EFiled: Nov 05 2019 04:47PM EST
Filing ID 64389126
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 HENDRICKS, NEIL HUNT, DANIEL LEFF, and RAY ROTHROCK, Defendants Below-Appellants, - and - BLUE APRON HOLDINGS, INC., STITCH FIX, INC. and ROKU, INC., Nominal Defendants Below-Appellants, v. MATTHEW SCIABACUCCHI, on behalf of himself and all others similarly situated, Plaintiff Below-Appellee.	No. 346, 2019 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2017-0931-JTL

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PRELIMINARY STATEMENT

According to Sciabacucchi and the supporting *amici curiae*, this case represents a pitched battle over the very essence of the Delaware franchise and Delaware's role in our federal system. But this appeal presents a narrow issue of statutory interpretation: whether purely procedural charter provisions designating *where* stockholders can bring a common type of corporate disclosure claim against officers and directors, albeit arising under federal law, are facially valid under Section 102(b)(1). As with any charter or bylaw provision, whether that provision is enforceable "as applied" to specific future circumstances is an issue to be decided only when such a dispute is presented. Questions raised about whether such a provision is good governance or policy are to be decided by corporations and their stockholders (by choosing to adopt such provisions or not) or by the General Assembly (which could amend Section 102(b)(1) to impose a global "internal affairs" limitation if desirable as a matter of policy). But neither the trial court, nor this Court, may properly engraft a policy limitation on Section 102(b)(1) found nowhere in its text under the guise of statutory interpretation.

As this Court previously observed when deciding the facial validity of a stockholder-proposed proxy access bylaw:

> In arriving at this conclusion, we express no view on whether the Bylaw…would create a better governance scheme from a policy standpoint. We decide only what is, and is not, legally permitted under

> the DGCL. **That statute, as currently drafted, is the expression of policy as decreed by the Delaware legislature.**

CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 240 (Del. 2008) (emphasis added). So too here. On this facial challenge, the Court's sole task is to interpret the plain language of Section 102(b)(1), and determine whether, under any possible set of facts, the challenged FFP could be validly applied. If even one set of claims could properly fall within the scope of Section 102(b)(1), the Court of Chancery's decision must be reversed.

Appellants' Opening Brief ("OB") demonstrated: (1) that the subject matter of FFPs falls within the plain language of Section 102(b)(1); and (2) the typical Section 11 claim—brought by plaintiffs who held stock at the time allegedly misleading disclosures were issued, in conjunction with state law claims for breach of the fiduciary duty of disclosure (and based on identical facts)—would fall within the scope of Section 102(b)(1). Neither the court below, nor Sciabacucchi, nor the *amici*, ever address this central issue, thereby conceding that in <u>at least</u> those identified circumstances, the FFPs could be validly applied.

Indeed, Sciabacucchi's Answering Brief ("AB") and the supporting *amici* are most notable for what they fail to address:

- They ignore the core internal board action at the heart of Section 11 claims—claims virtually identical to state law fiduciary duty claims. OB at 26-27.

- They largely ignore the federal case law, including *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989)—which the trial court did not even cite—that recognizes forum is a *procedural*, and not a substantive, right, and that parties may validly contract for different forums for '33 Act claims. Sciabacucchi offers no defense of the trial court's assertion that FFPs are "contrary to the federal regime," which is plainly wrong under *Rodriguez*. Op. 1.

- Nor do they respond to the argument that, by preventing Delaware corporate constituents from contracting in a manner federal law permits, the opinion *creates* unprecedented tension with federal law. OB at 35-39.

Like the trial court, Sciabacucchi and the *amici* focus on secondary policy matters and attempt to conjure a "parade of horribles" to distract from interpreting Section 102(b)(1). These suggestions about the supposed negative effect FFPs will have on Delaware's standing are overstated and entirely speculative. Upholding the facial validity of FFPs merely gives corporations the power to order their affairs (as federal law allows) by agreeing *ex ante* that stockholders must bring federal securities claims in federal court. This in no way represents overreaching by Delaware. Nor does it mandate the application of Delaware law to federal claims. Federal law would continue to govern the substance of those claims. Delaware corporate citizens would merely have the same freedom to adopt FFPs (or not) as other contracting parties have under *Rodriguez*.

Accordingly, the trial court's decisions should be reversed.

ARGUMENT

I. FEDERAL FORUM PROVISIONS ARE PERMISSIBLE UNDER SECTION 102(B)(1).

Although this case turns on the text of Section 102(b)(1), the Answering Brief is loaded with citations to academic commentary that avoid the fundamental question of what that text means. That twenty-one law professors take a particular position on an unsettled legal question, or that the Council of Institutional Investors ("CII") believes FFPs are not good governance, are of little moment. It is the role of this Court to interpret the text of the statute in accordance with Delaware law.

Rather than engage on the language of Section 102(b)(1), Sciabacucchi and the *amici* continue to try to stretch *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), and other authorities beyond what they say, contending that *Boilermakers* adopted the internal affairs doctrine as the line for what is the permissible subject matter of governing documents. AB at 13-15. Yet this conclusion is not supported by the text of Section 102(b)(1) or found anywhere in *Boilermakers*. The repeated references in *Boilermakers* to "internal affairs" simply described the subject matter covered by the specific bylaws at issue in that case. That *Boilermakers* held internal affairs bylaws "easily" fell within the scope of Section 109(b) suggests the court did not believe *only* provisions limited by the internal affairs doctrine were permissible. 73 A.3d at 939.

At no point did *Boilermakers* hold—or even suggest—that the terms "management of the business" or "conduct of its affairs" were limited to matters governed by the DGCL or Delaware common law. The internal affairs doctrine existed long before the 1967 DGCL amendments. Had the Legislature intended to limit the scope of Sections 102(b) or 109(b) to those matters governed by the internal affairs doctrine, it could easily have done so. That the term "internal affairs" appears nowhere in either statute is strong evidence the Legislature did not intend to limit the freedom those sections provide to only those matters where Delaware substantive law would otherwise govern. *See* OB at 24-25.

Nor did *Boilermakers* hold, as the law professor *amici* boldly claim, that "a forum selection bylaw could *not* regulate a securities fraud claim because such claims are external." Law Professors' Brief ("LPB") at 7. *Boilermakers* merely noted that certain '34 Act claims were not covered by any of the enumerated categories covered by *the specific bylaw at issue* and expressly "decline[d] to wade deeper into imagined situations involving multiple 'ifs' because ruling on these situationally specific kind of issues should occur *if and when* the need for rulings is actually necessary." 73 A.3d at 962.

Sciabacucchi's attempt to imply *ex post* limitations on this Court's decision in *ATP Tour, Inc. v. Deutscher Tennis Bund* also fails. 91 A.3d 554 (Del. 2014). *ATP* plainly held that the fee-shifting bylaw at issue there (which by its terms

encompassed any claim by a member against the corporation, including federal antitrust claims in that action) was *facially* valid under Delaware law. *Id.* at 556-59. The *ATP* Court did not characterize the antitrust claims as "external," nor did it "expressly decline to opine on the validity of such a bylaw as applied to external, antitrust claims." AB at 16. Rather, the Court properly acknowledged its opinion on the certified question (as on a facial challenge) was limited to determining facial validity and correctly declined to issue an advisory opinion as to whether the provision "was adopted for a proper purpose or is enforceable in the circumstances presented" because of the lack of a full stipulated factual record. 91 A.3d at 559-60. The point remains that the Supreme Court upheld as facially valid a bylaw governing "intra-corporate claims" that on its face included all claims brought by members against the corporation or other members, without restriction based on what substantive law applied to such claims.

Sciabacucchi dismisses the cases cited confirming the broad and enabling nature of Section 102(b)(1) as not factually "extend[ing] beyond internal affairs." AB at 12. That argument ignores *ATP* itself, and openly spurns the DGCL's long history of permitting innovation. *See* OB at 15-17. Drawing a negative inference about the scope of Section 102(b)(1) simply because no similar provision has been approved (nor rejected) is inconsistent with both the language of the statute (using inclusive term "any") and controlling case law. *Cf. Boilermakers*, 73 A.3d at 953

("[T]he Supreme Court long ago rejected the position that board action should be invalidated or enjoined simply because it involves a novel use of statutory authority.").

Sciabacucchi's only arguably textual response is to posit and attack hypothetical bylaws imposing non-compete agreements on employees based on the "and employees" language in Section 109(b) (but absent from Section 102(b)(1)). AB at 12-13. To state the obvious, Section 109(b) is not at issue, and Sciabacucchi's suggestion that Appellants' "broad" interpretive approach means this language would permit bylaws imposing non-compete bylaws misses the point. AB at 13. Such a provision may be facially valid under the text of Section 109(b), but it would be constrained in its application (and adoption) by such factors as local employment law regimes or other positive law that might render it unenforceable, or the fact that it would operate as a substantive rather than procedural regulation. *See, e.g.*, *AFSCME*, 953 A.2d at 234-35.

Moreover, although the trial court claimed an internal affairs limitation on Section 102(b)(1) was needed to prevent the DGCL's extraterritorial reach (Op. 43-44), Sciabacucchi acknowledges that a body of law already exists to prevent an otherwise valid state law from improper extraterritorial application. AB at 11-12 (citing *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977)); *see also* OB at 37-38 (same). Moreover, the "extraterritorial effect" of the Legislature's adoption of

Section 102(b) no more intrudes on other sovereign authority than does Delaware's common law validation of contractual choice of law or forum selection provisions. Nor is there any reasoned distinction between allowing contractual limits on where a non-resident stockholder brings a breach of fiduciary duty claim versus a Section 11 claim. In both instances, Delaware law reaches beyond its borders in the limited sense that Delaware provides the legal framework allowing the corporation and its constituents to order their affairs. Our federal system contemplates as much, because doing so is necessary to allow corporations to operate across state lines while maintaining orderly governance rules.

Nor does Section 115 "implicit[ly]" modify Section 102(b) to impose an "internal-affairs dividing line." AB at 17-18. Like the trial court, Sciabacucchi erroneously relies on post-enactment commentary interpreting Section 115 to arrive at this conclusion. *See* OB at 24. Nor does it make sense to *imply* that Section 115 supersedes the prior express grant of authority in Section 102(b), when it does not say so. *State ex rel. Green v. Foote,* 168 A. 245, 247 (Del. 1933) (it must be "manifestly clear that the later enactment is intended to supersede the earlier law and embrace the whole subject–matter"); *see also Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1351 (Del. 1985) (validating novel "poison pill" and declining to impose limitation on authority under 8 *Del. C.* § 157 absent "affirmative evidence" the Legislature intended such limitation). Had the Legislature intended Section 115 to

limit the broad grant of authority in Sections 102(b) or 109(b), it would have amended those sections, as it did with respect to fee-shifting. S.B. 75, 148th Gen. Assembly, Synopsis §§ 2, 5 (Del. 2015). Further, Appellants did not argue below that "silence means endorsement" and do not argue that now. AB at 18. Section 115 had the narrow purpose of codifying the holding in *Boilermakers*—a case that did not address the validity of FFPs and interpreted Section 109(b) broadly—and overruling subsequent decisions relying on *Boilermakers* to allow provisions selecting an exclusive ***non***-Delaware forum for DGCL based claims, and therefore is not relevant here.

Sciabacucchi's *expressio unius* argument (AB at 18-20) likewise fails. That general statutory interpretation canon cannot override either the text or express legislative history. 2A Sutherland Statutory Construction § 47:23 (7th ed.). Where, as here, the legislative history specifically indicates the statute is not exhaustive (OB at 23-24), the principle of *expressio unius* is inapplicable. *See Del. State Univ. v. Del. State Univ. Chapter of Am. Ass'n of Univ. Professors*, 2000 WL 33521111, at *5 (Del. Ch. May 16, 2000). Far from proscribing other provisions, the explanation released by the Corporation Law Council with the proposed amendment emphasized that the DGCL is "broadly enabling" and expressly endorsed further private ordering related to stockholder litigation:

> [T]he proposed legislation does not deprive corporations of the ability to adopt other provisions that address unproductive stockholder

> litigation by means other than fee-shifting. The DGCL is broadly enabling and gives wide authority to boards—and stockholders—to adopt binding bylaws and charter provisions. *ATP* and the recent case law addressing forum selection have respected the broadly enabling nature of the DGCL and suggest that some litigation-regulating provisions may be facially valid….
>
> [The Council members] also believe that the market may continue to experiment with litigation-regulating bylaws that do not have the *in terrorem* effect of fee-shifting provisions, and that the courts will be able to develop an equitable jurisprudence that fairly regulates such provisions.

Delaware Corporation Law Council, *Explanation of Council Legislative Proposal* at 9, 12 (2015).

The analogy to Section 102(b)(7) is misplaced. Section 102(b)(7) was enacted to validate exculpation provisions that were otherwise invalid as "contrary to" common law fiduciary duty principles. To override the common law, the Legislature amended Section 102(b) to grant express authority where such authority was otherwise lacking. Section 102(b)(7)'s silence on exculpation for officers and aiders and abettors does not implicitly validate such provisions because the default prior to enactment—invalidity—remains unaltered. By parallel logic, Section 115's silence about FFPs cannot imply such provisions are invalid because *Boilermakers* and *ATP* already established the validity of such provisions under Sections 102(b), 109(b), and general principles of Delaware contract law. *See, e.g.*, *Ingres Corp. v. CA, Inc.*,

8 A.3d 1143 (Del. 2010) (enforcing forum provisions). So the default prior to enactment—validity—remains unchanged.[1]

The remainder of Sciabacucchi's argument as to the scope of Section 102(b)(1) is a series of mischaracterizations. For example, Sciabacucchi erroneously claims that Appellants contend "Securities Act claims are internal affairs claims." AB at 20. False. Appellants merely noted that not only did the trial court improperly graft an unprecedented internal affairs limitation onto Section 102(b)(1), it compounded that error by applying a novel definition of "internal affairs" that is incorrect under relevant Supreme Court precedent. OB at 25. Appellants observed that had the court used the correct, and broader, definition, it could have concluded the process-oriented FFPs would still be covered. Appellants did not, and do not, contend Section 11 claims are subject to the internal affairs doctrine. Observing that Section 11 claims are "internal" (in the sense they arise from core internal corporate activities), and therefore fall within Section 102(b)(1)'s scope, is not saying they are "internal affairs claims" governed by substantive Delaware law.

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[1] Sciabacucchi's analogy based on 8 *Del. C.* § 145 fares no better. Section 145 permits indemnification only "if the person acted in good faith" and therefore by definition prohibits indemnification for bad faith conduct. Section 115 on the other hand uses no similar conditional words and does not purport to address the multitude of other forum provisions that could be adopted. *See* S.B. 75, Synopsis § 5.

Nor did Appellants argue Section 102(b)(1) would allow charter provisions that purport to substantively alter or override federal environmental regulations (AB at 23 n.85) or various other employment or consumer statutes (LPB at 12-13). But it is certainly true (and Sciabacucchi does not deny) that board action is often constrained by both federal and state law, and the fact that federal law regulates board conduct does not put that conduct out of reach of state fiduciary law. *E.g.*, *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47 (Del. 2017). By the same token, the internal board processes that go into crafting and issuing registration statements do not suddenly become "external" and beyond the reach of Section 102(b)(1) because they can be the subject of Section 11 claims as well as state law fiduciary claims.

Section 11 claims are surely direct *analogues* of state disclosure claims—they involve the same factual predicates and similar (or in some cases identical) legal analyses and defenses. OB at 26-27. The cases Sciabacucchi cites do not say otherwise. AB at 22-23. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977), merely holds that a Delaware fiduciary duty claim will not *necessarily* state a claim under the federal securities laws, which makes sense, because an *analogue* is not a clone. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), is even less relevant, involving a challenge to an anti-takeover statute on preemption grounds and nowhere rejecting the similarities between Section 11 and state disclosure claims.

Neither Sciabacucchi nor the *amici* meaningfully respond to the reality that Section 11 claims are typically based on the same internal corporate *conduct* as fiduciary duty claims. *See Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998) ("When corporate directors impart information they must comport with the obligations imposed by both the Delaware law and the federal statutes and regulations of the [SEC]."). Arguments about other, unrelated types of tort claims are red herrings. AB at 23-24. When a corporation offers securities in a public offering, both Delaware and federal law place primary responsibility for the disclosures in the hands of the corporation's directors and require them to speak truthfully. The care with which directors exercise the authority granted them under Delaware law to manage the "affairs of the corporation" is at the core of both state fiduciary claims and Section 11 claims. The same cannot be said for a slip-and-fall claim, or the "theft of shares" hypothetical (Op. 4-5); neither hypothetical situation depends on board action (as a Section 11 claim does).

Most critically, Sciabacucchi does not dispute that the trial court failed to apply the correct legal standard for a facial challenge, which requires the FFPs be declared facially valid unless they "cannot operate lawfully or equitably under any circumstances." OB at 30-32. Instead, Sciabacucchi admits (AB at 25) the court turned that standard on its head by pointing to situations where the provision might be unenforceable to support a "holistic" conclusion that '33 Act claims must be

external and therefore outside the scope of Section 102(b)(1). As a matter of well-settled law, however, the Court must interpret the FFPs so as to give them valid effect, up to the limits permitted by the DGCL. *See Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc.*, 2018 WL 4057012, at *20 (Del. Ch. Aug. 27, 2018).

Similarly, the Court should reverse the judgment as to Blue Apron because its FFP expressly applies only "to the fullest extent permitted by law."[2] This language merely makes explicit the principle above that governing documents must be interpreted up to but not beyond the limits of positive law. *Id.* Thus, Blue Apron's provision cannot be facially invalid because it clearly advises stockholders that its future application is limited to claims falling within such limits.

[2] Sciabacucchi erroneously asserts Blue Apron "abandoned" arguments in favor of its limiting clause. AB at 3. False. Page 8 of the Opening Brief describes the clause and page 32 explains why it matters.

II. FEDERAL FORUM PROVISIONS ARE NOT CONTRARY TO LAW AND DO NOT CONTRAVENE ANY PUBLIC POLICY.

To distract from the text of Section 102(b)(1), Sciabacucchi and the *amici* speculate as to a "parade of horribles" if FFPs are held valid. But hypothetical outcomes, or even supposed "public polic[y]" concerns, cannot trump statutory text. *See AFSCME*, 953 A.2d at 240. Moreover, the suggestion that upholding FFPs takes Delaware out of its "lane" and invites a federal response is simply wrong.

FFPs do not interfere with any substantive right or stray into the "federal lane." There is no immutable right to bring '33 Act claims in state court. To the contrary, established U.S. Supreme Court precedent—which the trial court did not even cite—provides that contractual forum selection provisions are presumptively valid, subject to the reasonableness of enforcing such provisions under the relevant circumstances, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *see also Ingres*, 8 A.3d 1143 (adopting *Bremen* standard), and that parties may contractually agree to limit the forum for '33 Act claims, as a limitation on a procedural and not substantive right, *Rodriguez*, 490 U.S. 477. Sciabacucchi attempts to cabin *Rodriguez* to its facts (AB at 29) without explaining why the principles behind its holding do not govern (and ignoring the long line of cases applying *Rodriguez* in other contexts). OB at 39.

Nor do FFPs violate an "express Congressional mandate" in the '33 Act or *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018). AB at 28. *Cyan*

merely confirms that state courts have concurrent jurisdiction over '33 Act claims and held that a '33 Act claim properly filed in state court cannot be removed to federal court. OB at 10; A199-A200. *Cyan* does not purport to address situations where parties agree *ex ante* to select a particular forum, much less to overrule existing U.S. Supreme Court precedent under *Bremen* and *Rodriguez*.

Thus, it is the trial court's Opinion prohibiting corporate constituents from contracting for a result expressly permitted under federal law that would create unprecedented tension with federal law and veer Delaware into the federal lane. To conclude FFPs (which merely allow corporations to exercise a right granted by federal law) are "contrary to the federal regime" (Op. 1) without even citing the controlling U.S. Supreme Court authority to the contrary is error.

Sciabacucchi and the *amici* cry "slippery slope" and contend that upholding FFPs will lead to similar provisions governing '34 Act claims, including Section 10b-5 claims. That argument misapprehends federal law. Section 27 of the '34 Act already provides for exclusive federal jurisdiction. 28 U.S.C. § 1404(a) governs transfer of venue between district courts, and employs a balancing test that considers, among other factors, whether the parties have a forum selection provision and the local interests of the forum where the suit is filed. Thus, venue provisions under the Exchange Act are entirely permissible but are subject to the strictures of Section

1404(a). Federal law has no problem handling '34 Act venue provisions, and the twenty-one law professors do not cite to this law.

Nor will permitting Delaware corporations to adopt purely procedural FFPs invite other states to encroach on Delaware law. AB at 31-33. Sciabacucchi's hysterical predictions of "chaos" and "instability" lack substance and fail to "connect the dots." Sciabacucchi does not explain why permitting a Delaware corporation to adopt provisions that channel *federal* securities claims into *federal* court could lead other states to throw out the internal affairs doctrine (any more than other states already on occasion pass laws that conflict with the internal affairs doctrine, *see, e.g.*, *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1116 (Del. 2005) (finding California Corporations Code § 2115, which purports to regulate foreign corporations doing business in California, violated internal affairs doctrine)). Rather, his argument is in essence that finding FFPs facially valid will open the door to charter or bylaw provisions that govern undefined "external" matters more generally. But that argument merely repackages the *ipse dixit* refrain that Section 11 claims are "external" without responding to Appellants' detailed arguments about the internal nature of those claims. Sciabacucchi is also noticeably silent as to the arguments that federal and state regulation of corporations routinely interact in complementary rather than adversarial ways. *See* OB at 36-37 (discussing interplay of Section 211(b) and proxy rules).

Sciabacucchi also proclaims, with no support, that other states only enforce Delaware exclusive forum provisions because they are limited to internal affairs. AB at 32. This ignores that Delaware forum provisions impose sometimes greater burdens on non-residents by limiting litigants to a single "home state" forum (Delaware). By contrast, the FFPs do not sweep nearly as broadly, only going as far as to channel cases "down the street" to the nearest federal courthouse. These slippery slope arguments also ignore that the common law already includes a "safety valve" permitting courts to decline to enforce an otherwise valid forum selection provision if doing so under the circumstances would be unreasonable or contravene a strong public policy interest of that state. *See, e.g.*, *Ingres*, 8 A.3d 1143.

But for all the policy concerns Sciabacucchi and the *amici* raise, they have no concern for Delaware's longstanding (and stated) policy in favor of private ordering and corporate innovation, whether initiated by stockholders or boards. If Sections 102(b) and 109(b) are interpreted, *sub silentio*, to contain the narrow internal affairs limitation posited by the trial court, it will impede the adoption of innovative provisions that touch on matters also governed by federal or other law, even where such provisions enhance corporate accountability or control less-than-socially-optimal corporate conduct that is permitted by federal or other law.

For example, the push for greater "proxy access" has led many Delaware corporations to adopt provisions—notably, at the prompting of one of the *amici*

supporting Sciabacucchi's position[3]—permitting certain stockholders to nominate directors and include those nominations in the corporation's proxy materials, which are creatures of the federal securities laws, *see* 17 C.F.R. §§ 240.14a-1-14b-2, and access to which is regulated by Exchange Act Rule 14a-8. Affirming the trial court's interpretation of Sections 102(b)(1) and 109(b) would arguably invalidate those provisions.

Or suppose, in response to concerns about the effects of corporate political expenditures following *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), that the board and stockholders of a Delaware corporation wanted to adopt a charter provision prohibiting the use of corporate funds for political purposes absent majority stockholder approval. That provision would also potentially be invalid as regulating "external matters" because federal election law regulates and permits corporate political expenditures. Thus, affirming the trial court's decision is likely to inhibit the flexibility and innovation that have always been hallmarks of the DGCL in ways even the *amici* would not endorse.

Lastly, Sciabacucchi dismisses the costs of increasing Section 11 litigation in state court as an "appeal to public policy," disputes whether higher dismissal rates are good or bad, and suggests any fix is through federal legislation. AB at 33-34.

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3 *See* CII, *Proxy Access by Private Ordering* (2017).

But whether he, or the Court, believe these issues present a problem is not the relevant question. The fact that dozens of Delaware corporations adopted FFPs reflects that boards and stockholders of these companies *did* identify a problem and sought to address it by adopting novel provisions. This is precisely the way Delaware has long encouraged corporations to use the freedom of contract granted under the DGCL. *See Boilermakers*, 73 A.3d at 951-52. And in the end, Sciabacucchi offers no reason why Delaware's "flexible corporate contract" should prohibit doing something that both Delaware and federal law allow any other party to do in any other contract.

III. THE AWARD OF $3 MILLION IN FEES WAS AN ABUSE OF DISCRETION.

Sciabacucchi's Answering Brief ignores fundamental problems with the Fee Award—namely, the trial court merely adopted Sciabacucchi's fee request on a winner-takes-all basis (rather than actually exercising discretion to come up with a "reasonable fee") and totally misapplied the *Sugarland* factors. It is true that abuse of discretion is a difficult standard of review to overcome, and this Court has only rarely found occasion to reverse a fee award on that basis.[4] But this is one of the rare occasions where the trial court so clearly abused its discretion that the Fee Award must be overturned.

The trial court's stated practice of engaging in baseball-style arbitration for fee awards is the *opposite* of exercising judicial discretion. Sciabacucchi does not contend otherwise and, instead, merely takes issue with Appellants' citation to *In re Colfax Corp.*, 10447-VCL (Del. Ch. Apr. 2, 2015), where the trial court *acknowledged* it was "not allowed to say up-front" it was doing baseball-style arbitration, *id.* at 26, yet did *exactly that* by awarding plaintiffs their requested fee, *id.* at 36 ("I am going to go with the plaintiffs' number of $375,000."), while explaining that "split[ting] the baby" would only "encourage bracketing." Awarding

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[4] Contrary to Sciabacucchi's claim (AB at 36), Appellants cited *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*, 177 A.3d 1, 46 (Del. 2017), a case where this Court held the trial court abused its discretion in setting the amount of a fee award. OB at 6.

one party its requested fees wholesale to reward that party (or its counsel) or to "socially engineer" future litigants' conduct is not a proper exercise of the court's discretion under *Sugarland*. This Court should not condone the trial court's "winner takes all" practice, but the Court need not conclude the court engaged in baseball-style arbitration to reverse the Fee Award because the trial court's award demonstrates it did not properly apply the *Sugarland* factors.

As Sciabacucchi concedes, Delaware courts assign the "greatest weight" under *Sugarland* to the value of the benefit conferred on the corporation. Yet Sciabacucchi ignores the glaring deficiency in the Fee Award, which paid "lip service" to this factor but then relied on precedent fee awards based on benefits conferred, legal issues, and forms of relief not substantively comparable to the present case. OB at 41-43. Nor does Sciabacucchi respond to the fact that *Exclusive Forum*, 7216-CS (Del. Ch. May 29, 2012), is not a precedential ruling and, therefore, cannot serve as a "yardstick" to measure the benefit here. OB at 43. The fees *there* were negotiated, reflecting compromises based on subjective risk calculus about what fees the court might award (after the court there indicated $400,000 per company was "not crazy") and the costs of litigating a dispute over fees. They are thus a poor reflection of any "intrinsic" value of the corporate benefit conferred.

Even if the trial court could look to *Exclusive Forum* for indirect guidance, it committed legal error by focusing on the *collective fee award* rather than the fee paid

by each company. Because *Sugarland* is based on the equitable principle that the stockholders who receive a corporate benefit should share in the costs of creating it, the only possible "yardstick" established by *Exclusive Forum* would be the fees paid by each company ($333,000). Instead, the court looked to the $3 million in total fees ultimately paid there as establishing the market value of litigation "establishing a precedent" concerning the validity of charter provisions or bylaws and taxed the full amount to the three corporations who happened to be sued in this case. The societal value of the development of Delaware law cannot substitute for the careful analysis of the value of the benefit conferred *on the corporation* that *Sugarland* requires. Fee Award 10-11; AB at 42.

Indeed, any proper application of the *Sugarland* benefit factor would also have to consider that the Blue Apron FFP's limiting clause already prevented it from ever operating illegally. *Supra* 14. Even if invalid under Delaware law, a provision with a limiting clause would, by its own terms, already be without force or effect, and thus a declaratory judgment provided no meaningful benefit to Blue Apron stockholders.

Finally, Sciabacucchi does not even try to justify (or even mention) the absurd $11,262.26 implied hourly rate. Sciabacucchi instead argues that the trial court was not required to use implied hourly rates "as a benchmark," citing *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012), which involved a massive $2 billion

monetary settlement and fee award based on a percentage of the common fund created. *Theriault* does not stand for the proposition that the court need not consider the implied hourly rate as a "cross-check" to avoid a windfall, especially where the trial court conceded the benefit was not quantifiable. *See* OB at 44.

Nor does Sciabacucchi (much less the trial court) cite any authority for relying on *fictional* hours that might be expended by both sides on appeal to make the (still absurd) hourly rate look more reasonable. Fee Award 15 (considering multiple of appellants' counsel's *likely* aggregate lodestar after appeal). Notably, the cases Sciabacucchi does cite (AB at 42 n.159) all involved fee awards based on *actual* hours counsel incurred.

It is clear that the trial court engaged in what can best be described as fuzzy math to rationalize a pre-determined result and did not apply the appropriate legal standard or a logical reasoning process, thus abusing its discretion.

CONCLUSION

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

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Dated: November 5, 2019