COMBATTING MULTIFORUM SHAREHOLDER LITIGATION: A FEDERAL ACCEPTANCE OF FORUM SELECTION BYLAWS

INTRODUCTION

The leading phenomenon in modern corporate takeovers is the escalation of multiforum shareholder litigation.[1] Delaware corporations are predisposed to multiforum litigation because a virtual majority of them qualify as out-of-state incorporators with headquarters in another state.[2] A study of 195 forum selection provisions exclusive to Delaware that were adopted or proposed through the end of December 2011 found that less than one percent of Delaware corporations had their principal places of business in the state of Delaware.[3] Consequently, Delaware corporations face exceptional circumstances because in most cases their shareholders can effortlessly obtain jurisdiction in at least three fora: the incorporation state courts, the headquarters state courts and federal courts.[4] In what this comment will verify, forum selection clauses are patently the best way to combat this phenomenon.[5]

1. Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2013*, at 3 (Jan. 9, 2014), *available at* http://ssrn.com/abstract=2377001; *see also* Peter B. Ladig, *Multi-Jurisdictional Litigation a Rich Vein of Issues for Chancery Court*, DELAWARE BUSINESS COURT INSIDER (Apr. 20, 2011), *available at* http://www.morrisjames.com/newsroom-articles-77.html.

2. *See* Claudia H. Allen, *Study of Delaware Forum Selection in Charters and Bylaws*, at 3, 17 (Jan. 25, 2012), *available at* http://www.ngelaw.com/files/Uploads/Images/StudyofDelaware Forum012512.pdf.

3. *Id.* at 3, 17.

4. Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, BROOKLYN LAW SCHOOL LEGAL STUDIES RESEARCH PAPERS ACCEPTED PAPER SERIES, at 483 (Jun. 2013), *available at* http://ssrn.com/abstract=2285485.

5. For clarification, "forum selection" and "exclusive forum" are used interchangeably throughout this comment.

Despite their routine appearance in contracts, forum selection provisions never gained traction in Delaware corporations.[6] Few public companies originally incorporated in Delaware had included forum selection clauses in their corporate bylaws.[7] Because bylaws are generally treated as contracts between corporations and their shareholders,[8] corporations could plausibly assume a forum selection bylaw would curb multiforum litigation.

A recent trend in corporate litigation tells the story. In 2012, shareholders filed derivative lawsuits and challenged 93 percent of merger and acquisition deals valued over $100 million and 96 percent of deals valued over $500 million with an average of five lawsuits per deal.[9] Most significantly, over half of these deals burdened the corporations involved with litigation in multiple states.[10] For transactions targeting Delaware corporations specifically, 65 percent resulted in multiforum litigation in Delaware and other jurisdictions, 19 percent were challenged outside Delaware only and 16 percent were challenged solely in the Delaware Court of Chancery.[11]

Comparatively, these same deals resulted in derivative suits only 39 percent of the time as recently as 2005 with a mere 8 percent involving suits in multiple states.[12] A staggering 98 percent of these deals resulted in shareholder litigation in 2013.[13] These statistics confirm this comment's position that multiforum shareholder litigation continues unabated and must be quelled through forum selection bylaws.[14]

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6. Dominick T. Gattuso & Meghan A. Adams, *Delaware Insider: Forum Selection Provisions in Corporate Charters and Bylaws: Validity vs. Enforceability*, BUSINESS LAW TODAY, at 1 (Dec. 2013), *available at* http://www.americanbar.org/publications/blt/2013/12/delaware_insider.html.

7. *Id.*

8. *See, e.g.*, CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 239 (Del. 2008) (characterizing bylaw that shareholders proposed to adopt as an "internal governance contract").

9. Robert M. Daines & Olga Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions: Review of 2012 M&A Litigation/Settlements/Plaintiff Attorney Fees/New Lawsuits Challenging Annual Proxies*, CORNERSTONE.COM, at 3 (last updated Feb. 2013), *available at* http://www.cornerstone.com/getattachment/03dcde90-ce88-4452-a58a-b9efcc32ed71/Recent-Developments-in-Shareholder-Litigation-Invo.aspx.

10. Approximately 52% of merger and acquisition deals in 2012 valued over $100 million resulted in multi-state litigation. Cain & Davidoff, *supra* note 1, at 2.

11. Claudia H. Allen, *Trends in Exclusive Forum Bylaws: They're Valid, Now What?*, at 1 (Nov. 18, 2013), *available at* http://www.kattenlaw.com/files/49783_Trends%20in%20Exclusive%20Forum%20Bylaws.pdf.

12. Cain & Davidoff, *supra* note 1, at Table A.

13. *Id.* at 2.

14. *Id.*

This comment simply proposes that federal courts should accept the facial validity of forum selection bylaws unilaterally adopted by directors of Delaware corporations without shareholder approval. Due to the Delaware Court of Chancery's modernized opinion in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, federal courts should reject the northern district of California's decision in *Galaviz v. Berg* that invalidated such bylaws and endorse the reasoning in *Boilermakers*. Part I of this comment examines the hazards associated with multiforum shareholder litigation and theorizes the leading solution. Part II discusses the evolution of forum selection bylaws in the corporate setting. Throughout Part III, the current state of law and post-*Boilermakers* ramifications are analyzed along with issues going forward. Part IV concludes by proffering the justifications for federal courts to follow *Boilermakers* in place of *Galaviz*.

I. THE HAZARDS OF MULTIFORUM LITIGATION AND THE SOLUTION: UNILATERALLY ADOPTED FORUM SELECTION BYLAWS

Multiforum shareholder litigation is the product of a special litigation environment that depends on unique rules of jurisdiction, preclusion and attorney compensation.[15] The class action is the primary vehicle through which shareholders seek to vindicate their rights against blameworthy corporate conduct.[16] In 1984, the United States Supreme Court unequivocally pronounced that under elementary principles of prior adjudication, a judgment in a properly entertained class action is binding on class members in any subsequent litigation.[17] This basic principle of preclusion shapes the landscape of multiforum shareholder litigation because of its effect on plaintiff's attorneys.

To ensure their professional survival, plaintiff's attorneys must compete to speak for the same group of shareholders and jockey for priority in settling claims with defendants.[18] The motivation of plaintiff's attorneys to utilize multiforum litigation stems from the risk that defendant

15. Myers, *supra* note 4, at 499.

16. Class actions are particularly appropriate in corporate shareholder litigation because 1) the directors' alleged misconduct is usually uniform from the standpoint of each individual shareholder, and 2) the probability that small losses will be spread among large numbers of shareholders makes class actions perhaps the only means through which shareholder litigation is economically viable. Stephen E. Morrissey, *State Settlement Class Actions that Release Exclusive Federal Claims: Developing a Framework for Multijurisdictional Management of Shareholder Litigation*, 95 COLUM. L. REV. 1765, 1765 & n.1 (1995).

17. Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984) (clarifying that a judgment in favor of either party is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment).

18. Myers, *supra* note 4, at 498-99.

corporations may reach a settlement agreement with *other* plaintiffs' attorneys in different jurisdictions, thereby releasing all of the claims asserted in his or her competing complaint.[19] The result is a substantial divergence in the interests of plaintiff shareholders and their attorneys.[20] Shareholder interests fall to the wayside because plaintiffs' attorneys wish to maximize their fee award and bring suits in jurisdictions that are known to award more favorable judgments.[21] The economic effects are extreme as jurisdictions compete and states are compelled to attract more corporate litigation by "increas[ing] judgments and fee awards . . . ."[22]

"The result is a "fee spiral" in which competing jurisdictions offer increased fee awards simply to attract filings without regard to the best interests of the corporation's shareholders."[23] Receipt of attorneys' fees in merger and acquisition deals are almost automatic today, so much that they are commonly referred to as a "merger tax."[24] The average agreed-upon plaintiff attorney fee in the settlements related to 2012 deals was $725,000.[25] On the other hand, one emerging trend has made it difficult to see how shareholders are benefitting from these suits.[26] A common remedy sought in derivative litigation is a disclosure settlement: settlements in which the target and acquirer agree to correct or provide additional disclosure to shareholders.[27] One decade ago, more than half of settlements included cash payments to shareholders of target companies while only 10% of derivative suits required additional disclosures.[28] In 2010 and 2011,

19. *Id.*

20. *Id.* at 508.

21. David A. Katz & Laura A. McIntosh, *Implementing Exclusive Forum Bylaws*, N.Y. L.J. (July 25, 2013), *available at* http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.22656.13.pdf.

22. *Id.*

23. Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 341 (Feb. 2013).

24. Claudia H. Allen, *Exclusive Forum Provisions: Putting on the Brakes*, BLOOMBERG BNA CORPORATE ACCOUNTABILITY REPORT, at 2 (Dec. 14, 2012), *available at* http://www.ngelaw.com/files/Uploads/Images/exclusive-forum-provisions-putting-on-the-brakes.pdf.

25. Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation*, at 16 (Jan. 2013), *available at* http://ssrn.com/abstract=1984758.

26. Robert M. Daines & Olga Koumrian, *Merger Lawsuits Yield High Costs and Questionable Benefits*, N.Y. TIMES (June 8, 2012), *available at* http://dealbook.nytimes.com/2012/06/08/merger-lawsuits-yield-high-costs-and-questionable-benefits/?_php=true&_type=blogs&_r=0.

27. Cain & Davidoff, *supra* note 25.

28. Daines & Koumrian, *supra* note 26.

"a modest 5 percent of settlements produced more cash for shareholders, while more than 80 percent of suits required only additional disclosures."[29]

Because there is no way for courts or litigants to force coordination of claims asserted in multiple jurisdictions, filing in a different forum is an effective way for a plaintiff's attorney to pursue control of shareholder litigation and a fee award.[30] Consider this modern example: A plaintiff's attorney sits in his office debating whether to file what would be the fourth similar shareholder complaint in a particular forum.[31] The attorney has a disincentive to file his client's complaint in that forum because the odds of being appointed lead counsel—and winning a fee—are slim to none.[32] The attorney has a much more appealing alternative to file his complaint in a second forum in the hopes of securing control of the case *in that forum*, and a "seat at the settlement table" coming with that control.[33] "In addition, if the attorney can expedite proceedings in the second forum, the center of gravity in the litigation will shift, increasing the attorney's leverage with defendants and other plaintiffs' attorneys."[34] A third plaintiff's attorney sitting on the sideline could easily be compelled to file a complaint in yet a third forum, and in this way, shareholder litigation derived from the same director misconduct spreads across multiple jurisdictions.[35] Unfortunately, there is no systematic solution to this problem.[36]

The hazards of multiforum litigation ultimately harm shareholders, corporations and the courts alike. One prevalent concern is the aforementioned divergence of interests in plaintiffs' attorneys and the shareholders they represent.[37] It is undisputed that competition between plaintiffs' attorneys largely results in no financial gain for shareholders in recent years.[38] The increased fee awards only deepen the pockets of plaintiffs' attorneys without creating any financial gain to other parties involved.[39] Shareholders are harmed because any remedy they receive, e.g., additional disclosures, is inequitable to the financial compensation afforded to their attorneys when considering the overall cost of shareholder

29. *Id.*
30. Myers, *supra* note 4, at 501.
31. *Id.* at 472.
32. *Id.*
33. *Id.* at 471.
34. *Id.*
35. *Id.* at 472.
36. *Id.* at 471 & n.8.
37. *See supra* notes 17-26 and accompanying text.
38. *See* Daines & Koumrian, *supra* note 26.
39. *Id.*

litigation.[40] Corporations are harmed because of the correlating increase in settlement costs. Any enlargement of settlements is a direct detriment to the bottom line and valuation of the corporation. Consequently, the hazards of multiforum litigation harm both shareholders and corporations, and unjustly favor plaintiffs' attorneys.

Furthermore, the harms associated with multiforum litigation extend beyond the parties involved. Judicial efficiency and comity would be better served if these cases were litigated in one jurisdiction.[41] Judicial resources are wasted as judges in two or more jurisdictions review the same documents and are commonly asked to decide the exact same motions regarding the same corporate conduct.[42] The unfavorable possibility that two judges would apply the law differently or otherwise reach different outcomes, thereby leaving the law in a confused state and posing full faith and credit problems for all involved, also exists.[43] Moreover, additional post-settlement or post-litigation problems such as class certification and the approval and division of attorney's fees are not uncommon.[44] Courts often struggle with the proper allocation of fees awarded between and among competing plaintiffs when several lawsuits are brought.[45]

To combat the threats posed by multiforum litigation, corporations began to propose exclusive forum provisions in their organizational documents in 2007 as a response to the increase in multiforum litigation led by New York lawyer Theodore N. Mirvis.[46] Although unilaterally adopted forum selection bylaws were declared valid for the first time in *Boilermakers*, this is not the final word on their effectiveness.[47] The real test of their usefulness will come as corporations with such bylaws attempt to use them to stop shareholders from proceeding with litigation filed in jurisdictions other than Delaware.[48] Consequently, their effectiveness depends on the future decisions of courts in other jurisdictions that may not

40. *Id.*

41. In re Allion Healthcare, Inc. S'holders Litig., 2011 WL 1135016, at *4 (Del. Ch. 2011). An in depth examination of the benefits to judicial efficiency and comity is provided *infra* Part IV.C.

42. *In re Allion Healthcare*, 2011 WL 1135016, at *4.

43. *Id.*

44. *Id.*

45. Ladig, *supra* note 1.

46. Katz & McIntosh, *supra* note 21.

47. Timothy R. Dudderar & Christopher N. Kelly, *Guest Analysis: Validity of Board-Adopted Forum Selection Bylaw Provisions Following* Boilermakers Local 154 Retirement Fund v. Chevron Corp. & ICLUB Investment Partnership v. FedEx Corp., WESTLAW CORPORATE GOVERNANCE DAILY BRIEFING, 2014 WL 6113627 (Oct. 1, 2013).

48. *Id.*

widely recognize such provisions as valid and instead may permit shareholder litigation to proceed notwithstanding such bylaws and their recently acknowledged validity under Delaware law.[49] Federal courts particularly are now at the center of a significant percentage of corporate shareholder litigation.[50] And with multiforum litigation surging to the front of corporate takeover lawsuits, the future of forum selection bylaws takes center stage in federal courts.

II. EVOLUTION OF FORUM SELECTION BYLAWS IN THE CORPORATE SETTING

A "forum selection clause" is a contractual provision in which the parties establish the place for specified litigation between them.[51] In the corporate context, a forum selection bylaw is a provision in a corporation's bylaws that designates a forum as the exclusive venue for certain shareholder suits against the corporation, either as an actual or nominal defendant, and its directors and employees.[52] Boards of directors in Delaware corporations have recently begun to adopt forum selection bylaws without shareholder approval[53], per their authority granted under 8 Del. C. § 109(a).[54]

The standard forum selection bylaw is intended to cover four types of suits all relating to internal corporate governance: derivative suits, fiduciary duty suits, suits arising from Delaware General Corporation Law and internal affairs suits.[55] Again, the primary reason boards adopt these bylaws is to protect against the staggering costs and risks associated with multiforum litigation.[56] For Delaware-chartered corporations, the incentive to have intra-corporate disputes resolved by Delaware courts is substantial because of the high regard in which Delaware's courts are held, the

49. *Id.*

50. Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1762 (2010).

51. Black's Law Dictionary (10th Ed. 2014).

52. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 941-42 (Del. Ch. 2013).

53. Katz & McIntosh, *supra* note 21.

54. Directors must first be given the power to adopt bylaws by the corporation. Del. Code Ann. tit. 8 § 109(a) (West 2006) ("Any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors . . .").

55. *Boilermakers*, 73 A.3d at 942-43.

56. *See* discussion *supra* Part I; *see* Cain & Davidoff, *supra* note 1; *see also Boilermakers*, 73 A.3d at 943.

efficiency with which they resolve complex business disputes, judicial expertise and the well-developed body of state corporate law.[57]

Only certain corporations encounter resistance in their attempts to implement a forum selection provision. Companies going public, being spun-off, emerging from bankruptcy or reincorporating in Delaware can adopt forum selection provisions in their charters without the need for public shareholder approval.[58] For companies already public, conversely, which represent the focus of this comment, the customary approach is to adopt a forum selection bylaw through unilateral board action.[59] Corporate practitioners generally agree that a forum selection provision in a corporation's bylaws, rather than its charter, is much less likely to be valid and enforceable against shareholders.[60]

A timeline is the proper lens with which to view the evolution of forum selection bylaws. Three decisions have dictated the progress of forum selection bylaws in present day Delaware corporations: *In re Revlon, Inc. Shareholders Litigation* in the Delaware Chancery Court, *Galaviz v. Berg* in the northern district of California and the recently decided *Boilermakers* case also in the Delaware Chancery Court.[61]

Prior to the March 2010 *Revlon* decision, only six corporations had adopted forum selection provisions in their organizational documents.[62] The *Revlon* opinion presented the first judicial discussion about forum selection provisions in the corporate setting.[63] The court suggested in dicta that corporations concerned about the dangers of multiforum litigation could take forum selection a step further: "corporations are free to respond [to multiforum litigation] with charter provisions selecting an exclusive forum for intra-entity disputes."[64] Public companies swiftly responded to the court's hint and either adopted bylaws or amended their charters with forum selection clauses designating Delaware as the exclusive forum for internal corporate governance suits.[65] Following *Revlon* through December

57. Grundfest & Savelle, *supra* note 23, at 354.

58. Allen, *supra* note 24, at 1.

59. *Id.*

60. *Id.* at 4.

61. In re Revlon, Inc. S'holders Litig., 990 A.2d 940 (Del. Ch. 2010); Galaviz v. Berg, 763 F. Supp. 2d 1170 (N.D. Cal. 2011); *Boilermakers*, 73 A.3d 934.

62. Allen, *supra* note 2, at 4.

63. *Revlon*, 990 A.2d 940.

64. *Id.* at 960 & n.8.

65. M. Scott Barnard & Jenny M. Walters, *Viva Delaware!: Strine Upholds Board-Adopted Forum Selection Bylaws*, BLOOMBERG BNA CORPORATE LAW DAILY (CCD Issue No. 164).

2010, thirty-eight corporations adopted forum selection provisions, eighteen of which were enacted with a bylaw.[66]

In January of 2011, *Galaviz* was the first case to specifically address the facial validity of a forum selection bylaw unilaterally adopted by a corporation's board of directors without shareholder approval.[67] The court in *Galaviz* addressed a question of first impression whether a shareholder could bring a breach of fiduciary duty claim in federal court despite a forum selection provision in the corporation's bylaws requiring that derivative suits be brought in Delaware.[68] The district court applied federal law and specifically used contract principles in its analysis in light of various precedents that described bylaws as representing a contract between a corporation and its shareholders.[69]

The court ultimately held that the forum selection bylaw at issue was not enforceable against shareholders because "[u]nder contract law, a party's consent to a written agreement may serve as consent to all the terms therein, whether or not all of them were specifically negotiated or even read, but it does not follow that a contracting party may thereafter unilaterally add or modify contractual provisions."[70] The court further reasoned that "the venue provision was unilaterally adopted by the directors . . . after the majority of the purported wrongdoing is alleged to have occurred, and without consent of existing shareholders who acquired their shares when no such bylaw was in effect."[71]

In the wake of this decision despite large amounts of vocal support against the adoption of these bylaws,[72] the trend towards adding forum selection bylaws unpredictably spiked.[73] 106 corporations adopted forum selection provisions in 2011, including fifty-seven via bylaw.[74] Commentators speculated that a number of factors contributed to this spike, but most hypothesized that corporations were still confident in the validity

66. Allen, *supra* note 2, at 14 and Figure 2.

67. *Galaviz*, 763 F. Supp. 2d at 1171.

68. *Id.* at 1172.

69. *Id.* at 1174.

70. *Id.*

71. *Id.* at 1174.

72. Following *Galaviz*, increasing hostility ensued from institutional shareholder groups toward exclusive forum provisions, as well as hostility in the form of shareholder proposals to cause corporations that already have exclusive forum provisions to remove them. *See, e.g.*, David Hernand & Thomas Baxter, *Under Fire: Continued Attacks on Exclusive Forum Provisions May Slow Adoption*, 16 WALL STREET LAWYER 4 (Apr. 2012).

73. Allen, *supra* note 24, at 7.

74. *Id.* at 1.

of forum selection provisions because the *Galaviz* court applied federal common law principles as opposed to Delaware law.[75]

The progress of forum selection bylaws was finally tempered in February 2012 when one plaintiffs' law firm filed nearly identical lawsuits in the Delaware Court of Chancery against twelve Delaware corporations with unilaterally adopted forum selection bylaws.[76] Immediately following the filing of these lawsuits, ten of the twelve targeted corporations repealed their bylaws and the two others, Chevron and FedEx, opted to litigate.[77] In total, fifteen companies repealed their forum selection bylaws in 2012 while only nine corporations adopted them during the same time period.[78] The Delaware Chancery Court consolidated the Chevron and FedEx cases in what became the *Boilermakers* decision.[79] In roughly four months following *Boilermakers*, exclusive forum provisions emphatically recaptured their progress as 105 corporations adopted a forum selection bylaw from the end of June through October 2013.[80] However, corporations still hesitate today because jurisdictions do not uniformly accept the facial validity of unilaterally adopted forum selection bylaws.[81]

III. THE BOILERMAKERS DECISION AND CURRENT STATE OF LAW

On June 25, 2013, the Delaware Court of Chancery upheld the facial validity of forum selection bylaws unilaterally adopted by Chevron's and FedEx's board of directors.[82] The plaintiffs, shareholders in Chevron and FedEx, sued their boards of directors for adopting forum selection bylaws without their approval.[83] The bylaws of both corporations were identical and covered the standard four types of suits: derivative suits, fiduciary duty suits, Delaware General Corporation Law suits and internal affairs suits.[84]

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75. *Id.* at 7.
76. *Id.* at 2.
77. *Id.* at 3.
78. *Id.* at 6-7.
79. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 938 (Del. Ch. 2013).
80. Allen, *supra* note 24, at 2.
81. *Id.* at 7.
82. *Boilermakers*, 73 A.3d at 941.
83. *Id.* at 938.
84. *Id.* at 942. The Chevron bylaw read:

Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any directors, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine shall [be a state

The plaintiffs based their claims on two arguments. First, the bylaws were statutorily invalid because they are beyond the board's authority under the Delaware General Corporation Law.[85] Second, the bylaws were contractually invalid and therefore cannot be enforced like other contractual forum selection clauses[86] under the test adopted by the Supreme Court in *The Bremen v. Zapata Offshore, Co*.[87] The Delaware Chancery Court held at the end of the day that the challenged bylaws are both statutorily and contractually valid and therefore enforceable.[88]

First, the bylaws at issue were held statutorily valid under D.G.C.L. § 109(b).[89] The court had to determine whether the adoption of forum selection bylaws was beyond the board's authority in the sense that they do not address a proper subject matter, i.e., if "[t]he bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[90] Simply stated, the proper inquiry is whether the bylaws are invalid because they do not relate to the business of the corporations, the conduct of their affairs, or the rights of the stockholders.[91]

Plaintiffs insisted the bylaws did not regulate permissible subject matters because they attempt to regulate an "external" matter, as opposed to an "internal" matter of corporate governance.[92] Chancellor Strine rejected this argument because forum selection bylaws, consistent with the "procedural, process-oriented" nature of all Delaware corporation bylaws, "regulated *where* stockholder may file suit, not whether the stockholder may file suit . . . ."[93] The court then said the forum selection bylaws

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or federal court located within the sate of Delaware, in all cases subject to the court's having personal jurisdiction over the indispensible parties named as defendants]. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw].

Id.

85. *Id.* at 938.

86. *Id.*

87. The *Bremen* test articulates that a forum selection clause will only be enforced if: (1) the forum selection clause was not induced by fraud or over-reaching; (2) trial in the designated forum will "not be so gravely difficult and inconvenient that [plaintiff] will for all practical purposes be deprived of his day in court"; and (3) enforcement of the forum selection provision "will not contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or judicial decision." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15-19 (1972).

88. *Boilermakers*, 73 A.3d at 963.

89. *Id.* at 954.

90. Del Code Ann. tit. 8, § 109(b) (West 2006).

91. *Boilermakers*, 73 A.3d at 950.

92. *Id.* at 951.

93. *Id.* at 951-52.

address the "rights" of the stockholders because they regulate where stockholders can exercise their right to bring certain internal affairs claims against the corporation and its directors and officers.[94]

The court also said the forum selection bylaws "plainly relate to the conduct of the corporation by channeling internal affairs cases into the courts of the state of incorporation, providing for the opportunity to have internal affairs cases resolved authoritatively by our Supreme Court if any party wishes to take an appeal."[95] And in response to plaintiffs' final argument that the bylaw did not speak to a "traditional" subject matter and should be invalidated on that reason alone, the court cited the Delaware Supreme Court's iconic decision in *Unocal*: "our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs. Merely because the General Corporation Law is silent as to a specific matter does not mean that it is prohibited."[96]

Second, plaintiffs' claimed the bylaws were contractually invalid because the shareholders do not vote in advance of their adoption to approve them, and therefore this method of adopting a forum selection clause is invalid as a matter of contract law when it does not require the assent of the stockholders who will be affected by it.[97] The court first dismissed plaintiffs' "vested rights" contention by reinforcing the fact that Delaware corporate law has long rejected this doctrine.[98] The "vested rights" doctrine asserts that boards cannot modify bylaws in a manner that arguably diminishes or divests pre-existing shareholder rights absent stockholder consent.[99]

In the bulk of it's reasoning, the court stated the bylaws were indeed contractually valid because the shareholders "assent to not having to assent to board-adopted bylaws."[100] This meant shareholders are on notice that, as to anything properly subjected to regulation by bylaw, the board itself may act unilaterally to adopt bylaws addressing those subjects, and essentially stockholders have already assented to a contractual framework established by the DGCL and the certificates of incorporation that explicitly recognize shareholders will be bound by bylaws adopted unilaterally by their

94. *Id.* at 950-51.

95. *Id.* at 951.

96. *Id.* at 953.

97. *Id.* at 955.

98. The court, emphatically spurning any vested rights claim, stated "under Delaware law, where a corporation's articles or bylaws 'put all on notice that the bylaws may be amended at any time, *no vested rights can arise that would contractually prohibit an amendment*." *Id.* at 955, nn.94 & 96.

99. *Id.* at 955 & n.95.

100. *Id.* at 956.

boards.[101] Hence, when shareholders similarly situated to those in *Boilermakers* who have authorized a board of directors to unilaterally adopt bylaws, it follows that the bylaws are not contractually invalid simply because the board-adopted bylaw lacks the contemporaneous assent of the shareholders.[102]

The court also rightfully rejected plaintiffs' "parade of horribles" challenge to the bylaws saying they are facially invalid by conjuring up hypothetical as-applied challenges in which a literal application of the bylaws might be unreasonable.[103] Forum selection bylaws, as explained by the unbroken history of other forum selection clauses, are not facially invalid because they might operate in a problematic way in some future situation, but are presumed valid until real-world concerns arise in real-world disputes that would trigger a *Bremen* analysis.[104] After the chancery court decided *Boilermakers*, plaintiffs timely appealed to the Delaware Supreme Court and later withdrew the appeal on October 15, 2013 fearing that a likely affirmation from a higher level court would make it much more difficult to succeed on an "as applied" challenge to the enforcement of a forum selection bylaw.[105]

IV. PROPOSED ACCEPTANCE OF BOILERMAKERS IN FEDERAL COURTS

To this day, no federal court has held a unilaterally adopted forum selection bylaw to be valid.[106] Given that such provisions are relatively new, the importance of this cannot be understated as future battles between plaintiff shareholders and corporations are likely to take place in courts outside Delaware.[107] Even though shareholders do not give explicit approval, federal courts need to accept the validity and presumptive enforceability of forum selection bylaws because it is in the best interests of shareholders, corporate officers, directors, the corporations themselves and courts alike. The reasons for federal acceptance of unilaterally adopted forum selection bylaws are three-fold: they are contractually valid, valid on the condition that the choice of law is correct and valid as a matter of public policy.

101. *Id.* at 955-56.
102. *Id.* at 956.
103. *Id.* at 958.
104. *Id.* at 963.
105. Allen, *supra* note 11, at 2.
106. *See id.* at 5-6.
107. *Id.* at 5.

A. The Contractual Perspective

From a contract perspective, forum selection bylaws are undeniably valid and presumptively enforceable. As the only existing case law on point, the reasoning of the *Galaviz* court was inherently flawed. The bulk of the court's error involved its utter failure to take into account certain principles of the Delaware General Corporation Law[108] Using a contract analogy, the court stated that "a party's consent to a written agreement may serve as consent to all the terms therein, whether or not all of them were specifically negotiated or even read, but it does not follow that that a contracting party may thereafter unilaterally add or modify contractual provisions."[109] Implicit in this reasoning is an artificial bifurcation of corporate bylaws: 1) contractually binding bylaws that are adopted by shareholders, and 2) non-contractually binding bylaws that are adopted by boards using their statutory authority conferred by the certificate of incorporation.[110]

As the *Boilermakers* court emphasized, this bifurcation misapprehends fundamental principles of Delaware corporate law.[111] The Delaware Supreme Court has repeatedly made clear that shareholders have assented to a contractual framework established by the Delaware General Corporations Law and corporate charters that explicitly recognize shareholders will be bound by bylaws adopted unilaterally by their boards.[112] By taking into account portions of Delaware corporate law that *Galaviz* did not, the bifurcation of corporate bylaws disappears and the result is "an inherently flexible contract between the stockholders and the corporation under which the stockholders have powerful rights they can use to protect themselves if they do not want board-adopted forum selection bylaws to be part of the contract between themselves and the corporation."[113]

The primary concern with the type of bylaws in *Boilermakers* and *Galaviz* is of course their unilateral birth. The want of express shareholder consent, however, does not defeat a bylaw adopted unilaterally by the board of directors. It is common knowledge that many different contracts are enforceable without express approval by one of the parties.[114] For example, certain contractual terms are still valid when a party has *implied* or

108. *Boilermakers*, 73 A.3d at 957.
109. *Galaviz*, 763 F. Supp. 2d at 1174.
110. *Boilermakers*, 73 A.3d at 955.
111. *Id.*
112. *Id.* at 956 & n.100.
113. *Id.* at 957.
114. *Galaviz*, 763 F. Supp. 2d at 1174.

constructive knowledge but no express knowledge. A principal will be bound by his agent's actions when he has implied actual authority, or even apparent authority. When bylaws operate as contracts between shareholders and corporations, it follows logically that express assent to a bylaw is not required for a shareholder to be bound by one.[115]

In addition, *Galaviz* should not be followed because the court also relied on the fact that the forum selection bylaw was adopted after the majority of the alleged wrongdoing occurred.[116] This concern surprisingly did not prompt the court to engage in a *Bremen* analysis to look for an unjust result,[117] but merely compelled a ruling that the bylaw cannot be treated as a typical "bilateral agreement" which receives favorable enforcement under federal law.[118] Perhaps in fear that a *Bremen* analysis could result in an unfair holding, the court did not inquire into *Bremen* because it accepted the plaintiffs' position that *Bremen* was not necessary as there was no agreement as to venue in the first instance.[119] The court even hypothesized that there would be little basis to decline to enforce the forum selection bylaw if the *Bremen* factors were controlling.[120]

The reasonableness of forum selection bylaws was supported by the fact that the plaintiffs did not seriously contest any of the *Bremen* factors.[121] This implicitly gives weight to a conclusion that forum selection bylaws should be valid, especially when their "as applied" enforcement would not create "unreasonable and unjust" results.[122] It seems as though the court went out of its way to rebuke the directors' wrongdoing and strike down the bylaw because it knew the forum selection bylaw would otherwise have been valid.

Although federal courts conceivably might hesitate to stray from *Galaviz*, a further look into the facts of that case indicate the *Schnell* line of cases can be used to reconcile the decided outcome. Under *Schnell*, a plaintiff may argue that a corporate bylaw should not be enforced because it

115. *Id.* & n.3.

116. *Id.* at 1174.

117. The northern district of California actually would have used what are known as the "*Argueta* factors" to determine the enforceability of a contractual forum selection clause, which are coextensive with and derived from the *Bremen* factors. *See id.* at 1172-73.

118. *Id.* at 1174.

119. *Id.* at 1173.

120. *Id.* at 1173-74.

121. The court stated the only possible *Bremen* factor weighing against enforcement of the bylaw would be if a lack of negotiation by shareholders equated to "overweening bargaining power" by corporations. *Id.* at 1173. However, the court then noted it has been long established that a contractual venue clause can be enforceable even when it has not been expressly negotiated and there is an imbalance in bargaining power. *Id.* at 1173, n.3.

122. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13.

was being used for improper purposes inconsistent with the directors' fiduciary duties.[123] The *Schnell* doctrine summarily states that "inequitable action does not become permissible simply because it is legally possible."[124]

As the bylaw in *Galaviz* was adopted after a majority of the board's wrongdoing occurred, it would have been inequitable to enforce it on the shareholders in that particular case merely because the directors legally had the power to do so. The forum selection bylaw in *Galaviz* seems to fit squarely within the realm of a *Schnell* claim. The court did not need to declare the bylaw invalid on its face, but had other means more suitable to achieve the desired end. A forum selection bylaw could be struck down using theories not articulated in *Galaviz*, and therefore the northern district of California's opinion is not good precedent.

It is very easy to contrast *Galaviz* with *Boilermakers* and clear any concern as to why the two cases should be decided differently. The bylaws in *Boilermakers* were consistent with the directors' fiduciary duties because they only regulate suits related to internal corporate governance matters, and do not prevent a shareholder from bringing other claims in other jurisdictions such as an action for securities fraud. Also, the bylaws contained important language that gave directors the right to waive the bylaw "in a particular circumstance in order to meet their obligation to use their power only for proper corporate purposes."[125] Implicit in this language is the notion that directors are barred from invoking this bylaw if doing so would result in action that is inconsistent with their fiduciary duties. As *Boilermakers* makes clear, the *Galaviz* decision was ripe with errors because forum selection bylaws are presumptively valid as a matter of contract law.[126]

B. Correct Choice of Law

An inquiry into the choices of applicable law also reveals that forum selection bylaws are indeed valid and presumptively enforceable. The *Galaviz* court applied federal law, rather than Delaware law, only because the plaintiffs' claims included alleged violations of federal law along with the challenge to the bylaw.[127] Oracle and its directors were also being sued

123. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 958 (Del. Ch. 2013).

124. Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971).

125. *Boilermakers*, 73 A.3d at 954.

126. *Id.* at 956.

127. Bonnie White, Note, *Reevaluating* Galaviz v. Berg*: An Analysis of Forum-Selection Provisions in Unilaterally Adopted Corporate Bylaws As Requirements Contracts*, 160 U. PA. L. REV. PENNUMBRA 390, 400 (2012).

for alleged violations of the False Claims Act; a federal statute that allows a private individual with knowledge of fraud committed on the United States government to sue on behalf of the government to recover civil penalties and triple damages.[128]

Although the inclusion of federal claims in *Galaviz* seemingly was proper, this illustrates how a plaintiff's attorney filing in federal court can partially insulate himself from dismissal by adding a federal cause of action.[129] A federal court will be conceivably reluctant to dismiss litigation under any discretionary doctrine when no other court will have jurisdiction over some of the claims.[130] Federal securities law, for example, has broadened over time to take in more and more of corporate internal affairs, so that much behavior is covered by the two overlapping systems (federal and state incorporation law), and participants may be able to pursue one action over another for strategic reasons.[131] Ordinarily, federal law should not be applied to determine the validity of forum selection bylaws similar to those at issue in *Galaviz* and *Boilermakers* because the bylaws do not limit any federal shareholder right, but only channel internal affairs cases governed by Delaware law to the Delaware Court of Chancery.[132]

If a shareholder's claim is properly within the scope of the internal affairs of a corporation, federal courts need to analyze the validity of a forum selection bylaw under the DGCL. The United States Supreme Court has made clear that the substantive law of the incorporation state governs disputes involving the internal affairs of a corporation, no matter where the claim is filed.[133] For example, a claim made by shareholders under the Securities Exchange Act of 1934, such as false proxy solicitation, the forum selection bylaw could not be used to dismiss a case from federal court and federal law would trump the DGCL.[134] Federal law, however, should fall to the wayside for internal corporate governance matters relating to derivative suits, fiduciary duty suits, DGCL suits and internal affairs suits, i.e., the four types of matters subject to FedEx and Chevron's bylaws.

128. James W. Adams, Jr., *Proof of Violation Under the False Claims Act*, 78 AM. JUR. PROOF OF FACTS 3d 357, 357 (2004); 31 U.S.C. §§ 3729-33 (2012).

129. Myers, *supra* note 4, at 504.

130. *Id.*

131. Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and its Application to Multi-Jurisdictional Litigation*, 106 NW. L. REV. 1753, 1763 (2012).

132. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 963 (Del. Ch. 2013).

133. Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) ("[O]nly one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholder—because otherwise a corporation could be faced with conflicting demands."); *see also* Myers, *supra* note 4, at 494.

134. *Boilermakers*, 73 A.3d at 962.

Plaintiff shareholders and their attorneys should not be insulated from dismissal in a federal court by cursory placement of a federal cause of action. Cases will of course arise when shareholders have accompanying claims with merit that only generate federal jurisdiction, and the waiver provisions of the *Boilermakers* bylaws prevent these cases from being abused.[135] Jurisdictional issues of this nature need not be considered because a director's failure to appropriately waive an exclusive forum provision can and almost certainly will be redressed through a breach of fiduciary duty claim. Forum selection bylaws are accordingly not defeated by the application of federal law in *Galaviz*.

C. The Policy Perspective

Federal acceptance of forum selection bylaws is further supported by the totality of all policy considerations. First, federal courts should parrot the acceptance of forum selection provisions in corporate organizational documents that other jurisdictions have begun to adhere to. Second, any concerns of upsetting the balance of corporate power are erased in light of the different methods available for shareholders to challenge these bylaws. Finally, numerous economic and political benefits will result if forum selection bylaws garner broad acceptance in federal courts throughout the United States.

1. Forum Selection Clauses in Organizational Documents Have Received Some Judicial Support in Other Jurisdictions

Federal courts can first take notice of various other jurisdictions that have already begun to uphold the validity of forum selection provisions. *Daugherty v. Ahn* involved a derivative action brought in Texas against Furmanite Corp. for allegations of inadequate internal corporate controls and violations of the Foreign Corrupt Practices Act.[136] On February 15, 2013, the Texas court granted Furmanite's motion to dismiss on the basis of its mandatory exclusive forum bylaw that had been adopted in 2006.[137] Furmanite's bylaw paralleled those of the defendants in *Galaviz* and *Boilermakers* and only addressed derivative actions.[138]

135. The waiver provisions are discussed in greater detail *supra* Part IV.A.

136. Allen, *supra* note 11, at 6.

137. *Id.*

138. The Furmanite forum selection bylaw read: "Venue for Derivative Suits. Any derivative action or proceeding by or in the name of the Corporation shall be brought only in the Chancery Court of the State of Delaware." *Id.*

Delaware has also recently expanded its acceptance of the facial validity of forum selection by laws. In *City of Providence v. First Citizens BancShares, Inc.*,[139] the Delaware Court of Chancery found a forum selection bylaw adopted by the board of a Delaware corporation designating North Carolina, the state of incorporation, as the exclusive forum for certain intra-corporate disputes.[140] The chancery court endorsed then-Chancellor Strine's reasoning in *Boilermakers* and emphasized that designating North Carolina as the exclusive forum does not pose problems to the bylaw's facial validity.[141]

The New York Supreme Court also recently endorsed the validity of forum selection provisions in a publicly traded Delaware corporation's bylaws and certificate designating the Delaware Court of Chancery as the exclusive forum for any derivative actions or actions for breach of fiduciary duties by the directors.[142] In *Hemg*, the court held shareholders were contractually bound to the forum selection clauses for the same reasons as those in *Boilermakers*, namely that shareholders were on notice the board could unilaterally adopt bylaws of this kind.[143] Much like Texas (*Furmanite*), New York (*Hemg*) and of course Delaware (*Boilermakers*, *Providence*), federal courts should recognize forum selection bylaws as presumptively valid on their face and later decide at the appropriate time whether they are enforceable through various "as-applied" challenges.

Another district court came close to deciding the same issues addressed in *Galaviz*. Also in February 2013, the United States District Court for the Southern District of New York denied the dismissal of four IPO derivative actions against Facebook on the basis of an exclusive forum provision in the corporate charter.[144] However, *In re Facebook* presents issues slightly outside the scope of this comment. The court's justifications do not apply to forum selection bylaws because Facebook had included the provision in its corporate charter.[145]

The district court declared dismissal was improper because of procedural deficiencies in the forum selection provision; the amended charter containing the clause was not filed with the Delaware Secretary of

139. 99 A.3d 229 (Del. Ch. 2014).

140. *Id.* at 236.

141. *Id.* at 235.

142. Hemg, Inc. v. Aspen Univ., 2013 WL 5958388, at *3 (N.Y.S. Nov. 4, 2013).

143. *Id.*

144. In re Facebook, Inc., IPO Sec. & Derivative Litig., 922 F. Supp. 2d 445, 463 (S.D.N.Y. 2013); *see also* Allen, *supra* note 11, at 6.

145. Allen, *supra* note 11, at 6.

State until four days after the IPO.[146] The provision was thus not in effect when shares were purchased in the public offering, which is sufficient to defeat an amendment to a company charter.[147] The court then issued the most important part of its holding as it pertains to this comment: "[t]he Court recognizes the considerable debate on the efficacy, enforceability and desirability of the use of exclusive forum provisions and declines to advance any position here."[148] Federal courts cannot hinge the future of forum selection bylaws on the positions expressed in *Galaviz* and *In re Facebook*. Rather, federal courts should hang their hat on state court decisions like *Daugherty* and *Boilermakers*.

2. Plausible Shareholder Reactions to Unilaterally Adopted Bylaws Relieve Any Alleged Disturbance of the Balance of Power Between Shareholders and Directors

Furthermore, shareholders rights are preserved because they are not left defenseless. In response to the *Boilermakers* decision, shareholders will certainly have an incentive to challenge forum selection bylaws in the future and indeed have multiple avenues to accomplish this purpose. Shareholders can first challenge the enforcement of these bylaws when they arise in real-world disputes through a claim for breach of fiduciary duties[149] or through the usual scrutiny of contractual forum selection clauses under the *Bremen* test.[150] These "as applied" challenges are persuasive reasons why forum selection bylaws should be granted validity on their face. Any wrongful action by a board of directors can be filtered out and struck down when necessary through one of these two claims.

Shareholders of Delaware corporations also have another remedy in their authority to unilaterally repeal or amend any bylaws adopted by their directors under D.G.C.L. § 109(a).[151] This powerful shareholder tool has already been used to attack forum selection bylaws. Four corporations in 2012 received non-binding repeal proposals from their shareholders: Roper Industries, Inc., Superior Energy Services, Inc., Chevron Corporation and United Rentals, Inc.[152] Roper Industries and Superior Energy Services elected to repeal their forum selection bylaws in response to the reaction

146. *Id.*

147. *Id.*

148. The court here sidestepped the facial validity of forum selection bylaws. *In re Facebook*, 922 F. Supp. 2d at 462, n.16; *see also* Allen, *supra* note 11, at 6.

149. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 954 (Del. Ch. 2013).

150. *See id.*; *see also* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15-18 (1972).

151. *Boilermakers*, 73 A.3d at 956.

152. Allen, *supra* note 24, at 5.

from their shareholders.[153] Chevron and United Rentals, on the other hand, took the proposals to a shareholder vote and eventually defeated the proposals on almost a two-to-one margin.[154] Yet while just two of the four attacks achieved their ultimate purpose, this proposal campaign was considered a success, especially for a comparatively new type of shareholder proposal.[155]

This is concrete proof that any concerns shareholders will lose some of their rights with the adoption of forum selection bylaws are alleviated when coupled with their reciprocal power to repeal them. If shareholders disagree with the directors' decision to restrict where the company can be sued, the mechanisms are already in place for shareholders to act. Shareholders also benefit from their power to repeal bylaws because they do not need the help of courts to accomplish their purpose. The ability to resolve disputes over forum selection bylaws and concurrently avoid litigation undoubtedly provides a cheaper alternative to challenging directors' conduct. The power of shareholders to repeal or amend bylaws thus supports the position that forum selection bylaws should be declared valid by federal courts.

Moreover, shareholders can summon their rights in what is sometimes referred to as the "power of corporate democracy."[156] Having the authority to annually elect directors, shareholders may choose to discipline boards that refuse to accede to a shareholder vote repealing a forum selection bylaw and replace the incumbent directors when they stand for re-election.[157] Corporate democracy accordingly serves as an effective deterrent to directors who try to abuse their power through a forum selection bylaw. Summarily, the balance of corporate power is not upset from the mere adoption of a forum selection bylaw because of the effective ways shareholders can react.

Additionally, the feasibility of possible shareholder reactions erases the majority of concerns typically associated with contractual forum selection clauses. At their core, forum selection clauses must withstand judicial scrutiny for "fundamental fairness."[158] The fairness of forum selection bylaws is evident when shareholders have numerous ways to redress unfavorable conduct by their corporation's board of directors. All that

153. *Id.*

154. The shareholder proposal at Chevron received support from approximately 39 percent of the votes cast, and the shareholder proposal at United Rentals received about 36 percent of the votes cast. *Id.* at 5 & n.35.

155. *Id.* at 6.

156. *Boilermakers*, 73 A.3d at 956-57 & n.106.

157. *Id.*

158. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991).

remains are the benefits associated with contractual forum selection clauses, such as "dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions."[159] Federal courts consequently do not need to put the validity of forum selection bylaws under the microscope in a corporate setting.

3. Widespread Economic and Political Benefits Result from the Adoption of Forum Selection Bylaws

Granting validity to forum selection bylaws carries substantial economic and political benefits to all parties involved. Contrary to some viewpoints[160], a company's adoption of a forum selection bylaw would actually incur noticeable benefits to the shareholders rather than harm them. The financial advantages are most significant and in all likelihood at the top of most shareholder priority lists. As discussed earlier, the dominant factor contributing to the recent growth in multiforum litigation is the competition among plaintiffs' counsel seeking to maximize their individual economic advantage.[161] These "foreign forum filings" increase litigation costs, create the opportunity for opportunistic settlements, generate the prospect of inter-jurisdictional inconsistencies, and often reflect a battle among plaintiffs' counsel for a "seat at the table" in the contest to collect any fees awarded; all of which are adverse to stockholders' best interests.[162]

As described by one legal scholar: "[i]n shareholder litigation, there is little reason to believe that competition between fora helps shareholders and every reason to suspect that the process caters to plaintiffs' attorneys at the expense of shareholders, the intended beneficiaries of shareholder litigation."[163] The danger is that protecting shareholder rights or improving shareholder value will often take a backseat to plaintiffs' counsel's interest in getting access to fee distributions, and thus shareholder litigation is highly susceptible to agency costs because interests of counsel will not always align with the interests of their clients, i.e., the shareholders.[164]

159. *Id.* at 594.

160. Grundfest & Savelle, *supra* note 23, at 326-27.

161. For further discussion on the competition between plaintiffs' attorneys, *see* Grundfest & Savelle, *supra* note 23, at 328; *see also supra* notes 15-27 and accompanying text.

162. Grundfest & Savelle, *supra* note 23, at 328-29.

163. *Id.* at 329 & n.21.

164. Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 151 (2011).

Eliminating the risk of high agency costs is a pecuniary benefit to shareholders.

Additionally, fiduciary duties are the driving forces that limit directors' behavior, and shareholder suits, whether derivative or direct, are the mechanism for enforcing these duties.[165] The mere threat of a fiduciary duty suit can serve to deter director misconduct, and it is this deterrence rationale that is regarded as the principal justification for shareholder suits.[166] However, for the threat of shareholder litigation to properly deter misconduct, the value of the claims in settlement must bear some relationship to their underlying merit.[167]

Multiforum litigation skews this relationship in a number of ways. First, it increases the likelihood that weak claims will survive early procedural hurdles because no single court has the power to throw them out.[168] Second, it diminishes the incentive for any plaintiff's attorney to invest in claims because fee awards must be split with attorneys in other fora.[169] Third and perhaps most significantly, the plaintiff's attorney in each forum cannot press for the strongest possible result in settlement because plaintiffs' attorneys in other fora may underbid him or her, and the predictable outcome is weaker settlement terms for the defendants.[170] Multiforum litigation thus distorts the relationship between a claim's settlement value and its merit.[171] It is clear that shareholders have no reason to want multiple fora to be involved in litigating a single corporate act.[172]

Because shareholder claims always settle, settlement must be the primary means to achieve the desired deterrence.[173] Statistically, litigation in merger transactions results in dismissal 30.2 percent of the time and ends with some type of settlement in the other 69.8 percent.[174] As long as settlement values reflect the strength of shareholder claims, the reputational and financial costs associated with a settlement can deter director

165. Myers, *supra* note 4, at 474-75.

166. *Id.* at 475.

167. *Id.* at 472.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id*.

172. *Id.* at 471 & n.10.

173. *Id.* at 476.

174. A challenged merger transaction is never decided by a jury and appealed to a final judgment. Myers, *supra* note 4, at 476 & n.32.; *see also* Tom Baker & Sean Griffith, *Ensuring Corporate Misconduct: How Liability Insurance Undermines Shareholder Litigation* 10, 38 (2010) (highlighting the reality that trial is generally unheard of in shareholder litigation).

wrongdoing.[175] Multiforum litigation puts plaintiffs' attorneys in competition with one another to settle with defendant corporations and saps meritorious claims of their deterrent effect.[176]

Even opponents of forum selection bylaws have begun to switch sides as this corporate phenomenon has played out in recent years. Quite notably, some institutional investors who originally opposed exclusive forum provisions have changed their views because of the realization that strike suits are "effectively a tax on their investments."[177] The multiforum litigation strategy raises settlement costs of marginally valuable lawsuits and thus represents a "deadweight loss" to society.[178] Institutional shareholders thus unquestionably have an interest in reducing the costs of unnecessary multiforum litigation.[179] Without a forum selection bylaw in place, plaintiffs' attorneys' may choose to litigate strategically by bringing state claims outside the state of incorporation.[180] This may be unnecessarily costly to both institutional and individual shareholders who must directly or indirectly pay the costs of settlement when all is said and done.[181]

Likewise, prominent proxy advisory firms have backed off their initial discouragement of forum selection clauses. "Proxy advisory firms are information-gathering companies hired by institutional investors to issue voting recommendations regarding everything from executive compensation to proposed mergers."[182] Glass Lewis & Co., for example, first recommended voting against corporate forum selection clauses in 2012, but has since softened its position and may consider recommending in favor of an exclusive forum provision if the issuer has a good reason, shows evidence of past abuse and otherwise has good governance.[183] ISS also recommended voting against these provisions at the outset but now will "evaluate [exclusive forum provisions] on a case-by-case basis, taking into account the governance and litigation history of the company."[184]

From the perspective of Delaware legislators, multiforum litigation strategies unopposed by forum selection bylaws also present a long-term

175. Myers, *supra* note 4, at 476.

176. *Id.* at 499.

177. Allen, *supra* note 11, at 7.

178. Quinn, *supra* note 164, at 152 & n.60.

179. *Id.* at 152.

180. *Id.*

181. *Id.*

182. Sagiv Edelman, *Proxy Advisory Firms: A Guide for Regulatory Reform*, 62 EMORY L.J. 1369, 1370 (2013).

183. Myers, *supra* note 4, at 76 & n.296.

184. *Id.* at 526 & n.297.

threat to Delaware's ability to determine its own corporate law.[185] Without these bylaws, the result is an increased likelihood that certain cases will present opportunities to develop new precedents that will be missed by Delaware courts, thus compromising Delaware's responsiveness to new events.[186] An inexperienced court also might be more likely to approve too large a fee award or misapply incorporation state law.[187]

A misapplication of Delaware state law is precisely one of the flaws in the *Galaviz* decision. The case likely would have been decided on different grounds had the northern district of California correctly found that the bylaws at issue were valid under the DGCL. Having non-Delaware judges apply Delaware law is comparable to "taking [a prominent chef's] secret recipes and giving them to a Jack-In-The-Box short-order cook."[188] The emerging "out-of-Delaware" trend that is problematic to legislators would inevitably gain more momentum if multiforum litigation is not quashed.[189]

Authors generally warn corporations to carefully consider whether to adopt a forum selection bylaw by taking into account a number of issues.[190] This author suggests throwing caution to the wind. It would be foolish for a Delaware corporation to not adopt a forum selection bylaw if such a provision was foregone at the company's inception. Chancellor Strine communicated the preferred acceptance of these bylaws by Delaware courts, and Delaware like all states is in the best position to interpret its own laws.

CONCLUSION

Forum selection bylaws equitably shift the focus of shareholder litigation away from plaintiffs' attorneys and back to the actual shareholders. To be a successful deterrent of multiforum litigation, these bylaws needs to be endorsed by federal courts specifically. Corporate shareholder litigation is trending to federal courts, and a ratification of forum selection bylaws in federal jurisdictions would propel the future effectiveness of these provisions. Forum selection bylaws are Delaware corporations' best bet to subdue the multiforum litigation phenomenon spurred by improperly motivated plaintiffs' attorneys.

185. Quinn, *supra* note 164, at 152 & n.60.

186. John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1348 (2012).

187. Myers, *supra* note 4, at 495.

188. *Id.* at 35 & n.104.

189. Armour, Black & Cheffins, *supra* note 186, at 1393.

190. Allen, *supra* note 23, at 7.

Federal courts should follow the *Boilermakers* decision and extinguish the position articulated in *Galaviz* for several reasons. First, the Delaware Chancery Court's reasoning in *Boilermakers* is sound and takes certain aspects of the DGCL into account that *Galaviz* did not. Forum selection bylaws are contractually valid when properly analyzed under the state of incorporation's law. Second, the bylaws are valid on the condition that the plaintiffs' claims do not contain any causes of action exclusive to federal courts. *Galaviz* did not satisfy this condition and does not permit the abrogation of future bylaws. Third, an examination of the relevant policy considerations supports the validity of forum selection bylaws. Despite the lack of express shareholder consent to these provisions, federal courts should accept the validity of unilaterally adopted forum selection bylaws.

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