No. 21-15923

**IN THE**
# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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NOELLE LEE,
derivatively on behalf of THE GAP, INC.,
*Plaintiff-Appellant*,

vs.

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

– and –

THE GAP, INC.,
*Nominal Defendant-Appellee*.

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On Appeal from the United States District Court
For the Northern District of California
The Honorable Sallie Kim
District Court Case 3:20-cv-06163-SK

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## APPELLANT'S REPLY BRIEF

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## PRELIMINARY STATEMENT

This appeal presents a single straightforward issue for the Court: Whether a corporation can, through a unilaterally-enacted forum selection clause, deprive shareholders of their ability to bring in federal court a derivative claim for violation of § 14(a) of the Exchange Act?[1] Or, stated differently, whether such a forum selection clause is valid and enforceable *vis-à-vis* Plaintiff's derivative § 14(a) claim?

The Magistrate Judge in this case concluded that such a clause was valid and enforceable, despite the fact that it resulted in the waiver of Plaintiff's derivative § 14(a) claim in violation of the Exchange Act's anti-waiver provision (*see* 15 U.S.C. § 78cc(a)). To Plaintiff's counsel's knowledge, the Magistrate Judge's decision was only the *second* decision to have enforced a similar forum selection clause with respect to a federal derivative claim for violation of § 14(a). The other decision was *Seafarers*

[1] All capitalized terms have the same definitions as set forth in Appellant's Opening Brief ("AOB"). Defendants-Appellees' Answering Brief is cited as "AB." Unless otherwise noted, all internal citations and quotation marks are omitted, and all emphasis is added.

*Pension Plan v. Bradway*, 2020 U.S. Dist. LEXIS 106062 (N.D. Ill. June 8, 2020), on which the Magistrate Judge in this case relied (*see* ER11–12). Last month, the Seventh Circuit reversed the *Seafarers* decision, concluding that the application of a similar forum clause to a derivative § 14(a) claim would violate the Exchange Act's anti-waiver provision. *See Seafarers Pension Plan v. Bradway*, __ F.4th __, 2022 U.S. App. LEXIS 554 (7th Cir. Jan. 7, 2022). This leaves the Magistrate Judge's decision in this case as the *sole* outlier decision.

For largely the same reasons as discussed by the Seventh Circuit in *Seafarers*, the forum selection clause in this case is invalid and unenforceable as applied to Plaintiff's derivative § 14(a) claim. In holding to the contrary, the Magistrate Judge misapplied this Court's precedent dealing with enforcement of forum selection clauses negotiated by sophisticated parties in *international context*. Because principles of international comity are *not* at issue in this case, it is irrelevant whether Delaware offers alternative remedies to Plaintiff's § 14(a) claim. Rather, under the Supremacy Clause, the Exchange Act must be enforced and GAP's forum selection clause is invalid and unenforceable as pertains to Plaintiff's § 14(a) claim.

The Court should not exercise its discretion to reach Defendants' multiple alternative grounds for affirmance. These grounds were not considered or ruled upon below and, under these circumstances, the appropriate course of action is for this Court to decline to decide these issues in the first instance, particularly where they hinge on fact-intensive application of law to the record in this case. Moreover, Defendants' failure to file a cross-appeal has prevented Plaintiff from addressing these issues in the opening brief and, given the page limitations, Plaintiff would be prejudiced in responding to these issues for the first time on reply. Finally, because Defendants are essentially asking for *broader relief* (dismissal with prejudice) than they obtained in the court below, their failure to file a cross-appeal is yet another reason for the Court to decline to reach these issues.

For all the foregoing reasons, the Court should reverse and remand.

## STANDARD OF REVIEW

Contrary to Defendants' suggestion, the *de novo* standard of review — ***not*** abuse of discretion — applies to whether GAP's forum bylaw is invalid or unenforceable because it violates the Exchange Act. *See Richards v. Lloyd's*

*of London*, 135 F.3d 1289, 1292 (9th Cir. 1998) (*en banc*) ("Whether the securities laws void the choice clauses is a question of law that we review *de novo*."); *Seafarers*, 2022 U.S. App. LEXIS 554, at **5–6 ("Boeing's forum bylaw presents only questions f law, which we ordinarily review *de novo*.").

Indeed, at issue on appeal is whether the district court misconstrued the Exchange Act and misinterpreted this Court's precedent in enforcing GAP's forum bylaw as to Plaintiff's § 14(a) claim— quintessential questions of law that this Court reviews *de novo*. *See Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997) ("The district court's interpretation of a statute is a question of law which we review *de novo*."); *Truesdell v. S. Cal. Permanente Med. Grp.*, 293 F.3d 1146, 1151 (9th Cir. 2002) ("A district court necessarily abuses its discretion when it makes an error of law.").

## ARGUMENT

### I. Enforcement of the Forum Selection Clause as to Plaintiff's Derivative § 14(a) Claim Violates the Exchange Act

Defendants do not dispute that a forum selection clause is unenforceable if "enforcement would contravene a strong public policy of the forum in which suit is brought … ***declared by statute***." *See The Bremen*

*v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *see also Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 916 (9th Cir. 2019) (reversing and remanding where enforcement of the clause would violate Idaho's anti-waiver statute).

Here, the relevant federal statutes are: (1) Section 27(a) of the Exchange Act, which vests federal courts with exclusive jurisdiction over the Exchange Act claims (*see* 15 U.S.C. § 78aa(a)); and (2) Section 29(a) of the Exchange Act, which voids "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of [the Exchange Act]" (*see* 15 U.S.C. § 78cc(a)). As the Seventh Circuit recently held, in reversing the only other outlier decision to enforce a similar forum bylaw to a derivative § 14(a) claim:

> Because the federal Exchange Act gives federal courts exclusive jurisdiction over actions under it, applying the bylaw to this case would mean that plaintiff's derivative Section 14(a) action may not be heard in any forum. ***That result would be contrary to Delaware corporation law, which respects the non-waiver provision in Section 29(a) of the federal Exchange Act***, 15 U.S.C. § 78cc(a).
>
> . . .
>
> If it can be applied to this case, the bylaw will force plaintiff to raise its claims in a Delaware state court, which is not authorized

> to exercise jurisdiction over Exchange Act claims. 15 U.S.C. § 78aa; *Cottrell v. Duke*, 737 F.3d 1238, 1247–48 (8th Cir. 2013). If that's correct, checkmate for defendants. ***That result would be difficult to reconcile with Section 29(a) of the Exchange Act, which deems void contractual waivers of compliance with the requirements of the Act.*** 15 U.S.C. § 78cc(a).

*Seafarers*, 2022 U.S. App. LEXIS 554, at **2, 8.

Although the Seventh Circuit framed its discussion in terms of *Delaware corporate law*, it necessarily had to first resolve that enforcement of the bylaw to plaintiff's derivative § 14(a) violates *federal law* before it could conclude that it also violates Del. Gen. Corp. Law § 115. *See Seafarers*, 2022 U.S. App. LEXIS 554, at *6 ("The most straightforward resolution of this appeal is under Delaware corporation law, which we read as barring application of the Boeing forum bylaw to this case invoking non-waivable rights under the federal Exchange Act."); *id.* at *9 ("As applied here, Boeing's forum bylaw violates Section 115 because it is inconsistent with the jurisdictional requirements of the Exchange Act of 1934.").

This Court can, but need not, follow the same framework as applied by the Seventh Circuit. Instead, the Court can simply analyze the validity and enforceability of GAP's forum bylaw *as a matter of federal law*. As

discussed above and further below, regardless of the framework applied, GAP's forum bylaw is unenforceable under federal law because it is contrary to both Section 27(a) and Section 29(a) of the Exchange Act.

### A. Where the Public Policy Is Already Expressed in a Duly-Enacted Statute, There Is No Need for Any *Additional* Statutory Language Confirming Such Public Policy

Defendants fail to offer *any* cogent reason for this Court to disregard the Exchange Act's plain statutory text. Instead, they seem to suggest that it is not sufficient for Congress to say that compliance with the Exchange Act cannot be waived. According to Defendants, Congress must go a step further and say that such a waiver would be against public policy. This argument misconstrues *Bremen* and *Gemini Technologies* and denigrates a validly-enacted Congressional statute. As discussed in the opening brief (and largely conceded by Defendants),[2] Congress ***made a public policy decision*** to grant federal courts "exclusive jurisdiction" over all actions brought to enforce any liability or duty under the Exchange Act. *See* 15

[2] *See, e.g.*, AB at 27–28 (conceding that "[t]he exclusive jurisdiction provision reflects a public policy of prohibiting adjudication of Exchange Act claims in state court").

U.S.C. § 78aa(a). It did so "motivated by a desire to achieve greater uniformity of construction and more effective and expert application of that law." *See Murphy v. Gallagher*, 761 F.2d 878, 885 (2d Cir. 1985); *see also Cottrell v. Duke*, 737 F.3d 1238, 1246 (8th Cir. 2013) ("Congress grants exclusive federal jurisdiction in order to cultivate uniformity and expertise, and sometimes to ensure the use of more liberal federal procedural protections."). Indeed, Congress "deliberately decided to vest federal courts with exclusive jurisdiction to adjudicate [Exchange Act] claims, *claims that frequently arise in the derivative setting*." *See Cottrell*, 737 F.3d at 1248.

Not only did Congress vest federal courts with exclusive jurisdiction, it went further and expressly provided that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance ***with any provision*** of [the Exchange Act]" "shall be void." *See* 15 U.S.C. § 78cc(a). Section 27(a), which provides federal courts with exclusive jurisdiction over the Exchange Act claims, ***is*** a "provision" of the Exchange Act — indeed, a crucial provision. *See, e.g.*, *Murphy*, 761 F.2d at 885; *Cottrell*, 737 F.3d at 1248. Thus, under plain language of Section 29(a), any

contractual provision that purports to waive compliance with Section 27(a) — such as GAP's forum bylaw — "shall be void." *See* 15 U.S.C. § 78cc(a).

The Exchange Act's anti-waiver provision is similarly woven into federal public policy. As the Seventh Circuit cogently observed:

> ***Non-waiver is woven into the public policy of the federal securities laws because it is the express statutory law.***

*Seafarers*, 2022 U.S. App. LEXIS 554, at *26. In light of the express Congressional statute providing federal courts with exclusive jurisdiction over the Exchange Act claims *and* providing that such exclusive jurisdiction *cannot be waived*, GAP's forum bylaw is unenforceable as to Plaintiff's derivative § 14(a) claim because it "would contravene a strong public policy of the [federal courts] … ***declared by statute***." *See Bremen*, 407 U.S. at 15; *see also Gemini Techs.*, 931 F.3d at 916 (reversing and remanding where enforcement of the clause would violate Idaho's anti-waiver statute).

### B. Enforcement of GAP's Forum Selection Clause *Would* Result in an Impermissible Waiver of Exclusive Jurisdiction

Defendants' attack on the Exchange Act's exclusive jurisdiction provision does not fare any better. Remarkably, Defendants argue that there

is no waiver of compliance with Section 27(a) because enforcement of GAP's forum bylaw does not require the adjudication of Plaintiff's § 14(a) claim in state court but, rather, would completely prevent Plaintiff from adjudicating her derivative § 14(a) claim ***in any forum***. *See* AB at 27–28. But the actual act of depriving Plaintiff of her ability to prosecute her derivative § 14(a) claim in federal court ***is*** an impermissible waiver of exclusive jurisdiction under the Exchange Act — in direct contravention of Section 29(a).

As the Seventh Circuit observed, applying the forum bylaw in this case "is contrary to Delaware corporation law ***and federal securities law***" because it "would mean that plaintiff's derivative Section 14(a) action may not be heard in any forum." *See* 2022 U.S. App. LEXIS 554, at **2, 4. Simply put, neither Delaware law nor federal law permit GAP to essentially "opt out of the Exchange Act" by completely depriving shareholders of *any* forum in which to prosecute derivative Exchange Act claims. *See id.* at *4 ("Delaware corporation law … respects federal securities law and does not empower corporations to use such techniques to opt out of the Exchange Act.").

In this regard, it is irrelevant whether Plaintiff may still be able to

prosecute a *direct* § 14(a) claim in federal court. *See* AB at 32–33 & n.13. As Defendants are well aware (but fail to discuss), Delaware law applies rigid rules for determining whether particular harm is "direct" or "derivative." *See Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (the determination of whether a stockholder's claim is direct or derivative "must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?") (emphasis in original).

Here, Plaintiff alleges that GAP's proxy statements contained false and misleading statements regarding the Company's commitments to diversity and failed to disclose the Company's discriminatory hiring and compensation practices. Plaintiff alleges that as a result of this conduct, the Company has incurred and will continue to incur substantial costs related to remediating the harm done to the Company as well as costs incurred as a result of unjust compensation and benefits paid to Defendants who have breached their fiduciary duties to the Company. *See, e.g.*, ER120–121

(¶¶ 172–175). Because the alleged harm was suffered ***by the Company*** (as opposed to shareholders individually), it is very unlikely that Plaintiff can litigate any direct § 14(a) claim premised on the alleged wrongdoing.

* * *

As the Supreme Court has recognized, "[t]he purpose of § 14 (a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *J. I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964). "The injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from ***the damage done the corporation***, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced ***on the stockholders as a group***." *Id.* at 432. In *Borak*, the Supreme Court recognized that shareholders have a private right of action to prosecute both a direct *and a derivative claim* for violation of § 14(a). *Id.* at 431–32. Allowing GAP to enforce its unilaterally-enacted forum bylaw to completely deprive shareholders of their ability to prosecute derivative

§ 14(a) claims ***in any forum*** thus violates the public policy of the forum as expressed in the Exchange Act and Supreme Court's decision recognizing shareholders' private right of action to bring a derivative § 14(a) claim.

## II. Defendants' Reliance on *Richards* and *Sun* Is Woefully Deficient as Those Cases Are Not Applicable by Their Own Facts

Defendants grasp at straws by relying on *Richards*, 135 F.3d 1289, and *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018), as purportedly authorizing the waiver of Plaintiff's unwaivable rights under the Exchange Act. As detailed in the opening brief (AOB at 19–25), neither decision comes close to authorizing the enforcement of GAP's forum bylaw to completely deprive Plaintiff of her ability to prosecute her derivative § 14(a) claim. *See also Seafarers*, 2022 U.S. App. LEXIS 554, at **19–28.

### A. *Richards*

With regard to *Richards*, that decision arose in the context of related Lloyd's of London litigation that has resulted in a number of decisions.[3] In

[3] *See Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Haynsworth v. The Corporation*, 121 F.3d 956 (5th Cir. 1997); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996);

enforcing the forum selection clause in *Richards* even though it might result in the waiver of the Names' claims under federal securities laws, this Court relied heavily on case law dealing with enforcement of forum selection clauses *in international agreements* and repeatedly emphasized that principles of *international comity* were at play. *See* 135 F.3d at 1291–95; AOB at 19–23.

In this regard, the Seventh Circuit's analysis in *Seafarers* is instructive. In *Seafarers*, defendants (similar to Defendants in this case) argued that the Seventh Circuit's prior decision in *Bonny*, 3 F.3d 156 (which arose from the Lloyd's of London litigation) allowed enforcement of the forum selection clause even if it would result in a waiver of the plaintiff's derivative § 14(a) claim because Delaware law provided for adequate alternative remedies. The Seventh Circuit rejected that argument, observing that the result in *Bonny* was driven by the international nature of the transactions at issue and the need for comity in enforcing international agreements:

> Defendants argue that we should extend the same analysis—focused on the sufficiency of remedies under state law—to enforce Boeing's forum bylaw here. ***That argument overlooks the decisive role that the international character of***

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*Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (11th Cir. 1998).

> ***the dispute played in* Bonny.** The English remedies were deemed sufficient only in light of the international nature of the investment agreements … .
>
> There is no hint in *Bonny* that the same logic and result would apply to a domestic transaction's forum-selection clause that had the effect of waiving federal securities rights and remedies and leaving the investor to only state-law remedies. To the contrary, ***extending Bonny to domestic investments and state-law remedies would undermine the pivotal decisions by Congress in 1933 and 1934 to assume the dominant role in securities regulation after decades of ineffective state regulation.*** Both federal Acts contain anti-waiver provisions that prevent parties from opting out of the federal laws in favor of state law, no matter how similar or strong the state-law rights and remedies are. *See* 15 U.S.C. §§ 77n & 78cc(a).

2022 U.S. App. LEXIS 554, at **25–26.

The same is true here. The "primary question" that this Court was addressing in *Richards* is "whether the antiwaiver provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 void choice of law and choice of forum clauses ***in an international transaction***." 135 F.3d at 1291. There is no hint in *Richards* that the same logic and result would apply to a domestic transaction's forum selection clause that had the effect of waiving federal securities rights and remedies and leaving the investor to only state-law remedies. *See Seafarers*, 2022 U.S. App. LEXIS 554, at **25–26. To the

contrary, just as in *Seafarers*, extending *Richards* to domestic investments and state-law remedies "would undermine the pivotal decisions by Congress in the Exchange Act to assume the dominant role in securities regulation after decades of ineffective state regulation." *See id.* at *26.

As the Seventh Circuit observed, as applied to Plaintiff's derivative § 14(a) claim, GAP's forum selection clause "does ***not*** implicate the unique needs of international trade or require [the Court] to parse the similarities and differences between foreign and domestic securities laws." *See id.* at *26. Contrary to Defendants' misplaced arguments:

> The anti-waiver provision of Section 29(a) does ***not*** invite a determination of whether state law offers alternative remedies that might be deemed sufficient against an inchoate standard. ***Non-waiver is woven into the public policy of the federal securities laws because it is the express statutory law.*** And that law is binding — especially where, as here, there are no countervailing international policy interests at stake.

*See id.*

At the end of the day, *Richards* and the other decisions from the related Lloyd's of London litigation "required a choice between United States law and policy and foreign law and policy." *See id.* at *27. Here, there is "no

comparable tension between federal law and policy and Delaware state law and policy." *Id.* After all, under the Supremacy Clause, state courts are required to enforce and apply federal law. *See* U.S. CONST. art. VI. For all of these reasons, the Magistrate Judge erred in relying on *Richards* to enforce GAP's forum bylaw where doing so resulted in an impermissible waiver of Plaintiff's derivative § 14(a) claim in violation of the Exchange Act.

**B. *Sun***

Defendants' reliance on *Sun* similarly misses the mark. To begin with, *Sun* did ***not*** involve the Exchange Act's anti-waiver provision and, thus, does not stand for the proposition that the Court must enforce a forum selection clause in a domestic context where such enforcement would be contrary to the Exchange Act's anti-waiver provision. *See Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("unstated assumptions on non-litigated issues are not precedential holdings binding future decisions"); *see also People v. Knoller*, 41 Cal. 4th 139, 155 (2007) ("An appellate decision is not authority for everything said in the court's opinion but only

for the points actually involved and actually decided.").[4]

More importantly, in *Sun*, the enforcement of the clause did ***not*** result in the waiver of any substantive rights because the court conditioned the dismissal on the requirement that defendant "could not argue that California securities laws do not apply to the disputed transaction" *and* defendants also "committed to refraining from raising any argument" that Washington securities laws were inapplicable in California. *See* 901 F.3d at 1085–86, 1092. That is not the case here, and enforcement of GAP's forum bylaw ***would*** extinguish Plaintiff's derivative § 14(a) claim. *See* ER8 (acknowledging that enforcement of the bylaw would result in Plaintiff's inability to bring the claim in any forum); AB at 4, 27–28 (same). As the Seventh Circuit observed, such a result would be contrary to both Delaware corporate law and federal securities law. *See Seafarers*, 2022 U.S. App. LEXIS 554, at **4, 8.

[4] Defendants' reliance on *Huffington v. T.C. Grp.*, 637 F.3d 18 (1st Cir. 2011), is misplaced as that case also involved a *state* (not federal) anti-waiver provision. *See id.* at 25. Moreover, in referencing the "chorus of authority" holding that anti-waiver provisions may not always render forum selection clauses unenforceable (*id.*), the First Circuit was referring to the same line of Lloyd's of London cases as discussed above, which, again, concerned issues of *international comity* that are simply not present in this case.

* * *

In sum, the decision in *Richards* and in related Lloyd's of London litigation involved issues of international comity and the need to balance United States law and policy and foreign law and policy — issues that are simply *not* present in this case. *See* 2022 U.S. App. LEXIS 554, at **25–27.[5] Defendants' reliance on *Sun* is similarly misplaced given that *Sun* did not involve the Exchange Act's anti-waiver provision and, in any event, did not result in any waiver of substantive rights.[6]

For all the foregoing reasons, the Magistrate Judge erred as a matter of law in relying upon this Court's inapposite decisions in *Richards* and *Sun* to excuse compliance with the Exchange Act's non-waivable requirements.

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[5] As the Seventh Circuit observed, the decisions stemming from the Lloyd's of London litigation are also generally consistent with the Supreme Court's later decision in *Morrison v. Nat'l Austl. Bank Ltd.*, which limited extraterritorial application of United States securities laws. *See* 561 U.S. 247, 255 (2010). Here, there are no issues of extraterritorial application of federal securities laws because the alternative forum is in Delaware and, under the Supremacy Clause, federal law is the supreme law. *See* U.S. CONST. art. VI.

[6] Defendants' reliance on *Lewis v. Liberty Mut. Ins. Co.*, 953 F.3d 1160 (9th Cir. 2020), similarly misses the mark. Just like *Sun* and *Huffington*, *Lewis* did ***not*** involve the Exchange Act's anti-waiver provision. *Id.* at 1167.

## III. The Exchange Act's Anti-Waiver Provision Voids GAP's Forum-Selection Clause to the Extent It Requires the Dismissal and, Thus, Waiver of Plaintiff's Derivative Section 14(a) Claim

In addition to being *unenforceable* under *Bremen* and *Gemini Technologies*, the forum selection clause in this case is also void *ab initio* to the extent that it purports to extinguish Plaintiff's derivative § 14(a) claim.[7]

The Exchange Act contains a strict anti-waiver provision that voids "***any***" condition or provision "binding any person to waive compliance with any provision of [the Exchange Act] or of any rule or regulation thereunder." 15 U.S.C. § 78cc(a). Here, to the extent that GAP's forum bylaw authorizes

[7] There is no merit to Defendants' suggestion that this argument is waived. This argument was raised in Plaintiff's opposition to Defendants' motion to dismiss. *See Lee v. Fisher*, Case No. 20-cv-6163-SK, Dkt. No. 52 at 27–28 (N.D. Cal. Feb. 8, 2021) (arguing that the Exchange Act voids any provision that seeks to waive compliance with the Exchange Act). It was also raised at oral argument. *See* ER16:20–23 (arguing that "the anti-waiver provision[] … precludes this Court from dismissing the 14(a) claim[]"). The argument was also adequately presented on appeal. *See, e.g.*, AOB at 3, 12, 28–29. If anything, it is Defendants' argument *against* voidability that is waived or forfeited because it is presented in a single sentence and one cursory footnote. *See* AB at 22, 38 n.16; *see also In re Estate of Saunders*, 745 F.3d 953, 962 n.8 (9th Cir. 2014) (arguments raised only in footnotes "are generally deemed waived"); *Stetco v. Holder*, 498 F. App'x 677, 679 (9th Cir. 2012) (argument raised in a footnote in an answering brief was waived).

the complete extinguishment of Plaintiff's derivative § 14(a) claim, it amounts to an impermissible waiver under Section 29(a) of the Exchange Act and, thus, is void. *See, e.g.*, *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) ("were we persuaded that the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies, we would have little hesitation in condemning the agreement as against public policy"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985) ("We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.").

In *Seafarers*, the Seventh Circuit held that neither *Bremen* nor any other Supreme Court precedent "endorsed such clauses as paths to avoid otherwise applicable federal statutes." *See* 2022 U.S. App. LEXIS 554, at *21. On the contrary, the Seventh Circuit cited to *Mitsubishi Motors* for the proposition that a forum selection clause that seeks to "foreclose entirely

plaintiff's derivative Section 14(a) claim" would be "against public policy." *See id.* at **22–23 (citing *Mitsubishi Motors*, 473 U.S. at 637 n.19).

Arguing the contrary, Defendants argue that the U.S. Supreme Court in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), held that "compliance" under Section 29(a) does not apply to waiver of exclusive jurisdiction under Section 27(a) because this is not a "substantive obligation" imposed by the Exchange Act. *See* AB at 31–32. This argument misapprehends the Supreme Court's holding in *McMahon*.

To begin with, *McMahon* concerned the enforceability of a predispute *arbitration agreement*, not forum selection clause. 482 U.S. at 222. In that context, it required the Court to reconcile the public policy underlying two competing statutes — the Federal Arbitration Act and the Exchange Act. *See id.* at 225–26. Here, there is no competing statute that the Court must reconcile; rather, the Exchange Act is the *only* public policy at issue.

More importantly, in finding that "compliance" with the predispute arbitration agreement in that case would not violate Section 29(a), the Court specifically observed that enforcement of the arbitration agreement ***would***

***preserve the plaintiffs' ability to prosecute the Exchange Act claims in arbitration***. *See id.* at 229 ("where arbitration does provide an adequate means of enforcing the provisions of the Exchange Act, § 29(a) does not void a predispute waiver of § 27"); *id.* at 238 ("In this case, where the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, enforcement does not effect a waiver of 'compliance with any provision' of the Exchange Act under § 29(a).").

In contrast, here, enforcement of GAP's forum bylaw does ***not*** preserve Plaintiff's ability to prosecute her derivative § 14(a) claim. Instead, as the Magistrate Judge acknowledged, enforcement of the forum bylaw means that Plaintiff cannot bring the claim in ***any*** forum. *See* ER8. Accordingly, unlike in *McMahon*, enforcement of the forum bylaw in this case does violate Section 29(a) of the Exchange Act because it would waive "compliance" with the Exchange Act by completely extinguishing Plaintiff's derivative § 14(a) claim. *See* 2022 U.S. App. LEXIS 554, at *8.

In sum, whether analyzed under the *Bremen* framework or separately under the Exchange Act's anti-waiver provision, enforcement of GAP's

forum bylaw as to Plaintiff's § 14(a) claim would be against public policy.

## IV. The Forum Bylaw Is Also Invalid Under Delaware Law

In addition to being unenforceable under *Bremen* and void under Section 29(a) of the Exchange Act, GAP's forum bylaw is also invalid under Delaware law.[8] Arguing the contrary, Defendants rely on the Delaware Court of Chancery's decision in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013). *See* AB at 24–25. But as the Seventh Circuit held in *Seafarers*, "the reasoning of *Boilermakers Fund* does ***not*** authorize application of [such] forum bylaw to this case, where it would effectively foreclose a claim under federal securities law." *See* 2022 U.S. App. LEXIS 554, at *18. On the contrary, if anything, Chancellor Strine's decision in *Boilermakers* "made clear that enforcement of a forum bylaw to foreclose a plaintiff from exercising her rights under the Exchange Act of 1934 would be inconsistent with the anti-waiver provision of that Act." *See id.*

[8] As Defendants acknowledge (*see* AB at 28–29), Plaintiff preserved this issue by raising it in the opening brief. *See* AOB at 14–16. It was also addressed in the court below. *See Lee v. Fisher*, Case No. 20-cv-6163-SK, Dkt. No. 52 at 27 (N.D. Cal. Feb. 8, 2021).

In *Seafarers*, the Seventh Circuit found instructive the same hypothetical discussion from *Boilermakers* that Plaintiff highlighted in her opening brief. *Compare Seafarers*, 2022 U.S. App. LEXIS 554, at **16–19 (finding that *Boilermakers* "provided important guidance for this case" and proceeding to discuss the hypothetical analyzed by Chancellor Strine); *with* AOB at 15–16 (analyzing the same hypothetical). Defendants' only response is to baselessly argue that this "misrepresents" *Boilermakers*. *See* AB at 30. Not so. Although the hypothetical situation analyzed in *Boilermakers* is not part of the court's holding, as the Seventh Circuit acknowledged, it nonetheless provides "important guidance" for this case by demonstrating how Delaware courts would treat a forum bylaw that impermissibly attempts to extinguish claims subject to federal courts' exclusive jurisdiction. *See Seafarers*, 2022 U.S. App. LEXIS 554, at *16.

As Chancellor Strine observed, defendants attempting to dismiss a derivative § 14(a) claim on the basis of a forum bylaw that designated Delaware Court of Chancery as the exclusive forum "would have trouble" because plaintiff would be able to argue that such application of the forum

bylaw would result in the waiver of plaintiff's claim and "***such a waiver would be inconsistent with the antiwaiver provisions of [the Exchange Act]***." *See Boilermakers*, 73 A.3d at 962. Chancellor Strine's observation thus "signals clearly enough that Delaware law would not look kindly on defendants' effort to apply" GAP's forum bylaw to Plaintiff's derivative § 14(a) claim in this case. *See Seafarers*, 2022 U.S. App. LEXIS 554, at *18.

## V. This Court Should Not Reach the Numerous Alternative Grounds for Affirmance Advanced by Defendants

Understandably realizing the inherent weakness of their arguments on the merits of Plaintiff's appeal, Defendants devote *the majority* of their argument section to advancing a plethora of "alternative grounds" for affirmance. *See* AB at 39–59. Because these arguments are beyond the scope of this appeal and Defendants have failed to present any valid justification for considering them, the Court should decline to reach them.

### A. The Court Should Decline to Consider Alternative Grounds That Were Not Considered by the District Court

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106,

120 (1976); *accord Planned Parenthood of Greater Wash. v. United States HHS*, 946 F.3d 1100, 1110 (9th Cir. 2020). Here, the court granted Defendants' motion to dismiss on the basis of *forum non conveniens* and did ***not*** reach demand futility or the merits of the § 14(a) claim. ER4–12. Because these issues were not considered by the district court, the Court should decline to consider them in the first instance. *See, e.g.*, *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428, 437 n.8 (9th Cir. 2018) (declining to reach alternative grounds where they were not considered by the district court); *Cent. Freight Lines, Inc. v. Amazon Fulfillment Servs.*, 861 F. App'x 154, 157 (9th Cir. 2021) (same); *Gilbertson v. Albright*, 350 F.3d 1030, 1034 (9th Cir. 2003) (same); *Fed. Deposit Ins. Corp. v. Nichols*, 885 F.2d 633, 638 (9th Cir. 1989) (same); *Davis v. U.S. Dep't of Housing & Urban Dev.*, 627 F.2d 942, 945 (9th Cir. 1980) (same).

That's particularly true because Defendants are asking this Court to opine in the first instance on the issue of demand futility, which (as Defendants concede) is an inherently *factual* issue requiring the court to go director-by-director and claim-by-claim in determining whether, under the particular facts of this case, a demand on the board of directors would be

futile and, thus, excused. *See* AB at 42. Indeed, this Court reviews for abuse of discretion an order granting or denying a motion to dismiss on the basis of demand futility. *See Rosenbloom v. Pyott*, 765 F.3d 1137, 1147 (9th Cir. 2014). Because the district court never had an opportunity to pass upon this issue, if the Court concludes that the district court erred in enforcing the forum bylaw, the proper course is to remand for the district court to consider demand futility in the first instance. *See Hawkins v. Kroger Co.*, 906 F.3d 763, 773 n.11 (9th Cir. 2018) (alternative grounds for affirmance that were not considered by the district court and involve factual issues "are best presented to the district court in the first instance on remand"); *Winter v. United States*, 244 F.3d 1088, 1092 (9th Cir. 2001) (same); *Greater L.A. Council on Deafness v. Zolin*, 812 F.2d 1103, 1107 & n.5 (9th Cir. 1987) (same).

Although several exceptions to the rule exist, they are strictly confined. *See Planned Parenthood of Greater Wash.*, 946 F.3d at 1110–11. Here, beyond a cursory statement that this Court *can* consider alternative grounds for affirmance (*see* AB at 40), Defendants fail to offer any cogent reason why *in this case* such exercise of discretion is appropriate. On these facts, the Court

should decline to consider Defendants' alternative grounds in the first instance. *See Planned Parenthood of Greater Wash.*, 946 F.3d at 1111 ("A district court is usually best positioned to apply the law to the record."); *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1095 (9th Cir. 2014) ("While the record in this case is fully developed, and Davis pressed her unconscionability argument before the district court and did so again here, the resolution of the issue is not clear, and for that reason we decline to exercise our discretion to address the unconscionabil[i]ty question in the first instance.").

### B. Because Defendants Did Not Cross-Appeal, They Are Not Entitled to Greater Relief on Appeal

It is well-settled that without a cross-appeal, an appellee "may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999); *see also Greenlaw v. United States*, 554 U.S. 237, 244–45 (2008) ("it takes a cross-appeal to justify a remedy in favor of an appellee"). The Supreme Court has observed that this rule is "inveterate and certain" (*see El Paso*, 526 U.S. at 479) and is necessary to protect "the institutional interests in fair notice and repose." *Id.* at 480.

Here, Defendants are asking this Court to rule in the first instance on the issue of demand futility and to essentially dismiss all of Plaintiff's claims ***with prejudice***. This request (dismissal with prejudice) is substantially broader than what Defendants obtained in the court below (dismissal without prejudice on the basis of *forum non conveniens*). Under the judgment as entered by the district court, Plaintiff is free to refile her state-law claims in Delaware without any issues of *res judicata*. On the other hand, if this Court reaches Defendants' alternative grounds for affirmance and, for example, concludes that Plaintiff did not adequately plead demand futility, such a ruling would preclude Plaintiff from refiling any of her state-law claims in Delaware. *See, e.g.*, *Arduini v. Hart*, 774 F.3d 622 (9th Cir. 2014) (issue preclusion bars relitigation of demand futility).

Because Defendants are asking for substantially greater relief than what they received in the court below, they were required to file a cross-appeal. *See El Paso*, 526 U.S. at 479; *Greenlaw*, 554 U.S. at 244–45. They failed to do so, and the Court should not reach these issues.

In addition, permitting Defendants to raise these issues for the first

time in the answering brief would also unfairly prejudice Plaintiff due to lack of notice. Because Defendants did not file a cross-appeal, Plaintiff had no notice that Defendants intend to address these arguments on appeal. As a result, Plaintiff's opening brief focused solely on the issues identified in Plaintiff's notice of appeal and the issues on which the district court ruled.

Thus, among other things, Plaintiff's opening brief did ***not*** set forth all of the facts necessary to address demand futility and the merits of the § 14(a) claim. In Plaintiff's opposition brief to the motion to dismiss filed in the district court, the relevant fact section spanned 11 pages — or 4,103 words. *See Lee v. Fisher*, Case No. 20-cv-6163-SK, Dkt. No. 52 at 3–13 (N.D. Cal. Feb. 8, 2021). Nor did Plaintiff have an opportunity to address in the opening brief why the complaint in this case adequately pleads demand futility or why Plaintiff's § 14(a) claim is well-pleaded. In the court below, the relevant argument section on demand futility totaled 12.5 pages (5,065 words) (*see id.* at 14–26) and the relevant argument section on the merits of § 14(a) claim consisted of 4 pages (1,488 words) (*see id.* at 31–34).

In sum, due to Defendants' failure to file a cross-appeal and put

Plaintiff on notice that Defendants intend to raise these alternative grounds in their answering brief, Plaintiff had no reason to address these issues in the opening brief and, thus, would need to devote nearly ***10,000 words*** to adequately address those issues for the first time on reply. Given that the reply brief is limited to ***7,000 words*** (*see* 9th Cir. R. 32-1(b)), it would be prejudicial to force Plaintiff to address these issues in a truncated format for the first time on reply, which weighs heavily against this Court exercising its discretion to reach the alternative grounds. *See, e.g.*, *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 689–90 (9th Cir. 2011) (observing that the appellee's failure to file a cross-petition "and election to raise an issue only in its answering brief disadvantages appellants, who are unable to anticipate presciently and to address adequately the issue in their opening brief").

* * *

For all these reasons, the Court should decline to reach Defendants' alternative grounds for affirmance. Notably, even if the Court were to reach these grounds, any dismissal of Plaintiff's claims would need to be with leave to amend. *See* FED. R. CIV. P. 15(a)(2) ("The court should freely give

leave when justice so requires."); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) ("this policy is to be applied with extreme liberality"); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (absent prejudice, or a strong showing of any of other factors, "there exists a presumption under Rule 15(a) in favor of granting leave to amend").

It would be an unnecessary expenditure of this Court's limited resources to adjudicate the myriad of alternative grounds raised by Defendants only to send the case back to the district court with instructions to grant leave to amend. Accordingly, if the Court concludes that the district court erred in enforcing GAP's forum bylaw as to Plaintiff's derivative § 14(a) claim, it should reverse and remand, and allow the district court to address in the first instance Defendants' alternative grounds.

## CONCLUSION

For all these reasons and the reasons sets forth in Appellant's Opening Brief, the Court should reverse and remand for further proceedings.

/ / /

/ / /

Dated: February 4, 2022

Respectfully submitted,

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# CERTIFICATE OF COMPLIANCE

## Form 8. Certificate of Compliance for Briefs

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**9th Cir. Case Number(s)** 21-15923

I am the attorney or self-represented party.

**This brief contains** 6,797 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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**CERTIFICATE OF SERVICE**

I certify that, on February 4, 2022, I caused the foregoing Appellant's Reply Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of February 2022, at La Jolla, California.

*s/ Yury A. Kolesnikov*
Yury A. Kolesnikov