2020 WL 6035988 (C.A.7) (Appellate Brief)
United States Court of Appeals, Seventh Circuit.

SEAFARERS PENSION PLAN, Plaintiff-Appellant,
v.
Robert A. BRADWAY, et al., Defendants-Appellees,
and
The Boeing Company, Nominal Defendant-Appellee.

No. 20-2244.
September 30, 2020.

On Appeal from the United States District Court for the Northern District of Illinois the Honorable Harry D. Leinenweber, Judge Case No. 1:19-cv-8095

Brief for the Appellees

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1** ***Jurisdictional Statement

Appellant's jurisdictional statement is complete and correct.

Statement Of The Issue

Does it offend public policy for a corporation and its shareholders to agree, pursuant to a corporate bylaw, that any claims pursued by a shareholder derivatively on the corporation's behalf must be pursued in the courts of the state where the corporation is incorporated?

Statement Of The Case

This is a shareholder derivative action brought by a putative shareholder of The Boeing Company, purportedly on Boeing's behalf, against current and former directors of Boeing in the aftermath of two tragic accidents involving Boeing's 737 MAX aircraft. Years before these events, Boeing had adopted a corporate bylaw providing, in relevant part, that "the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation." (Pl. Br. 3-4) Multiple shareholders besides Plaintiff have filed derivative actions regarding the 737 MAX accidents, and consistent with this bylaw, nearly all filed their suits in the Delaware Court of Chancery. [1]

Seafarers Pension Plan, the plaintiff here, ignored the forum selection bylaw and filed its derivative action in federal court, asserting claims under § 14(a) of the ***2** Securities Exchange Act of 1934 and Delaware law. (Pl. Br. 7) [2] Plaintiff's complaint alleges that Defendants solicited proxies from Boeing shareholders using materials that "withheld material information" about Boeing's "corporate culture" and the 737 MAX. (*Id*. at 6)

The district court granted Defendants' motion to dismiss for *forum non conveniens*, based on the forum selection bylaw. The court held that the bylaw is valid and enforceable as applied to Plaintiff's derivative § 14(a) claim. The court rejected Plaintiff's assertion that applying the bylaw to its § 14(a) claim violated public policy by depriving it of a substantive right to bring such a claim. Rather, correctly applying this Court's decision in *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), the district court explained, "Delaware law permits shareholders to bring a derivative claim against their corporate directors for failing 'to disclose fully and fairly all material information within the board's control when it seeks shareholder action." (SA7) The court held: "This is precisely what Plaintiff complains here." (*Id*.)

Plaintiff argues that Boeing's forum selection provision violates public policy by requiring all shareholder derivative actions to be filed in state court, where claims under the Securities Exchange Act cannot be brought. However, the district court correctly recognized that, under Delaware law, corporate bylaws constitute a binding contract between the corporation and its shareholders. *See*, *e.g.*, *ATP Tour v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014). And controlling precedent is ***3** clear that a contractual forum selection provision like Boeing's bylaw does not violate public policy. *See Bonny*, 3 F.3d at 160-62. Accordingly, the district court's decision should be affirmed.

Summary Of Argument

I. The district court did not abuse its discretion by deciding that the application of Boeing's bylaw to Plaintiff's § 14(a) claim does not violate federal public policy. Under Delaware law, corporate bylaws constitute a binding contract between a corporation and its shareholders. Accordingly, forum selection bylaws are subject to the Supreme Court's instruction that contractual forum selection provisions "[should be] given controlling weight in all but the most exceptional cases." *Atlantic Marine Constr. v. U.S. Dist. Court*, 571 U.S. 49, 60 (2013).

Plaintiff argues that a forum selection provision that requires all shareholder derivative actions to be filed in state court, where claims under the Securities Exchange Act cannot be brought, violates federal public policy. But this Court rejected that argument in *Bonny*, in which it enforced a forum selection provision that specified a forum where the plaintiffs' Exchange Act claim could not be brought, even though the result of its decision was that the plaintiffs could not bring their claims under the Exchange Act at all. *Bonny*, 3 F.3d at 161-62. The Court held that enforcing the provision did not violate public policy because remedies in the chosen forum "vindicate plaintiffs' substantive rights while not subverting the United States' policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors." *Id.* at 161.

***4** Here, the district court was well within its discretion to determine that Delaware law provides adequate remedies for the allegedly wrongful conduct. As a result, applying Boeing's forum selection bylaw to Plaintiff's § 14(a) claim does not violate public policy.

II. The Court should also reject Plaintiff's argument that applying Boeing's forum selection bylaw to Plaintiff's § 14(a) claim violates the Delaware General Corporation Law ("DGCL"). The Delaware Court of Chancery has already held that a bylaw with precisely the same words as Boeing's bylaw is authorized under § 109(b) of the DGCL. *Boilermakers Local 154 v. Chevron Corp.*, 73 A.3d 934, 951 (Del. Ch. 2013). Plaintiff's argument that the bylaw violates § 115 of the DGCL fails because § 109(b) provides a broader grant of authority to corporations than § 115, as the Delaware Supreme Court recently held. *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020). As a result, it is irrelevant whether Boeing's bylaw was authorized by § 115, because it is beyond dispute that it was authorized by § 109(b).

Standard Of Review

The district court's dismissal for *forum non conveniens* is reviewed for "clear abuse of discretion." *Mueller v. Apple Leisure Corp.*, 880 F.3d 890, 893 (7th Cir. 2018).

Argument

Plaintiff argues that applying Boeing's bylaw to its § 14(a) claim violates both federal public policy and Delaware law. Neither argument can succeed. As a result, this Court should hold that the district court did not abuse its discretion in dismissing for *forum non conveniens*, and should affirm the lower court's judgment. *See Atlantic Marine Constr. v. U.S. Dist. Court*, 571 U.S. 49, 60 (2013) ("[T]he appropriate way to ***5** enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens."); *Mueller*, 880 F.3d at 894 (same).

I. Boeing's Bylaw Is Enforceable Under Federal Law As Applied To Plaintiff's § 14(a) Claim.

Plaintiff's challenge to the enforcement of Boeing's forum selection bylaw as applied to its § 14(a) claim is foreclosed by controlling precedent. Under Delaware law, corporate bylaws "constitute a binding part of the contract between a Delaware corporation and its stockholders." *Boilermakers Local 154 v. Chevron Corp.*, 73 A.3d 934, 955-56 (Del. Ch. 2013); *see also ATP Tour v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014) (same). The Supreme Court has instructed that contractual forum selection provisions "[should be] given controlling weight in all but the most exceptional cases." *Atlantic Marine Constr.*, 571 U.S. at 63 (bracket in original).

"The presumptive validity of a forum selection clause can be overcome if the resisting party can show it is 'unreasonable under the circumstances.'" *Bonny v. Society of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993). But such clauses are unreasonable only "(1) if their incorporation into the contract was the result of fraud, undue influence or overweening bargaining power; (2) if the selection forum is so 'gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court'; or (3) if enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision." *Id*. (internal citations omitted; bracket in original).

On appeal, Plaintiff acknowledges that it does not pursue arguments under the first two exceptions, focusing only on the third: public policy. (Pl. Br. 12 n.8) ***6** However, Plaintiff's public policy argument is directly contrary to this Court's decision in *Bonny*, which enforced a forum selection provision even though the provision specified a forum in which federal securities claims could not be brought and therefore had the effect of foreclosing the plaintiffs' federal Exchange Act claim entirely. *See Bonny*, 3 F.3d at 161-62. In a decision in a parallel case argued the same day as *Bonny*, this Court held that "[i]t defies reason to suggest that a plaintiff may circumvent forum selection ... merely by stating claims under laws not recognized by the forum selected in the agreement." *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 211 (7th Cir. 1993) (quoting and endorsing *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993)).

Bonny enforced the parties' contractual forum selection provision, notwithstanding its effect of foreclosing the plaintiffs' federal securities claim, because the remedies available in the selected forum (in that case, the United Kingdom) were adequate to vindicate the plaintiffs' substantive rights protected by the federal securities laws. 3 F.3d at 161. The Court held: "In the present case, we are satisfied that several remedies in England vindicate plaintiffs' substantive rights while not subverting the United States' policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors." *Id. Bonny* reflects the consensus of the courts of appeals that have addressed the issue. *E.g.*, *Sun v. Advanced China Healthcare*, 901 F.3d 1081, 1088-90 (9th Cir. 2018); *Haynsworth v. The Corp.*, 121 F.3d 956, 967 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996); *Shell v. RW Sturge*, 55 F.3d 1227, 1229 (6th Cir. 1995); ***7** *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993); *Riley v. Kingsley Underwriting*, 969 F.2d 953, 956 (10th Cir. 1992). [3]

Here, Plaintiff seeks to assert a derivative claim on behalf of Boeing against Defendants for violating § 14(a) of the Securities Exchange Act, which "forbid [s] material misrepresentations or omissions in soliciting a shareholder's proxy vote." *Beck v. Dobrowski*, 559 F.3d 680, 681 (7th Cir. 2009). Under Delaware law, shareholders may assert a substantially similar cause of action against corporate directors for failing "to disclose fully and fairly all material information within the board's control when

it seeks shareholder action," including via a proxy statement. *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992). Therefore, Delaware law "vindicate[s] plaintiff['s] substantive rights," just as English law did in *Bonny*. It is immaterial whether the comparable Delaware cause of action matches precisely the burdens of proof or other contours of § 14(a). As *Bonny* noted, "[p]erhaps the United States' securities laws would provide plaintiffs with a greater chance of success under lighter scienter and causation requirements. However, enforcing the [forum selection] clauses here simply means that plaintiffs will have to structure their case differently ***8** than if they were proceeding in federal district court." *Bonny*, 3 F.3d at 162. [4]

Plaintiff argues that Delaware law is not similar to § 14(a) "because Section 14(a) claims cannot be directly asserted or disposed of in state court due to federal courts' exclusive jurisdiction over such claims." (Pl. Br. 26) But that argument does not address the *substantive* similarity between § 14(a) and Delaware law. Moreover, that was precisely the situation in *Bonny*; the plaintiffs in that case could not bring their Exchange Act claim in the courts of the United Kingdom. Even so, this Court rejected the argument that the forum selection provision there impermissibly "deprived [plaintiffs] of all substantive rights under the federal securities laws," 3 F.3d at 159, holding that there were other remedies available in the selected forum to vindicate the plaintiffs' disclosure claims. *Id*. at 161. The district court here was well within its discretion to determine that the same is true in this instance: Delaware law provides remedies for the supposed wrongful conduct - allegedly misleading proxy solicitations. *Supra* at 7.

Plaintiff does not contest that remedies for such alleged conduct, if proven, can be obtained under Delaware law. It asserts only the argument that "Delaware courts have long held that Delaware law is *not* an adequate substitute for the Exchange Act." (Pl. Br. 28, citing *Loudon v. Archer-Daniels-Midland*, 700 A.2d 135 (Del. 1997); ***9** *Arnold v. Society for Savings Bancorp*, 678 A.2d 533 (Del. 1996)) But the decisions Plaintiff cites explain only that Delaware law does not replicate *in its entirety* the federal scheme. The decisions say nothing about whether Delaware law offers a remedy for the specific allegedly wrongful conduct asserted here regarding proxy solicitations, and so do not refute the plain fact that Delaware law does offer such a remedy, as *Stroud* makes clear. *Supra* at 7. [5]

The availability of remedies under Delaware law is also a complete response to Plaintiff's argument that Boeing's bylaw "impermissibly and unilaterally eradicates [Boeing] shareholders' substantive rights to assert derivative federal claims under the Exchange Act." (Pl. Br. 13) Applying the bylaw to Plaintiff's claim does not eliminate any "substantive right" to pursue the allegation that Defendants issued false or misleading proxy solicitations. Rather, it simply has the effect of requiring Plaintiff to pursue that allegation under Delaware law. *See City of Providence v. First Citizens BancShares*, 99 A.3d 229, 237 (Del. Ch. 2014) ("The Forum Selection Bylaw plainly does not insulate the Board's approval of the proposed merger from judicial review."). Plaintiff conflates the issue whether it has a right to bring a derivative action to pursue alleged wrongdoing by Defendants with whether it has a right to pursue that alleged wrongdoing *under federal law*. Defendants do not challenge the ***10** first principle, but there is no support for the second, which is foreclosed by this Court's holding in *Bonny*. There is no basis for Plaintiff's argument that it violates public policy for parties to voluntarily agree to such a provision - particularly as a way to avoid the inefficiency of multiple shareholders pursuing similar suits in different courts arising from the same events.

Additionally, contrary to Plaintiff's assertion, the bylaw is not "unilateral." (Pl. Br. 13) Rather, under Delaware law, bylaws are contractual: an agreement between shareholders and the corporation. *Supra* at 5. Moreover, although they may be adopted by a corporation's board in the first instance, shareholders "have powerful rights they can use to protect themselves," including that they "can check [the board's] authority by repealing board-adopted bylaws." *Boilermakers*, 73 A.3d at 956. Boeing's shareholders have not chosen to do so at any point in the years since the forum selection bylaw was adopted.

The availability of Delaware remedies also forecloses Plaintiff's argument that applying the bylaw to Plaintiff's claim "eliminates exclusive federal jurisdiction over Exchange Act claims contrary to Congress' express intent." (Pl. Br. 13, 16) *Bonny* concluded that any such concern was negated when there are remedies in the designated forum that "vindicate plaintiffs' substantive rights." *Bonny*, 3 F.3d at 160-61. Thus, *Bonny* rejects conclusively the argument that the Exchange Act's exclusive federal jurisdiction provision eliminates parties' ability to agree that allegations that could be adjudicated under the Exchange Act will instead be adjudicated under some other law. In other words, that Plaintiff's allegations of false or misleading proxy ***11** solicitations

could be adjudicated under federal law does not mean that Plaintiff has been deprived of a substantive right under the Exchange Act by the agreement of Boeing and its stockholders to adjudicate such allegations in Delaware.

For similar reasons, *Bonny* also explicitly rejected Plaintiff's argument that "a forum provision that did not [permit Exchange Act claims to be filed in federal court] would run afoul of the anti-waiver provision of the Exchange Act." (Pl. Br. 27, citing *Boilermakers*, 73 A.3d at 962) *Bonny* held that the selection of a forum in which federal securities claims cannot be brought did not violate the Exchange Act's anti-waiver provision. 3 F.3d at 160-61. Moreover, the decision Plaintiff relies on, *Boilermakers*, expressly *declined* to state an opinion on this issue. 73 A.3d at 962. It noted only what a plaintiff "could argue," but stated that "rulings on these situationally specific kind of issues should occur if and when the need for rulings is actually necessary." *Id*.

Given *Bonny*'s clear holdings against its positions, Plaintiff resorts to arguing that *Bonny* does not govern the instant dispute because its holding turned on "two key factors: 'the international nature of the transactions involved' and 'the availability of remedies under British law that do not offend the policies behind the securities laws.'" (Pl. Br. 21) However, as the district court correctly concluded, the international aspect of *Bonny* does not provide a basis for distinguishing this case, and - as in *Bonny* - the availability of remedies under the specified forum's law is what *defeats* Plaintiff's argument.

***12** First, the "international nature of the transactions involved" was not actually key to *Bonny*'s analysis of public policy. While the decision did note that the agreement was an international one and that there was a strong policy of enforcing such agreements, its analysis of whether the forum selection provision offended the policies underlying the federal securities laws in no way depended on that aspect of the agreement. In fact, in analyzing the public policy question, the Court considered whether the international nature of the transaction was a reason *not* to enforce the forum selection provision. The Court stated that the fact "that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not alone a valid basis *to deny* enforcement of forum selection" provisions. *Id*. at 162 (emphasis added). Contrary to Plaintiff's contention, nowhere did the Court suggest that the international nature of an agreement might be a reason *to enforce* a forum selection provision even though such a provision might not be enforceable as applied to a domestic transaction. *See also Sun*, 901 F.3d at 1089 ("Although *Richards* involved a forum-selection clause that pointed to a foreign forum, the conclusion is equally applicable when a clause points to a state forum.").

Moreover, the plaintiffs in *Bonny* were American citizens. 3 F.3d at 161. Public policy plainly supports protecting American citizens who make investments; thus, the *Bonny* Court explained that "[b]y including the anti-waiver provisions in the securities laws, Congress made clear that the public policy of these laws should not be thwarted." *Id*. at 160-61. But *Bonny*'s holding was not that federal public policy relaxes based on international comity; rather, the Court enforced the forum selection ***13** provision because it was "satisfied that several remedies in England vindicate plaintiffs' substantive rights while not subverting the United States' policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors." *Id*. at 161. The same analysis applies here. As a result, Plaintiff's attempt to distinguish *Bonny* fails.

In urging that international agreements are subject to different rules, Plaintiff also asserts that the Supreme Court's decision in *Bremen* "enforced a forum selection clause that was also part of a 'freely negotiated international commercial transaction.'" (Pl. Br. 22, quoting *M/S Bremen v. Zapata*, 407 U.S. 1, 17 (1972)) Plaintiff argues that *Bremen* "distinguished that type of agreement from one involving businesses operating within the United States." (*Id*., citing *Bremen*, 407 U.S. at 15-16) However, the Court in *Bremen* made only the point that federal public policy sometimes may be more concerned with events that take place within the United States than those that occur abroad. *See Bremen*, 407 U.S. at 16. That analysis does not support an argument that parties can agree to adjudicate in a non-federal forum allegations that could be adjudicated under the Securities Exchange Act only if the non-federal forum is foreign. *See Sun*, 901 F.3d at 1090 ("[W]e conclude that the strong federal policy in favor of enforcing forum-selection clauses would supersede anti-waiver provisions in state statutes as well as federal statutes, regardless whether the clause points to a state court, a foreign court, or another federal court."); *Bense v. Interstate Battery*, 683 F.2d 718, 721 (2d Cir. 1982) ("We see no reason [to] preclude the application of *The Bremen* Court's reasoning to domestic suits."); ***14** *Spenta*, 574 F. Supp. 2d at 857 ("Although *Bonny* involved an international transaction, ... its reasoning is equally applicable in the domestic context."); *Friedman v. World Transp.*, 636 F. Supp. 685, 689 (N.D. Ill. 1986) ("[C]ourts have consistently

applied *The Bremen* analysis to cases involving only domestic parties and causes of action other than admiralty."). Thus, *Bremen* provides no reason to distinguish *Bonny* here.

The second "key factor" to *Bonny*'s holding, according to Plaintiff, was "the availability of remedies under British law that do not offend the policies behind the securities laws.'" (Pl. Br. 21) However, what *Bonny* said is that it would enforce the forum chosen by the parties where the plaintiffs had similar remedies available that did not "subvert[] the United States' policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors." 3 F.3d at 161. Here, as explained above, the district court did not abuse its discretion by determining that Delaware law offers remedies similar to § 14(a) and does not subvert the policies of the Exchange Act. *Supra* at 7-11.

Finally, Plaintiff ignores the strong policy favoring the adoption and application of forum selection bylaws. As the Delaware courts have recognized, forum selection bylaws have been widely adopted "in response to corporations being subject to litigation over a single transaction or a board decision in more than one forum simultaneously." *Boilermakers*, 73 A.3d at 943; see also *KT4 Partners v. Palantir Techs.*, 203 A.3d 738, 759 (Del. 2019) (noting that the "wave of forum shopping by plaintiffs' counsel" in mergers and acquisitions lawsuits "prompted many corporations to adopt forum selection clauses limiting internal affairs claims to the Delaware Court of ***15** Chancery"). Following the problems with the 737 MAX, Boeing shareholders filed *seven* derivative suits across *three* courts. In addition to Plaintiff's action here, five derivative actions were filed in the Delaware Court of Chancery. *Supra* at 1 n.1. And another was filed in federal court in Delaware. *See Chopp v. Bradway*, No. 20-326 (D. Del.). [6] This multiplicity of actions is precisely the type of inefficiency the Delaware courts have recognized corporations might reasonably attempt to avoid.

II. Boeing's Bylaw Is Enforceable Under Delaware Law As Applied To Plaintiff's § 14(a) Claim.

The Court should also reject Plaintiff's argument that applying Boeing's forum selection bylaw to Plaintiff's § 14(a) claim violates Delaware law.

As an initial matter, Delaware uses the same test for as-applied challenges to forum selection provisions as federal law. *See Nat'l Indus. v. Carlyle Inv. Mgmt.*, 67 A.3d 373, 381 (Del. 2013). Consequently, absent Delaware precedent applying the test differently - which Plaintiff does not cite - Plaintiff's as-applied challenge fails under Delaware law for the same reasons it fails under federal law.

Plaintiff's argument about Delaware law does not even purport to discuss public policy. Rather, Plaintiff argues that applying the bylaw to its § 14(a) claim violates Delaware statutes. But Delaware statutes set forth what matters may be addressed by corporate bylaws, not how those bylaws may be applied in particular instances. Section 109(b) of the Delaware General Corporation Law authorizes the adoption of "*any* provision ... relating to the business of the corporation, the conduct of its affairs, and its rights or powers ... or the rights or powers of its stockholders." ***16** 8 Del. C. § 109(b) (emphasis added). Accordingly, the Delaware Chancery Court has held that § 109(b) authorized a forum selection bylaw that is *precisely* the same as Boeing's. *Boilermakers*, 73 A.3d at 951 ("8 Del. C. § 109(b) has long been understood to allow the corporation to set 'self-imposed rules and regulations [that are] deemed expedient for its convenient functioning.' The forum selection bylaws here fit this description.") (bracket in original; internal footnote omitted). [7]

Plaintiff's argument that § 115 of the Delaware General Corporation Law precludes Boeing's bylaw is inaccurate and irrelevant. Plaintiff argues that § 115 "states that forum selection clauses in a Delaware corporation's governing documents, like bylaws, must be 'consistent with applicable jurisdictional requirements.'" (Pl. Br. 18, quoting 8 Del. C. § 115) But the language Plaintiff quotes is not a requirement about what bylaws must include. Rather, it limits only what provisions may be adopted under § 115 itself. 8 Del. C. § 115. [8] Therefore, it does not limit what bylaws may be adopted under *other* provisions of Delaware's corporate code. Indeed, the Delaware ***17** Supreme Court has held definitively that those other provisions, including § 109, provide *broader* authorizations than § 115. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 129-30 (Del. 2020) (holding that § 115 "is

not properly viewed as modifying" other authorizing statutes). [9] Here, Boeing's bylaw is facially valid under § 109(b) of the DGCL. Accordingly, it is irrelevant whether the bylaw would also be authorized under § 115.

Plaintiff also argues that applying Boeing's bylaw to its § 14(a) claim would "serve an illegitimate function" because "Delaware law only permits a corporation to adopt forum provisions to 'regulate *where* stockholders may file suit,"' not whether they may file suit. (Pl. Br. 20, quoting *Salzberg*, 227 A.3d at 136) But as *Salzberg* explained, "forum-selection provisions 'are process-oriented,' and are not substantive," *because* "they regulate where the stockholder may file suit, not whether the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation." 227 A.3d at 136 (emphasis in original). To be sure, the bylaw may have the effect of limiting the law under which a shareholder may assert a claim derivatively on the corporation's behalf, but that is not what it regulates, and such an effect does not change its procedural nature. Indeed, the Delaware Court of Chancery held that a bylaw with precisely the same language as ***18** Boeing's was "process oriented" and therefore valid under Delaware law. *Boilermakers*, 73 A.3d at 951.

More fundamentally, the as-applied test requires consideration of the policy considerations that support the bylaw, which undercuts Plaintiff's argument that applying Boeing's bylaw here would "serve an illegitimate function." The bylaw's application here illustrates precisely the function that public policy supports: to avoid the inefficiencies and burdens of having multiple derivative suits arising out of the same events, purportedly on the corporation's behalf, filed and proceeding in parallel in different courts. *Boilermakers*, 73 A.3d at 944 (noting that corporations assert that "multiforum litigation, when it is brought by dispersed stockholders in different forums, directly or derivatively, to challenge a single corporate action, imposes high costs on the corporations and hurts investors by causing needless costs that are ultimately born by stockholders").

This Court need not ignore the realities of how shareholder litigation often unfolds in the aftermath of traumatic corporate events. Shareholders' lawyers quickly deploy, each jockeying for their own corner of the litigation landscape. Here, Plaintiff (and, no doubt its counsel) was crowded out of Delaware because other shareholders had already filed derivative actions. So, in an effort to stake out its own turf, it asserted its own derivative claims, including a § 14(a) claim, in federal court. Such duplicative litigation arising from the same events is expensive, and a corporation's board can reasonably determine that permitting such litigation to proliferate is not in the best interests of either the corporation or its shareholders - subject, as always, ***19** to the shareholders' ability to repeal the bylaw if they disagree. That is precisely what Boeing's forum selection bylaw does here, and Delaware precedent establishes the validity of the bylaw, and endorses that goal. *Supra* at 14. [10]

Conclusion

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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Footnotes

1 *See Isman v. Bradway*, C.A. No. 2019-794 (Del. Ch.); *Kirby Family P'ship v. Muilenburg*, C.A. No. 2019-907 (Del. Ch.); *Slotoroff v. Bradway*, C.A. No. 2019-941 (Del. Ch.); *DiNapoli v. Duberstein*, C.A. No. 2020-465 (Del. Ch.); *Construction & General Building Laborers v. Albaugh*, C.A. No. 2020-466 (Del. Ch.).

2 Plaintiff voluntarily dismissed its state law claims before Defendants responded to the complaint. (Pl. Br. 7)

3 *Accord Solid Q Hldg. v. Arenal Energy*, 2017 WL 935891, *2 (D. Utah Mar. 8, 2017) (enforcing a forum selection provision selecting a state forum even though the complaint asserted a federal securities claim that was subject to exclusive federal jurisdiction); *Vernon v. Stabach*, 2014 WL 1806861, *6 (S.D. Fla. May 7, 2014) (same); *Spenta Enterprises v. Coleman*, 574 F. Supp. 2d 851, 857 (N.D. Ill. 2008) (relying on *Bonny* and other appellate decisions enforcing forum selection provisions "even when doing so meant that parties could not bring their federal securities claims").

4 Thus, *Drulias v. Guthrie*, No. 19-1636 (C.D. Cal. Oct. 23, 2019), attached as an addendum to Plaintiff's brief, is inapposite. Contrary to *Bonny*, that decision failed to consider whether the availability of remedies in the chosen forum rendered acceptable the application of a forum selection provision whose effect was to foreclose federal claims under the Exchange Act. The decision also relied on the Delaware Chancery Court's decision in *Sciabacucchi v. Salzberg*, which has since been reversed by the Delaware Supreme Court. (ADD 7); *Salzberg*, 227 A.3d at 138.

5 Plaintiff also cites an Eighth Circuit decision that refused to stay a § 14(a) case in favor of a state law case. (Pl. Br. 26-27, discussing *Cottrell v. Duke*, 737 F.3d 1238 (8th Cir. 2013)) But considerations governing whether to stay a case in deference to a parallel state court action are entirely different than considerations governing whether a contractual forum selection provision is enforceable if it has the effect of requiring allegations of wrongful conduct to be litigated under state law.

6 *Chopp* was voluntarily dismissed after Defendants moved to dismiss.

7 Plaintiff also argues the bylaw violates § 109(b) because § 109(b) states that bylaws may contain any provision "not inconsistent with law," but Boeing's bylaw "unlawfully eliminates Seafarers' substantive right under federal and Delaware law to assert derivative claims on behalf of Boeing under the Exchange Act." (Pl. Br. 20) However, the bylaw is not inconsistent with federal law for the reasons explained above in Part I. And Plaintiff cites no Delaware law creates a substantive right for Plaintiff to pursue a federal claim when federal law does not.

8 The pertinent part of § 115 provides: "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...."

9 Plaintiff selectively quotes *Salzberg*, asserting that it "indicated that 'federal forum provisions' would not be enforceable if a company applied them to 'foreclose suits in federal court.'" (Pl. Br. 19, quoting *Salzberg*, 227 A.3d at 117) That is inaccurate. *Salzberg* stated that the particular forum selection provisions at issue in that case "d[id] not foreclose suits in federal court." It did not consider, much less adopt, a rule precluding forum selection provisions from having that effect.

10 Plaintiff also argues that Boeing's bylaw should not even be read to apply to its § 14(a) claim. (Pl. Br. 24-25) Plaintiff did not make this argument below, and therefore has forfeited it. Regardless, the bylaw's plain language applies to *all* derivative claims.