statutory section that governs the contents of a corporation's charter. Section 102(b)(1) provides in relevant part:

> [T]he certificate of incorporation 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, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State.

Section 102(b)(1), in particular, has extraordinary longevity, containing the same core language as its predecessor in the 1899 DGCL. *See* 21 Del. Laws 448 (1899).

Throughout its long history, Section 102(b)(1) has been interpreted consistent with the principle that "[t]he DGCL gives stockholders broad discretion to establish at the outset whatever terms for the organization, management, and finance of the

corporation they believe will best serve the needs of the particular enterprise." Welch & Saunders, *Freedom and its Limits in the Delaware General Corporation Law*, 33 Del. J. Corp. L. 845, 848-50 (2008) (A304-06); Drexler et al., Delaware Corporation Law & Practice § 6.02[1] ("[Section 102(b) is an] expansive provision [that] permits great flexibility….").

This broad reading is consistent with how Delaware has long characterized itself—as permitting maximum flexibility and private ordering among corporate constituencies. *See Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 845 (Del. Ch. 2004) ("[Delaware corporations have] the broadest grant of power in the English-speaking world to establish the most appropriate internal organization and structure for the enterprise."); *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 698 (Del. Ch. 2005) (describing the "risk-taking, innovative, wealth-creating engine that is the Delaware corporation"), *aff'd*, 906 A.2d 27 (Del. 2006). Indeed, the DGCL "allows for the insertion of a variety of provisions in a certificate of incorporation for special purposes or to satisfy specific needs of a corporate entity…. An important hallmark of the [DGCL] is its flexibility." Balotti & Finkelstein, Delaware Law of Corporations & Business Organizations § 1.3 (3d ed.).

Consistent with these principles, Delaware courts have routinely applied Section 102(b)(1) broadly. In its seminal decision in *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 117 (Del. 1952), this Court upheld a provision counting

interested directors for quorum purposes, observing that Section 102(b)(1) "confers, in the most general language, the right to include in a [charter] *any* provision deemed appropriate for the conduct of the corporate affairs." (emphasis added). Fifty years later, in *Jones Apparel*, the Court of Chancery cited this enduring concept from *Sterling* to uphold a novel charter provision regulating stockholder action by written consent. 883 A.2d at 848-49. *Jones Apparel* aptly noted that "Delaware's corporate statute is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations" and that Section 102(b)(1) is "logically read as [an] important provision[]" embodying this principle. *Id.* at 845.

Consistent with this expansive approach, *Boilermakers* expressly refused to invalidate forum selection bylaws merely because they did not speak to the "traditional" subject matter of bylaws and, instead, noted that "the Supreme Court long ago rejected the position that board action should be invalidated or enjoined simply because it involves a novel use of statutory authority." 73 A.3d at 953; *see also Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985) (upholding validity of "poison pill"). It is telling that the parties did not identify a single Delaware

decision invalidating a charter provision because the ***subject matter*** fell outside of the scope of Section 102(b)(1).[1]

Thus, as a matter of pure statutory construction, the text of Section 102(b)(1) demonstrates why the FFPs are permissible. "The most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it." *Boilermakers*, 73 A.3d at 950. Notably, it uses the disjunctive "and" in its operative clause, authorizing "***[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." (emphasis added). Moreover, the statute expressly authorizes "*any*" provision falling into these general categories. *See, e.g.*, *Siegman v. Columbia Pictures Entm't, Inc.*, 576 A.2d 625, 632 (Del. Ch. 1989) (referring to "any" as "broad language"); *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 746 (Del. 1997) (noting parties used "an" instead of "the" or "the same" or "such," which would have indicated intent to limit parties' rights).

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[1] Although this Court held in *Cochran v. Penn-Beaver Oil Co.* that a charter provision removing books and records inspection rights was "unauthorized and ineffective," it did so because the provision contravened common law inspection rights and other parts of the DGCL and therefore was not covered by the "authority to create, define, limit and regulate the powers of stockholders." 143 A. 257, 259-60 (Del. 1926); *see also Loew's Theatres, Inc. v. Commercial Credit Co.*, 243 A.2d 78, 80-81 (Del. Ch. 1968) (same).

Though the language is broad and enabling, it is not unbounded. It is constrained by those subject matters enumerated in Section 102(b)(1) (i.e., related to the corporation's affairs and the relationships among the various corporate constituencies) and the scope of the DGCL more generally. For this reason, a charter provision could not regulate a supplier or customer relationship, because they are not corporate constituents and the DGCL has never been understood to govern those types of relationships. Nor could a charter provision regulate relations between corporate constituents unrelated to their status as such—e.g., a products liability claim brought by someone who happens to be a stockholder—because although the relationship is present, the necessary subject matter is not.

At the most basic level, the FFPs meet this "subject matter" test and fall within the broad category of "provision[s] for the management of the business and for the conduct of the affairs of the corporation," as they directly regulate a common type of securities claim related to the board's disclosures to current and prospective stockholders in connection with an IPO or secondary offering. Likewise, the provisions also "defin[e], limit[] and regulat[e] the powers of [] stockholders" insofar as they prescribe where current and former stockholders can bring Section 11 claims against the corporation and its officers and directors. As Stitch Fix's registration statement noted, it adopted its FFP (and a separate provision of the type approved in *Boilermakers*) to specify that "the Court of Chancery…and the federal

district courts of the United States will be the exclusive forums *for substantially all disputes between us and our stockholders*." A89 (emphasis added). Nothing in the statute turns on the *source* of the underlying claim regulated by a forum provision; the applicable law is irrelevant as long as the provision *itself* meets the requirements of Section 102(b)(1).

Thus, when considered through this basic textualist lens—which the trial court should have employed—the FFPs clearly fall within the scope of Section 102(b)(1) and, therefore, could only be invalid if they are "contrary to laws of this State," which they are not. *Infra* Part II.

2. The Authorities the Trial Court Cited Do Not Support Invalidating the Federal Forum Provisions.

Rather than rely on the text of Section 102(b)(1), the trial court went searching for language in two decisions ***upholding*** bylaws under Section 109(b), *Boilermakers* and *ATP*, and in commentary surrounding the 2015 Amendments, to support its conclusion that Section 102(b)(1) only permits provisions designating forums for "internal affairs" claims (as the trial court defined those). But the FFPs are entirely consistent with *Boilermakers* and *ATP*, and the commentary surrounding the 2015 Amendments has no bearing on the proper construction of Section 102(b)(1).

a. *Boilermakers*.

The trial court principally relied on then-Chancellor Strine's decision in *Boilermakers* as "dr[a]w[ing] a line" that forum selection bylaws or charter

provisions can only regulate where current and former stockholders bring "internal affairs claims." Op. 23. But that is not what *Boilermakers* says.

Although *Boilermakers* spoke in terms of "internal" and "external" matters, it merely concluded the bylaws at issue "easily" fell into the "internal" category. 73 A.3d at 939, 952. *Boilermakers* did not hold that "internal" was synonymous with the "internal affairs" doctrine. Properly understood, *Boilermakers*' observation about "internal" and "external" matters is consistent with the scope of Section 102(b)(1) described above—namely, that charter provisions must govern the "affairs" of the corporation or the "powers" of the various corporate constituencies—things that are "intra-corporate" or "internal" to the corporation. The trial court also pointed out that *Boilermakers* "did not stop with the statutory language" of Section 109(b) and instead emphasized the forum selection bylaws there governed claims held by the "plaintiff-stockholder *as a stockholder*." Op. 22-23. But that too is consistent with the text of Section 102(b)(1) discussed above as it looks to the plaintiff's relationship to the corporation and the subject matter of the claim but is not defined or limited by the particular *law* that governs that claim.

The *Boilermakers* court was simply not faced with the question of whether Section 11 disclosure claims are "internal" or "external." But the FFPs are not materially distinguishable from the bylaws at issue in *Boilermakers*. Both provisions channel common types of claims involving internal corporate processes into courts

having a comparative advantage in adjudicating such claims, and both were adopted to address separate insalubrious litigation trends. 73 A.3d at 943-44. Rather, *Boilermakers* principally teaches that novel use of corporate authority is not disfavored (*id*. at 953), forum selection provisions in governing documents are presumptively valid (*id*. at 948-49), and a party raising a facial challenge must show the provision can *never* operate lawfully (*id*.)—all of which support the validity of the FFPs.

b. *ATP*

Nor does *ATP* support invalidating the FFPs. In *ATP*, this Court was posed with certified questions about the validity of a fee-shifting provision in the bylaws of a non-stock corporation facing state law fiduciary duty and federal antitrust claims from its members. 91 A.3d at 557. As the Court noted, the bylaw at issue "applie[d] in the event that a member brings a claim against another member, a member sues the corporation, or the corporation sues a member," which this Court referred to as "intra-corporate litigation." *Id.*

The trial court emphasized that this Court's "repeated references to 'intra-corporate litigation' are important" and that this Court "did not suggest that the corporate contract can be used to regulate other types of claims." Op. 28. But the trial court assumed too much. There is nothing in *ATP* indicating this Court excluded the antitrust claims when it concluded that a fee-shifting bylaw "that allocates risk

among parties in intra-corporate litigation" was valid. This Court did not discuss the nature of the underlying claims, taking as a given that they were "intra-corporate," i.e. between the corporation and its members.[2]

Therefore, the inferences the trial court drew from *ATP* are misplaced; if anything, the decision suggests that provisions governing more broadly defined intra-corporate claims—including Section 11 claims—are valid.

c. The 2015 Amendments.

Finally, the trial court erroneously relied on the 2015 Amendments as justifying reading Section 102(b)(1) more narrowly than its text. Op. 28-32. But, as explained above, the trial court did not need to resort to legislative history—particularly legislative history of *other sections* of the DGCL—given the plain text of Section 102(b)(1). "A court should not resort to legislative history in interpreting a statute where statutory language provides unambiguously an answer to the question at hand." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1287 (Del. 1994); *see also* Sutherland Statutory Construction § 51:1 (7th Ed.) ("[C]ourts do not resort to other statutes if the statute being construed is clear and unambiguous.").

[2] Notably, the appellees in *ATP* argued the bylaw was unauthorized because it was not limited to "internal affairs" cases or cases "central to the relationship between those who manage the corporation" and its members, and, therefore, this Court implicitly rejected those arguments in upholding the bylaw. *ATP*, Answering Br. at 16-17 (Dec. 9, 2013).

But even then, as the trial court conceded, the legislative history does not go far enough: the Synopsis and legislative commentary only indicate an intent to codify *Boilermakers* to permit the forum provisions at issue there (and preclude such provisions that do not designate Delaware as a forum) and to prohibit fee-shifting provisions in stock corporations. So the court went further and relied on *statements* of members of the Corporation Law Council expressing their individual views that the law existing at the time did not permit charters and bylaws to regulate federal securities claims. Op. 30-31. Such statements are not a valid tool of statutory interpretation. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011).[3]

3. The Trial Court Erred by Narrowly Construing Section 102(b)(1) to Incorporate "Internal Affairs."

Based on its (mis)reading of these authorities, and "first principles" discussed below, the trial court concluded that charter provisions can only regulate "internal affairs" claims, which the court defined as those involving the "rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal

[3] The trial court even speculated about what the legislature "would have" done if it had "believed" charters and bylaws could regulate more than internal affairs claims. Op. 32 (reasoning that if the legislature "thought that the charter or bylaws could regulate other types of claims, then the prohibitions ***would have*** swept more broadly" and "[t]he drafters ***would not have*** taken the half measure of banning fee-shifting provisions for a subset of claims, thereby permitting experimentation in other areas" (emphasis added)).

structure of the corporation." Op. 3. Although the phrase "internal affairs" appears nowhere in Section 102(b)(1), the trial court purported to graft the "internal affairs" doctrine onto the statute for purposes of determining the enforceability of purely "process-oriented" forum selection provisions. *Boilermakers*, 73 A.3d at 951. As a result, the court concluded that Delaware corporations lack the authority to regulate "external" claims that arise under the laws of other jurisdictions. Op. 4, 38. This has no basis in the text of Section 102(b)(1).

Moreover, the trial court failed to cite *any authority* to support its narrow definition of "internal affairs." Both the U.S. Supreme Court and this Court have defined "internal affairs" to pertain to "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081-82 (Del. 2011). "Internal affairs" is not confined to a particular universe of claims but rather refers to matters that arise out of the aforementioned relationships. Thus, even accepting the premise that forum selection provisions in charters may only regulate "internal affairs" claims (which the statute does not support), such a rule would still capture the FFPs because the claims at issue deal with fundamentally internal relationships.

4. Section 11 Claims Are "Internal" and Therefore Proper Subject Matter for Charter Provisions.

The trial court's conclusion that Section 11 claims are "external" reflects a failure to carefully consider the nature of those claims. Section 11 claims have far more in common with fiduciary duty claims (which the court conceded charters can regulate) than it acknowledged.

As the Supreme Court summarized: "Section 11…was designed to assure compliance with the disclosure provisions of the ['33] Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering…. Liability against the issuer…is virtually absolute, [and] [o]ther defendants bear the burden of demonstrating due diligence." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983). Thus, the "target" of Section 11 claims is the company itself, with the individuals who act on its behalf and are principally responsible for the disclosures—i.e., its directors and officers—as the primary defendants.

Because "due diligence" is a defense, the primary inquiry in a Section 11 claim is whether directors and officers can show they undertook a "reasonable investigation," defined as "that required of a prudent man in the management of his own property." 15 U.S.C. § 77k(c). That inquiry necessarily implicates the ***care*** with which they reviewed the registration statement, which is similar in many respects to the fiduciary duties imposed by state law. *See* Hillary A. Sale, *Independent Directors as Securities Monitors*, 61 Bus. Law. 1375, 1391 (2006)

(A279). And the operative factual basis for a Section 11 claim—i.e., internal board deliberations and discussions with management—is the same for a traditional fiduciary duty analysis.[4]

Accordingly, Section 11 claims are in many ways the federal analogues of Delaware fiduciary duty disclosure claims. Indeed, the most apt metaphor for the relationship between the claims may be that of "conjoined twins," as they arise from identical fact patterns and their fates are deeply intertwined. *E.g.*, *In re Unocal Expl. Corp. S'holders Litig.*, 793 A.2d 329, 336-37 (Del. Ch. 2000) (asserting fiduciary duty and Section 11 claims arising from merger transaction and related disclosures). The trial court never grappled with these basic similarities. And, although the court posited several reasons why Section 11 claims should be considered "external," none withstand scrutiny.

a. Section 11's Application to "Purchasers" Does Not Render the Federal Forum Provisions Invalid.

The trial court's principal basis for asserting Section 11 claims are "external" is that they arise not out of share ownership, but from the *purchase* of shares. Op. 37. But that conclusion is almost always incorrect because (i) many purchasers will

[4] Like the care implicated in these processes, which are clearly "internal," other examples abound of fiduciary duty claims that arise from the failure to comply with federal law requirements. *See, e.g.*, *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 51-54 (Del. 2017) (violations of federal environmental laws by Duke Energy's directors providing basis for breach of fiduciary duty claims).

have already held shares before a registered offering, and (ii) large trades are often split into smaller orders, resulting in a purchaser being a stockholder for all but the instant of the first trade. Grundfest, *supra* 42-44 (A461-63). On a facial challenge, like this one, Sciabacucchi has the burden to show purchasers can *never* be existing stockholders, which he cannot. *Infra* pp.30-32.

Yet even where a purchaser who was not a pre-existing stockholder brings a Section 11 claim, that fact does not somehow convert a Section 11 claim into an "external" claim. To hold otherwise ignores the basic reality that a stockholder becomes a stockholder by purchasing stock. It is splitting hairs to argue that, because Section 11 is articulated in terms of a "purchase" of stock, the stockholder status that necessarily follows a purchase should be ignored.

In any case, the trial court's assertion that charters cannot regulate transactions with persons not yet stockholders is wrong. For example, 8 *Del. C.* § 202(b) authorizes charter provisions that place "[a] restriction on the transfer or registration of transfer of *securities* of a corporation, or on the amount of a corporation's securities that may be owned by any person or group of persons." (emphasis added). The use of the word "security" to apply to "a wider class of interests than mere capital shares, namely, bonds, convertible debentures, options and other forms of corporate ownership or indebtedness," thus also applies to optionholders and other securityholders that are possible *future* stockholders. *Joseph A. Seagram & Sons*,

Inc. v. Conoco, Inc., 519 F. Supp. 506, 512 (D. Del. 1981). Such restrictions can serve a variety of salutary purposes, and can prohibit transactions with non-stockholders, unaccredited investors, persons who refuse to be bound by SEC resale restrictions, and others. Drexler, *supra* § 22.01.

Thus, Section 202 evidences that the DGCL contemplates charter-based rules governing relationships between non-stockholders and corporations. Additional DGCL provisions also regulate transactions with non-stockholders, further undermining the court's reasoning. *E.g.*, 8 *Del. C.* § 152 (regulating form of payment of stock subscriptions); 8 *Del. C.* § 157 (authorizing charter provisions governing rights and options to acquire stock); 8 *Del. C.* § 221 (authorizing charter provisions giving debtholders voting rights).

b. The Trial Court's Other Reasons Why Section 11 Claims Are "External" Are Unconvincing.

The trial court offers three further reasons why Section 11 claims cannot be regulated by charter provisions, but none is convincing. First, the court points to the broad definition of "security" in the '33 Act to include debt securities as "underscor[ing] the absence of any meaningful connection between a ['33 Act] claim and stockholder status." Op. 36. That is a red herring. The intent behind the FFPs was to capture Section 11 claims brought by stockholders following IPOs and other registered offerings. *E.g.*, A89. The provisions do not attempt to govern claims based on other kinds of securities not created under the authority of the DGCL.

Second, the court's argument that Section 11 claims are not tied to stockholder status because *former* stockholders can bring claims under Section 11 was rejected in *Boilermakers*. 73 A.3d at 952 n.80 (reasoning former stockholders could bring claims because they *were* stockholders when the claims arose). The FFPs continue to bind former stockholders because their Section 11 claims arise from their original purchases of stock.

Third, the trial court's assertion that Section 11 claims are external because "[a]n internal role with the corporation is not required" to be liable for a Section 11 claim is similarly misplaced. Op. 36. Holding liable third parties (e.g., underwriters) who supplied false information to directors and officers that resulted in a false or misleading registration statement is no different than holding financial advisors liable for lying to boards in the fiduciary duty context. The possibility that a financial advisor can be named as an aider and abettor does not make bylaws permitted under *Boilermakers* "external," and the same reasoning applies to third parties named in a Section 11 action. *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 861-63 (Del. 2015) (holding third parties liable for aiding and abetting breach of fiduciary duty).

5. The Trial Court Did Not Apply the Correct Standard for a Facial Challenge.

In any event, all of the trial court's reasons for labeling Section 11 claims as "external" would at most justify refusing to enforce the FFPs "as applied" to claims

where those reasons are actually implicated. They do not go to the facial validity of the FFPs. The court's approach is contrary to the rule articulated in *Boilermakers* about the proper framework for considering a facial challenge to a provision in a corporation's governing documents. 73 A.3d at 948-49.

That rule starts from the premise that charter provisions are presumed valid, and in "a facial challenge to the validity of a charter provision, a *plaintiff* has the burden to show the charter provision 'cannot operate lawfully or equitably *under any circumstances*.'" *Cedarview*, 2018 WL 4057012, at *20. The plaintiff must show the provision "do[es] not address proper subject matters" under the statute and "can *never* operate consistently with law." *Boilermakers*, 73 A.3d at 949 (emphasis added) (citing *Stroud v. Grace*, 606 A.2d 75, 79 (Del. 1992); *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985)).

Merely because a company *could* attempt to enforce the FFPs in a way that is beyond the scope of what is permissible under Section 102(b)(1) does not mean they "cannot operate lawfully or equitably *under any circumstances*." Here, the typical Section 11 claim brought by current or former stockholders against the company and its directors is entirely consistent with Section 102(b)(1). Whether it would be reasonable to enforce the FFPs against an underwriter, or in a case involving debt

securities, are the subject of future "as applied" challenges. Those hypotheticals are not before the Court.[5]

[5] In a similar vein, the trial court rejected Blue Apron's argument based on its savings clause—that limited its application "to the fullest extent permitted by law"—because it concluded that "there is no context in which Blue Apron's Federal Forum Provision could operate validly." Op. 54. This was error, because, as explained above, at a minimum the provisions operate validly in the context of the typical Section 11 claim they were intended to address.

II. THE FEDERAL FORUM PROVISIONS ARE NOT "CONTRARY TO THE LAWS OF THIS STATE".

A. Question Presented

Whether the Federal Forum Provisions are unenforceable as "contrary to the laws of this State" under "first principles" or otherwise, despite well-settled authority authorizing forum selection provisions as a matter of contract law? A160-69; A197-200.

B. Scope of Review

This Court's review of the construction of charter provisions is *de novo*. *Centaur Partners*, 582 A.2d at 926; *Activision*, 106 A.3d at 1033-34.

C. Merits of Argument

The Opinion did not explicitly address the only *express* limitation in Section 102(b)(1), namely, that charter provisions may not be "contrary to the laws of this State." To the extent the trial court's "first principles" were intended to reach that result, this was error. Indeed, the right to adopt and enforce forum selection provisions is firmly established as a matter of contract law and does not contravene any stated policy considerations.

1. The Federal Forum Provisions Are Valid as a Matter of Contract Law.

The trial court erred by ignoring relevant contract law principles in favor of its "first principles." Indeed, this Court's long-standing precedent confirms that charters are to be treated as contracts between corporations and their stockholders.

See Berlin v. Emerald Partners, 552 A.2d 482, 488 (Del. 1988); *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 342-43 (Del. 1983). Moreover, the specific type of contract provision at issue here—forum selection provisions—are presumptively enforceable as a matter of contract law. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (establishing three-part test for determining whether presumptively valid forum selection clauses are unenforceable); *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143 (Del. 2010) (adopting *Bremen* standard).

During its lengthy discussion of "first principles," the court improperly concluded the FFPs are unenforceable because charters of Delaware corporations are not "ordinary contract[s]" because "the State of Delaware is an ever-present party." Op. 3. It noted, for example, the "Delaware contract" is subject to the limitations of the DGCL and Delaware courts overlay fiduciary duties in enforcing charter provisions. Op. 42-43. While it is no doubt true that Delaware is an "ever present party" in charters, ***all*** contracts necessarily rely on the presence (and potential intervention) of some sovereign to be enforced. Further, it is not as if garden-variety contracts (as opposed to charters) are immune from state-imposed legal requirements and overlays. *E.g.*, 6 *Del. C.* § 2-316 (requiring "conspicuous" writing to exclude implied warranty of merchantability in sales contracts); *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 260 n.95 (Del. Ch. 2013) ("[The implied covenant of good faith and fair dealing] *inheres in all contracts*.").

As noted above, the FFPs are authorized under the plain language of Section 102(b)(1), and Delaware courts have held that forum selection provisions generally are well within the permissible subject matter about which parties may contract in a charter. *Boilermakers*, 73 A.3d at 939 ("Delaware law, like federal law, respects and enforces forum selection clauses."). The trial court did not offer any meaningful distinction between the FFPs and the charter provisions upheld in *Boilermakers* that stands up to scrutiny. *Supra* pp.22-23.

2. No Policy Considerations Justify Invalidating the Federal Forum Provisions.

Nor do the FFPs run afoul of any policy limitations under Delaware law. *See* Op. 49-51. To the contrary, the Opinion overrides Delaware's ***stated*** public policy of permitting corporations to privately order their affairs. *Supra* pp.16-17. As set forth below, there is no tension between permitting private ordering and promoting comity and deference between state and federal systems. Delaware would remain firmly in its lane by acknowledging that corporations and stockholders may pre-select from among jurisdictionally permissible forums for Section 11 claims. The U.S. Supreme Court has pronounced that, as a matter of federal law, such agreements are entirely permissible, and expressed a preference in favor of "the objective of allowing buyers of securities a broader right to select the forum for resolving disputes." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989).

a. The Federal Forum Provisions Do Not Improperly Encroach on the Laws of Other Sovereigns.

The trial court was quick to conclude any overlap between state corporate law and federal securities law represents a dangerous encroachment into the realm of the latter. The court failed to recognize that Delaware law and federal law routinely intersect and necessarily "influence" each other in ways that are complementary rather than adversarial.

For example, in *Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989), this Court recognized that a settlement approved by the Court of Chancery that had the effect of extinguishing related federal claims was valid because it did not purport to interfere with federal jurisdiction. The U.S. Supreme Court approved that result in *Matsushita Electric Industrial Co. v. Epstein*, holding that giving effect to a settlement extinguishing federal securities claims did not "trespass" on federal law. 516 U.S. 367, 377, 382 (1996).

The FFPs likewise do not interfere with federal jurisdiction. To the contrary, they cement federal jurisdiction by requiring federal claims to be heard in federal court, and do not alter or interfere with the ability of federal courts to adjudicate these claims. In this way, the FFPs encroach less on the territory of the federal regime than the kinds of settlements at issue in *Nottingham*, because those settlements had preclusive effects on related federal litigation. *See id.* at 374. The FFPs do not tacitly "box in" the federal courts, and do not substantively interfere

with any claims, because the provisions are ***entirely procedural***, as *Boilermakers* recognized. 73 A.3d at 951-52 ("regulat[ing] *where* stockholders may file suit, not *whether* the stockholder may file suit").

Moreover, the trial court failed to recognize that Delaware corporate law and federal law routinely intersect in complementary ways. For example, 8 *Del. C.* § 211(b) requires stock corporations hold "annual meetings" even if they do not have clearance from federal regulators to issue proxy materials. Yet the potential for these requirements to conflict does not mean Delaware cannot require annual meetings. Rather, Delaware's judiciary and the SEC have devised practical solutions to the perceived conflicts between Section 211(b) and the federal proxy rules. *See Newcastle Partners v. Vesta Ins. Grp., Inc.*, 887 A.2d 975, 981 (Del. Ch. 2005) (ordering annual meeting where it was "unlikely" SEC would stop the meeting and observing nothing in federal securities laws "suggests any purpose to interfere with the power of state courts to require that stockholder meetings be held"), *aff'd*, 906 A.2d 807 (Del. 2005); Exchange Act Release No. 57,262 (Feb. 4, 2008) (creating procedure to grant exemptions from requirements for registrants to address potential for conflicts with annual meeting requirement).

Finally, the trial court concluded that "internal affairs" must constrain charter-based forum provisions to limit the DGCL's extraterritorial reach. Op. 43-44. But this reasoning ignores the "presumption that a law is not intended to apply outside

the territorial jurisdiction of the State in which it is enacted." *Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977). That is, existing legal doctrines already restrict states from exceeding the proper boundaries of what and where they may regulate. *E.g.*, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978) (invalidating state trucking regulations under Commerce Clause where they imposed substantial burden on interstate commerce); *FdG Logistics LLC v. A&R Logistics Holdings*, 131 A.3d 842, 855 (Del. Ch. 2016) (interpreting choice of law statute as not creating a "mechanism for the wholesale importation of every provision of Delaware statutory law into the commercial relationship of contracting parties"). The court's failure to recognize these existing limitations and to impose a novel "internal affairs" limitation on Section 102(b)(1) was error.

b. The Federal Forum Provisions Do Not Run Afoul of Federal Law.

The enforcement of the FFPs is also entirely consistent with U.S. Supreme Court precedent. The Supreme Court recently addressed whether a Section 11 claim that was *properly filed in state court* (i.e., not subject to a forum-selection provision) could be removed to federal court. *Cyan*, 138 S. Ct. 1061. *Cyan* did not involve forum selection provisions, and nothing suggests *Cyan* prohibits parties from enforcing a forum selection clause specifying federal court as an appropriate forum for Section 11 claims. *Cyan* merely stands for the proposition that, when a plaintiff

validly elects to proceed with such a claim in state court (and is not otherwise bound to proceed elsewhere), the action is not removable.

The enforceability of forum selection provisions is governed by an entirely separate body of law, including *Bremen* and *Rodriguez*, which recognizes the right of parties to contract for different forums for ’33 Act claims. In *Rodriguez*, the Supreme Court held that parties could even limit ’33 Act claims to arbitration because parties are not prohibited from waiving *procedural* rights (as opposed to substantive rights). 490 U.S. at 481. Subsequent case law confirmed that parties may privately order to determine *ex ante* the forum(s) for resolving ’33 Act claims. *See, e.g.*, *Young v. Valt.X Holdings, Inc.*, 336 S.W.3d 258 (Tex. App. 2010) (dismissing ’33 Act claims where forum selection clause in shareholder agreement designated Canadian courts to hear claims relating to stock); *Richards v. Lloyd’s of London*, 135 F.3d 1289 (9th Cir. 1998) (enforcing forum selection clause designating English courts where plaintiff brought ’33 Act claims).

As set forth above, neither “first principles” nor other policy considerations weigh in favor of finding the FFPs invalid. Because those provisions are permissible under Delaware law, they should be upheld.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING $3 MILLION IN FEES.

A. Question Presented

Whether the trial court abused its discretion and misapplied the *Sugarland* factors in awarding Sciabacucchi's counsel their requested $3 million in attorneys' fees and expenses? A250-61.

B. Scope of Review

This Court normally reviews "a decision to award attorneys' fees for abuse of discretion." *In re Unfunded Ins. Tr. Agreement of Capaldi*, 870 A.2d 493, 496 (Del. 2005); *Sugarland Indus. v. Thomas*, 420 A.2d 142, 149 (Del. 1980). To the extent the court misapplied applicable legal principles, this Court's review is *de novo*. *Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011 (Del. 2007).

C. Merits of Argument

As a threshold matter, the trial court should not get the benefit of an "abuse of discretion" standard when it did not employ any discretion. The court engaged in "baseball-style arbitration"—simply adopting wholesale Sciabacucchi's $3 million demand and disregarding Appellants' $364,723 figure based on the hours expended—rather than exercising reasoned discretion in arriving at its fee award. Indeed, the trial court has a stated practice of rewarding the party who it believes advances the more reasonable position, with the implicit (if not explicit) intent of penalizing parties it views as less reasonable. *See In re Colfax Corp.*, 10447-VCL,

at 26, 36 (Del. Ch. Apr. 2, 2015) (TRANSCRIPT) (acknowledging "I'm not allowed to say up-front I'm doing this as a baseball arbitration" but nonetheless selecting plaintiffs' requested fee award of $375,000 over defendant's $100,000 because "I don't think that it is beneficial to split the baby because I think that encourages bracketing" and "plaintiffs should be encouraged and somewhat rewarded for coming in with a reasonable number"); *see also Marcato Int'l Master Fund, Ltd. v. Gibbons*, 2017-0751-JTL, at 59 (Del. Ch. May 25, 2018) (TRANSCRIPT) ("I am awarding the full amount requested, which is $1,509,213.15....").

This Court has warned in other contexts that this style of all-or-nothing adjudication represents an abdication of the duty to exercise independent judgment. *Cf. Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 361-62 (Del. 1997) (reversing appraisal decision where trial court "announced in advance that he intended to choose between absolutes" and selected one of two divergent expert valuations rather than exercising discretion to arrive at an independent valuation). The same reasoning should apply here.

In any event, the trial court's award of $3 million cannot withstand scrutiny under any legal standard and is inconsistent with *Sugarland*. First, the court failed to engage in a meaningful analysis of the value of the "corporate benefit." Indeed, it is not clear that invalidating provisions adopted with the salutary goal of channeling Section 11 claims into a particular class of forum with a comparative

advantage in adjudicating such claims was a "corporate benefit." It *harmed* the corporations by foreclosing their attempts to curtail abusive and costly litigation.

It is telling that the cases the court cited as "apt precedents" (Fee Award 11-12) all involved significant changes to governing documents that implicated corporate takeover mechanics, and most involved hotly-contested struggles for control. *E.g.*, *Kallick*, 68 A.3d at 247 (enjoining enforcement of change-in-control provision in public notes); *Kurz v. Holbrook*, 989 A.2d 140, 145 (Del. Ch. 2010) (invalidating bylaw shrinking board from 6 to 3 intended to permit preferred stockholder to gain control); *San Antonio Fire & Police Pension Fund v. Bradbury* (*Amylin*), 2010 WL 4273171, at *1 (Del. Ch. Oct. 28, 2010) (disabling continuing director provisions in debt instruments); *In re Vaalco Energy, Inc. S'holder Litig.*, 11775-VCL, at 59 (Del. Ch. Dec. 21, 2015) (TRANSCRIPT) (invalidating "for cause" director removal provisions in charter and bylaws).

In fact, the trial court did not even purport to award fees based on any *corporate* benefit running to the defendant companies (or their stockholders) but rather for having "established a precedent." Fee Award 10-11. The court admitted having done so but reasoned this was acceptable because of the availability of insurance and "that same corporation is unlikely to be targeted on every governance issue." *Id.* Putting aside that the court's rationalization is factually wrong—i.e., fee awards often do not exceed deductibles, as was the case here—this reasoning is

inconsistent with the rationale for shifting fees under the corporate benefit doctrine, "that *those who benefit* should compensate whoever has caused the benefit." *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *4 (Del. Ch. Nov. 27, 1990) (emphasis added); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1253 (Del. 2012).

Second, the trial court's heavy reliance on *In re Exclusive Forum*, describing it as an "apt precedent for sizing the value of the benefit conferred," was error because it lacks precedential (and persuasive) value. Fee Award 4-8. *Exclusive Forum* was a transcript of an office conference about coordinating thirteen pending fee applications in challenges to forum provisions like those in *Boilermakers*, which the companies voluntarily withdrew. 7216-CS, at 57-58 (Del. Ch. May 29, 2012) (TRANSCRIPT). Then-Chancellor Strine's "comments" about the requested $400,000 fee were—in his own words—"offhand" comments designed to motivate the parties to coordinate a resolution of the applications. *Id.* at 64 ("I'm just telling you offhand. It is not crazy."). The court's comments were not rulings, were not made with the benefit of briefing, and are not a reliable indicator of what the court would have awarded.

And the fees eventually paid—roughly $333,000 each for *nine* corporations for a total of $3 million—were negotiated, reflecting compromises based on the parties' consideration of continued litigation costs. They are a poor reflection of any "intrinsic" value of the corporate benefit conferred.

Third, the trial court largely disregarded the time and effort Sciabacucchi's counsel expended, which this Court has held should serve as a cross-check to preclude unwholesome windfalls. *See In re Abercrombie & Fitch Co. S'holders Derivative Litig.*, 886 A.2d 1271, 1273-45 (Del. 2005); *see also Sugarland*, 420 A.2d at 152 (testing trial court's award on hourly basis and concluding it worked out to a "modest" rate). This is remarkable considering the implied hourly rate based on the hours expended is $11,262.26 per hour. Appellants are aware of no cases based on therapeutic benefits that even approach $11,262.26 per hour. Indeed, the cases the court cited as "apt precedents" (Fee Award 11-12) do not come close. *E.g.*, *Kurz v. Holbrook*, 5019-VCL, at 31-34 (Del. Ch. July 19, 2010) (TRANSCRIPT) ($1,481 per hour); *Amylin*, 2010 WL 4273171, at *12-13 ($790 per hour); *Vaalco*, Stipulation and Order of Dismissal at 3 (Apr. 20, 2016) ($1,296 per hour).

Fourth, the court compounded its error by improperly relying on the effort *expected* to be expended in the appeal to bring down (somewhat) the implied hourly rate (to a still shocking $6,000 per hour) to justify the size of its fee award. Fee Award 13-14. But the court cited no authority for doing so. Rather, the chance a decision is going to be appealed goes to the plaintiff's contingency risk. *See, e.g.*, *In re Appraisal of Dell Inc.*, 2016 WL 6069017, at *17 (Del. Ch. Oct. 17, 2016) (considering possibility of appeal in assessing contingency factor), *rev'd on other grounds*, 177 A.3d 1 (Del. 2017); *see also Amylin*, 2010 WL 4273171, at *12-13

(fee application following appeal, finding appeal "played a less significant role in producing any benefit" and awarding approximately half of the fees requested).

Appellants' proposed 2x multiple would fairly compensate counsel for this contingency risk. If the trial court believed a 2.5x or 3x multiple was more appropriate, it could have awarded that in its exercise of ***discretion***. Instead, the court merely adopted Sciabacucchi's outsized demand amounting to more than 16 times counsel's recorded fees. Such an award is abusive and unsupported and should be reversed.

CONCLUSION

For these reasons, the trial court's judgment and $3 million fee award should be reversed.

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