No. 21-15923

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOELLE LEE,
derivatively on behalf of The Gap, Inc.,
Plaintiff-Appellant,

v.

ROBERT J. FISHER, *et al.*,
Defendants-Appellees,

and

THE GAP, INC.,
Nominal Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3: 20-cv-06163-SK, Hon. Sallie Kim

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL RETAIL FEDERATION SUPPORTING APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America and the National Retail Federation are nonprofit, tax-exempt organizations. Neither has a parent corporation, and no publicly traded corporation owns 10% or more of their stock.

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing diverse retailers from the United States and more than forty-five countries. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs. For over a century, NRF has been a voice for every retailer and retail job, communicating the impact retail has on local communities and global economies. Since its inception, NRF has submitted *amicus curiae* briefs in cases raising significant issues for the

retail community, on topics including, *inter alia*, workplace liability, wage and hour laws, taxation, and COVID-related regulation.

Amici, whose members include thousands of corporations, many of them public, have a strong interest in this case. Forum-selection bylaws just like the one at issue here have been widely adopted by corporations, which are creatures of state law. Such bylaws serve the interests of both corporations and their stockholders by ensuring that suits raising matters of corporate governance are brought in the courts of the state in which a corporation is organized and whose law thus governs the corporation's internal affairs.[1]

[1] No party or counsel for any party authored this brief in whole or in part, and no one other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this *amici* brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Gap, Inc.'s corporate bylaws include a forum-selection bylaw that identifies the Delaware Court of Chancery as "the sole and exclusive forum for . . . any derivative action or proceeding brought on behalf of the Corporation." ER-6. Hundreds of major public Delaware corporations have adopted materially identical forum-selection bylaws that require derivative actions—actions on behalf of the corporation, asserting a right of the corporation—to be brought in Delaware state court. Such bylaws seek to ensure that Delaware courts adjudicate an important internal governance dispute governed by Delaware law: Who controls the corporation's decision to assert a cause of action, the duly elected board of directors or an individual stockholder? It has been nearly ten years since the Delaware Court of Chancery ruled that forum-selection bylaws like Gap's are facially valid. And the Delaware legislature codified that ruling by amending the Delaware General Corporation Law to include § 115, which expressly authorizes such bylaws.

The District Court properly enforced Gap's Delaware forum bylaw against plaintiff Noelle Lee's assertedly derivative claim under § 14(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and dismissed

plaintiff's complaint. *Amici* urge this Court to affirm the District Court's order of dismissal.

Plaintiff contends that enforcement of Gap's bylaw here would violate the Exchange Act's anti-waiver provision because she cannot bring her assertedly derivative § 14(a) claim in Delaware state court, since § 14(a) claims are subject to exclusive federal jurisdiction. But notwithstanding her characterization of the claim, the § 14(a) claim plaintiff has pleaded is properly classified as direct, not derivative. It is undisputed that plaintiff is free to assert in federal court a direct § 14(a) claim. And all of the relief plaintiff seeks for the violation of § 14(a) she alleges is available as relief for a direct claim. Enforcement of Gap's bylaw therefore would not violate the Exchange Act's anti-waiver provision, which safeguards substantive rights, not forms of action.

Nor would enforcement of Gap's bylaw violate § 115 of the Delaware General Corporation Law. In *Seafarers Pension Plan ex rel. Boeing Co.* v. *Bradway*, 23 F.4th 714 (7th Cir. 2022), the Seventh Circuit held that enforcement of a Delaware forum bylaw, essentially identical to Gap's bylaw, against an assertedly derivative § 14(a) claim would violate § 115. But its holding depended on its erroneous conclusion that enforcement of

the bylaw would violate the Exchange Act's anti-waiver provision. This Court therefore should not follow the Seventh Circuit's decision.

BACKGROUND

The complaint. Plaintiff Noelle Lee is an alleged stockholder of Gap. ER-62. In 2020, plaintiff brought this action asserting derivative claims—*i.e.*, claims on behalf of Gap—against Gap's directors, some of whom were current or former officers of the company, and thirty unnamed "Doe Defendants." ER-1, 62-65, 165.

The complaint claimed that the defendants had breached their fiduciary duties of loyalty and good faith by causing Gap to discriminate against minorities in nominating candidates for election to its board of directors and in hiring and promoting employees. *See, e.g.*, ER-69 (¶ 59) ("[t]he Individual Defendants breached their duty of loyalty and good faith by . . . causing, the Company to cover up Gap's discrimination. . . ."); ER-60 (¶ 19) (defendants "have breached their fiduciary duties by . . . failing to ensure diversity at the top of the Company and failing to ensure equal opportunities for Black and other minority workers"); ER-110 ("The Director Defendants Breached Their Duties of Loyalty and Good Faith by Failing to Ensure Diversity on the Board and Among Managers and

Executives at the Company"). The complaint alleged that, as a result of the defendants' conduct, Gap "has expended and will continue to expend significant sums of money" on matters such as "investigations into issues pertaining to the lack of diversity at Gap" and discrimination and other employment lawsuits. ER-120 (¶¶ 172-75).

The complaint also claimed that the defendants "have breached their [fiduciary] duty of candor and have also violated the federal proxy laws" by making materially misleading statements in Gap's 2019 and 2020 annual proxy statements, "thus depriv[ing] shareholders of adequate information necessary to make a reasonably informed decision." ER-54 (¶ 5); ER-108 (¶ 143); *see also* ER-84-109. In support of this claim, the complaint alleged that the defendants "caused Gap to consistently make false statements about Gap's consideration of diversity in the Board nomination process and its commitment to diversity and the promotion of Blacks and other minority employees." ER-84 (¶ 99). The complaint alleged that the defendants also made misstatements in connection with advisory (non-binding) proposals on the retention of its accounting firm, Deloitte & Touche, and the compensation of Gap's executive officers. *See* ER-89-103. According to the complaint, the

alleged misstatements caused Gap's stockholders to "hee[d] the Company's recommendation to reelect the current Board, approve executive compensation, and re-hire Deloitte." ER-132 (¶ 227).

The complaint asserted five claims—all styled as derivative claims brought on behalf of Gap—against the director defendants. *See* ER-127-32. Four of the claims asserted breach of fiduciary duties and unjust enrichment as a result of breach of fiduciary duties. *See* ER-127-29 (Counts I-IV). The fifth claim asserted a violation of § 14(a) of the Exchange Act and SEC Rule 14a-9. *See* ER-130-32 (Count V).

The complaint sought as relief both damages and equitable relief. *See* ER-133-35. Plaintiff, however, disclaimed damages for the § 14(a) claim. *See* ER-132 (¶ 228). The complaint sought only injunctive and equitable relief for that claim. *See id.* The requested relief consisted of an order requiring Gap to put to shareholder votes various matters relating to the alleged proxy misstatements, such as proposals for the resignation of the defendant directors and their replacement by Black directors, the replacement of Deloitte as Gap's auditor, and the return of executive compensation payments by the defendant directors. *See* ER-133-35.

The District Court decision. The District Court granted the defendants' motion to dismiss the complaint on the ground that Gap's forum-selection bylaw specified the Delaware Court of Chancery as "the sole and exclusive forum for . . . any derivative action or proceeding brought on behalf of the Corporation." ER-6, 12.

The District Court rejected plaintiff's argument that the bylaw was unenforceable because its enforcement against her assertedly derivative § 14(a) claim would contravene the "strong public policy" expressed in the anti-waiver and exclusive federal jurisdiction provisions of the Exchange Act. ER-7-8. Citing *Sun* v. *Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1090 (9th Cir. 2018), the District Court explained that "the strong federal policy in favor of enforcing forum-selection clauses supersedes the anti-waiver provisions in state and federal statutes." ER-8. The District Court concluded that enforcing the bylaw would not violate the exclusive federal jurisdiction provision because the result would be dismissal of plaintiff's derivative § 14(a) claim, not adjudication of the claim by a state court. *Id.* The District Court also rejected plaintiff's argument that her state-law remedies for alleged proxy misstatements were inadequate,

holding that plaintiff had failed to show that she could not obtain any relief in the Delaware Court of Chancery. ER-11.

The District Court did not address the other grounds Gap argued justified dismissal—including that the complaint failed to adequately allege demand futility, warranting dismissal under Federal Rule of Procedure 23.1, and that the complaint failed to state a claim, warranting dismissal under Rule 12(b)(6).

The panel decision. A panel of this Court affirmed for the same reasons articulated by the District Court. Panel Op. (ECF 46-1) 11. The panel cited *Advanced China Healthcare* for the proposition that "the strong federal policy in favor of enforcing forum-selection clauses supersedes the anti-waiver provisions in state and federal statutes." *Id.* at 8. The panel concluded that enforcement of the bylaw would not violate the exclusive federal jurisdiction because it would "not force the Delaware Court of Chancery to adjudicate plaintiff's derivative Section 14(a) claim." *Id.* The panel also concluded that plaintiff had failed to show that she could not obtain relief under state law in the Delaware Court of Chancery for the alleged proxy misstatements. *Id.* at 9.

The panel rejected plaintiff's argument that enforcement of the bylaw would violate both Delaware law and federal law for the reasons stated in a recent decision of the Seventh Circuit, *Seafarers Pension Plan ex rel. Boeing Co.* v. *Bradway*, 23 F.4th 714 (7th Cir. 2022). Panel Op. 10. The panel acknowledged that in *Seafarers*, a divided panel had held that a forum-selection bylaw identical to Gap's was unenforceable because it was contrary to § 115 of the Delaware General Corporation Law and the anti-waiver provision of the Exchange Act. *Id.* The panel found that plaintiff had "waived" any argument based on § 115 by raising § 115 only in her reply brief. *Id.* The panel further explained that *Advanced China Healthcare* was "binding precedent" that "foreclose[d] reliance on the Exchange Act's anti-waiver provision" as a basis to hold Gap's forum-selection bylaw unenforceable. *Id.*

On October 24, this Court ordered that the case be reheard en banc and vacated the panel opinion. ECF 55.

ARGUMENT

I. Delaware forum bylaws are facially valid forum-selection clauses that serve corporate and stockholder interests in the authoritative application of Delaware law

A. A Delaware forum bylaw is a presumptively valid contractual forum-selection clause

Gap's Delaware forum bylaw requires that derivative actions and other actions raising matters of internal corporate governance be brought in the Delaware Court of Chancery. ER-45-46. The bylaw thus operates like a typical contractual forum-selection clause by specifying the exclusive forum in which covered suits may be brought.

As a matter of federal law, forum-selection clauses are "prima facie valid." *Gemini Techs., Inc.* v. *Smith & Wesson Corp.*, 931 F.3d 911, 914 (9th Cir. 2019) (quoting *Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)). "The enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." *Atl. Marine Constr. Co.* v. *U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 63 (2013). Accordingly, "a valid forum-selection clause should be given controlling weight in all but the most exceptional cases." *Gemini*, 931 F.3d at 914 (quoting *Atl. Marine*, 571 U.S. at 63 (internal alterations omitted)).

Under these principles, Gap's Delaware forum bylaw is facially valid. Plaintiff contends that Gap's bylaw is not presumptively valid because it is not a contractual forum-selection clause, but rather an amendment to Gap's bylaws that was "unilaterally adopted" by Gap's board of directors. *See* Appellant's Br. 23. The Delaware Court of Chancery rejected precisely this argument in *Boilermakers Local 154 Retirement Fund* v. *Chevron Corp.*, 73 A.3d 934, 954-58 (Del. Ch. 2013), in which stockholders brought a facial challenge to forum-selection bylaws materially identical to Gap's forum-selection bylaw. As *Boilermakers* explained, plaintiff's argument—"that board-adopted bylaws are not like other contracts because they lack the stockholders' assent—rests on a failure to appreciate the contractual framework established by the DGCL [Delaware General Corporation Law] for Delaware corporations and their stockholders." *Id.* at 956. Under Delaware law, "bylaws, together with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders." *Id.* at 940.

Stockholders "are on notice that . . . under 8 Del. C. § 109(b), the board itself may act unilaterally to adopt bylaws." *Id.* at 955-56. And

stockholders have "the indefeasible right" under § 109(b) to amend bylaws, including "by repealing board-adopted bylaws," as well as the right to replace directors in annual elections. *Id.* at 956-57. Therefore, *Boilermakers* held, "a forum selection clause adopted by a board with the authority to adopt bylaws is valid and enforceable under Delaware law to the same extent as other contractual forum selection clauses." *Id.* at 940.

Courts outside Delaware have likewise concluded that a Delaware forum bylaw is facially valid regardless of whether it was adopted by the corporation's board of directors. *See Roberts* v. *TriQuint Semiconductor, Inc.*, 358 Or. 413, 423-39 (Or. 2015); *Drulias* v. *1st Century Bancshares, Inc.*, 30 Cal. App. 5th 696, 707-09 (Cal. Ct. App. 2018). As *Boilermakers* and these decisions recognize, a duly adopted Delaware forum bylaw—such as Gap's—is entitled to the same presumption of validity as other contractual forum-selection clauses.

B. Delaware forum bylaws serve corporate and stockholder interests by channeling derivative litigation and other actions raising issues of Delaware corporate law to the courts of Delaware

Delaware forum bylaws serve the interests of Delaware corporations and their stockholders by directing actions raising issues of

Delaware corporate law to the courts of Delaware. As the Delaware Supreme Court has recognized, a Delaware corporation has a "legitimate interest in having consistent rulings on related issues of Delaware law, and having those rulings made by the courts of this state." *United Techs. Corp.* v. *Treppel*, 109 A.3d 553, 560 (Del. 2013). "[B]y channeling internal affairs cases into the courts of the state of incorporation," Delaware forum-selection bylaws "provid[e] for the opportunity to have internal affairs cases resolved authoritatively by [the Delaware] Supreme Court if any party wishes to take an appeal." *Boilermakers*, 73 A.3d at 951.

A derivative action, by definition, raises a threshold issue of state corporate law. Enforcement of Delaware forum bylaws against derivative actions thus serves corporate and stockholder interests in the authoritative and consistent application of Delaware corporate law.

As the Delaware Supreme Court has explained, a derivative action is thus a "two-fold" suit—"first, it is the equivalent of a suit by the stockholders to compel the corporation to sue; and second, it is a suit by the corporation, asserted by the stockholders in its behalf, against those liable to it." *Schoon* v. *Smith*, 953 A.2d 196, 202 (Del. 2008); *see also Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) ("The

derivative form of action permits an individual shareholder to bring suit to enforce a *corporate* cause of action against officers, directors, and third parties.").

Whether the corporation should assert a cause of action is a decision generally confided to the "reasonable business judgment" of the corporation's board of directors. *Kamen*, 500 U.S. at 96. "[I]t is only when demand [upon the board to bring the action] is excused that the shareholder enjoys the right to initiate suit on behalf of his corporation in disregard of the directors' wishes." *Id.* (internal quotation marks omitted).

The Supreme Court therefore recognized in *Kamen* that the "first" suit in a derivative action "relates to the allocation of governing powers within the corporation"—even when the "second" suit asserts a federal cause of action. 500 U.S. at 101. Because that issue was a matter of internal corporate affairs, *Kamen* held that it is presumptively governed by "the law of the State of incorporation." *Id.* at 101, 108-09. Thus, in *Kamen*, Maryland law governed the "first" suit in a derivative action asserting a claim under the federal Investment Company Act. *Id.* at 109 & n.10.

Enforcement of Delaware forum bylaws against derivative actions thus ensures that the "first" suit in a derivative action—one governed by Delaware law—will be adjudicated by a Delaware court. Plaintiff and her *amici* contend, however, that enforcement of Delaware forum bylaws improperly impedes plaintiffs' efforts to enforce corporations' obligations to comply with federal statutes with exclusive federal jurisdiction provisions. *See* Appellant's Br. 14-16; Pub. Citizen Amicus Br. (ECF 66) 10-12; Am. Ass'n for Justice Amicus Br. (ECF 68) 11-12, 19. That argument reflects a basic misunderstanding of the nature of a derivative action. A derivative action, by definition, is an action on behalf of the corporation to enforce a right of the corporation. *See Kamen*, 500 U.S. at 95; *see also Schoon*, 953 A.2d at 202 & n.12 (the derivative action is "a vehicle to enforce a corporate right"). Enforcement of a Delaware forum bylaw against a derivative action will therefore never prevent a plaintiff from bringing an action *against* the corporation to enforce the corporation's compliance with federal law.

II. Enforcement of Gap's Delaware forum bylaw against an assertedly derivative § 14(a) claim does not violate federal law

A forum-selection clause is unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought,

whether declared by statute or by judicial decision." *Gemini*, 931 F.3d at 914, 916 (quoting *Bremen*, 407 U.S. at 15). Plaintiff contends that Gap's forum-selection bylaw is unenforceable against an assertedly derivative claim under § 14(a) of the Exchange Act because enforcement would contravene the public policy expressed in the anti-waiver provision of § 29(a) of the Exchange Act. Appellant's Br. 17-18.

But enforcement of Gap's Delaware forum-selection bylaw in these circumstances would not violate the Exchange Act's anti-waiver provision. Therefore, although *Sun* v. *Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1090 (9th Cir. 2018) was correctly decided, to hold Gap's bylaw enforceable this Court need not rely, as the panel did, on *Advanced China*'s statement that "the strong federal policy in favor of enforcing forum-selection clauses . . . supersede[s] antiwaiver provisions." *See* Panel Op. 8. Nor need the Court conclude, as the panel did, that "the Exchange Act's antiwaiver provision does not contain a clear declaration of federal policy." *See id.*

Plaintiff argues that because claims under the Exchange Act are subject to the exclusive jurisdiction of the federal courts, enforcement of Gap's bylaw would result in the complete waiver of her assertedly

derivative § 14(a) claim and thus violate the Exchange Act's anti-waiver provision. Appellant's Br. 14-16. This argument misapprehends both the operation of the anti-waiver provision and the classification of derivative claims under Delaware law.

"By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act." *Shearson/Am. Exp., Inc.* v. *McMahon*, 482 U.S. 220, 228 (1987). A waiver thus violates § 29(a) only if it leaves the waiving party with means "inadequate to protect the substantive rights" created by the Exchange Act. *Id.* at 229. Conversely, a waiver does not violate § 29(a) if the waiving party retains "adequate means of enforcing the provisions of the Exchange Act." *Id.*

Enforcement of Gap's forum-selection bylaw against an assertedly derivative § 14(a) claim would not deprive plaintiff of adequate means to protect the substantive rights created by § 14(a)—and thus would not violate § 29(a). Section 14(a) "was intended to promote the free exercise of the voting rights of *stockholders* by ensuring that proxies would be solicited with explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (emphasis added). It thus

embodies "the congressional purpose of ensuring full and fair disclosure to *shareholders*." *Id.* at 382 (emphasis added). Neither plaintiff nor Gap contends that Gap's forum-selection bylaw interferes with plaintiff's ability to vindicate the substantive rights § 14(a) confers on stockholders. In her complaint, plaintiff alleges that Gap directors and officers violated § 14(a) by making material misstatements in the Gap's 2019 and 2020 annual proxy statements. ER-130-32. Plaintiff is free to bring in federal court a direct § 14(a) claim against Gap directors and officers for those alleged misstatements.

Plaintiff contends that Gap's forum-selection bylaw is nevertheless invalid because she seeks to vindicate the rights of Gap, not its stockholders, and so the claim she asserts under § 14(a) can be asserted only as a derivative claim. Appellant's Reply Br. 11-13. No link in this chain of reasoning is correct.

Although plaintiff asserts that her complaint seeks to vindicate Gap's rights under § 14(a), the allegations of her complaint identify only an impairment of *Gap stockholders*' rights under § 14(a). Plaintiff alleges, for example, that "the conduct of the Individual Defendants interfered with *Plaintiff's* voting rights and choices at the 2019 and 2020

annual meetings," ER-132 (¶ 228) (emphasis added), and that "[t]he 2019 and 2020 Proxy Statements . . . deprived *shareholders* of adequate information to make a reasonably informed decision," ER-108 (¶ 143) (emphasis added). That plaintiff does not allege any impairment of Gap's rights under § 14(a) as a result of the alleged proxy misstatements is unsurprising. The recognized purpose of § 14(a) is to safeguard stockholders' right to vote their shares on an informed basis, not any voting or disclosure right of the corporation. *See Mills*, 396 U.S. at 381-82.

The § 14(a) claim plaintiff asserts is therefore properly classified as direct. "The characterization of a claim as direct or derivative is governed by the law of the state of incorporation"—here, Delaware, where Gap is incorporated. *N.Y. City Emp.'s Ret. Sys.* v. *Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010); *see also Lapidus* v. *Hecht*, 232 F.3d 679, 682 (9th Cir. 2000). Citing *Tooley* v. *Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), plaintiff contends that Delaware's "rigid rules" for determining whether a claim is direct or derivative make it "very unlikely that [she] can litigate any § 14(a) claim premised on the alleged wrongdoing." Appellant's Reply Br. 11-12. But in *Tooley*, the claim at

issue was based on allegations that the director defendants breached their duties by agreeing to the delaying of a merger closing date, not by making any material misstatements. *See Tooley*, 845 A.2d at 1033. And in decisions post-dating *Tooley*, the Delaware Supreme Court has made clear that under the *Tooley* test for classifying claims as direct or derivative, a claim alleging material misstatements in a proxy statement is direct.

For example, in *In re J.P. Morgan Chase & Co. Shareholder Litigation*, 906 A.2d 766, 768 (Del. 2006), the stockholder plaintiffs "claimed that the JPMC directors had breached their fiduciary duties by . . . inducing JPMC shareholders to approve [a] merger with a proxy statement that contained materially inaccurate or incomplete disclosures." Discussing that claim, the Delaware Supreme Court explained: "This Court has recognized, as did the Court of Chancery, that where it is claimed that a duty of disclosure violation impaired the stockholder's right to cast an informed vote, that claim is direct." *Id.* at 772.

In that case, both the Delaware Court of Chancery and the Delaware Supreme Court also recognized that both equitable and

monetary relief are available as remedies for such direct claims. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 825 (Del. Ch. 2005) (explaining that equitable remedies such as an order requiring the amendment of the allegedly misleading proxy statement and a re-vote or an order of rescission are available if timely pursued); *In re J.P. Morgan*, 906 A.2d at 774 (explaining that "[d]amages will be available . . . where disclosure violations are concomitant with deprivation to stockholders' economic interests or impairment of their voting rights"). Plaintiff therefore has no basis to contend that the equitable relief she seeks—new shareholder votes on various matters—is unavailable as relief for a direct claim. *See Calamore* v. *Juniper Networks, Inc.*, 364 Fed. Appx. 370, 372 (9th Cir. 2010) (recognizing that "[d]irect proxy disclosure claims, if made promptly, may support equitable relief such an order to amend a proxy solicitation and require a re-vote" (citing *In re J.P. Morgan*, 906 A.2d at 825)).

A claim alleging material proxy misstatements is direct because the injury in a proxy misstatement claim is to the stockholder's individual right to cast an informed vote. That injury is "an individual, not corporate, harm" because "[w]ithholding information from shareholders

violates their rights even if it leads them to making the 'right,' and even highly profitable, result" for the corporation. *In re Tyson Foods, Inc.*, 919 A.2d 563, 601-02 (Del. Ch. 2007).By contrast, misstatements in a corporation's own proxy statements cannot similarly injure the corporation because "a corporation may not vote its own shares." *See Stream TV Networks, Inc.* v. *SeeCubic, Inc.*, 250 A.3d 1016, 1031 (Del. Ch. 2020) (citing 8 Del. Code § 160(c)).

This Court has accordingly held that under Delaware law, a § 14(a) claim alleging the impairment of the informed exercise of stockholders' voting rights is direct, not derivative. For example, in *N.Y. City Employees Retirement System* v. *Jobs*, 593 F.3d 1018, 1023 (9th Cir. 2010), the Court concluded that under both California and Delaware law, a stockholder plaintiff's "claim for injury to its right to a fully informed vote is a direct claim." The Court then held that "[b]ecause [the stockholder plaintiff']'s § 14(a) claim is direct, the district court erred in dismissing the consolidated complaint on the ground the claim was derivative and had to be pleaded as such." *Id.* Similarly, in *Calamore* v. *Juniper Networks, Inc.*, 364 Fed. Appx. 370, 371 (9th Cir. 2010), the Court concluded that a § 14(a) claim asserted by the stockholder of a

Delaware corporation was direct and that the district court therefore erred in dismissing it on the ground that it had to be pleaded as a derivative claim.

Because Delaware law classifies as direct a stockholder's claim under § 14(a) that proxy misstatements harmed the stockholders' right to cast an informed vote, plaintiff has not asserted a derivative § 14(a) claim that could be waived by enforcement of Gap's bylaw. Enforcement of the bylaw therefore does not violate the anti-waiver provision.

Plaintiff also contends that, regardless of the classification of her claim under Delaware law, she has a right to pursue either a direct or derivative § 14(a) claim under *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). Appellant's Reply Br. 12. "In *Borak*," she argues, "the Supreme Court recognized that shareholders have a private right of action to prosecute both a direct *and a derivative claim* for violation of § 14(a)." *Id.* *Borak*, however, nowhere held that a stockholder may pursue a § 14(a) claim as a derivative claim when a direct claim could provide the stockholder with all of the relief she seeks.

In *Borak*, the plaintiff stockholder argued that his § 14(a) claim was direct; the company argued that the claim was derivative, and that "a

private right of action . . . would not extend to derivative suits." 377 U.S. at 431. It was in that context that the Court stated: "While the respondent [stockholder] contends that his [§ 14(a)] claim is not a derivative one, we need not embrace that view, for we believe that a right of action exists as to both derivative and direct causes." *Id.* The Court then went on to observe that "[t]he injury which a stockholders suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder." *Id.* at 432. The Court concluded that "[t]o hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial private relief." *Id.*

Borak thus held that the classification of a § 14(a) claim as derivative as a matter of state corporate law could not be asserted as an obstacle to the stockholder's right to obtain private relief. Here, however, Delaware law classifies the § 14(a) claim plaintiff asserts as a direct claim, and Gap does not dispute that classification. In these circumstances, requiring plaintiff to assert her § 14(a) claim is not "tantamount to a denial of private relief." *Id.* To the contrary, plaintiff

may obtain all the private relief she seeks through a direct claim. *Borak* therefore does not support her entitlement to instead pursue a derivative claim.

Moreover, even if *Borak* is properly read as recognizing a stockholder's option to pursue a derivative § 14(a) claim when a direct § 14(a) claim can provide the relief she seeks, enforcement of Gap's bylaw here still would not violate the anti-waiver provision. As *Shearson* made clear, waivers do not violate § 29(a) if the waiving party retains "adequate means of enforcing the provisions of the Exchange Act." 482 U.S. at 229. Thus, in *Shearson*, the Supreme Court held that a waiver of a judicial forum did not violate § 29(a) because arbitration provided an adequate alternative means of enforcement. *Id.* at 227-38. Here, a waiver of plaintiff's arguable right to a derivative form of action does not violate § 29(a) because a direct action provides an alternative means of enforcement that is not merely adequate, but equally effective.

III. Enforcement of Gap's Delaware forum bylaw against an assertedly derivative § 14(a) claim does not violate Delaware law

Invoking the Seventh Circuit's decision in *Seafarers Pension Plan ex rel. Boeing Co.* v. *Bradway*, 23 F.4th 714 (7th Cir. 2022), plaintiff contends that enforcement of Gap's Delaware forum-selection bylaw

against her assertedly derivative § 14(a) claim would violate § 115 of the Delaware General Corporation Law. Appellant's Reply Br. 6, 10, 25-26. In *Seafarers*, the Seventh Circuit held that enforcement of Boeing's Delaware forum-selection bylaw—materially the same as Gap's bylaw at issue here—against an assertedly derivative § 14(a) claim would violate § 115. 23 F.4th at 718, 721. In reaching that holding, however, the Seventh Circuit conducted an incomplete analysis that did not address relevant Delaware and federal law.

Section 115 provides that a corporation's "bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State." 8 Del. Code § 115. The Seventh Circuit concluded that a forum-selection bylaw that required a stockholder to bring a derivative § 14(a) claim in Delaware state court was not "consistent with applicable jurisdiction requirements" because § 14(a) claims are subject to exclusive federal jurisdiction. 23 F.4th at 720-21. The Seventh Circuit also concluded that if a forum-selection bylaw that effectively prevented a stockholder from bringing a derivative § 14(a) claim in "any" court in Delaware, state or federal, the bylaw's mandate

was inconsistent with § 115's authorization of a forum-selection bylaw that channeled claims to "any or all" courts in Delaware. *Id.* The Seventh Circuit thus concluded that § 115 did not authorize a bylaw that required assertedly derivative § 14(a) claims to be brought in Delaware state court. *See id.* at 720-24.

The Seventh Circuit's holding rested on its conclusion that enforcement of Boeing's forum-selection bylaw would violate the Exchange Act's anti-waiver provision—the same argument plaintiff advances here. As the Seventh Circuit explained, "The most straightforward resolution of this appeal is under Delaware corporation law, which we read as barring application of the Boeing forum bylaw to this case invoking non-waivable rights under the federal Exchange Act." *Id.* at 719; *see also id.* at 720 ("As applied here, Boeing's forum bylaw violates Section 115 because it is inconsistent with the jurisdictional requirements of the Exchange Act of 1934.").

In concluding that enforcement of the bylaw would violate § 115, however, the Seventh Circuit assumed—without analysis—that the plaintiff stockholder's claim under § 14(a) was properly classified as derivative and that the relief it sought could not be obtained in a direct

action. The Seventh Circuit did not mention, let alone, address *Shearson*'s holding that waivers that leave a party with adequate means of enforcing the Exchange Act do not violate § 29(a). *See Shearson*, 482 U.S. at 228-29. The Seventh Circuit did not recognize the Delaware case law holding that claims that "a duty of disclosure violation impaired the stockholder's right to cast an informed vote" are "direct." *In re J.P. Morgan Chase*, 906 A.2d at 772. And the Seventh Circuit made no effort to determine whether any relief the plaintiff sought would not be available in a direct action.

Rather than conducting an independent analysis of whether enforcement of Boeing's bylaw on the facts before it would violate the anti-waiver provision, the Seventh Circuit largely justified its conclusion by pointing to a passage in *Boilermakers* referring to the anti-waiver provision. But *Boilermakers*, which was decided before § 115 was enacted, adjudicated a facial challenge to two forum-selection bylaws, not their application to any particular claim. *See Boilermakers*, 73 A.3d at 938-39. Furthermore, the passage the Seventh Circuit relied on suggested that the bylaws would violate the anti-waiver provision if they

were enforced against a *direct* § 14(a) claim, not a derivative § 14(a) claim.

In that passage, the *Boilermakers* court observed that "if a claim under SEC Rule 14a-9 was brought against FedEx and its board of directors in federal courts and the defendants moved to dismiss because of the forum selection clause, they would have trouble." 73 A.3d at 962 As the court's description makes clear, is the court was hypothesizing a *direct* § 14(a) claim—a derivative claim would be one brought on behalf of FedEx, not "against FedEx." *Id.*

The court then explains that the "trouble" would be twofold: "First, a claim *by a stockholder* under federal law for falsely soliciting proxies does not fit within any category of claim enumerated in FedEx's forum selection bylaw." *Id.* (emphasis added). That is so because the bylaws at issue in *Boilermakers*—just like Gap's bylaw here—covered all derivative actions, but did not purport to cover direct claims under the federal securities laws. And "[s]econd, the plaintiff could argue that if . . . the bylaw waived *the stockholder's rights* under the Securities Exchange Act, such a waiver would be inconsistent with the anti-waiver provision of that Act." *Id.* (emphasis added).

All this passage shows is that in the view of the *Boilermakers* court, a corporation would violate the anti-waiver provision, and thus federal law, by wielding a forum-selection bylaw to require a stockholder to bring not only all derivative claims, but also a direct § 14(a) claim, in Delaware state court. In that scenario the stockholder would be unable to obtain any private relief under § 14(a). The passage, however, nowhere suggests that enforcement of a forum-selection bylaw against a derivative § 14(a) claim, but not against a direct § 14(a) claim, would violate the anti-waiver provision or independently violate Delaware law.

Because enforcement of Gap's forum bylaw here would leave plaintiff free to pursue a direct § 14(a) claim in federal court to obtain the relief she seeks, enforcement would not violate the anti-waiver provision. *Boilermakers* says nothing to the contrary.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's order dismissing the complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29-2(c)(3) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 6,029 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

November 28, 2022

/s/ Anitha Reddy
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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