No. 21-15923

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOELLE LEE, derivatively on behalf of The Gap, Inc.,

Plaintiff-Appellant,

v.

ROBERT J. FISHER; SONIA SYNGAL; ARTHUR PECK; AMY BOHUTINSKY; AMY MILES; ISABELLA D. GOREN; BOB L. MARTIN; CHRIS O'NEILL; ELIZABETH A. SMITH; JOHN J. FISHER; JORGE P. MONTOYA; MAYO A. SHATTUCK III; TRACY GARDNER; WILLIAM S. FISHER; DORIS F. FISHER; THE GAP, INC., Nominal Defendant,

Defendants-Appellees.

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

DEFENDANTS-APPELLEES' SUPPLEMENTAL EN BANC BRIEF

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INTRODUCTION

The panel resolved this case by applying *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018), which in turn applied this Court's en banc decision in *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998). Op. 7-10. Taken together, those cases recognized that courts must follow the federal policy favoring enforcement of forum-selection clauses—even when doing so eliminates a plaintiff's ability to bring an Exchange Act claim altogether—so long as the plaintiff can seek adequate substantive relief in the designated forum. Plaintiff has backed away from her petition's request that the Court overrule *Sun*. ECF 62 at 1-2. The Court should apply *Sun* and affirm the decision below.

The Court has now asked the parties to brief two issues: (1) the significance of the "forum-selection clause appl[ying] only to derivative claims, not direct claims, under the Exchange Act"; and (2) "the application of 8 Del. Code § 115." ECF 65. Both reinforce that the panel's bottom-line conclusion is correct.

First, the fact that Plaintiff can bring a *direct* Exchange Act claim advancing the same false-statement theory she raised in this derivative action confirms that Gap's forum-selection clause does not implicate the Act's antiwaiver provision. By its terms, that provision prohibits only waivers of "compliance" with the substantive obligations of the Act. Enforcing Gap's forum-selection clause would not waive those obligations, because (1) Defendants would still be legally bound to comply

with the Exchange Act, and (2) Plaintiff, the SEC, and the Company itself could enforce such compliance through *direct* claims.

Second, Delaware General Corporation Law (DGCL) Section 115 does not prohibit enforcing Gap's forum-selection clause. The panel rightly concluded that Plaintiff waived this argument by failing to raise it before the district court or in her opening appellate brief. Op. 10. More fundamentally, the Delaware Supreme Court has held that Section 115 applies only to claims arising under Delaware law—it does *not* apply to claims, like Plaintiff's, arising under federal law. *See Salzberg v. Sciabacucchi*, 227 A.3d 102, 116-20 (Del. 2020). And even if Section 115 did apply, its plain terms do not prohibit enforcing Gap's forum-selection clause here.

Contrary to Plaintiff, the panel's decision worked no sea change in the law, and Defendants remains fully bound to comply with the Exchange Act. The en banc Court should agree with the panel and affirm.

ARGUMENT

I. ENFORCING GAP'S FORUM-SELECTION CLAUSE DOES NOT IMPLICATE THE EXCHANGE ACT'S ANTIWAIVER PROVISION

Enforcing Gap's forum-selection clause against Plaintiff's derivative Exchange Act claim does not waive Defendants' "compliance" with the Act, because many other mechanisms for enforcing compliance remain available—including a direct action by Plaintiff. The antiwaiver provision is simply not implicated here. *See* Gap Br. 31-33.

1. Statutory interpretation begins with the text. The antiwaiver provision prohibits "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder." 15 U.S.C. § 78cc(a). By its terms, it applies only to waivers of "compliance" with the Exchange Act and rules issued thereunder. The Supreme Court has explained that the term "compliance" in this provision refers to the "*dut*[*ies*] with which persons trading in securities must 'comply'" and the "*substantive* obligations imposed by the Exchange Act." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987) (emphases added).

The Supreme Court has also made clear that the antiwaiver provision does not prohibit private agreements that eliminate one or more of the procedural mechanisms available for enforcing the Exchange Act, so long as other mechanisms remain viable. In *McMahon*, the Court approved a contract that required arbitration of private Exchange Act claims and thereby blocked shareholders from bringing those claims in court. The Court emphasized that arbitration "provide[d] an adequate means of enforcing the . . . the Exchange Act." *Id.* at 229. At the same time, the Court indicated that the antiwaiver provision would be violated "*only*" if arbitration was somehow "inadequate to protect the substantive rights at issue." *Id*. (emphasis added). In doing so, the Court recognized that the ultimate touchstone of the

provision is substantive "compliance" with the federal securities laws, not the availability of any particular enforcement mechanism. *Id.*[1]

2. Enforcing Gap's forum-selection clause does not implicate the antiwaiver provision, because the clause does not waive Defendants' duty of "compliance" with the Exchange Act. Whether or not the clause is enforced against Plaintiff, Defendants remain subject to the same "duties" and "substantive obligations" under Section 14(a) of the Act: They may not issue or approve proxy statements with false or misleading statements of material fact. *See* 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a-9(a).

Nor does enforcing the forum-selection clause against Plaintiff extinguish the most important mechanisms for enforcing Defendants' substantive compliance with the Act. A derivative claim is just one "form of action" under the Act; such a claim allows "an individual shareholder to bring 'suit to enforce a *corporate* cause of action against officers, directors, and third parties.'" *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 95 (1991) (citation omitted). Even though enforcing the forum-selection clause prevents Plaintiff from pursuing that specific derivative "form of

[1] This pragmatic focus on promoting substantive compliance with federal law, rather than on procedural rights to particular enforcement mechanisms, is consistent with the Supreme Court's broader forum-selection clause jurisprudence, including cases invoked repeatedly by Plaintiff. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995).

action" on behalf of the corporation, there are other mechanisms for enforcing compliance with the Act, including: (1) suits by the SEC, *e.g.*, *SEC v. Das*, 723 F.3d 943, 946 (8th Cir. 2013); (2) direct actions by shareholders, *e.g.*, *Golub v. Gigamon Inc.*, 994 F.3d 1102, 1104-05 (9th Cir. 2021); and (3) direct actions by companies against their officers.

Most notably, *Plaintiff herself* could have brought her Section 14(a) allegations as a direct claim under the Exchange Act. Her claim rests on the assertion that Defendants deprived her of the right to an informed shareholder vote by making false statements about Gap's commitment to diversity in its 2019 and 2020 proxy statements. *E.g.*, ER-108 (¶¶ 143-44) (alleging the proxies "deprived shareholders of adequate information necessary to make a reasonably informed decision" and that shareholders "would not have voted to keep the same Directors" had they received accurate information); ER-130–32 (¶¶ 223-29) (asserting that if Gap had accurately disclosed that information, shareholders "would not have voted to reelect Board members, approve executive compensation packages, and re-hire" the Company's auditor); ER-54, 56 (¶¶ 5, 11). *See* U.S. Chamber Amicus Br. 5-7, ECF 84.

Those allegations fall squarely within the ambit of a *direct* Exchange Act claim. In *New York City Employees' Retirement System v. Jobs*, this Court explained that "[t]he characterization of a claim as direct or derivative is governed by the law of the state of incorporation." 593 F.3d 1018, 1022 (9th Cir. 2010). The Delaware

Supreme Court has repeatedly held that "where it is claimed that a duty of disclosure violation impaired the stockholders' right to cast an informed vote, *that claim is direct*." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 771-72 & n.13 (Del. 2006) (emphasis added) (applying *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033, 1035 (Del. 2004)); *see Brookfield Asset Mgmt. v. Rosson*, 261 A.3d 1251, 1263 n.39 (Del. 2021) ("[A] board failing to disclose all material information when seeking stockholder action" is "harm unique to the stockholders."); *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 601 (Del. Ch. 2007) (Denial of "the right to a fully informed vote . . . is almost always an individual, not corporate, harm."); Strine et al. Letter 2, ECF 82.

In *Jobs*, this Court held the same in the context of a Section 14(a) claim. Because such a claim "implicates a duty of disclosure owed to shareholders," the Court held, a plaintiff's "claim for injury to its right to a fully informed vote is a *direct* claim." 593 F.3d at 1022-23 (emphasis added). That ruling follows the Supreme Court's explanation that Section 14(a) "was intended to promote 'the free exercise of the voting rights of stockholders' by ensuring that proxies would be solicited with 'explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.'" *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (citation omitted). Indeed, the Court has recognized that Section 14(a) claims alleging false or misleading proxy statements can be brought directly

by stockholders. *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964); *see Yamamoto v. Omiya*, 564 F.2d 1319, 1326 (9th Cir. 1977).

The SEC has likewise emphasized that "a shareholder's [Section 14(a)] claim based on a proxy violation is a direct action." *Kamen* SEC Amicus Br. 10, 1991 WL 11009297. Echoing *Mills*, the SEC explained that Section 14(a) was intended to protect "the free exercise of the voting rights of stockholders," and that a Section 14(a) claim "asserts a violation of a shareholder's own right to truthful and complete information in communications used to solicit his vote." *Id.* (quoting H.R. Rep. No. 73-1383, at 14 (1934)). As a result, "when a shareholder's vote is secured through a false or misleading proxy statement, it is the personal right of the shareholders . . . that is violated." *Id.* And "when [a] shareholder sues to vindicate that right, the action asserts a direct infringement of federal requirements." *Id*. at 10-11.

Settled authority thus make clear that Plaintiff could and should have brought her Section 14(a) deprivation-of-an-informed-vote claim as a direct claim. Had she done so, she could have sought the exact same "injunctive and equitable relief" she is seeking in this derivative action—a court order requiring Gap to "put[] forward for shareholder vote" various new corporate governance policies purporting to respond to the issues on which Plaintiff was denied her voting rights. ER-132–35 (explaining requested equitable relief and expressly disavowing "any monetary damages for the proxy law violations"); *Mills*, 396 U.S. at 386 (noting courts' broad

discretion to fashion equitable relief for Section 14(a) disclosure-based voting claims); U.S. Chamber Amicus Br. 19-24.

Plaintiff's right to bring her Section 14(a) claim as a direct action confirms that Gap's forum-selection clause does not directly or indirectly "waive [Gap's] compliance" with the Act. 15 U.S.C. § 78cc(a). The antiwaiver provision thus has no bearing on this case.

3. Plaintiff's amici—though, notably, not Plaintiff herself—argue that she could *not* bring a direct action here. *See* Law Profs. Amicus Br. 20-21, ECF 67. They are mistaken. Both the Delaware Supreme Court and this Court have held that proxy violations like the ones Plaintiff alleges support direct claims, not derivative claims. *Supra* at 5-7. Plaintiff's amici have no response to *Jobs*, *J.P. Morgan*, or the other binding authority cited above.

Instead, amici mischaracterize Plaintiff's Section 14(a) claim as resting on allegations about Gap's "performance and value," arguing that harms to the Company's *value* injure shareholders only indirectly through injuries first inflicted on Gap. Law Profs. Amicus Br. 21. But that is incorrect: Plaintiff's Section 14(a) claim alleges that Defendants' proxy statements "interfered with *Plaintiff's voting rights* and choices at the 2019 and 2020 annual meetings." ER-132 (emphasis added). Moreover, Plaintiff expressly disavowed damages related to her Section

14(a) claim. *Id.* In any event, the availability of a derivative claim would not negate Plaintiff's ability to bring a direct claim.

4. Plaintiff and her amici further suggest that the Supreme Court's decision in *Borak*, 377 U.S. at 430-31, grants her a specific right to a *derivative* Section 14(a) claim—and that the denial of that right violates the Exchange Act's antiwaiver provision, *see* Reply Br. 10-12; Pub. Citizen Amicus Br. 23-28, ECF 66. That argument fails for multiple reasons.

First, *Borak* has no bearing on the antiwaiver provision. As explained, that provision is concerned only with waivers of "compliance" with the Act. *Supra* at 3-5. Even if Plaintiff were correct that *Borak* grants her a right to bring a Section 14(a) derivative claim here, a waiver of that right does not eliminate Gap's duty to comply with the Act. *Id.* Moreover, *Borak* expressly recognizes that Section 14(a) can be enforced *directly* by stockholders, 377 U.S. at 431, confirming that in those circumstances a derivative action is not necessary to "provide an adequate means of enforcing" the Act, *McMahon*, 482 U.S. at 229.

Second, Plaintiff misreads *Borak*. There, the Supreme Court noted that certain Section 14(a) claims might be brought *only* as derivative claims, and that in those circumstances "[t]o hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief." 377 U.S. at 432. Crucially, though, the Court did not hold that Section 14(a) creates an implied right

of action to bring a derivative claim—under federal law—even when a direct claim *is* available, or when state corporate law would not authorize a derivative action.

Recognizing such a private right of action is inconsistent with *Borak*'s rationale, which emphasized the need for a derivative action when otherwise there would be a "denial of [private] relief" altogether. *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714, 729 (7th Cir. 2022) (Easterbrook, J., dissenting) (quoting *Borak*, 377 U.S. at 432). It also ignores the Supreme Court's repeated refusal to "extend the scope of *Borak* actions beyond the ambit" of its original ruling. *E.g.*, *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); Grundfest & Manesh Amicus Br. 3-5 & nn.5-10, ECF 79 (citing cases limiting *Borak* to its facts). And this Court has subsequently clarified that the classification of such an action as direct or derivative turns on state law. *Jobs*, 593 F.3d at 1022.

Here, *Jobs* and settled Delaware authority make clear that Plaintiff can bring a direct claim alleging that Defendants violated Section 14(a) by depriving her of a right to an informed vote. *Supra* at 5-7. *Borak* does not grant her a right to bring a derivative claim in these circumstances. There is accordingly no conflict between Gap's forum-selection clause and *Borak*.[2]

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[2] To the extent *Borak* recognized a right to bring "derivative" Section 14(a) actions, it appeared to be referring to the type of claim directly at issue in that case—i.e., a claim brought by an individual shareholder, in his own capacity, but alleging injuries inflicted on "the stockholders as a group." 377 U.S. at 432. Subsequent

Finally, Plaintiff is wrong to claim that her rights (or the corporation's rights) will be impaired unless she prevails in barring enforcement of Gap's forum-selection clause. *E.g.*, Pet. Reh'g 2-3, 17; Reply Br. 20-21. As explained, she is free to file a *direct* claim under Section 14(a), and the Company can file a direct claim on its own behalf. *Supra* at 5-7. Moreover, Plaintiff has conceded that she can obtain the full relief she seeks by filing a derivative action for breach of fiduciary duty under Delaware law in Delaware Chancery Court. *See* Oral Arg. at 6:30-9:30, 29:30-30:30. There is accordingly no practical reason why Plaintiff needs a derivative claim to enforce Gap's compliance with the Exchange Act. The antiwaiver provision is not implicated here.

II. ENFORCING GAP'S FORUM-SELECTION CLAUSE DOES NOT VIOLATE DGCL SECTION 115

Plaintiff's rehearing petition asserted that Gap's forum-selection clause violates Section 115, a provision of Delaware corporate law enacted in 2015. Pet. Reh'g 18-20. As the panel concluded, that argument was not raised below or in Plaintiff's opening brief, and is therefore waived. It also fails on the merits.

1. Delaware law broadly authorizes corporations to include in their bylaws and articles of incorporation any provisions regulating the powers of the corporation,

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decisions indicate Delaware law would treat the type of action at issue in *Borak* as a *direct* claim. *Supra* at 5-7; *see Kamen* SEC Amicus Br. 12 & n.9, 1991 WL 11009297 (explaining why *Borak* is consistent with treating Section 14(a) claims as direct claims, and citing *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 32 & n.21 (1977)).

its directors, and its shareholders, as well as any matters relating to its business and affairs. *See* DGCL §§ 102(b)(1), 109(b). Until 2013, there was debate over whether those provisions authorized forum-selection clauses at all. *See* Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 Am. U. L. Rev. 501, 509-20 (2021). That year, in an opinion by then-Chancellor Strine, the Court of Chancery held that such clauses were proper means of establishing the forum for "internal affairs claims," i.e., claims "governed by state corporate law." *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 951-52 (2013).

In 2015, the Delaware General Assembly enacted Section 115 "to codify *Boilermakers*" and confirm the validity of forum-selection clauses addressing state-law claims. *Salzberg*, 227 A.3d at 117; *see* S.B. 75 summary, 148th Gen. Assemb., Reg. Sess. (Del. 2015) ("Synopsis") § 5, https://legiscan.com/DE/bill/SB75/2015 ("New Section 115 confirms" the holding in *Boilermakers*.). Section 115 provides:

> [1] The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and [2] no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. [3] "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.

Del. Code Ann. tit. 8, § 115.

Section 115 thus establishes two rules of law. First, clause [1] confirms *Boilermakers*' holding that bylaws and certificates of incorporation *can* contain forum-selection clauses requiring litigation of "internal corporate claims" in Delaware state or federal court. Second, clause [2] *prohibits* clauses forbidding such claims from being brought in Delaware state court. Clause [3] then provides a general definition of "internal corporate claims." Importantly, Section 115 provides no guidance for claims other than "internal corporate claims"; courts must "look elsewhere"—such as to Sections 102(b)(1) or 109(b)—to decide whether a forum-selection clause addressing such claims is permissible. *Salzberg*, 227 A.3d at 119.

The Delaware Supreme Court has confirmed that Section 115's definition of "internal corporate claims" includes only state-law claims. In *Salzberg*, the court explained Section 115 was not "intended to encompass federal claims within the definition of internal corporate claims" and so only "address[es] claims requiring the application of Delaware corporate law as opposed to federal law." *Id.* at 120 n.79. There, for example, the Court rejected a Section 115 challenge to forum-selection clauses governing federal securities claims, holding that Section 115 "[wa]s not implicated" and "[did] not apply." *Id.* at 120 & n.79; *see id.* at 115-16, 120, 129-32 (forum-selection clause was valid under "Section 102(b)'s broad authorization").

2. Plaintiff asserts that Section 115's reference to "applicable jurisdictional requirements" precludes enforcement of Gap's forum-selection clause, because the

clause is "inconsistent with the jurisdictional requirements of the Exchange Act." Pet. Reh'g 18 (quoting *Seafarers*, 23 F.4th at 720). In doing so, she relies on the Seventh Circuit's recent split decision in *Seafarers*, 23 F.4th 714. There, the majority assumed, without analysis, that Section 115's references to "internal corporate claims" include federal claims. 23 F.4th at 720. It then relied mainly on the phrase "consistent with applicable jurisdictional requirements" to interpret Section 115's broad authorization as banning forum-selection clauses that violate the Exchange Act. *Id.* Plaintiff's Section 115 argument fails for at least three separate reasons.

First, as the panel recognized, Plaintiff "did not identify Section 115 . . . in the district court or in her opening brief on appeal, and so has waived any reliance on that provision." Op. 10. The panel correctly enforced that waiver and refused to consider any new argument based on Section 115. *See Kaffaga v. Est. of Steinbeck*, 938 F.3d 1006, 1018 n.8 (9th Cir. 2019). None of Plaintiff's subsequent filings offer any reason to hold otherwise.

Second, even if not waived, Section 115 affects only forum-selection clauses governing Delaware *state-law* claims. As *Salzberg* makes clear, Section 115 does not "encompass federal claims within the definition of internal corporate claims," and thus "is not implicated" in cases involving federal claims. 227 A.3d at 120 n.79; *see* Synopsis § 5 (Section 115 speaks only to "claims arising under the DGCL . . . .");

Grundfest & Manesh Amicus Br. 17-19. Because Plaintiff's Exchange Act claim arises under federal law, Section 115 is "irrelevant," and does not prohibit enforcing Gap's forum-selection clause. Strine et al. Letter 2.[3]

Third, even if—despite *Salzberg*—Plaintiff's federal claim could be construed as an "internal corporate claim," Section 115 still would allow enforcement of Gap's forum-selection clause here.

Section 115's prohibitory clause—identified as clause [2] in the block quotation above—is irrelevant here: Gap's forum-selection clause *requires* claims to be brought in Delaware court. Nor does clause [1] bar Gap's forum-selection clause. In *Seafarers*, the Seventh Circuit emphasized that Section 115's first clause limits its authorization of forum-selection clauses to those "consistent with applicable jurisdictional requirements," holding that the bylaw at issue "violate[d] Section 115 because it [wa]s inconsistent with the jurisdictional requirements of the [antiwaiver provision]." 23 F.4th at 720. But as explained above, Gap's forum-selection clause does *not* violate the antiwaiver provision. *Supra* at 2-11. So here

[3] The *Seafarers* majority failed to acknowledge *Salzberg*'s core holding that Section 115's regulation of forum-selection clauses does not "encompass federal claims," 227 A.3d at 120 n.79, presumably because the parties' briefs did not mention it. *Salzberg* refutes the Seventh Circuit's holding that Section 115 implicitly precludes forum-selection clauses addressing federal claims.

there is no federal "jurisdictional" problem at all. *See* U.S. Chamber Amicus Br. 27-31.

In any event, Section 115 uses the phrase "consistent with applicable jurisdictional requirements" in its first clause *authorizing* corporations to adopt forum-selection clauses. By its terms, that clause does not *prohibit* bylaws requiring certain claims to be brought in Delaware court. Section 115's only prohibition appears—expressly—in clause [2]. As Judge Easterbrook explained, Section 115 "forbids only provisions that block litigation in Delaware," not those that require it. *Seafarers*, 23 F.4th at 731-32.

Section 115's reference to "applicable jurisdictional requirements" simply confirms that its authorization of forum-selection clauses does not affect any courts' preexisting jurisdiction. *See* Synopsis § 5 ("[N]or is Section 115 intended to limit or expand the jurisdiction of the Court of Chancery or the Superior Court."). It does not, of its own force, implicitly prohibit forum-selection clauses like Gap's. *See Salzberg*, 227 A.3d at 119 (rejecting similar argument that Section 115 "implicit[ly]" prohibits certain forum-selection clauses, especially given express prohibition on clauses barring litigation in Delaware courts). Such clauses remain viable under Section 109(b)'s "broad authorization." *Id.* at 115; *see id.* at 120 ("Forum provisions were valid prior to Section 115's enactment.").

All this is consistent with Section 115's legislative history. *Seafarers* notes commentary stating that the law was "not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction." 23 F.4th at 720 (quoting Synopsis § 5). But just because Section 115 was "not intended to authorize" such a provision does not mean it *was* intended to prohibit it. Instead, like *Boilermakers*—which Section 115 "codif[ied]," *Salzberg*, 227 A.3d at 117—it does not speak to forum-selection clauses addressing federal claims.

In short, Section 115 "simply clarifies that *for certain claims*, Delaware courts may be the only forum, but they cannot be excluded as a forum." *Id.* at 118. Section 115 does not block enforcement of Gap's forum-selection clause here.

CONCLUSION

For the reasons set forth here, in Defendants' prior briefing, and in the amicus briefs supporting Defendants, the district court's dismissal order should be affirmed.

Dated: November 28, 2022

Respectfully submitted,

s/ Roman Martinez

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(5)-(6), Ninth Circuit Rule 32-1, and this Court's November 10, 2022 Order, Defendants-Appellees' Supplemental En Banc Brief is proportionately spaced, has a typeface of 14 point and contains 4,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

s/ *Roman Martinez*
Roman Martinez