EFiled: Oct 21 2019 12:00PM EDT
Filing ID 64335187
Case Number 346,2019

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 HENRICKS, NEIL HUNT, DANIEL LEFF, and RAY ROTHROCK,	:	
Defendants Below-Appellants,	:	C.A. No. 346, 2019
- and -	:	**Appeal from The Court of of Chancery of The State Delaware**
BLUE APRON HOLDINGS, INC. STITCH FIX, INC. and ROKU, INC.,	:	**C.A. No. 2017-0931-JTL**
Nominal Defendants Below-Appellants,	:	
v.	:	
MATTHEW SCIABACUCCHI, on behalf of himself and all others similarly situated,	:	
Plaintiff-Below Appellee.	:	

APPELLEE'S ANSWERING BRIEF

HEYMAN ENERIO
GATTUSO & HIRZEL LLP

Kurt M. Heyman (# 3054)
Melissa N. Donimirski (# 4701)
Aaron M. Nelson (# 5941)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
(302) 472-7300

Attorneys For Plaintiff-Below / Appellee Matthew Sciabacucchi

OF COUNSEL:

BLOCK & LEVITON LLP
Jason M. Leviton
Joel A. Fleming
Lauren Godles Milgroom
Amanda R. Crawford
260 Franklin Street, Suite 1860
Boston, MA 02110
(617) 398-5600

Dated: October 21, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

In the Securities Act of 1933, Congress gave plaintiffs the choice to file suit in federal or state court and provided that claims filed in state court could not be removed.[1] Last year, the Supreme Court of the United States unanimously affirmed that this rule applies even to class actions.[2]

Each of the Nominal Defendants, Blue Apron Holdings, Inc., Stitch Fix, Inc., and Roku, Inc.[3] went public in 2017. In connection with their initial public offerings,[4] each Company adopted a provision in its charter purporting to require that "any complaint asserting a cause of action arising under the Securities Act" be filed in federal court.[5]

Delaware corporation law has long been thought to govern only the internal affairs of the corporation. The Federal Forum Provisions, which seek to regulate external matters, represent a dramatic break from that tradition.

Plaintiff-Appellee Matthew Sciabacucchi,[6] who bought securities of each

---

[1] Securities Act of 1933 § 22(a), 48 Stat. 86–87 (codified, as amended, at 15 U.S.C. § 77v(a)).

[2] *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, 138 S. Ct. 1061 (2018).

[3] Collectively, the "Companies."

[4] "IPOs."

[5] "Federal Forum Provision" or "FFP."

[6] "Plaintiff."

Company traceable to their IPOs, brought suit seeking a judgment declaring the Federal Forum Provisions invalid under Delaware law.

The parties filed cross-motions for summary judgment and the Court of Chancery granted Plaintiff's motion.[7] The court held that (1) the FFPs were invalid because "the constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law";[8] (2) Plaintiff's challenge to Blue Apron's FFP[9] was ripe because, among other things, Plaintiff was an absent member of the putative class in a Securities Act action filed against Blue Apron in state court; and (3) the "savings clause" in Blue Apron's FFP could not save it from Plaintiff's facial challenge "because there is no context in which Blue Apron's Federal Forum Provision could operate validly."[10]

Plaintiff moved for a fee award. The Court of Chancery issued a seventeen-page opinion analyzing each of the *Sugarland* factors,[11] and awarding Plaintiff's

[7] The "Merits Opinion" or "Merits Op," (Ex. A to Appellants' Opening Brief ("OB")).

[8] *Id.* 5.

[9] The Roku and Stitch Fix defendants conceded ripeness.

[10] *Id.* 51-54.

[11] *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).

counsel $3 million.[12] That is the same amount earned by counsel in *In re Exclusive Forum Provision Mootness Fee Petitions*,[13] which also challenged exclusive forum provisions adopted in corporate charters or bylaws.

Defendants appealed. The Blue Apron defendants have abandoned their ripeness and savings-clause arguments. The Court is left to decide the validity of the FFPs and whether the Court of Chancery abused its discretion in the fee award.

[12] The "Fee Opinion" or "Fee Op." (OB, Ex. B).

[13] Consol. C.A. No. 7216-CS (Del. Ch. May 29, 2012) (TRANSCRIPT).

SUMMARY OF ARGUMENT

I. Answer to Appellants' Summary of Arguments

1. Denied. "Delaware corporation law governs only the internal affairs of the corporation."[14] Sections 102(b)(1) and 109(b) of the Delaware General Corporation Law[15] give Delaware corporations broad flexibility to adopt charter and bylaw provisions governing the corporation's internal affairs. But the DGCL does not authorize provisions regulating external matters. The internal-affairs dividing line is a fundamental tenet of Delaware's corporate law, was reaffirmed in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*,[16] and was codified by the General Assembly in Section 115 of the DGCL.

Securities Act claims are not internal. This Court has held that claims under Delaware's Blue Sky Law—which mirrors the federal Securities Act—are not internal affairs claims. It has also held that claims arising from misstatements in connection with the purchase or sale of securities are "personal" to the investor and not internal affairs claims. Appellants cannot overcome these precedents.

2. Denied. By breaching the internal-affairs dividing line, the FFPs violate core public policies and risk serious conflicts between this State and separate

---

[14] Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 674 (2005).

[15] "DGCL."

[16] 73 A.3d 934 (Del. Ch. 2013).

sovereigns. Allowing Delaware corporations to adopt provisions regulating external matters would invite Congress and the SEC to federalize corporate law and encourage Delaware's sister states to apply their own law in determining the validity of a Delaware corporation's governing provisions. Delaware cannot tolerate—and should not risk—this result.

3. Denied. Appellants seem to recognize they cannot overturn the fee award under an abuse-of-discretion standard. Instead, they assert that the Court of Chancery did not exercise discretion, distorting an out-of-context phrase, "baseball-style arbitration," taken from a transcript of a fee hearing in a *different* action. The Court should reject this attempt to rewrite history. In this action, the trial court issued a thoughtful opinion, carefully analyzing each of the *Sugarland* factors before ordering that counsel here be paid the same amount as counsel in *Exclusive Forum*, the closest precedent. That is not an abuse of discretion.

STATEMENT OF FACTS

Each Company adopted an FFP purportedly requiring that Securities Act claims be filed in federal court.[17] Each Company's charter also included a provision making the Delaware Court of Chancery the exclusive forum for "any action asserting a claim governed by the internal affairs doctrine."[18] Plaintiff purchased securities of each Company that were traceable to the IPOs, giving him standing to assert Securities Act claims.[19]

[17] A50; A84; A100.

[18] *Id*.

[19] *Compare* B103 *with* B648, B656; B314 *with* B650, B655; and B491 *with* B652, B654.

ARGUMENT

I. The DGCL Does Not Authorize FFPs Or Other Provisions Governing External Matters

A. Question Presented

Was the Court of Chancery correct that the DGCL does not authorize Delaware corporations to adopt Federal Forum Provisions? Yes.[20]

B. Scope of Review

"Interpretation of a statute is a question of law, which [this Court] ... review[s] *de novo*."[21] "The construction or interpretation of a corporate certificate ... is a question of law subject to *de novo* review[.]"[22]

C. Merits of Argument

Twenty-one corporate law professors agree with the Court of Chancery: a Delaware corporation's charter may not "restrict the forum for federal securities actions, because the right to bring such actions is not a property right associated with shares of corporate stock, and it thus falls outside of the scope of what Delaware law permits the corporate charter … to regulate."[23]

---

[20] Preserved at B31-38; A217-226.

[21] *First Health Settlement Class v. Chartis Specialty Ins. Co*., 2015 WL 1021443, *4 (Del.).

[22] *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990).

[23] Lucian Bebchuk, et al., *Delaware Law Status of Bylaws Regulating Litigation of Federal Securities Law Claims* (Nov. 19, 2018); *see also generally* Ann M. Lipton,

Appellants cannot overcome this common sense conclusion. They acknowledge, as they must, that under *Boilermakers* (now codified by statute),[24] charter or bylaw provisions can regulate only "internal" matters.[25] That leaves them with two, impossibly narrow paths to victory. Both are dead ends.

First, Appellants argue that the Court of Chancery erred in treating the "internal"/"external" line drawn in *Boilermakers* as coterminous with the boundaries of the internal affairs doctrine.[26] But any fair reading of *Boilermakers* shows that when then-Chancellor Strine said "internal," he meant "internal affairs": the phrase appears thirty-seven times.[27] Any doubt left by *Boilermakers* is erased by Section 115, which defines "internal corporate claims" in a way that tracks the internal affairs doctrine and excludes Securities Act claims.[28] Appellants have identified no

---

Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters & Bylaws, 104 GEO. L.J. 583, 598 (2016) ("[T]here is no reason to believe that corporate governance documents, regulated by the law of the state of incorporation, can dictate mechanisms for bringing claims that do not concern corporate internal affairs, such as claims alleging fraud in connection with a securities sale.").

[24] Corporation Law Council, *Explanation of Council Legislative Proposal* (2015) ("Council Statement") at 9 (intent of Section 115 was to "give statutory force to … *Boilermakers*[.]").

[25] OB 21 (citing *Boilermakers*, 73 A.3d at 939, 952); *see also* OB 19 (acknowledging that a charter could not regulate "a products liability claim brought by someone who happens to be a stockholder").

[26] *Id.*

[27] *Boilermakers*, 73 A.3d 934.

[28] 8 *Del. C.* § 115.

case where a Delaware court approved a provision extending beyond the confines of the internal affairs doctrine or used "internal" to mean something other than "internal affairs."

Second, Appellants argue that even if "internal" means "internal affairs," the FFPs are valid because Securities Act claims are internal affairs claims. This fallback argument—which Defendants did not raise below—is foreclosed by controlling precedent. Claims arising under the Delaware Securities Act—a state-law analogue to the federal Securities Act—are not internal affairs claims.[29] Similarly, claims arising from misstatements in connection with the purchase or sale of securities are personal to the investor and are not internal affairs claims.[30] The same logic applies to Securities Act claims.

1. Sections 102(b)(1) And 109(b) Are Limited To Provisions Governing Internal Affairs

"The corporate contract … reflects a choice to have Delaware law govern the internal relations of the firm."[31] But it goes no further. "Delaware corporation law governs only the internal affairs of the corporation."[32]

---

[29] *Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977).

[30] *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1140–41 (Del. 2016).

[31] William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953, 1004 (2003).

[32] Strine, *The Delaware Way*, 30 DEL. J. CORP. L. at 674.

The internal affairs doctrine is a fundamental building block of corporate law.[33] It "is a major tenet of Delaware corporation law having important federal constitutional underpinnings," which "requires that the law of the state of incorporation should determine issues relating to internal corporate affairs."[34] Contrary to Appellants' suggestion,[35] "the internal affairs doctrine is not merely a principle of conflicts law. It is also one of serious constitutional proportions—under due process, the commerce clause and the full faith and credit clause—so that the law of one state governs the relationships of a corporation to its stockholders, directors and officers in matters of internal corporate governance."[36]

"[I]t is a basic concept[[37]] that the General Corporation Law is a part of the certificate of incorporation of every Delaware company."[38] And the enabling language of Section 102(b)(1) and its companion provision,[39] Section 109(b), tracks

---

[33] As early as 1885, New Jersey's Court of Chancery thought it "too obvious for remark that [New Jersey could not] regulate the internal affairs of foreign corporations[.]" *Gregory v. New York, L.E. & W.R. Co.*, 40 N.J. Eq. 38, 44 (N.J. Ch. 1885).

[34] *McDermott Inc. v. Lewis*, 531 A.2d 206, 209, 215 (Del. 1987).

[35] *Contra* OB 3.

[36] *McDermott*, 531 A.2d at 216; *see also VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) ("The internal affairs doctrine is not … only a conflicts of law principle.").

[37] In the Court of Chancery's words, a "first principle[.]" Merits Op. 3.

[38] *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991).

[39] Section 102(b)(1) is the enabling provision for the certificate of incorporation.

the internal-affairs dividing line:

102(b)(1)	109(b)
[T]he certificate of incorporation may also 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. …	The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, **the conduct of its affairs**, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees. …

This Court has recognized the "affairs of the corporation" language refers to the "conduct of intra-corporate matters."[40] Similarly, the "limiting and regulating the powers of … stockholders" language refers to the powers of stockholder *qua* stockholders.[41] This accords with another important "first principle": the fundamental "presumption that a law is not intended to apply outside the territorial

Section 109(b) is the enabling provision for the bylaws. The parties agree that "the provisions are generally viewed as covering the same broad subject matter."A156 n.14.

[40] *Automatic Steel Prod. v. Johnston*, 64 A.2d 416, 418 (Del. 1949).

[41] *Boilermakers*, 73 A.3d at 952 ("the bylaws would be regulating external matters if the board adopted a bylaw that purported to bind … a stockholder plaintiff, who sought to bring a tort claim against the company based on a personal injury … or a contract claim based on a commercial contract … [T]hose kinds of bylaws would be beyond the statutory language of 8 Del. C. § 109(b) [because] … the bylaws would not deal with the rights and powers of the plaintiff-stockholder as a stockholder.").

jurisdiction of the State in which it is enacted."[42]

Appellants and their *amici* cite many cases emphasizing the "broad" enabling nature of Sections 102(b)(1) and 109(b). None extends beyond internal affairs. *Jones* refers to "the Delaware corporation enjoy[ing] [a] broad[] grant of power … to establish the most appropriate **internal** organization and structure for the enterprise."[43] *Disney* addressed derivative breach of fiduciary duty claims.[44] *Sterling* discusses a provision addressing whether "interested directors may be counted toward a quorum."[45] And *Siegman* addresses the Delaware Takeover Statute, which governs change-of-control transactions with interested stockholders.[46] None holds—or even suggests—that the DGCL authorizes provisions governing external claims.

One way to illuminate the problem with Appellants' reading of Section 102(b)(1) is to apply the same logic to Section 109(b), which authorizes provisions "relating to the rights or powers of [the corporation's] … employees." Under

---

[42] *Singer*, 380 A.2d at 981.

[43] *Jones Apparel Grp., Inc. v. Maxwell Shoe Co., Inc.*, 883 A.2d 837, 845 (Del. Ch. 2004) (emphasis added) (quoting Folk, AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW 5 (1969)) (cited in OB 16).

[44] *In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 698 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (cited in OB 16).

[45] *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. 1952) (cited in OB 16-17).

[46] *Siegman v. Columbia Pictures Entm't, Inc.*, 576 A.2d 625, 632 (Del. Ch. 1989) (cited in OB 18).

Appellants' "broad" interpretive approach, a Delaware corporation could simply adopt bylaws imposing non-competes on all of its employees—a regulation of an external matter promising significant conflicts with other states.[47]

2. Boilermakers Affirms The Internal Affairs Dividing Line

The parties agree that the leading decision is *Boilermakers*, which was codified by Section 115.[48] The parties also agree that *Boilermakers* drew a line between the "internal" claims that a charter may regulate and the "external" claims that it cannot.[49] But Appellants say "*Boilermakers* did not hold that 'internal' was synonymous with the 'internal affairs' doctrine."[50]

This bare assertion is unburdened by citation to any language from *Boilermakers* or any other Delaware decision using "internal" to mean something broader than "internal affairs." It cannot withstand scrutiny.

On any fair reading, "internal" means "internal affairs." *Boilermakers*' opening paragraph emphasizes six times that the provisions at issue regulated

---

[47] *Cf. Nuvasive, Inc. v. Miles*, 2019 WL 4010814, *1 (Del. Ch.) (declining to enforce non-compete contained in contract between Delaware corporation and California employee with Delaware choice-of-law provision because "non-compete provisions are generally against fundamental California policy").

[48] Council Statement at 9.

[49] *Boilermakers*, 73 A.3d at 952 (a bylaw would be "beyond the statutory language" by "regulating external matters").

[50] OB 21.

internal affairs claims governed by Delaware law:

> The board of Chevron, the oil and gas major, has adopted a bylaw providing that litigation relating to Chevron's **internal affairs** should be conducted in Delaware, the state where Chevron is incorporated and whose **substantive law** Chevron's stockholders know governs the corporation's **internal affairs**. The board of the logistics company FedEx, which is also incorporated in Delaware and whose **internal affairs** are also therefore governed by **Delaware law**, has adopted a similar bylaw providing that the forum for litigation related to FedEx's **internal affairs** should be the Delaware Court of Chancery. The boards of both companies have been empowered in their certificates of incorporation to adopt bylaws under 8 Del. C. § 109(a).[51]

In total, the phrase "internal affairs" appears thirty-seven times in the opinion.

Boilermakers specifically construed the "conduct of the affairs of the corporation," and "powers of … the stockholders" language, on which Appellants rely, as adopting an internal-affairs dividing line.[52] It explained that if the bylaws were "regulating external matters," they "would be beyond the statutory language" because "the bylaws would not deal with the rights and powers of the plaintiff-stockholder as a stockholder."[53]

Later, *Boilermakers* emphasizes that "neither of the forum selection bylaws purports in any way to foreclose a plaintiff from exercising any statutory right of action created by the federal government. Rather, the forum selection bylaws plainly

---

[51] 73 A.3d at 937 (emphases added).

[52] Technically, the parallel language of Section 109(b).

[53] *Boilermakers*, 73 A.3d at 952.

focus on claims governed by the internal affairs doctrine and thus the law of the state of incorporation."[54]

Boilermakers approvingly quoted a law review article stating that forum selection provisions "do not purport to regulate a stockholder's ability to bring a securities fraud claim or any other claim that is not an intra-corporate matter."[55] And it repeated "that Chevron's and FedEx's stated reasons for the bylaws have nothing to do with foreclosing anyone from exercising any substantive federal rights, but only with channeling internal affairs cases governed by state law to the state of incorporation's courts."[56]

3. ATP Draws The Same Line

In *ATP Tour, Inc. v. Deutscher Tennis Bund*, the Court answered "four certified questions of law concerning the validity of a fee-shifting provision in a Delaware non-stock corporation's bylaws."[57] The General Assembly later "limit[ed *ATP*] to its facts[.]"[58] But to the extent that *ATP* is instructive, it too points to the

---

[54] *Id.* at 962.

[55] *Id.* (citing Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra–Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 370 (2013)). Professor Grundfest has since changed his mind.

[56] 73 A.3d at 963.

[57] 91 A.3d 554, 555 (Del. 2014).

[58] Council Statement at 12.

internal-affairs dividing line.

ATP addressed abstract questions. Three times, the Court emphasized that its holding was limited to bylaws governing "intra-corporate" litigation.[59] Contrary to Appellants' suggestion, the Court expressly declined to opine on the validity of such a bylaw as applied to external, antitrust claims.[60]

4. The General Assembly Codified Boilermakers And The Internal-Affairs Dividing Line When It Adopted Section 115

Any doubt left by *Boilermakers* and *ATP* is removed by Section 115. Following those decisions, the Corporation Law Council drafted the amendments that became Section 115. In conveying its draft to the General Assembly, the Corporation Law Council explained the amendments were meant to "give statutory force to the *Boilermakers* decision" and "limit *ATP* to its facts."[61]

Section 115 provides that:

> The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal

[59] *ATP*, 91 A.3d at 555 ("The provision … shifts attorneys' fees and costs to unsuccessful plaintiffs in **intra-corporate litigation**[.]"), 557 ("The first certified question asks whether the board … may lawfully adopt a bylaw that shifts all litigation expenses to a plaintiff in **intra-corporate litigation**[.]"); *id.* ("A bylaw that allocates risk among parties in **intra-corporate litigation** would also appear to satisfy the DGCL's requirement that bylaws must 'relat[e] to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.'") (emphases added).

[60] *Id.* at 560 ("We cannot say, as a matter of law, that the ATP fee-shifting provision … is enforceable in the circumstances presented.").

[61] Council Statement at 9, 12.

> corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. 'Internal corporate claims' means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.

The authorization of exclusive-forum provisions is limited to "internal corporate claims." As Appellants recognize, "internal corporate claims" is defined "to encompass claims covered by the internal-affairs doctrine" and does not include Securities Act claims.[62] This was not an accident. Members of the Corporation Law Council have stated that Delaware law does not authorize FFPs.[63]

---

[62] OB 29-30.

If Securities Act claims *were* internal corporate claims, the FFPs would violate Section 115 because they "prohibit bringing such claims in the courts of this State." Amici Arlo Technologies, Inc., et al., ignore this fundamental problem in arguing that Section 115 authorizes FFPs. Arlo Br. 6-7.

[63] *See* Lawrence A. Hamermesh & Norman M. Monhait, *Fee-Shifting Bylaws: A Study in Federalism*, THE INSTITUTE OF DELAWARE CORPORATE AND BUSINESS LAW (June 29, 2015), *available at* http://blogs.law.widener.edu/delcorp/2015/06/29/fee-shifting-bylaws-a-study-in-federalism/ ("[T]he subject matter scope of Sections 102(b)(1) and 109(b) is … not limitless. … [I]t does not … permit the charter or the bylaws to create a power to bind stockholders in regard to … the venue for, federal securities class actions."). As noted in Verity Winship, *Contracting Around Securities Litigation: Some Thoughts on the Scope of Litigation Bylaws*, 68 SMU L. REV. 913, 923 (2015), Professor Hamermesh and Mr. Monhait were "involved in drafting the initial legislation" (*i.e.*, were members of the Corporation Law Council).

Appellants will no doubt argue—as they did below—that Section 102(b)(1) authorizes any provision that is not expressly forbidden. But *expressio unius est exclusio alterius*.[64] Section 115's silence is not an implicit endorsement of FFPs; it reflects either prohibition or implicit recognition that FFPs were never authorized by Section 102(b)(1) in the first place.

To see why silence cannot mean endorsement, consider Section 102(b)(7).

In *Smith v. Van Gorkom*, this Court held directors could be liable for monetary damages for breaching their duties of care.[65] Insurers responded with skyrocketing premiums or outright refusals of coverage.[66] In turn, some suggested "the certificate of incorporation of Delaware corporations could be amended to limit or eliminate liability of directors … under existing law by analogy to trust law in an old English Chancery decision[.]"[67] Indeed, "some corporations had already adopted such provisions."[68]

---

[64] *Brown v. State*, 36 A.3d 321, 325 (Del. 2012); *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007).

[65] 488 A.2d 858 (Del. 1985).

[66] Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom After Van Gorkom*, 41 BUS. LAW. 1, 6 (1985).

[67] E. Norman Veasey, Jesse A. Finkelstein, C. Stephen Bigler, *Delaware Supports Directors with A Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 BUS. LAW. 399, 403 (1987) (citing *In re Brazilian Rubber Plantations and Estates, Ltd.*, 1 Ch. 425 (1911)).

[68] *Id.*

The General Assembly responded with Section 102(b)(7), which expressly authorizes provisions exculpating directors from monetary liability for breaches of the duty of care and expressly prohibits exculpation for breaches of the duty of loyalty. It is silent about provisions exculpating officers or aider-abettors (call these, "Non-Director Exculpation Provisions").

If silence meant endorsement, Delaware corporations could adopt Non-Director Exculpation Provisions. Indeed, the textual argument for such provisions is stronger than that for FFPs in two key respects. *First*, claims against officers or aider-abettors can be internal affairs claims.[69] So Non-Director Exculpation Provisions would seem to fall within Section 102(b)(1)'s generic enabling authority. *Second*, Section 102(b)(7)'s express prohibition of some exculpatory provisions (*e.g.*, duty-of-loyalty claims against directors) could be read to implicitly authorize any exculpatory provision not expressly forbidden.

But that is not the law. This Court has twice held that Section 102(b)(7)'s silence on Non-Director Exculpation Provisions means prohibition.[70]

Section 145 of the DGCL works the same way. Sections 145(a) and (b) expressly authorize broad indemnification provisions "if the person acted in good

---

[69] *See, e.g.*, *Hamilton Partners, L.P. v. Highland Capital Mgmt., L.P.*, 2014 WL 1813340, *9 n.101 (Del. Ch.) (collecting cases).

[70] *See, e.g.*, *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 874 (Del. 2015); *Gantler v. Stephens*, 965 A.2d 695, 709 n.37 (Del. 2009).

faith[.]" Nothing in Section 145 expressly prohibits indemnification of fiduciaries who did not act in good faith. And Section 145(f) says the indemnification provisions of Section 145(a) and (b) "shall not be deemed exclusive." But Delaware courts nonetheless read Section 145(a) and (b)'s silence—*i.e.*, the absence of express authorization—as a prohibition of indemnification for acts not in good faith.[71]

The same logic applies here.

5. Securities Act Claims Are Not Internal Affairs Claims

Alternately, Appellants say, Securities Act claims *are* internal affairs claims.[72]

The argument—which Appellants did not raise below[73]—fails the straight-face test for several reasons, not least of which is that each Company adopted a charter provision selecting the Court of Chancery as the exclusive forum for internal affairs claims.[74]

Moreover, the boundaries of the "internal affairs" doctrine are clearly marked. "The term 'internal affairs' encompasses those matters that pertain to the

---

[71] *Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 401 n.83 (Del. Ch. 2008).

[72] OB 25.

[73] The argument is "waived for failure to raise [it] first in the Court of Chancery." *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017).

[74] A69; A84; A100. Moreover, Appellants acknowledge that Section 115 is defined "to encompass claims covered by the internal-affairs doctrine." OB 29-30. So if FFPs were internal affairs claims, they would fall within the scope of Section 115 and would violate its bar on provisions that "prohibit bringing such claims in the courts of this State."

relationships among or between the corporation and its officers, directors, and shareholders."[75] Securities Act claims fall well outside those boundaries.

More than a century ago, the United States Supreme Court recognized that "when a corporation … gives securities, it does business, and a statute regulating such transactions does not regulate the internal affairs of the corporation."[76] That remains the rule today.[77]

In *Singer*, this Court held that the Delaware Securities Act—which is modeled on the federal Securities Act[78]—did not regulate internal affairs.[79] And in *Citigroup*

---

[75] *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1082 (Del. 2011) (internal quotation omitted).

[76] *Williams v. Gaylord*, 186 U.S. 157, 165 (1902).

[77] Roberta S. Karmel, *Realizing the Dream of William O. Douglas: The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 80 (2005) (former SEC commissioner; "The federal securities laws generally have been considered full disclosure statutes, as opposed to … laws governing the internal affairs of corporations.").

[78] The Delaware Securities Act of 1973 is modeled on the Uniform Securities Act of 1956, *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 853 (Del. Ch. 2016), which, in turn, was modeled on the federal Securities Act of 1933. *Kronenberg v. Katz*, 872 A.2d 568, 600 n.66 (Del. Ch. 2004); 69A Am. Jur. 2d Securities Regulation—State § 143 (2019) ("The civil liability provisions of the Uniform Securities Act of 1956 … were modeled after section 12 of the Securities Act of 1933"); Martin C. McWilliams, Jr., *Thoughts on Borrowing Federal Securities Jurisprudence Under the Uniform Securities Act*, 38 S.C. L. REV. 243, 244–45 (1987) ("The Uniform Securities Act … contains much material borrowed from the federal securities laws. Professor Loss, the principal draftsman of the Uniform Act, has written that he hoped for 'interchangeability' between state and federal precedent in certain areas.").

[79] *Singer*, 380 A.2d at 981 ("we read the Securities Act as a Blue Sky Law governing

v. AHW, this Court held that claims alleging misstatements in connection with the purchase or sale of securities are "personal" claims not "governed by the internal affairs doctrine."[80] As noted above, *Boilermakers* recognized that federal securities claims are "not an intra-corporate matter."[81] And the suggestion that a federal securities claim is essentially an "analogue[]" of Delaware fidicuary duty claims[82] has been repeatedly rejected by the United States Supreme Court.[83] Appellants

---

transactions which are subject to Delaware jurisdiction under traditional tests. … [W]e do not read the Act as an attempt to introduce Delaware commercial law into the internal affairs of corporations merely because they are chartered here."). It is widely accepted that blue sky laws do not govern internal affairs. Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 92 (2006).

[80] 140 A.3d at 1140–41 ("whatever analytical problems are involved in recognizing the Holder Claims as a species of common law fraud claim or negligent misrepresentation claim do not turn those Holder Claims into … claims governed by the internal affairs doctrine. As discussed above, holder claims are analytically indistinct from seller and purchaser claims, which are direct claims that are personal to the holder.").

[81] 73 A.3d at 962 (quoting Grundfest & Savelle, *Forum Selection Provisions*, at 370); *see also In re Ebix, Inc. S'holder Litig.*, 2014 WL 3696655, *17 (Del. Ch.) ("the Board's disclosing accurate, material information when seeking stockholder action is a matter of Delaware law under the internal affairs doctrine, but the Board's complying with SEC rules and regulations when filing information with the SEC is not. Instead, that issue is governed by the federal securities laws, over which this Court does not have subject matter jurisdiction."); *Sanders v. Wang & Computer Assocs.*, 1998 WL 842281, *2 (Del. Ch.) (noting the "wild[] contrast" between "issues … relating to the internal governance of a corporate citizen of this State" and "manipulation of a nationally traded security in violation of federal securities statutes.").

[82] OB 27.

[83] *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977) (declining to permit a

cannot overcome these precedents.

First, Appellants argue that "Section 11 claims have far more in common with fiduciary duty claims … than [the Court of Chancery] acknowledged."[84] But the commonalities they identify do not bear out this claim.

The fact that the company itself is usually the primary defendant in a Section 11 action is banal. Delaware corporations are sued every day under all types of legal theories that have nothing to do with internal affairs.[85] Appellants also emphasize that a due diligence defense under the Securities Act "implicates the ***care*** with which [individual defendants] reviewed the registration statement, which is similar in many respects to the fiduciary duties imposed by state law."[86] But any garden-variety negligence action also involves a breach of a duty of care.[87] That does not transform

---

claim under the federal securities laws "for the breach of corporate fiduciary duty alleged in this complaint."); *id.* at 479 ("[c]orporations are creatures of state law," and so, state law "govern[s] the internal affairs of the corporation."); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) ("transfers of stock by stockholders to a third party … do not themselves implicate the internal affairs of the target company.").

[84] OB 26.

[85] Appellants cite *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 51-54 (Del. 2017) for the proposition that "violations of federal environmental laws by Duke Energy's directors provid[ed] a basis for breach of fiduciary duty claims." OB 27 n.4. That surely doesn't help them. Are they suggesting that federal environmental claims are also internal affairs claims that can be regulated by the corporation's bylaws?

[86] OB 26 (emphasis original).

[87] *Rayfield v. Power*, 840 A.2d 642 (Del. 2003) ("to prevail in a negligence action, a

"a tort claim against the company based on a personal injury" into an internal claim, even where brought by "a stockholder plaintiff."[88] So too with a claim arising from misstatements in connection with the purchase or sale of securities: that is a "personal" claim that is not "governed by the internal affairs doctrine."[89] Finally, it is possible for a Section 11 claim to arise from "internal board deliberations and discussions with management."[90] But the Act imposes strict liability for any false statement; it is equally possible for a Section 11 claim to be based on misstatements that have nothing to do with boardroom deliberations.

Second, Appellants misconstrue the Court of Chancery's opinion. In holding that Securities Act claims were not internal claims, the Court of Chancery observed:

- Defendants in a Securities Act claim can include those who are neither directors nor officers nor hold any internal role with the corporation;
- Stock is just one of the fifty-plus different types of securities regulated by the Securities Act;[91]

---

plaintiff must prove by a preponderance of the evidence that the defendant's action breached a duty of care in a way that proximately caused injury to the plaintiff.").

[88] *Boilermakers*, 73 A.3d at 952.

[89] *AHW*, 140 A.3d at 1140.

[90] OB 27.

[91] Appellants emphasize that Section 202 uses the word "security" instead of "stock" (OB 28-29), arguing this reflects an intent to regulate external matters.

There is a simpler explanation. "The phrasing in Section 202 was modeled after Section 8–204 of the Uniform Commercial Code, to which the official comments state, 'A purchaser who takes delivery of a certificated security is entitled to rely on

- Even where Securities Act claims do involve stock, when the predicate act of purchasing occurs, the purchaser has not yet become a stockholder and does not yet have any relationship with the corporation that is governed by Delaware corporate law; and

- Even where Securities Act claims do involve stock, the purchaser need not continue to own stock to assert a claim.[92]

Appellants say it was error for the Court of Chancery to consider these features of the Securities Act because Plaintiff brought a facial challenge. But the Court of Chancery was not cataloguing these features to show that the FFPs were invalid as applied to Plaintiff. Rather, the Court of Chancery cited these features because, considered holistically, they help explain the nature of a Securities Act claim and why such claims are considered external.

---

the terms stated on the certificate.'" *Henry v. Phixios Holdings, Inc.*, 2017 WL 2928034, *8 (Del. Ch.). Similarly, Sections 152, 157, and 221 limit the powers of the corporation. Any impact on future stockholders is incidental.

[92] Merits Op. 34-37. One could add to this list that the Securities Act provides for a rescission remedy, 15 U.S.C. § 77l(a)(2), which is incompatible with "the contractual nature of the stockholders' relationship with the corporation" that provides the basis for charter/bylaw provisions governing internal claims. *Boilermakers*, 73 A.3d at 954.

II. Federal Forum Provisions Transgress Public Policy

A. Question Presented

Do Federal Forum Provisions transgress a public policy settled by the common law or implicit in the DGCL itself? Yes.[93]

B. Scope of Review

"Interpretation of a statute is a question of law, which [this Court] ... review[s] *de novo*."[94] "The construction or interpretation of a corporate certificate ... is a question of law subject to *de novo* review[.]"[95]

C. Merits of Argument

A charter provision is invalid if it "transgress[es] a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself."[96] Because they regulate external matters, the FFPs transgress Delaware's strong public policy of avoiding conflicts with the federal securities regime and Delaware's sister states.

1. Authorizing Provisions Regulating External Matters Would Invite Federalization Of Corporate Law

American corporate law is "a delicately balanced 'ecosystem' within our

---

[93] Preserved below at B39-B42; A226-A231.

[94] *First Health*, 2015 WL 1021443, *4.

[95] *Centaur*, 582 A.2d at 926.

[96] *Sterling*, 93 A.2d at 118.

unique brand of federalism."[97] "[T]he focus of the federal lane has always been, and should always be, market fraud and disclosure. … [M]onitoring the structure of internal corporate governance is the focus of the state lane."[98] And "[t]here is a reason that the line down the middle of the road is yellow."[99]

In asking the Court to approve the FFPs, Appellants seek to steer across the yellow line. Approving FFPs would radically expand the scope of Sections 102 and 109 in unprecedented and unpredictable ways.[100]

"Keeping the fragile Delaware franchise healthy is in the best interests of … investors everywhere."[101] That franchise "is fragile largely because of encroaching federalization."[102] "Delaware may say the words, but it gets to do so only when the

---

[97] E. Norman Veasey & Christine Di Guglielmo, *History Informs American Corporate Law: The Necessity of Maintaining A Delicate Balance in the Federal 'Ecosystem'*, 1 VA. L. & BUS. REV. 201, 202 (2006).

[98] Myron T. Steele, *Sarbanes-Oxley: The Delaware Perspective*, 52 N.Y.L. SCH. L. REV. 503, 506–07 (2008) (citing Jim Hightower, THERE'S NOTHING IN THE MIDDLE OF THE ROAD BUT YELLOW STRIPES AND DEAD ARMADILLOS (1997)).

[99] *Id.*

[100] Although the FFPs here allow Securities Act claims to be filed in any federal court, the logic of Appellants' argument would allow far more aggressive restrictions.

[101] E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1503 (2005).

[102] *Id*.

federal authorities do not take away the microphone."[103] Thus, keeping the federal government "in its [l]ane" is a public policy principle of overriding importance.[104]

Delaware encourages the federal government to stay in its lane by appealing to reciprocity. "[T]he division between the two governmental authorities has given primary responsibility for fair disclosure and securities market regulation to the federal government … State law has retained the substantive regulation of corporate transactions and board conduct."[105] Delaware is extraordinarily careful to respect that "complementary," "symbiotic relationship"[106] by avoiding decisions that would tread on federal policies.

Approving the FFPs would vitiate an express Congressional mandate[107] and a unanimous decision by the Supreme Court of the United States.[108] It would also disregard the SEC's longstanding hostility to charter provisions limiting securities plaintiffs' choice of forum.[109] This would take Delaware out of its lane and

---

[103] Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 644–45 (2003).

[104] Strine, *The Delaware Way*, 30 DEL. J. CORP. L. at 684.

[105] Chandler & Strine, *New Federalism*, 152 U. PA. L. REV. at 973.

[106] *Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998).

[107] 15 U.S.C. § 77v(a).

[108] *Cyan*, 138 S. Ct. 1061.

[109] *See* Response of the SEC's Office of Chief Counsel (Division of Corporation Finance) to Johnson & Johnson (Feb. 11, 2019), https://perma.cc/AF2J-9PMY (granting no-action relief to Johnson & Johnson, allowing it to exclude from its proxy materials, a shareholder proposal for a bylaw requiring arbitration of securities

encourage a federal response.

Appellants point to three different lines of United States Supreme Court authority:[110] *Bremen*, which adopts a three-part test for evaluating whether a contract's otherwise-valid forum-selection provision should be enforced;[111] *Rodriguez*, which holds that the anti-waiver provisions of the Securities Act do not forbid retail brokerages from including an arbitration clause in their customer contracts;[112] and *Cyan*, which confirmed that state courts have jurisdiction over Securities Act class actions.[113]

Appellants do not contend these decisions change the meaning of Sections 102 or 115 or create a federal rule that a state's corporation law *must* authorize FFPs.[114] Rather, Appellants first assume the DGCL authorizes FFPs, then contend

---

claims); Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187, 1220–22 (2013) ("the SEC recently granted no-action relief to two corporations seeking to exclude stockholder proposals of binding by-law amendments providing for mandatory individual arbitration … In addition, the SEC has twice considered issuer-stockholder arbitration provisions in an IPO issuer's constituent instruments in connection with reviewing the issuer's IPO registration statement, and in both instances refused to declare the registration statement effective.").

[110] OB 38-39.

[111] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

[112] *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989).

[113] *Cyan*, 138 S. Ct. 1061.

[114] OB 39.

federal law would not preempt or invalidate otherwise-valid FFPs.

A considerable problem for this argument is that every federal court presented with an FFP has refused to enforce it.[115] Nonetheless, the parties agree the dispositive question is whether FFPs are authorized by the DGCL. That does not, however, make federal law irrelevant.[116] Nor does Plaintiff's argument require the Court to decide whether federal law would, in fact, preempt or invalidate FFPs, if they were authorized by the DGCL or contained in a stockholders agreement.[117]

The relevant public policy principle is not simply that Delaware obeys the Supremacy Clause and recognizes settled preemption doctrine. The stay-in-your-lane policy is broader and requires a more cautious approach. "[T]he 'brooding

---

[115] *See, e.g.*, *Iuso v. Snap, Inc.*, 2017 WL 10410800, *4 (C.D. Cal.); *Clayton v. Tintri, Inc.*, 2017 WL 4876517, *2 (N.D. Cal.).

[116] There is no tension with the generic federal policy in favor of traditional, contractual, forum-selection clauses. If sophisticated investors want to bind themselves to a federal forum by contract, they can. *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, *16 (Del. Ch.) ("[S]tockholders can bind themselves contractually in a stockholders agreement in a manner that cannot be permissibly accomplished through a certificate of incorporation.").

[117] Delaware generally enforces forum-selection provisions contained in a contract. *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1145 (Del. 2010). "Although Section 115 precludes placing certain types of exclusive forum selection provisions in a corporation's charter or bylaws, it does not purport to impose this same restriction on forum selection provisions located outside those two governing documents." *Bonanno v. VTB Holdings, Inc.*, 2016 WL 614412, *15 (Del. Ch.). "Section 115 is not intended … to prevent the application of any such provision in a stockholders agreement or other writing signed by the stockholder[.]" Del. S.B. 75 syn., 148th Gen. Assem. (2015).

omnipresence' of the potential threat of increased federalization requires vigilance to preserve the historical balance."[118] To guard that balance, Delaware has steered clear of even minor tensions with the federal securities regime,[119] precisely because it wants to avoid forcing the federal government's hand and provoking further preemption in areas that have traditionally been left to the states.[120]

Appellants ignore this longstanding policy of "deference to the panoply of federal protections that are available to investors in connection with the purchase or sale of securities of Delaware corporations[.]"[121] This Court should not.

2. Authorizing Provisions Regulating External Matters Would Invite Other States To Apply Their Own Law To Determine The Validity Of Delaware Corporations' Charters and Bylaws

FFPs also promise conflicts between Delaware and its sister states. Under "the

---

[118] Veasey & Di Guglielmo, *History Informs American Corporate Law*, 1 VA. L. & BUS. REV. at 205.

[119] *In re Oracle Corp.*, 867 A.2d 904, 928 (Del. Ch. 2004) ("this court has been reluctant to have equity fill non-existent gaps in the federal regulation of securities markets"); *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 29 (Del. Ch. 2009) ("Delaware's common law fraud remedy does not provide investors with expansive, market-wide relief. That is a domain appropriately left to the federal securities laws, the SEC, and the federal courts."); *Frank v. Arnelle*, 1998 WL 668649, *8 (Del. Ch.) ("I am hesitant … to impose additional disclosure obligations where federal securities law quite plainly does not").

[120] Roe, *Delaware's Competition*, 117 HARV. L. REV. at 644–45 ("Delaware players have reason to fear that if they misstep, federal authorities (Congress, the courts, or the SEC) will enter the picture.").

[121] *Malone*, 722 A.2d at 13.

Fourteenth Amendment Due Process Clause, directors and officers of corporations have a significant right ... to know what law will be applied to their actions and stockholders ... have a right to know by what standards of accountability they may hold those managing the corporation[.]"[122] Allowing Delaware corporations to adopt charter or bylaw provisions exceeding the scope of the internal affairs doctrine would infringe on those Due Process rights and create a significant risk of conflicts with sister states.

Other states have honored the type of forum provisions approved in *Boilermakers* because those provisions are limited to internal affairs.[123] But there is no good reason another state should apply Delaware law if asked to enforce charter or bylaw provisions regulating external matters.

That way, chaos lies. Investors and fiduciaries would face the unwholesome specter of fifty different states' laws being applied to interpret provisions of a Delaware corporation's charter or bylaws. This instability would generate unfavorable precedents and create uncertainty about whether other states would apply Delaware law to *any* particular charter or bylaw provision. Appellants' FFPs invite these type of unseemly conflicts and run afoul of Delaware's strong public

---

[122] *VantagePoint*, 871 A.2d at 1113.

[123] *Drulias v. 1st Century Bancshares, Inc.*, 30 Cal. App. 5th 696 (Cal. Ct. App. 2018); *Roberts v. TriQuint Semiconductor, Inc.*, 364 P.3d 328 (Ore. 2015).

policy in favor of federalism and comity.[124]

3. *The Costs Of Concurrent Jurisdiction Are Overstated; If A "Fix" Is Necessary, It Should Come From Congress*

In their own appeal to public policy, Appellants say that state courts dismiss Section 11 complaints at a lower rate than federal courts and, as a result, *Cyan* has caused D&O insurance premiums to increase. But higher dismissal rates are not necessarily better. Appellants do not attempt to weigh the costs of increased premiums against the benefits of increased deterrence for false statements.

Appellants' *amici* go further, citing a non-peer-reviewed event study (not part of the record below) to suggest that the Merits Opinion reduced the stock price of companies with an FFP.[125] That study cannot be relied upon. The size of the effect varies dramatically depending on the size of the "event window."[126] Significant effects appear only when using a multi-day window.

There is no basis for the insulting supposition—also based on extra-record speculation—that the Court of Chancery's opinion somehow leaked days before it

---

[124] *Pyott v. Louisiana Mun. Police Employees' Ret. Sys.*, 74 A.3d 612, 616 (Del. 2013); *Oracle*, 867 A.2d at 926 (citing *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970)).

[125] Chambers Br. at 17-18 (citing Dhruv Aggarwal, Albert H. Choi & Ofer Eldar, *Federal Forum Provisions and the Internal Affairs Doctrine* (2019), available at https://www.ssrn.com/abstract=3439078).

[126] *Federal Forum Provisions*, at 20 ("The results for wider event windows appear to be larger and more statistically significant.").

was issued.[127] Nor is there reason to believe the market needed days to assimilate a highly anticipated ruling that was widely reported immediately.[128] Assuming the market learned of and reacted to the decision on the day it was issued—what the authors call "day 0"—the reaction was small and for many subgroups, not statistically significant.[129]

Finally, even if Appellants and their *amici* were correct that state-court Securities Act actions are a bad idea, the remedy is not to distort Delaware law but to amend the federal statute. "If further steps are needed, they are up to Congress."[130]

---

[127] *Contra id.* at 18 (asserting that because "Delaware judges tend to be vocal on such matters, it is possible that the market could anticipate a decision a few days before it is announced.").

[128] "[T]he use of a two-day window is inappropriate to measure price impact in an efficient market. An efficient market is said to digest or impound news into the stock price in a matter of minutes[.]" *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 269 (N.D. Tex. 2015); *see also* Richard A. Brealey & Stewart C. Myers, PRINCIPLES OF CORPORATE FINANCE 351–53 (7th ed. 2003) (major part of the price adjustments occurs within 5 to 10 minutes).

[129] *Federal Forum Provisions*, at 20-21.

[130] *Cyan*, 138 S. Ct. at 1078.

III. The Trial Court Exercised And Did Not Abuse Its Discretion In Awarding The Fee

A. Question Presented

Did the Court of Chancery abuse its discretion by awarding Appellee's counsel the same fee paid to counsel in *Exclusive Forum*? No.[131]

B. Scope of Review

"The Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded. Absent a clear abuse of discretion, [this Court] will not reverse the Court of Chancery's award."[132] The Court will not substitute its "own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness," nor "set aside or overturn the Court of Chancery's factual findings unless they are clearly wrong and justice requires it, or they are not the product of an orderly and logical deductive process."[133]

[131] Preserved below at B662-669.

[132] *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 506 (Del. 2005).

[133] *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 432 (Del. 2012).

C. Merits of Argument

1. The Court Did Not Use Baseball Arbitration

Appellants do not cite a single case in which this Court held that the Court of Chancery abused its discretion in setting the amount of a fee award.[134] Nor could they. This Court has cited *Sugarland* eighteen times since it was decided; not once did the Court find an abuse of discretion in the amount of the award.

Recognizing they cannot prevail under the applicable standard, Appellants argue that the Court of Chancery "should not get the benefit of an 'abuse of discretion' standard" because it "engaged in 'baseball-style arbitration'" and "did not employ any discretion."[135]

The Court should reject this swing-for-the-fences argument. The Court of Chancery did not use "baseball-style arbitration."[136] That phrase is taken from a transcript in *Colfax*, an unrelated action.[137] And Appellants are badly distorting what the court said in *Colfax*. The Vice Chancellor was not describing his "stated

---

[134] In *Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011, 1016 (Del. 2007), the Court remanded after reversing on a legal question, which was reviewed under a *de novo* standard, regarding appellant's entitlement to *any* award.

[135] OB 40.

[136] *Contra* OB 6, 40-41.

[137] *In re Colfax Corporation*, 10447-VCL, at 26 (Del. Ch. Apr. 2, 2015) (TRANSCRIPT).

practice";[138] he was *rejecting* a defendant's suggestion to use baseball arbitration:

> [Mr. Clark:] Your Honor's breadth of discretion here is as wide as it could possibly be in the Court of Chancery. You come up with a number. You can do it as a baseball arbitration or you could split a baby.
>
> THE COURT: But I'm not allowed to say up-front I'm doing this as a baseball arbitration.[139]

In any event, this case is not *Colfax*. The Court must determine whether the Court of Chancery abused its discretion in *this* case. It did not.

In awarding fees, the Court of Chancery was required to apply the *Sugarland* factors: "1) the results achieved; 2) the time and effort of counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved."[140] In its seventeen-page opinion, the trial court carefully considered each factor.[141] Appellants do not challenge factors (3) through (5). They focus solely on factors (1) and (2) but cannot show that the Court of Chancery abused its discretion with respect to either.

---

[138] *Contra* OB 40.

[139] *Colfax*, Tr. at 26.

[140] *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012) (citing *Sugarland*, 420 A.2d at 149).

[141] *EMAK*, 50 A.3d at 434 ("The Vice Chancellor analyzed each *Sugarland* factor and the record supports his findings. This Court remains content to leave the challenge of quantifying fee awards to the trial judge in the absence of evidence of capriciousness or factual findings that are clearly wrong.").

2. The Court Did Not Abuse Its Discretion In Valuing The Benefit

"Delaware courts have assigned the greatest weight to the benefit achieved in litigation."[142] The Court of Chancery acted appropriately to value the benefit.

First, Appellants' own authority recognized that resort to *quantum meruit* is necessary only where the Court of Chancery "lack[s] any yardstick" to value a therapeutic benefit.[143] But the many decisions weighing the relative value of supplemental disclosures prove that a benefit need not be calculated with mathematical precision as long as there is authority valuing a comparable benefit.[144]

Here, there was directly comparable authority.[145] Before the Court of Chancery upheld exclusive-forum provisions in *Boilermakers* (for internal claims),

---

[142] *Id.*

[143] *Off v. Ross*, 2009 WL 4725978, *7 (Del. Ch.).

[144] *See In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, *5 (Del. Ch.) ("The court awards fees for supplemental disclosures by juxtaposing the case before it with cases in which attorneys have achieved approximately the same benefits.") (cleaned up)); *In re Golden State Bancorp Inc. S'holders Litig.*, 2000 WL 62964, *3 (Del. Ch.) (where the benefits are "nonquantifiable [and] nonmonetary" the Court looks to "cases in which attorneys have achieved approximately the same benefits."); *In re Dr. Pepper/Seven Up Cos., Inc. S'holders Litig.*, 1996 WL 74214, *5 (Del. Ch.) ("Fee applications in class actions resulting in nonquantifiable, nonmonetary benefits have generated decisions from this Court that provide guidance for the exercise of … discretion.").

[145] The Court of Chancery also appropriately relied on seven-figure fee awards in a number of other cases where plaintiffs obtained therapeutic relief. *See* Fee Op. 9-11 (collecting cases, including *Kallick v. SandRidge Energy, Inc.*, C.A. No. 8182-CS (Del. Ch. Oct. 30, 2013) (ORDER) ($2.5 million); *San Antonio Fire & Police Pension Fund v. Bradbury* (*Amylin*), 2010 WL 4273171, *13 (Del. Ch.) ($2.9

plaintiffs sued thirteen other companies with similar provisions. Instead of fighting, the companies voluntarily withdrew their provisions. The lawyers sought mootness fees of $400,000 per company for a total of $5.2 million. Then-Chancellor Strine suggested this was a "not crazy" number,[146] explaining:

> I'm looking at defense counsel … who have sat mutely in court … in [weak disclosure settlements] … and not opposed fees … into the seven figures; the idea that you're sitting here and … let's just say I awarded 400 for every case. Would that be shocking? Really?
>
> In comparison to the disclosure-only settlements … [counsel] g[o]t rid of an actual bylaw that deals with where plaintiffs who own stock can sue the directors of the corporation. Now, again, wise or unwise, seems to me a fairly substantive bylaw. … This is a very sensitive subject for our state. It's a very sensitive subject for our nation in terms of dealing with representative litigation, and it needs to be dealt with in a serious and proportionate way.[147]

Then-Chancellor Strine explained "there's one simple reason why the defendants themselves can't say that this is an insubstantial issue. It's because their own clients chose to make it a [charter provision.]"[148] "This is a [provision] that affected people's rights and where they could sue in each case. The boards thought

---

million); *Pontiac Gen. Empls.' Ret. Sys. v. Ballantine*, C.A. No. 9789-VCL, at 41–42 (Del. Ch. May 8, 2015) (TRANSCRIPT) ($1.2 million); *Marcato Int'l Master Fund, Ltd. v. Gibbons*, C.A. No. 2017-0751-JTL, at 57–59 (Del. Ch. May 25, 2018) (TRANSCRIPT) ($1.5 million)).

[146] *Exclusive Forum*, Tr. at 64.

[147] *Id.* at 21 (emphasis added).

[148] *Id.* at 20.

they were important. … Precisely because they are important, the plaintiff[] ha[d] a perspective on getting rid of them."[149]

Exclusive Forum also rejected a "very odd" argument that Appellants resurrect here:[150] "That's a very odd thing where I'm supposed to say … 'I may disagree with the plaintiffs' position on this. I think this is a wise bylaw. Getting rid of it is actually harmful. The plaintiffs should actually pay all the other investors.' I really don't think that's what the law is around this benefit theory."[151]

Shortly thereafter, the fee disputes were resolved. Although complete information about the fee paid by each corporate defendant is not available, we know that (at least) nine defendants each paid $333,333 for a total of (at least) $3 million.[152]

The Court of Chancery did not abuse its discretion in giving weight to those

[149] *Id.* at 16-17.

[150] OB 41-42.

[151] Tr. at 17.

[152] The final numbers were not disclosed on the *Exclusive Forum* docket. In *In re Colfax Corp.*, C.A. No. 10447-VCL, however, the same law firm disclosed that at least nine companies had each paid $333,333 in *Exclusive Forum*. *See* Plaintiffs' Brief In Support Of Cross-Motion For An Award Of Attorneys' Fees And Expenses (Del Ch. Feb. 13, 2015) (Trans. ID 56775521) at 15. The Court of Chancery referenced that same figure in awarding fees. *Colfax*, Tr. at 37.

negotiated fees in considering the appropriate award here.[153]

If anything, the benefits achieved in *Exclusive Forum* were less significant than those achieved here for a simple reason. There, defendants mooted the complaints, so the plaintiffs' victory was fleeting. After *Boilermakers*, many of the *Exclusive Forum* defendants reinstated their forum provisions.[154] Here, if the Court affirms the Merits Opinion, Plaintiff's victory is permanent.

Second, Appellants misconstrue the Court of Chancery's reference to the Merits Opinion "establishing a precedent."[155] The trial court was not disregarding the corporate benefit obtained in this case. Rather, the Court of Chancery was explaining that it would not give Plaintiff's counsel extra credit for suing three separate companies, instead of just one:

> Focusing on the aggregate award rather than on the per-company payment also seems warranted … It is neither necessary nor desirable to have many companies sued on the same issue. It is true … that this results in a negative lottery … in which one company bears the brunt of the fee award for establishing a precedent. ... But that outcome is more reasonable than it might originally appear.[156]

---

[153] *In re Abercrombie & Fitch Co. S'holders Deriv. Litig.*, 886 A.2d 1271, 1275 (Del. 2005) (while a court is not required to "blind[ly] accept[]" a negotiated fee, "Appellant is correct that a court should give weight to an agreement regarding attorneys' fees").

[154] B673-675.

[155] OB 42-43.

[156] Fee Op. 10.

3. The Court of Chancery Did Not Abuse Its Discretion In Weighing Counsel's Time and Effort

Finally, the Court of Chancery did not abuse its discretion in its analysis of the time-and-effort factor. *Sugarland* does not require courts to use the implied hourly rate, rather than the benefit conferred, as the benchmark for a fee award.[157] Nonetheless, the court did calculate the implied hourly rate, while also considering other appropriate factors to contextualize that figure, including that (i) Plaintiff's counsel would likely incur just as many hours on appeal; (ii) Plaintiff's counsel's hours were lower because of work done to develop this argument in other litigation; and (iii) the requested fee was about twice Appellants' counsel's likely aggregate lodestar after appeal.[158] These factors have been considered before and Appellants do not cite any authority suggesting that it was an abuse of discretion for the Court of Chancery to consider them here.[159]

---

[157] *Theriault*, 51 A.3d at 1257; *see also Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1167 (Del. 1989) ("a time factor lodestar … has not supplanted the multiple factors criteria" of *Sugarland*).

[158] Fee Op. 12-15.

[159] *Bradbury*, 2010 WL 4273171, *12 (considering hours devoted to appeal, albeit weighing them less heavily); *Berger v. Pubco Corp.*, 2008 WL 4173860, *2 (Del. Ch.) ("that plaintiff's counsel has engaged in similar cases and may have [borrowed] some of the legal arguments … supports a higher award because plaintiff's counsel are experienced … and were, therefore, able to prosecute this action in a diligent and competent manner.") (cleaned up); *Schmelzer v. TeraMedica, Inc.*, C.A. No. 10558-VCG (Del. Ch. June 22, 2015) (TRANSCRIPT) at 52 (describing an award of two times defendants' fees as not being "particularly unreasonable").

CONCLUSION

The judgment should be affirmed.

HEYMAN ENERIO
GATTUSO & HIRZEL LLP

/s/ Kurt M. Heyman
Kurt M. Heyman (# 3054)
Melissa N. Donimirski (# 4701)
Aaron M. Nelson (# 5941)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
(302) 472-7300

Attorneys for Plaintiff-Below/ Appellee Matthew Sciabacucchi

OF COUNSEL:

BLOCK & LEVITON LLP
Jason M. Leviton
Joel A. Fleming
Lauren Godles Milgroom
Amanda R. Crawford
260 Franklin St., Suite 1860
Boston, MA 02110
(617) 398-5600

Dated: October 21, 2019