

The Limits of Delaware Corporate Law:
Internal Affairs, Federal Forum
Provisions, and *Sciabacucchi*

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Stanford Law School and
The Rock Center for Corporate Governance
September 12, 2019

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Abstract. The Securities Act of 1933 provides for concurrent federal and state jurisdiction. Securities Act claims were historically litigated in federal court, but in 2015 plaintiffs began filing far more frequently in state court where dismissals are less common and weaker claims more likely to survive. D&O insurance costs for IPOs have since increased significantly. Today, approximately 75% of defendants in Section 11 claims face state court actions. Federal Forum Provisions [FFPs] respond by providing that, for Delaware-chartered entities, Securities Act claims must be litigated in federal court or in Delaware state court.

In *Sciabacucchi*, Chancery applies “first principles” to invalidate FFPs primarily on grounds that charter provisions may only regulate internal affairs, and that Securities Act claims are always external. In so concluding, *Sciabacucchi* adopts a novel definition of internal affairs that is narrower than precedent, and asserts that plaintiffs have a federal right to bring state court Securities Act claims. It describes all Securities Act plaintiffs as purchasers who are not owed fiduciary duties at the time of purchase. The opinion constrains all actions of the Delaware legislature relating to the DGCL to comply with its novel definition of “internal affairs.”

Sciabacucchi's logic and conclusion are fragile. The opinion conflicts with controlling U.S. and Delaware Supreme Court precedent and relies critically on assumptions of fact that are demonstrably incorrect. It asserts that FFPs are “contrary to the federal regime” because they preclude state court litigation of Securities Act claims. But the U.S. Supreme Court in *Rodriguez* holds that there is no immutable right to litigate Securities Act claims in state court, and enforces an agreement that precludes state court Securities Act litigation. *Sciabacucchi* assumes that Securities Act plaintiffs are never existing stockholders to whom fiduciary duties are owed. But SEC filings and the pervasiveness of order splitting conclusively establish that purchasers are commonly existing holders protected by fiduciary duties. The opinion fears hypothetical extraterritorial application of the DGCL. To prevent this result, it invents a novel definition of “internal affairs” that it applies to constrain all of the Legislature’s past and future activity. But the opinion nowhere addresses the large corpus of U.S. and Delaware Supreme Court precedent that already precludes extraterritorial applications of the DGCL. It thus invents novel doctrine that conflicts with established precedent in an effort to solve a problem that is already solved. The opinion’s novel, divergent definition of “internal affairs” also conflicts with U.S. and Delaware Supreme Court precedent that the opinion nowhere considers.

Sciabacucchi is additionally problematic from a policy perspective. By using Delaware law to preclude a federal practice in federal court under a federal statute that is permissible under federal law, *Sciabacucchi* veers Delaware law sharply into the federal lane and creates

unprecedented tension with the federal regime. Its narrow “internal affairs” definition invites sister states to regulate matters traditionally viewed as internal by Delaware, and advances a position inimical to Delaware’s interests. By propounding its divergent internal affairs constraint as a categorical restriction on the General Assembly’s actions, past and future, the opinion causes the judiciary to intrude into the legislature’s lane. And, data indicate that the opinion in *Sciabacucchi* caused a statistically and economically significant decline in the stock price of recent IPO issuers with FFPs in their organic documents.

In contrast, a straightforward textualist approach would apply the doctrine of consistent usage and use simple dictionary definitions to preclude any extension of the DGCL beyond its traditional bounds. Textualism avoids all of the concerns that inspire the invention of a divergent “internal affairs” definition. Textualism does not require counter-factual assumptions, conflict with U.S. or Delaware Supreme Court precedent, cause Delaware to constrain federal practice in a manner inconsistent with federal law, or advocate policy positions inimical to Delaware’s interest. Textualism also interprets the DGCL in a manner that profoundly constrains the ability of all Delaware corporations to adopt mandatory arbitration of Securities Act claims. Textualism validates FFPs in a manner that precludes the adverse, hypothetical, collateral consequences that animate *Sciabacucchi*’s fragile analysis, without generating *Sciabacucchi*’s challenging *sequelae*.

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I. Introduction.

Sciabacucchi v. Salzberg,¹ addresses a question of first impression under Delaware law. May a certificate of incorporation validly contain a forum selection provision directing that claims arising under the Securities Act of 1933 (“Securities Act” or “’33 Act”) be litigated in federal court (a “Federal Forum Provision”), even though the Securities Act expressly provides for concurrent federal and state jurisdiction?

Federal Forum Provisions were first proposed in 2016 in response to a dramatic shift of Section 11 Securities Act litigation from federal to state court.² Section 11 litigation is dismissed less frequently in state court, where weaker claims are more likely to survive and have superior settlement value.³ The state court shift is concurrent with a dramatic increase in the price of directors’ and officers’ insurance coverage for initial public offerings.⁴ Federal Forum Provisions redirect federal complex Securities Act claims to federal courts that have traditionally resolved those disputes, and that have a comparative advantage in resolving those complex claims.⁵ Federal Forum Provisions implement the neutral principle that litigation is best resolved by courts with a comparative advantage in addressing underlying disputes.⁶

* The William A. Franke Professor of Law and Business at Stanford Law School, and Senior Faculty of the Rock Center on Corporate Governance; Commissioner of the United States Securities and Exchange Commission (1985-1990). I would like to thank Gal Dor, Raphael Ginsburg, Kyl Grigel, and Joseph Tisch for extraordinary research assistance. My interest in this matter is paternal. I developed the concept of Federal Forum Provisions and drafted the language for those provisions in a form substantially similar to the text at issue in *Sciabacucchi*. Plaintiffs, in their complaint, describe Federal Forum Provisions as the “Grundfest Solution” to the challenge presented by the migration of federal Section 11 claims to state court. *See* Verified Class Action Complaint for Declaratory Judgment at ¶ 46, *Sciabacucchi v. Salzberg*, No. 2017, 0931-JTL (Del. Ch. Dec 29, 2017) (hereinafter “*Sciabacucchi* Complaint”).

¹ C.A. No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018).

² *See infra* Section II; *see also Sciabacucchi* Complaint at ¶ 46.

³ *See infra* Section II.

⁴ *See infra* Section II.

⁵ If a plaintiff files a Securities Act claim in Delaware state court, the defendant corporation will rationally not seek to dismiss the complaint because such motion would allow plaintiffs to raise an as-applied challenge to the Federal Forum Provision’s validity under DGCL Section 115. *See infra* Section VI.C.

⁶ Federal Forum Provisions promote the same judicial efficiency objective as intra-corporate forum selection provisions that are designed to direct corporate litigation to the courts of the state with the greatest expertise in resolving the underlying dispute. *See, e.g.,* Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAWYER 325 (2013); *see also* *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A. 3d 934, 963 (Del. Ch. 2013).

The United States Supreme Court in 1989 held that plaintiffs have no immutable right to litigate federal Securities Act claims in state court, and enforced a private agreement prohibiting state court litigation of Securities Act claims.⁷ Federal Forum Provisions are thus consistent with U.S. Supreme Court precedent permitting preclusion of state court Securities Act litigation. This is the backdrop against which *Sciabacucchi* emerges.

Sciabacucchi's facts are simple. Three corporations adopted Federal Forum Provisions in their initial public offering charters. They were sued in a complaint fashioned as both a derivative and direct claim.⁸ The complaint presents a facial challenge to the provisions' validity. More than eighty corporations have adopted Federal Forum Provisions, typically in connection with initial public offerings.⁹ These three defendants were randomly selected from among the adopting population.¹⁰

Two of the three corporate defendants, Roku and Stitch Fix, adopted substantively identical Federal Forum Provisions:

Unless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of the Corporation shall be deemed to have notice of and consented to [this provision].¹¹

The third corporate defendant, Blue Apron, "hedged a bit. Its provision tracks the others but also states that "the federal district courts of the United States of America shall, *to the fullest extent permitted by law*, be the sole and exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933."¹²

Sciabacucchi holds that Federal Forum Provisions are "ineffective and invalid."¹³ The opinion reasons that "contrary to the federal regime, [Federal Forum Provisions] preclude a plaintiff from asserting a 1933 Act claim in state court."¹⁴ There are also "grounds to believe that because the Federal Forum Provisions conflict with the forum alternatives that 1933 Act permits, the [Federal Forum Provisions] could be pre-empted."¹⁵

Sciabacucchi explains that "at the moment the predicate act of purchasing occurs, the purchaser is not yet a stockholder and does not yet have any relationship with the corporation

⁷ *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989).

⁸ *Sciabacucchi* Complaint at ¶60 (explaining that the complaint is brought as both a direct class claim and as a derivative claim).

⁹ See *infra* Section II.

¹⁰ *Sciabacucchi v. Salzberg*, No. 2017-0931 JTL, Transcript of Oral Argument on Motion for Fees and Expenses, Apr. 11, 2019, at 22, lines 7-8 ("[t]he reason we sued these three is we had a client who stock in these three. That's why we sued these three.")

¹¹ *Sciabacucchi*, 2018 WL 6719718, at *6 (citing *Sciabacucchi* Complaint ¶¶ 15-16).

¹² *Id.* at *3 (citing *Sciabacucchi* Complaint ¶ 14).

¹³ *Id.* at *3, 23.

¹⁴ *Id.* at *1.

¹⁵ *Id.* at *23.

that is governed by Delaware corporate law.”¹⁶ Because purchaser-plaintiffs are not stockholders at the time of purchase, no fiduciary duties are owed to them, so none can be breached.

Most fundamentally, *Sciabacucchi* applies “first principles”¹⁷ to conclude that, notwithstanding the text of the Delaware General Corporation Law (“DGCL”), organic provisions of Delaware-chartered entities may only contain provisions that govern “internal affairs.”

“The certificate of incorporation differs from an ordinary contract, in which private parties execute a private agreement in their personal capacities to allocate their rights and obligations. When accepted by the Delaware Secretary of State, the filing of a certificate of incorporation effectuates the sovereign act of creating a “body corporate” – a legally separate entity.... As the sovereign that created the entity, Delaware can use its corporate law to regulate the corporation’s internal affairs.... Delaware deploys the corporate law to determine the parameters of the property rights that the state has chosen to create. But Delaware’s authority as the creator of the corporation does not extend to its creation’s external relationships when the laws of other sovereigns govern those relationships. Other states exercise territorial jurisdiction over a Delaware corporation’s external interactions.... When litigation arises out of those [external] relationships, the DGCL cannot provide the necessary authority to regulate the claims.”¹⁸

By *Sciabacucchi*’s logic, even if the DGCL’s plain text confirms the validity of Federal Forum Provisions, the provisions are invalid because they are not “internal.” *Sciabacucchi* implements this analytic framework to conclude that Securities Act claims are external because they do not “turn on the rights, powers, or preferences of the shares, language in the corporation’s charter or bylaws, a provision of the DGCL, or the equitable relationships that flow from the internal structure of the corporation.”¹⁹ The Securities Act claim “does not arise out of the corporate contract and does not implicate the internal affairs of the corporation.”²⁰ A Securities Act claim is therefore “an external claim that falls outside the scope of the corporate contract.”²¹

This “first principles” constraint is not limited to charter or bylaw provisions. It applies with equal force to constrain Delaware’s own legislature. “Delaware’s authority as the creator of the corporation does not extend to its creation’s external relationships,”²² *i.e.*, matters that fail *Sciabacucchi*’s internal affairs test. When “the claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate.”²³ “Delaware can regulate the internal affairs of its corporate creations, regardless of their location, but only their internal affairs.”²⁴ *Sciabacucchi* thus advances a “proto-*Marbury*” proposition governing all of Delaware’s existing

¹⁶ *Id.* at *17.

¹⁷ *Id.* at *2, *18-23.

¹⁸ *Id.* at *2.

¹⁹ *Id.* at *1.

²⁰ *Id.* at *2.

²¹ *Id.* at *18.

²² *Id.* at *2.

²³ *Id.*

²⁴ *Id.* at *21.

and future corporate law. *Marbury v. Madison*²⁵ holds that courts can invalidate legislation as unconstitutional.²⁶ *Sciabacucchi* holds that Delaware courts can and must invalidate legislative actions that violate “first principles” as reflected in *Sciabacucchi*’s definition of “internal affairs,” even if the legislation is otherwise consistent with the United States and Delaware constitutions, and with United States and Delaware Supreme Court definitions of “internal affairs.” (*See infra*, Section VII.B).

To be sure, *Sciabacucchi* itself does not invalidate any DGCL provision.²⁷ Instead, it maps a legal Rubicon. It commands Delaware’s legislature: “The line is drawn at “first principles” and at “internal affairs” as defined in *Sciabacucchi*. You may not cross it.” Even if the legislature amended the DGCL expressly to permit Federal Forum Provisions,²⁸ *Sciabacucchi* would invalidate the statute as seeking to regulate external conduct that offends *Sciabacucchi*’s conceptualization of “first principles.” *Sciabacucchi*’s implications reach far beyond the four corners of the Federal Forum Provisions, and articulate a novel principle that would constrain all of past and future Delaware corporate law.

Sciabacucchi is, however, highly contestable. As an initial matter, the opinion fails to consider controlling United States Supreme Court precedent that contradicts an assertion central to its analysis. This is the “*Rodriguez* problem.” The opinion also incorrectly assumes, as a matter of fact, that Securities Act purchasers are not pre-existing stockholders to whom fiduciary obligations are owed. This is the “purchaser problem.” A threshold procedural problem arises because the opinion nowhere recognizes that it is adjudicating a facial challenge in which plaintiff’s burden is to demonstrate that Federal Forum Provisions “cannot operate lawfully or equitably *under any circumstance*.”

The “*Rodriguez* problem” arises because *Sciabacucchi* asserts that prohibiting state court Securities Act litigation is “contrary to the federal regime,”²⁹ and speculates that Federal Forum Provisions are “pre-empted.”³⁰ But the United States Supreme Court in *Rodriguez de Quijas v. Shearson/ American Express, Inc.*³¹ conclusively establishes that plaintiffs have no immutable right to litigate Securities Act claims in state court, and enforces a contract of adhesion prohibiting state court litigation of Securities Act claims. *Sciabacucchi* nowhere mentions *Rodriguez*. It presents no support for its assertion that prohibitions on state court litigation of Securities Act claims are “contrary to the federal regime.” Ironically, *Sciabacucchi* warns that “asserting that state corporate law could be used to regulate federal claims” would have “vast” and negative implications.³² Yet, that’s precisely what *Sciabacucchi* does. By invalidating a federal practice governing a federal claim that is consistent with federal law, *Sciabacucchi*

²⁵ 5 U.S. (1 Cranch) 137 (1803).

²⁶ See SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 38-40 (1990) (overviewing the role of *Marbury* in the emergence of judicial review).

²⁷ *Sciabacucchi* does, however, imply that existing provisions of the DGCL are invalid because they govern matters that are external by *Sciabacucchi*’s definition. *See infra* Section VI.A.

²⁸ This article’s analysis concludes that DGCL Section 115 expressly authorizes Federal Forum Provisions and precludes mandatory arbitration for all Delaware chartered corporations. *See infra* Section VI.C.

²⁹ *Sciabacucchi*, 2018 WL 6719718, at *1.

³⁰ *Id.* at *23.

³¹ 490 U.S. 477 (1989)

³² *Id.* at *22.

deploys Delaware law to impose a restraint on federal practice that appears nowhere in federal law. *Sciabacucchi* thus creates an unprecedented intrusion by Delaware law into the federal space, and paradoxically generates the “vast” and negative implications against which it warns. *Sciabacucchi*’s failure to address the operation of forum selection clauses more generally creates additional tension between its holding and United States and Delaware Supreme Court precedent.³³ (*See infra*, Section IV.A).

The “purchaser problem” arises because *Sciabacucchi* asserts that “[a]t the time the predicate act occurs, the purchaser is not yet a stockholder and lacks any relationship with the corporation that is grounded in corporate law.”³⁴ Securities Act plaintiffs are thus not pre-existing stockholders protected by Delaware fiduciary obligations. But registration statements on file with the Securities and Exchange Commission establish that existing holders purchase additional shares in both initial public offerings and in follow-on offerings. These filings are sufficient to rebut *Sciabacucchi*’s assertions of fact, and establish that Securities Act purchasers are owed fiduciary obligations. Significantly, the problem with *Sciabacucchi*’s assumption is, in practice, far more profound than these registration statements suggest. An extensive literature establishes that order splitting is ubiquitous in modern equities markets. When an institutional investor purchases 100,000 shares of an issuer’s stock, the purchase is likely conducted as, say, 100 transactions of 1,000 shares, and not as a single 100,000 share trade. By *Sciabacucchi*’s own logic, even if no fiduciary duty is owed in connection with the purchase of the first 1,000 shares, the purchaser is then a pre-existing holder owed Delaware fiduciary duties with respect to the acquisition of the remaining 99,000 shares. Order splitting also occurs in retail transactions. Indeed, the median trade size on the Nasdaq market is today a mere 100 shares. Defective registration statements are therefore commonly material misrepresentations to existing holders who can assert fiduciary breach claims under *Malone v. Brincat*³⁵ and *Caremark*.³⁶ *Sciabacucchi*’s assertion that Securities Act purchasers are not pre-existing holders is presented with no citation support, and is foundational to *Sciabacucchi*’s analysis. The opinion’s logic collapses if this assumption is incorrect. This assumption is incorrect. (*See infra*, Section V.C).³⁷

Sciabacucchi’s “procedural problem” arises because it is a facial challenge. Plaintiffs’ burden on a facial challenge “is a difficult one: they must show that [Federal Forum Provisions]

³³ The United States and Delaware Supreme Courts agree that forum selection clauses are “*prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” *M/S Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 10 (1972). *See also Boilermakers*, 73 A.3d at 940 (citing *Ingres*, 8 A.3d 1143 (Del. 2010)). “U.S. Supreme Court precedent reinforces the conclusion that forum selection bylaws are, as a facial matter of law, contractually binding.” *Boilermakers*, 73 A.3d at 957. Plaintiffs cannot credibly claim that requiring litigation of a federal claim in federal court is unreasonable when there is at least one federal court in every state, when the Securities Act itself provides for a federal forum, and when the Supreme Court enforces contracts that prohibit state court litigation of Securities Act claims. *Sciabacucchi* nowhere addresses any of this precedent, and contrary to the presumption of *prima facie* validity holds Federal Forum Provisions invalid.

³⁴ *Sciabacucchi*, 2018 WL 6719718, at *2.

³⁵ 722 A.2d 5 (Del. 1998). *See infra* Section V.G.

³⁶ 698 A.2d 959 (Del. Ch. 1996). *See infra* Section V.G.

³⁷ DGCL Section 202, and other sections of that Code, expressly authorize charter and bylaw provisions regulating transactions with purchasers who are not yet stockholders. *Sciabacucchi*’s proposition that organic provisions cannot regulate purchasers who are not yet stockholders thus independently conflicts with the statute’s plain text. *See infra* Section VI.A.

cannot operate lawfully or equitably *under any circumstance*.”³⁸ There need be only one circumstance under which Federal Forum Provisions operate lawfully or equitably for a facial challenge to fail. *Sciabacucchi* never addresses the facial nature of the challenge. It never endeavors to identify one circumstance in which Federal Forum Provisions might lawfully apply. Instead, it relies on hypotheticals, some of which are impossibilities, combined with demonstrably incorrect assumptions of fact, and assertions of law contradicted by Supreme Court precedent, to argue that Federal Forum Provisions are invalid. Moreover, “charter provisions are presumed to be valid, and the courts will construe [them] in a manner consistent with the law rather than strike [them] down.”³⁹ *Sciabacucchi* also nowhere refers to this presumption, and nowhere endeavors to construe Federal Forum Provisions in a manner consistent with the law. (*See infra*, Sections, V.A and V.B).

Sciabacucchi’s core logic relies on a “first principles” analysis to conclude that all of Delaware corporate law must be subject to an internal affairs constraint. This “first principles” analysis is animated by concern that Delaware might interpret the DGCL to allow regulation of tort, contract, or conversion claims on a domestic or extraterritorial basis.⁴⁰ The easy answer to all these hypothetical concerns is that none of them can arise in the context of Federal Forum Provisions. Federal Forum Provisions relate only to Securities Act claims. *Sciabacucchi* presents no example of how Securities Act claims might implicate tort, contract, or conversion claims because no such examples exist. As applied to Federal Forum Provisions that are limited to Securities Act litigation, *Sciabacucchi*’s hypotheticals are not hypotheticals at all. They are impossibilities. But impossibilities and hypotheticals drive the analysis. Other forum selection provisions not at issue in *Sciabacucchi* might come into being and credibly raise *Sciabacucchi*’s hypothetical concerns. Delaware can address those concerns if and when those provisions arise in a real case or controversy. (*See infra*, Sections V.A and VI.D).

Delaware law repeatedly cautions against reliance on hypotheticals. The “wisdom of declining to opine on hypothetical situations that might or might not come to pass is evident.”⁴¹ “Delaware courts ‘typically decline to decide issues that may not have to be decided or that create hypothetical harm’.”⁴² It is “imprudent and inappropriate to address these hypotheticals in the absence of a genuine controversy with concrete facts.”⁴³ Yet, *Sciabacucchi*’s core “first principles” analysis arises only because of concern about hypothetical fact patterns that might never arise as they might relate to charter provisions that might never exist.

The opinion’s concern over extraterritorial application of the DGCL⁴⁴ is additionally fraught because it nowhere recognizes the sophisticated body of United States Supreme Court

³⁸ *Boilermakers*, 73 A.3d 934, 948 (Del. Ch 2013) (emphasis in original).

³⁹ *Cedarview*, 2018 WL 4057012, at *20.

⁴⁰ *Sciabacucchi*, 2018 WL 6719718, at *1.

⁴¹ *Boilermakers*, 73 A.3d at 963.

⁴² *Id.* at 940 (quoting 3 STEPHEN A. RADIN, *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE OFFICERS* 3498 (6th ed. 2009)).

⁴³ *Id.*

⁴⁴ *Sciabacucchi*, 2018 WL 6719718, at *2 (“But Delaware’s authority as the creator of the corporation does not extend to its creation’s external relationships, particularly when the laws of other sovereigns govern those relationships. Other states exercise territorial jurisdiction over a Delaware corporation’s external interactions. A Delaware corporation that operates in other states must abide by the labor, environmental, health and welfare, and

and other precedent that already precludes extraterritorial applications of the sort that trouble *Sciabacucchi*. The opinion nowhere explains why existing Commerce Clause precedent is inadequate to address its extraterritoriality concerns; how its internal affairs constraint differs from existing precedent; and why the addition of a self-imposed internal affairs constraint, as uniquely defined in *Sciabacucchi*, rationally advances the current state of the law. *Sciabacucchi*'s "first principles" analysis, from an extraterritoriality perspective, proposes to solve a problem that has already been solved and doesn't need any more solving. (*See infra*, Section V.D).

Sciabacucchi's "internal affairs" constraint is independently problematic because its definition diverges from precedent. The United State Supreme Court in *Edgar v. Mite Corp.* defines internal affairs as "matters peculiar to the relationship among or between the corporation and its current officers, directors, and shareholders – because [if multiple states had authority to regulate a corporation's internal affairs] a corporation could be faced with conflicting demands."⁴⁵ Delaware's definition is essentially identical.⁴⁶ *Sciabacucchi* diverges from this precedent to invent a materially narrower definition: a matter is internal if it "turn[s] on the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision of the DGCL, or the equitable relationships that flow from the internal structure of the corporation."⁴⁷ *Sciabacucchi* offers no rationale for its divergence from controlling precedent, and nowhere analyzes that precedent. The definition of "internal affairs" is a matter of substantial import to Delaware corporate law. Careful analysis is warranted before Delaware's judiciary endorses a divergent definition that constrains established precedent. No such analysis resides in *Sciabacucchi*. (*See infra* Section V.E).

Sciabacucchi's application of its divergent definition is additionally problematic. The opinion concludes that Securities Act claims are always external.⁴⁸ It follows that brazen lies knowingly written into a prospectus by directors sitting in the boardroom, who profit from the prevarication, are external. This conclusion conflicts with Delaware Supreme Court precedent recognizing that a lie can simultaneously be an internal violation of Delaware law and violate federal law.⁴⁹ The inconsistency arises, in part, because *Sciabacucchi* presents a curated

securities law regimes (to name a few) that apply in those jurisdictions. When litigation arises out of those relationships, the DGCL cannot provide the necessary authority to regulate the claims . . . Because the claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate.").

⁴⁵ 457 U.S. 624, 645 (1982).

⁴⁶ *VantagePoint Venture Partners v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) ("[T]he internal affairs doctrine applies to those matters that pertain to the relationship among or between the corporation and its officers, directors, and shareholders.").

⁴⁷ *Sciabacucchi*, 2018 WL 6719718, at *1.

⁴⁸ *Id.* at *1 ("[A] 1933 Act claim is external to the corporation.").

⁴⁹ Delaware's Supreme Court explains in *Malone v. Brincat*, 722 A.2d 5 (Del. 1998), that Securities Act violations can simultaneously constitute classic breaches of Delaware fiduciary duties: "[W]hen directors communicate publicly or directly with shareholders about corporate matters, the *sine qua non* of directors' fiduciary duty is honesty." *Id.* at 10. Accordingly, "[w]hen corporate directors impart information they must comport with the obligations imposed by both the Delaware law and the federal statutes and [SEC] regulations . . ." *Id.* at 13. The fact that a federal claim arises from internal conduct that breaches Delaware fiduciary principles in no sense causes either the underlying conduct, or the federal claim based on that conduct, to become external. Instead, federal and Delaware causes of action co-exist as both govern the same internal conduct. The "historic roles played by state and federal law in regulating corporate disclosures have been not only compatible but complementary." *Id.* at *13. Arguing that the federal claim causes the underlying action not to be internal, or that the federal claim is not itself

rendition of Section 11 liability that overlooks the profoundly internal nature of the Section 11 claim. Under Section 11, officers and directors are liable together with the corporation for material misrepresentations in the registration statement unless the officers and directors establish a “due diligence” defense by demonstrating they behaved as a prudent person would in the management of their own property. The defense inexorably requires a deep dive into boardroom practice. It inquires as to the individualized and collective conduct of defendant officers and directors. Which documents did each director review? Which questions did each ask? Did each director exercise appropriate skepticism? These matters are entirely internal. Section 11 liability is generated by actions that emanate exclusively from the boardroom, and that are as internal as conduct gets. Section 11 also contains a complex mechanism for allocating liability among directors, officers, and the corporation. It thus inevitably implicates “the equitable relationships that flow from the internal structure of the corporation,”⁵⁰ and is internal by *Sciabacucchi*’s own definition. *Sciabacucchi*’s curated rendition of Section 11 liability is foundational to its incorrect conclusion that Section 11 liability is always external. (*See infra*, Section V.G).

Sciabacucchi’s divergent, narrowing definition of internal affairs has material adverse policy consequences for Delaware law. If conduct underlying the Section 11 claim is external, then that conduct can be regulated by sister states. Nothing then precludes California, for example, from enacting legislation requiring that all directors of California-headquartered corporations spend at least six hours in video-recorded due diligence sessions in connection with federally registered offerings. Such regulation is deeply intrusive into a board’s functioning, and would, under *Edgar v. Mite* and *VantagePoint*, constitute impermissible intrusions into a Delaware corporation’s internal affairs. *Sciabacucchi*, however, would have no objection to that intrusion because its incomplete description of Section 11 models the violation as external. A very slippery slope ensues. If processes that cause the filing of a defective registration statement are external, then so too are a host of other boardroom functions that become amenable to regulation by sister states. This trajectory is inimical to Delaware’s interest in regulating the internal functioning of Delaware-chartered entities, and constitutes an independent reason to question *Sciabacucchi*’s analysis and holding. (*See infra*, Section VII.F).

But *Sciabacucchi*’s implications for the law are not limited to the four corners of Federal Forum Provisions. *Sciabacucchi*’s holding constrains all past and future legislative activity to comply with its conceptualization of “first principles.”⁵¹ It forces all of Delaware corporate law to fit within its divergent definition of “internal affairs.” The opinion forces this “proto-

internal, particularly when federal law expressly permits private ordering through forum selection, defeats the complementary structure of the federal and state regimes. *Sciabacucchi* creates this additional tension with Delaware Supreme Court precedent.

⁵⁰ *Sciabacucchi*, 2018 WL 6719718, at *1.

⁵¹ “As the sovereign that created the entity, Delaware can use its corporate law to regulate the corporation’s internal affairs . . . But Delaware’s authority as the creator of the corporation does not extend to its creation’s external relationships, particularly when the laws of other sovereigns govern those relationships. Other states exercise territorial jurisdiction over a Delaware corporation’s external interactions. A Delaware corporation that operates in other states must abide by the labor, environmental, health and welfare, and securities law regimes (to name a few) that apply in those jurisdictions. When litigation arises out of those relationships, the DGCL cannot provide the necessary authority to regulate the claims . . . Because the claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate.” *Sciabacucchi*, 2018 WL 6719718, at *2.

Marbury” position onto the legislature with no analysis of conflicts it generates with existing DGCL text, and no analysis of the implications of its divergent internal affairs definition. It also fails to recognize that Delaware courts “must . . . respect the broadly enabling nature of the DGCL, and [w]here the markets begin to use the DGCL’s breadth in new ways, it is the General Assembly, not the courts, that should evaluate whether, on public policy grounds, the statute’s authorizing breadth should be narrowed.”⁵² From this perspective, *Sciabacucchi* veers Delaware’s judiciary into the Legislature’s lane, as well as into the federal lane. Careful deliberation is appropriate before adopting a sweeping judicial constraint on all past and future legislative conduct, particularly when the question presented can be resolved on narrower grounds that adhere to the statutory text, that avoid the significant interpretive challenges presented by “first principles,” and do not call for the application of a divergent definition of internal affairs. (*See infra*, Sections VII.A and VII.B).

The stock market is also sensitive to concerns over *Sciabacucchi*. A recent study documents that the release of the opinion in *Sciabacucchi* was correlated with statistically and financially significant negative stock price responses among recent IPO issuers with Federal Forum Provisions in their organic documents.⁵³ These findings support the inference that Federal Forum Provisions are in stockholders’ best interests, and that plaintiff counsel, not the corporation, stands to gain from a decision invalidating Federal Forum Provisions. These findings also suggest that the market was surprised by the holding in *Sciabacucchi*, and that the consensus view was that Federal Forum Provisions would likely be upheld as valid under Delaware law. Put another way, the data suggest that the market was both surprised and disappointed by the holding in *Sciabacucchi*. (*See infra*, Sections II and VII.E).

All these problems are, however, efficiently avoided by applying well-established precedent. “The most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it.”⁵⁴ *Sciabacucchi* pays scant attention to this “most important consideration.” The plain text of DGCL Sections 102(b)(1), 115, and 202, unambiguously support the validity of Federal Forum Provisions and nothing in *Sciabacucchi* suggests that Federal Forum Provisions are inconsistent with the plain text. The text is also naturally read to preclude charter or bylaw regulation of tort, contract, or conversion claims under the DGCL. A natural reading avoids all hypothetical concerns that drive *Sciabacucchi*’s “first principles,” and that lead to its divergent definition of internal affairs. (*See infra*, Sections VI.D, VI.E, and VI.F).

DGCL Section 202 is not addressed by *Sciabacucchi*. Section 202 authorizes charter-based transfer restrictions that are “not manifestly unreasonable.”⁵⁵ It conclusively presumes that a restriction is for “a reasonable purpose” if it is for “maintaining any statutory or regulatory

⁵² Del. State Bar Assoc. Corp. L. Council, Explanation of Counsel Legislative Proposal (2015), at 10, <https://www.corporatedefensedisputes.com/files/2015/03/COUNCIL-SECOND-PROPOSAL-EXPLANATORY-PAPER-3-6-15-U0124513.pdf>.

⁵³ Aggarwal, Dhruv and Choi, Albert H. and Eldar, Ofer, *Federal Forum Provisions and the Internal Affairs Doctrine* (August 18, 2019), U of Michigan Law & Econ Research Paper No. 19-009; U of Michigan Public Law Research Paper No. 646, <https://ssrn.com/abstract=3439078> or <http://dx.doi.org/10.2139/ssrn.3439078>.

⁵⁴ *Boilermakers*, 73 A.3d at 951.

⁵⁵ DCGL 202(c)(5).

advantage ... under applicable local, state, federal or foreign law.”⁵⁶ Federal Forum Provisions are for the purpose of maintaining an advantage under federal law that is consistent with federal law. They are presumptively valid. If Federal Forum Provisions are valid as stringent restrictions on alienation, they are *a fortiori* valid as less stringent, general charter or bylaw provisions. Any other conclusion forces the illogical result that Delaware permits stringent charter restrictions on alienation that it would preclude as less stringent charter provisions of general application. Moreover, applying *Sciabacucchi*’s internal affairs constraint indicates that the Legislature exceeded its authority in adopting large portions of Section 202, and that portions of Section 202 are just as invalid as Federal Forum Provisions. (*See infra*, Section VI.A).

DGCL Section 102(b)(1) authorizes “any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders . . . if such provisions are not contrary to the laws of this State.” Federal Forum Provisions are for the management of the stockholder litigation affairs of the corporation, and, by dictionary definition, regulate the powers of the corporation, directors, and stockholders. The plain text is dispositive. It supports the validity of Federal Forum Provisions, particularly when read *in pari materia* with DGCL 202. Federal Forum Provisions are also not contrary to Delaware or federal law. (*See infra*, Section VI.B).

DGCL Section 115 directly addresses forum selection provisions. Its text and legislative history unambiguously support the validity of Federal Forum Provisions. “Internal corporate claims” are those “based upon a violation of a duty by a current or former director or officer.” Section 11 claims are based on just such violations, as established in *Malone v. Brincat*.⁵⁷ Section 115 rationally does not require that the violation be exclusively of a Delaware duty and, consistent with *Malone*, the plain text categorizes acts that violates both federal and Delaware law as “internal corporate claims.” Federal Forum Provisions allow claims to be brought in federal court in Delaware, or in Delaware state court, and never preclude bringing a claim in any Delaware court. Federal Forum Provisions are, on a facial challenge, entirely consistent with Section 115. *Sciabacucchi* nowhere contradicts this analysis. It reaches a contrary conclusion only by relying primarily on post-adoption commentary that is internally inconsistent, fails to address the operation of Section 11 liability, and fails to recognize that Securities Act plaintiffs are purchasers to whom fiduciary duties are owed. In any event, post-adoption commentary cannot override a statute’s plain text and legislative history. (*See infra*, Section VI.C).

Sciabacucchi’s concern that validating Federal Forum Provisions might promote charter-based regulation of tort, contract, or conversion claims is also misplaced as a matter of textual analysis. Section 102(b)(1) is naturally read to allow regulation of directors, officers, and stockholders only in their capacities as such. Indeed, Section 115 includes the express modifier “in their capacities as such” when referring to officers, directors, and stockholders. The principle of consistent usage makes it reasonable to apply the same text-based modifier that appears expressly in Section 115 to Section 102(b)(1). Thus, if a stockholder is also a tort claimant, then the tort claim is a random adjunct to her stockholder status and does not implicate the stockholder in her capacity “as such.” Simple textualism, driven by dictionary definitions and the

⁵⁶ DGCL 202(d)(2).

⁵⁷ 722 A.2d at 14-15.

doctrine of consistent usage, thus precludes all of the concerns that motivate *Sciabacucchi*'s resort to "first principles" and to the invention of a divergent internal affairs constraint. (*See infra*, Sections VI.D and VI.E).

Observers are concerned that validating Federal Forum Provisions paves the way for mandatory Securities Act arbitration. To them, the battle over Federal Forum Provisions is a proxy war over mandatory Securities Act arbitration. Concerns that Federal Forum Provisions are a "gateway drug" to mandatory Securities Act arbitration are, however, not only misplaced, they have the argument backward. Federal Forum Provisions expressly preclude arbitration. They force litigation into federal or Delaware state court. It stands logic on its head to argue that a provision that prohibits arbitration facilitates arbitration. Further, this article's interpretation of DGCL Section 115 categorizes Securities Act claims as "internal corporate claims." That plain text interpretation effectively precludes mandatory arbitration of Securities Act claims for all Delaware-chartered entities, even those with no Federal Forum Provisions in their charters or bylaws. Mandatory Securities Act arbitration would then be impermissible under Delaware law for a majority of the market capitalization of publicly traded firms in the United States, and this result ensues in a manner that creates no conflict with the Securities Act. This might be hailed as a victory by opponents of mandatory Securities Act arbitration. Put another way, by mandating that litigation proceed in federal court, Federal Forum Provisions assure those claims will not proceed in arbitration. This is powerful anti-arbitration medicine. More fundamentally, if arbitration's opponents have a problem with federal arbitration law, they should address their federal concerns to federal authorities, such as Congress or the SEC. Distorting Delaware law to achieve a federal regulatory objective damages Delaware law and steers Delaware law squarely into the federal lane. It is also a fundamentally flawed strategy because, in the context of Securities Act litigation, the federal government can readily pre-empt any action that Delaware might take. (*See infra*, Section VI.G).

Section II of this article describes the etiology of Federal Forum Provisions. It addresses the demographics of firms that have adopted the provisions, documents dramatic increases in the price of D&O insurance concurrent with the migration of Section 11 claims to state court, and describes a first-mover disadvantage faced by firms seeking to innovate by adopting novel charter or bylaw provisions. Section II also describes recent empirical findings that *Sciabacucchi* caused a statistically and financially significant decline in the stock price of issuer with Federal Forum Provisions.

Section III describes the evolution of organic forum selection provision in Delaware law, from *Revlon*, through *Boilermakers*, and to *Sciabacucchi*. Section IV addresses federal law governing concurrent Securities Act jurisdiction, federal and Delaware law governing forum selection provisions, state law public policy concerns related to Federal Forum Provisions, and implications for *Sciabacucchi* of the PSLRA,⁵⁸ SLUSA,⁵⁹ and *Cyan*.⁶⁰

⁵⁸ Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

⁵⁹ Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.).

⁶⁰ *Cyan v. Beaver County Emp. Retirement Fund*, 138 S. Ct. 1061 (2018).

Section V addresses *Sciabacucchi*'s assumptions, hypotheticals, first principles, and internal affairs constraint. It begins with a review of principles governing facial challenges and the presumption of validity that attaches to charter and bylaw provisions. It then addresses *Sciabacucchi*'s assertion that Securities Act purchasers are not pre-existing holders, and demonstrates that SEC filings and the substantial academic literature regarding order splitting refute *Sciabacucchi*'s unsubstantiated assertion. The substantial body of existing jurisprudence limiting the extraterritorial application of the DGCL independently rebuts the assertion that an internal affairs constraint is necessary, on first principles or any other grounds, to constrain the extraterritorial operation of the DGCL. The analysis proceeds to discuss the centrality of hypotheticals to the opinion's analysis, the discordant nature of the opinion's definition of internal affairs, and the implications of *Malone* and *Caremark* in demonstrating that Securities Act claims can be both internal and federal violations. The section concludes with a demonstration that Section 11 violations are easily categorized as internal, even under *Sciabacucchi*'s divergent definition, and a *Gedankenexperiment* showing that *Sciabacucchi* generates internal contradictions if applied as written.

Section VI applies a textualist approach to resolve the challenge. It demonstrates that the plain text of DGCL Sections 102(b)(1), 115, and 202 all support the validity of Federal Forum provisions, and does so in a manner that precludes *Sciabacucchi*'s concerns over the improper hypothetical expansion of DGCL authority to cover tort, contract, or conversion claims. The analysis also describes the unnecessary analytic issues raised by *Sciabacucchi*'s departure from textualism, and closes with an analysis of the interaction between Federal Forum Provisions and the debate over Securities Act arbitration.

Section VII addresses concern that Delaware should remain in "its lane" and related public policy considerations. It explains that by prohibiting provisions permitted under federal law, *Sciabacucchi* unnecessarily veers Delaware into the federal lane. Section VII also expands upon efficiency rationales supporting adoption of Federal Forum Provisions, conflict of interest that plague plaintiffs' position in *Sciabacucchi*, and the adverse implications of *Sciabacucchi*'s under-inclusive interpretation of "internal affairs" for Delaware corporate law.

Section VIII addresses miscellaneous matters, including *Sciabacucchi*'s concerns regarding the definition of the term "security" under federal law, "outsider" liability under the Securities Act, and liability under Sections 12(a)(1) and (2), and Section 15 of the Securities Act, the only provisions supporting private rights of action other than Section 11 that are covered by Federal Forum Provisions.

Section IX concludes by observing that the question presented in *Sciabacucchi* can be resolved on narrow grounds that avoid all the complexities associated with "first principles" and internal affairs logic. The plaintiff in *Sciabacucchi* failed to carry his burden of demonstrating that Federal Forum Provisions "cannot operate lawfully or equitably on *under any circumstances*."⁶¹ Federal Forum Provision are thus valid as a facial matter under Delaware law. But that isn't the last word on the question of Federal Forum Provision's validity. The future of Federal Forum Provisions then awaits litigation raising an actual case or controversy in which the validity of a specific Federal Forum Provision is tested on an as-applied basis. "The answer

⁶¹ *Boilermakers*, 73 A.3d at 948 (emphasis in original).

to the possibility that a statutorily and contractually valid bylaw may operate inequitably in a particular scenario is for the party facing a concrete situation to challenge the case-specific application of the bylaw, as in the landmark case of *Schnell v. Chris-Craft Industries*.⁶² Plaintiffs will also be able to challenge the application of a Federal Forum Provision as potentially violating important state policy. This suggested minimalist resolution is consistent with Delaware precedent, and preserves the ability of future courts efficiently to police Federal Forum Provisions to assure that they are applied equitably and fairly.

⁶² *Id.* at 949 (citing *Schnell v. Chris-Craft Indus., Inc.* 285 A.2d 437 (Del. 1971)).

II. The Etiology of Federal Forum Provisions

If necessity is the mother of invention, litigation is sometimes its muse. Federal Forum Provisions evolved in response to plaintiffs' dramatic shift of Section 11 litigation from federal to state court where dismissal rates are significantly lower. Lower dismissal rates allow weaker claims to survive and force defendants to incur additional expense to defend and settle those claims. Steep recent increases in the cost of directors' and officers' ("D&O") insurance coverage for initial public offerings are consistent with this trend. Median retentions for initial public offerings increased ten-fold from \$1 million to \$10 million between 2016 and the first half of 2019. Median primary rates per million dollars of coverage increased almost five-fold over the same period from \$28,000 per million to \$123,000 per million. Chancery's decision in *Sciabacucchi* invalidating Federal Forum Provisions is also correlated with a statistically and economically significant decline in the stock price of issuers that had adopted Federal Forum Provisions. Those data suggest that Federal Forum Provisions benefit corporations and stockholders, and that Chancery's decision in *Sciabacucchi* reduced shareholder wealth.

A. The Migration of Securities Act Claims.

Federal securities class action complaints most commonly allege violations of Section 10(b) of the Exchange Act of 1934,⁶³ and Rule 10b-5, thereunder.⁶⁴ In each year from 2014 through 2018, between 86% and 93% of corporate defendants named in newly-filed federal class action securities fraud complaints faced Rule 10b-5 claims.⁶⁵ Exchange Act claims are subject to exclusive federal jurisdiction.⁶⁶

Complaints alleging violations of Sections 11 or 12 of the Securities Act of 1933 are less common. Over the same five-year period, between 10% and 16% of federal class action securities complaints alleged Section 11 violations.⁶⁷ Between 4% and 12% alleged Section 12(a)(2) violations.⁶⁸ Sections 11 and 12(a)(2) claims are often jointly pled.⁶⁹ Approximately 33.2 percent of public offerings filed between 2015 and 2018 became subject to Section 11

⁶³ 15 U.S.C. § 78j(b) (2012).

⁶⁴ 17 C.F.R. § 240.10b-5 (2018).

⁶⁵ *Securities Class Action Filings, 2018 Year in Review*, CORNERSTONE RESEARCH 10 fig. 9 ("Cornerstone 2018 YIR"), <http://securities.stanford.edu/research-reports/1996-2018/Cornerstone-Research-Securities-Class-Action-Filings-2018-YIR.pdf>.

⁶⁶ 15 U.S.C. § 78aa (2012).

⁶⁷ Cornerstone 2018 YIR, at 10, fig. 9.

⁶⁸ *Id.*

⁶⁹ See, e.g., Daniel Hooper Smith, *Subjective Falsity Under Section 11 of the Securities Act: Protecting Statements of Opinions*, 6 U. P. R. Bus. L.J. 141, 160 (2015) ("Section 11 is often pled alongside section 12(a)(2) ..."); *Pension Tr. Fund for Operating Engineers v. Mortgage Asset Securitization Transactions, Inc.*, 730 F.3d 263, 277 (10th Cir. 2013) (plaintiffs alleging violations of sections 11 and 12(2)(a)); *Cozzarelli v. Inspire Pharm., Inc.*, 549 F.3d 618, 628 (4th Cir. 2008) (same); *Rombach v. Chang*, 355 F.3d 164, 178 (2d Cir. 2004) (same).

litigation in federal or state court.⁷⁰ Securities Act claims are subject to concurrent federal and state jurisdiction.⁷¹

Historically, Section 11 claims were litigated predominantly in federal court. Table 1 documents that, in calendar year 2010, plaintiffs filed Section 11 claims against 24 issuers. The overwhelming majority, 22 of 24 (91.67 percent), were sued in federal court only. No issuer faced claims filed exclusively in state court. Only 2 issuers (8.33 percent) faced claims filed in both federal and state court. The Maximum Disclosure Loss (“MDL”)⁷² exposure associated with the two actions filed in state and federal court was quite small in the context of overall class action securities fraud litigation: \$656 million, or only 14 one-hundredths of one percent of the total MDL alleged in all class action securities fraud complaints filed that year.⁷³ State court Section 11 litigation was, in 2010, a minor sideshow that warranted little if any attention.

By 2018, however, state courts came to dominate Section 11 litigation. Of the 41 issuers facing newly filed Section 11 claims, only 11 (26.83 percent) faced actions filed exclusively in federal court. In contrast, 30 (73.17 percent) faced claims filed either exclusively in state court, or in state and federal court. The MDL exposure associated with state court Section 11 actions surged to \$24.929 billion, a 38-fold increase over 2010 levels. Data for the first half of 2019 indicate that state court Section 11 litigation activity continues to dominate with 76.00 percent of new cases being brought exclusively in state court or in state and federal court. If first half trends continue, 50 issuers will be sued in Section 11 actions in 2019, a peak over this ten year period, and again with roughly three quarters of the activity involving state court proceedings.

⁷⁰ From 2014 through 2018, there were a total of 434 initial public offerings and a total of 144 publicly traded issuers named in Section 11 complaints. While the 144 Section 11 lawsuits are close to one-third the total of the contemporaneous initial public offerings, this statistic should be interpreted with caution because some Section 11 claims relate to follow-on offerings by issuers that have already conducted their IPOs. Further, because of time lags in filing activity, issuers that went public during this period are not necessarily those named as defendants in the actions filed during the same period. The 33.2% statistic is thus better appreciated as indicating an order of magnitude rather than a precise estimate. See Cornerstone 2018 YIR, at 24, Fig. 23.

⁷¹ 15 U.S.C. § 77v(a) (2012).

⁷² Cornerstone 2018 YIR, at 39 (“MDL is the dollar value change in the defendant firm’s market capitalization from the trading day with the highest market capitalization during the class period to the trading day immediately following the end of the class period. MDL should not be considered an indicator of liability or measure of potential damages. Instead, it estimates the impact of all information revealed during or at the end of the class period, including information unrelated to the litigation.”).

⁷³ Cornerstone Research, *Securities Class Action Filings, 2010 Year in Review*, 1, fig. 1 (showing that total MDL in 2010 was \$474 billion), <http://securities.stanford.edu/research-reports/1996-2010/Cornerstone-Research-Securities-Class-Action-Filings-2010-YIR.pdf>.

Table 1⁷⁴
Section 11 Class Action
Activity by Venue (2010 – 2018)

Year	Federal Court Only	State Court Only	Parallel Filings	Total	Percentage of State or Parallel Filings	MDL of State Court Filings (\$Billions) *
2010	22	0	2	24	9.09%	\$0.656
2011	21	1	1	23	8.70%	\$2.679
2012	13	3	5	21	38.10%	\$5.897
2013	12	0	1	13	7.69%	\$0.187
2014	20	2	3	25	20.00%	\$7.944
2015	20	11	6	37	45.95%	\$37.097
2016	12	13	14	39	69.23%	\$33.799
2017	11	2	14	27	59.26%	\$23.102
2018	11	17	13	41	73.17%	\$24.929
2019 (1H)	6	12	7	25	76.00%	NA
2019 (est.) ⁷⁵	12	24	14	50	76.00%	NA

The increase in state court Section 11 litigation is occasionally attributed to the Supreme Court’s March 20, 2018, decision in *Cyan*.⁷⁶ Table 1, indicates that the trend began in 2015, well before *Cyan* was decided.

While *Cyan* may not have initiated the recent shift to state court, it did significantly alter the geographic incidence of state court Section 11 claims. Prior to *Cyan*, state court Section 11 litigation concentrated in California. Since *Cyan*, Section 11 litigation has surged in New York. While no Section 11 claims were filed in New York State courts between 2010 and 2017, 13 claims were filed in 2018.⁷⁷ “These New York cases account for nearly the full difference between the number of state cases filed in 2017 and 2018.”⁷⁸

⁷⁴ Cornerstone 2018 YIR, 21-22, figs. 20, 21. Each entry denotes a single defendant against whom Section 11 claims have been filed in federal and/or state court. Data through June 30, 2019 are from Cornerstone Research, *Securities Class Action Filings, 2019 Midyear Assessment*. <http://securities.stanford.edu/research-reports/1996-2019/Cornerstone-Research-Securities-Class-Action-Filings-2019-MYA.pdf>.

⁷⁵ The estimate for the full year of 2019 is a simple linear extrapolation of first half data.

⁷⁶ See, e.g., Cornerstone 2018 YIR, at 21; *Cyan v. Beaver County Emp. Retirement Fund*, 138 S. Ct. 1061 (2018).

⁷⁷ Cornerstone 2018 YIR, at 19, Fig. 18.

⁷⁸ Michael Klausner, Jason Hegland, Carin LeVine, Sarah Leonard, *State Section 11 Litigation in the Post-Cyan Environment*, 6, July 1, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3411861.

B. Plaintiffs' Incentives to Migrate.

Plaintiffs have powerful incentives to prefer state to federal court when litigating Section 11 claims. The literature highlights “three differences in procedural rules governing Section 11 class actions in state and federal court that could have a major impact on litigating and resolving these cases.”⁷⁹ First, pleading standards in some state courts are “more plaintiff-friendly than applied in federal court.”⁸⁰ Second, federal courts provide for automatic stays of discovery while motions to dismiss are pending, whereas state courts do not uniformly apply automatic stays.⁸¹ Federal law also imposes restrictions on the identity of class representatives and class counsel that do not exist in state court proceedings.⁸² These restrictions can also be viewed as less favorable to plaintiff counsel, particularly in weaker cases.⁸³ Third, federal courts provide for “a relatively orderly process by which related cases are consolidated in one court,” but “there is no process for consolidation of a state case and a federal case.”⁸⁴ It follows that “defendants potentially face lawsuits not only in federal and state court, but possibly in multiple state courts, for the same alleged violation.”⁸⁵

Support for the proposition that state courts are plaintiff-friendly in Section 11 cases is found in data indicating that only 19 percent of Section 11 complaints filed in state courts between 2011 and 2018 were dismissed,⁸⁶ whereas the comparable statistic in federal court is 42 percent.⁸⁷ Section 11 complaints are thus more than twice as likely to survive a motion to dismiss

⁷⁹ *Id.* at 3.

⁸⁰ *Id.*; see also Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 424-27 (2018) (noting that *Iqbal* / *Twombly* pleading standards have been adopted by only five states and the District of Columbia. Many states continue to apply their own, more lenient pleading standards.).

⁸¹ Klausner, *et al.*, *supra* note 78, at 4. There is, however, a split as to whether the PSLRA’s discovery stay applies to state court proceedings. See Rachel Graf, *N.Y. Judges Split on Post-Cyan Discovery Stays*, Law360 (Aug. 7, 2019), <https://www.law360.com/articles/1185924/ny-judges-split-on-post-cyan-discovery-stays>. See also *Cyan*, 138 S. Ct. at 1066-67 (explaining that the PSLRA’s requirement that the lead plaintiff in any class action brought under the Federal Rules of Civil Procedure file a certification stating, among other things, that she had not purchased the relevant security at the direction of plaintiff’s counsel, is procedural, and thus applies only to suits brought in federal court). Some interpret *Cyan* to suggest that other procedural provisions of the PSLRA that are governed by the Federal Rules, for example, restrictions on payment of attorney fees and expenses and the share of recovery to be awarded to the representative party, also do not apply in state court actions. See, e.g., Israel David & Samuel P. Groner, *State Court Securities Lawsuits and the PSLRA in a Post-Cyan Era*, Law.com (May 2, 2019), <https://www.law.com/newyorklawjournal/2018/05/02/state-court-securities-lawsuits-and-the-pslra-in-a-post-cyan-era/?slreturn=20190726093839>.

⁸² For example, the PSLRA imposes a presumption that the lead plaintiff is the class member with the largest financial interest in the relief sought. 15 U.S.C. § 77z-1(a)(3)(B)(2018).

⁸³ “There is a possibility that [s]ection 11 actions in state court will be filed by opportunistic lawyers representing plaintiffs with minimal economic losses, just to extract nominal settlements from deep-pocket defendants who want the case to go away.” Dhruv Aggarwal et al., *Federal Forum Provisions and the Internal Affairs Doctrine*, 11 n.51 (Aug. 18, 2019), <https://ssrn.com/abstract=3439078> (citing *In re BankAmerica Corp. Sec. Litig.*, 95 F. Supp. 2d 1044, 1049 (E.D. Mo. 2000), *aff’d*, 263 F.3d 795 (8th Cir. 2001), *as amended* (Oct. 3, 2001), as an example of a state court “authoriz[ing] a lead plaintiff that had previously been found woefully inadequate when bringing the same action in federal court.”).

⁸⁴ *Id.* at 5.

⁸⁵ *Id.* at 5.

⁸⁶ Klausner et al., *supra* note 78, at 9.

⁸⁷ *Id.* This dismissal rate is based on cases in which there is a final ruling on a motion to dismiss. It excludes voluntarily dismissals and complaints dismissed without prejudice. Compare Cornerstone 2018 YIR, at 23

and reach discovery in state court than in federal court. Put another way, if a case has an expected settlement value of \$10 million in federal or state court, conditional on surviving a motion to dismiss, then that lawsuit's expected value in state court is \$8.1 million (an 81 percent survival probability multiplied by a \$10 million valuation). The same claim in federal court is worth \$5.8 million (a 58 percent survival probability multiplied by a \$10 million valuation). Identical claims are thus, on average, worth more on an *ex ante* basis in state than in federal court.⁸⁸ If plaintiffs can accurately identify claims likely to be dismissed in federal court but that will survive in state court, then there exists a subset of Section 11 claims that are worthless if filed in federal court but have settlement values in the millions of dollars if filed in state court.

The uncertainty associated with litigating Section 11 claims in state courts, where the judiciary is less familiar with the cause of action, increases the variance of litigation outcomes. "Complexity and expense aside, more state court class actions and parallel proceedings increases the risk of inconsistent rulings, whether by state court judges unfamiliar with the Securities Act's terrain, or in cases involving unsettled or tricky issues."⁸⁹ As a federal court recently observed, "remanding [a Section 11] case [to state court] creates the risk that parallel state and federal proceedings could produce inconsistent (and even contradictory) conclusions regarding key questions of fact and law."⁹⁰ Increasing uncertainty increases a lawsuit's settlement value and generates negative externalities for the judicial system and market as a whole.⁹¹ The increases in settlement value attributable to increased uncertainty, and the negative systemic externalities caused by litigating Section 11 claims in state court, arise in addition to the costs imposed directly on issuers because of lower state court dismissal rates.

The literature further suggests that complaints that survive in state court, but that would have been dismissed in federal court, contribute to a proliferation of weak-merits Section 11 litigation. "Commenters have expressed concerns that (a) state courts will fail to filter Section 11 cases at the motion to dismiss stage as vigorously as they do in federal courts, (b) cases of doubtful merit will be filed in state court in anticipation of a lenient bar at the motion to dismiss stage, and (c) defendants will face high litigation costs in simultaneously defending cases in state and federal courts."⁹² If the complaints dismissed in federal court that would survive in state

(Measuring the sample differently, and over a longer time period, indicating that between 2010 and 2017, the state court dismissal rate was 33% whereas the equivalent rate in federal court was 48%).

⁸⁸ *Accord* Aggarwal et al., *supra* note 83, at 13 ("[T]he lower rate of dismissal and higher probability of settlement suggest that the overall litigation expenses for corporate defendants are substantially higher in state courts as compared to federal courts.").

⁸⁹ James Goldfarb & Guarav Talwar, *The Post-Cyan Spike in State Securities Act Filings*, Law360, (March 19, 2019, 1:54 PM EDT), https://www.mmlawus.com/newsitem/pdf/The_Post-Cyan_Spike_In_State_Securities_Act_Filings_3015574751391253681.pdf.

⁹⁰ *Baker v. Dynamic Ledger Solutions, Inc.*, Case No. 17-cv-06850-RS, 2018 WL 4740197, at *2 (N.D. Cal. Apr. 19, 2018).

⁹¹ See generally Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267 (2006).

⁹² Klausner et al., *supra* note 78, at 6 (citing Doug Greene et al., *The Coming Securities Class Action Storm: Multijurisdictional Litigation After Cyan*, Practical Law 19 (2018), https://www.wileyrein.com/media/publication/486_Q32018.pdf; David M. J. Rein et al., *Securities Litigation Involving the Private Securities Litigation Reform Act (PSLRA)*, THOMPSON REUTERS PRACTICAL LAW, <https://us.practicallaw.thomsonreuters.com/w-010-6738>; Michael S. Fylnn et al., *Client Memorandum: The Supreme Court's Cyan Decision and What Happens Next*, DAVIS POLK & WARDWELL LLP (Apr. 13, 2018), <https://www.davispolk.com/files/2018-04-13-supreme-courts-cyan-decision-what-happens-next.pdf>).

court are indeed weaker claims, then the proliferation of state court Section 11 claims is consistent with concern that initial public offerings today bear the cost of defending against a higher probability of facing a weak, non-dismissed Section 11 claim, in addition to the other disadvantages of litigating Section 11 claims in state court.

Data describing settlement values in state court and comparable Section 11 claims in federal court are sparse. However, as Table 2 suggests, there appears to be no dramatic difference in settlement values between claims filed exclusively in federal court and those filed exclusively in state court. These data should, however, be approached with caution because, in addition to the small sample size, the selection bias that causes weaker claims systematically to be filed in state court also causes the subsamples not to be comparable. Until sample sizes are sufficiently large to support quality-corrections more sophisticated than simple measures of the percentage of estimated maximum statutory damages, including metrics that reflect the underlying merits of each claim, it will be difficult to draw rigorous conclusions from the analysis of comparative settlement values. To be sure, the most obvious interpretation of these data suggests that weaker claims filed in state court can garner settlements comparable to those paid in respect of stronger claims filed in federal court, but that is not the only possible interpretation of the data.

Table 2
Settlement Values in
Section 11 Cases Filed in
Federal or State Courts
(2014 - 2018)⁹³

Settlements	Section 11 Cases Filed in	
	State Court Only	Federal Court Only
Dollar value		
Median	\$7,550,000	\$5,925,000
Mean	\$8,361,458	\$12,500,000 ⁹⁴
As a percentage of Estimated Statutory Damages ⁹⁵		
Median	11.29%	10.82%
Mean	11.34%	11.76%
No. of Observations	12	10

⁹³ Klausner et al., *supra* note 78, at 11, figs. 5,6.

⁹⁴ The higher mean value for federal settlements is attributable to a single settlement that, if excluded from the sample, reduces the mean value of federal settlements to \$7.6 million.

⁹⁵ Estimated Statutory Damages are defined in Klausner *et al.*, *supra* note 78, at 11, n. 24 (“Estimated statutory damages are calculated as the difference between the value of shares issued in a public offering and the market value of those shares at the time of a lawsuit, adjusted by the change in the overall market over the same time period.”).

C. The Cost of Directors and Officers Insurance.

The dramatic shift of Section 11 litigation to state court is concurrent with a steep increase in the price of D&O coverage for initial public offerings. Commenters attribute the price hikes to increased state court litigation following *Cyan*, combined with *Sciabacucchi*, which “effectively eliminates the possibility of using Federal Forum Provisions for most companies. The bottom line is that IPO companies ... now continue to face the possibility of having to fight Section 11 litigation in state court, possibly as part of a multi-front war.”⁹⁶ Consequently, “[m]any insurers will now only quote primary D&O insurance for an IPO company subject to a separate retention for state court securities lawsuits, and in some cases also subject to coinsurance. The retentions range as high as \$10 million or more.... In any event the cost of D&O insurance for the IPO companies is higher than in the past, in many cases significantly so.”⁹⁷

Press reports suggest that “rates are rising from 10% to 50% with some “extreme outliers” seeing even higher rates.”⁹⁸ Observers report that “firms including those with a recent initial public offering, financial troubles or a claims history are seeing very significant increases.”⁹⁹ “A \$5 million policy that cost \$200,000 in 2016 can now easily cost \$500,000 to \$600,000.”¹⁰⁰ Since *Cyan*, “the market has gotten absolutely more challenging.”¹⁰¹

Capacity for new business is also “dramatically thinner than historically” the case, and some policyholders with \$25 million in capacity “are seeing it reduced to \$15 million or \$10 million.”¹⁰² These reductions in capacity diminish the aggregate effectiveness of insurance in a manner not reflected through increased retentions or rates. These significant increases in insurance premia, and reductions in coverage limits are costs borne by all IPO issuers and investors, regardless of whether issuers are named in Section 11 actions.

Data describing insurance market pricing reinforce these assessments. Table 3, based on data provided by Aon Commercial Risk solutions, a major D&O broker, shows that retentions, the deductibles paid out of pocket by insureds before coverage begins, have climbed dramatically since 2016 with median retentions for all IPO issuers rising from \$1 million to \$10 million in the first half of 2019. This is a tenfold increase in expense borne by the median insured before coverage is available. Median retentions for technology IPOs began at a higher base of \$1.25 million in 2016, and have also increased to \$10 million, an eightfold increase.

⁹⁶ Kevin M. LaCroix, *The Top Ten D&O Stories of 2018*, DANDODIARY.COM (Jan 7, 2019), <https://www.dandodiary.com/2019/01/articles/director-and-officer-liability/top-ten-stories-2018/>.

⁹⁷ *Id.*

⁹⁸ Judy Greenwald, *D&O Rates Skyrocket in Hardening Market*, BUSINESS INSURANCE (June 25, 2019), <https://www.businessinsurance.com/article/20190625/NEWS06/912329208?template=printart>.

⁹⁹ *Id.*

¹⁰⁰ Suzanne Barlyn, *D&O Insurance Costs Soar as Investors Run to Court Over IPOs*, INS. J. (June 18, 2019) (quoting Paul Schiavone, head of North American Financial Lines for Allianz Global Corporate & Specialty).

¹⁰¹ *Id.* (quoting Jennifer Sharkey, President of the Northeast Management Liability Practice for insurance broker Arthur J. Gallagher & Co.).

¹⁰² Greenwald, *supra* note 98.

Table 3
Median Retentions in
Initial Public Offerings
(2016 – 2019 (1H))¹⁰³

Year	Median Retentions			
	All Offerings		Technology Offerings	
	Dollar Amount	Percentage of 2016 Level	Dollar Amount	Percentage of 2016 Level
2016	\$1,000,000	---	\$1,250,000	---
2017	\$1,000,000	100%	\$2,000,000	160%
2018	\$2,500,000	250%	\$5,000,000	400%
2019(1H)	\$10,000,000	1,000%	\$10,000,000	800%

The cost of insurance available once retentions are satisfied has also spiked. Table 4, also based on data provided by Aon, indicates that the median rate per million for the primary policy of coverage¹⁰⁴ for all IPO issuers increased from \$28,000 in 2016 (2.8 percent of the primary policy limit) to \$123,000 in the first half of 2019 (12.3 percent of the primary policy limit). The 2019 cost of coverage for the first million dollars of exposure beyond the retention was thus 439% of the comparable 2016 price. The increase for technology issuers was slightly more dramatic, with the median rate per million rising from \$28,150 in 2016 (2.815 percent of the primary policy limit) to \$134,000 in the first half of 2019 (13.4 percent of the primary policy limit), an increase of 476%.

A technology issuer at the market median in 2018 would thus pay an aggregate of \$1,340,000 for the first \$10 million in coverage that would become available only after the issuer had already absorbed \$10 million in litigation or settlement expenses.¹⁰⁵ The issuer could also learn that the maximum amount of coverage, even with higher retentions and premiums, was significantly lower than had previously been the case.

¹⁰³ Aon Commercial Risk Solutions, data on file with author.

¹⁰⁴ The primary layer of coverage is often written for \$5 million or \$10 million. Thus, the median technology issuer represented by Aon in 2018 paid an annual premium of \$750,000 for \$10 million in primary layer coverage.

¹⁰⁵ This calculation assumes that \$10 million of coverage is available at the same rate as the first \$1 million of insured exposure.

Table 4
 Median Primary Rate Per
 Million Dollars of Coverage
 in Initial Public Offerings¹⁰⁶
 (2016 – 2019(1H))

Year and Quarter	Mean Retention	Percentage of 2015 Level	Mean Premium	Percentage of 2015 Level
2015	\$2.0 Million	100%	\$196,776	100.0%
2016	\$1.5 Million	75%	\$217,191	110.4%
2017	\$2.0 Million	100%	\$225,872	114.7%
2018: Q1	\$2.5 Million	125%	\$281,508	143.1%
Q2	\$2.5 Million	125%	\$314,847	160.0%
Q3	\$4.0 Million	200%	\$391,111	198.8%
Q4	\$5.0 Million	250%	\$540,334	274.6%
2019: Q1	\$7.5 Million	325%	\$660,144	335.5%
Q2	\$8.0 Million	400%	\$768,105	390.3%

Further supporting data are presented in Table 5 which reports mean, not median, statistics regarding D&O insurance pricing provided by Woodruff-Sawyer, another leading D&O insurance broker. Table 5 indicates that, for the second quarter of 2019, mean retentions in IPOs were quadruple the levels observed in 2015. Premia almost quadrupled. These data are directionally consistent with Aon’s median statistics and are of similar magnitude. The two data sets can be viewed as confirming a common underlying trend of dramatically increased cost for D&O insurance among IPO issuers.

Table 5
 Mean Retentions and
 Premia in IPOs
 (2015 – 2019 Q2)¹⁰⁷

Year	All Offerings		Technology Offerings	
	Dollar Cost	Percentage of 2016 Level	Dollar Cost	Percentage of 2016 Level
2016	\$28,000	---	\$28,150	---
2017	\$22,847	81.6%	\$29,500	105%
2018	\$51,500	184%	\$75,000	266%
2019(1H)	\$123,000	439%	\$134,000	476%

While consistent with subjective reports regarding the effects of Section 11 claim migration to state court, these data are formally insufficient to establish causality. They do not control for a wide range of factors that influence insurance market pricing, nor do they test whether issuers

¹⁰⁶ *Id.*

¹⁰⁷ Data from Woodruff Sawyer on file with author.

more likely to be subject to problematic state court litigation incur higher premia. The data are, however, consistent with public reports that initial public offerings now face dramatically higher D&O insurance costs, and that issuers have powerful incentives to control the insurance costs associated with those offerings, as well as the litigation costs generated by Section 11 claims.

D. The Evolution, Propagation, and Demographics of Federal Forum Provisions.

First proposed in May of 2016,¹⁰⁸ Federal Forum Provisions provide that federal Securities Act claims that were traditionally litigated in federal court will continue to be litigated in federal court where the judiciary has a comparative advantage in resolving those claims.¹⁰⁹ The first Federal Forum Provision appeared in the charter of an issuer whose registration statement was declared effective on March 1, 2017.¹¹⁰ About two years later, as of March 27, 2019, at least 58 initial public offerings were of issuers with Federal Forum Provisions in their charters or bylaws.¹¹¹ Of these 58 issuers, 54 are chartered in Delaware. No other jurisdiction charters more than one issuer in the sample. These issuers are most frequently headquartered in California (28), Massachusetts (12), New York (6), and Washington (3). In 27 of these 58 offerings (46.6%), the issuer is headquartered in California and chartered in Delaware. This is far and away the most common charter-headquarter duet.

Federal Forum Provisions appear primarily in the going-public charters of initial public offerings, and 93% of initial public offerings between 2013 and 2017 were chartered in Delaware.¹¹² Federal Forum Provisions are thus very much a Delaware phenomenon. Thirty-eight issuers included Federal Forum Provisions in their charters (65.5%), while twenty (34.5%) adopted them as bylaws. Nine (15.5%) designate a specific federal court in which Securities Act cases are to be filed. In each instance the designated court is in the judicial district of the corporation's headquarters, which is where the litigation would most likely proceed given federal venue rules and corporate defendants' historic preference for litigation in their home district.

The large majority of these issuers are in the biotech and technology sectors: 28 (48.3 percent) are categorized within four-digit SIC Codes that describe the biotech sector,¹¹³ and the

¹⁰⁸ See Verified Class Action Compl. for Decl. J. at ¶ 46, *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL (Del. Ch. Dec. 29, 2017).

¹⁰⁹ However, if a claim is filed in Delaware state court, the defendant corporation will rationally agree to litigate in Delaware lest the Federal Forum Provision as there applied violate DGCL 115. See *Infra*, Section VI.C.

¹¹⁰ Snap, Inc., Form S-1 (March 1, 2017), <https://www.sec.gov/Archives/edgar/data/1564408/000119312517068848/d270216d424b4.htm>.

¹¹¹ These issuers were identified by searching SEC filings on Forms S-1, 1-A, and 8-K through March 27, 2019, for documents containing the terms "exclusive forum" and "federal district courts." Each document was then examined to assure that it referred to a charter or bylaws containing a Federal Forum Provision. The analysis excludes issuers still in registration as of March 27, 2019.

¹¹² See Wilmer, Cutler, Pickering, Hale and Dorr LLP, *2018 WilmerHale IPO Report 8*, at <https://www.wilmerhale.com/en/insights/publications/2018-ipo-report>.

¹¹³ Issuer SIC codes are drawn from the cover pages of the corresponding issuer registration statements. SIC 2836 (biological products) had 13 issuers; SIC 2834 (pharmaceutical preparations) had 9 issuers; SIC 3841 (surgical and medical instruments) had 3 issuers; and there was one issuer in each of SIC 2833 (medicinal chemicals), 3845 (electromedical apparatus), and 4841 (cable and other pay television services).

internet and computer tech sectors account for another 20 (34.5 percent).¹¹⁴ The biotech and internet/tech sectors thus together account for 48 (82.8 percent) of the 58 companies. This is a rational pattern inasmuch as the expected benefits of Federal Forum Provisions are larger for issuers with higher probabilities of facing Section 11 claims.¹¹⁵

A separate analysis of a population of 107 issuers that adopted Federal Forum Provisions¹¹⁶ reaches conclusions consistent with these demographics. That analysis also finds that “adopting firms are more likely to belong to industries that are known to be vulnerable to securities class action litigation.”¹¹⁷ The adopting firms tend to be larger than the norm in IPOs, and are more likely to engage in underpriced offerings: *i.e.*, the initial IPO price tends to be lower than the market price at the end of the first day of trading.¹¹⁸ Firms adopting Federal Forum Provisions tend to have more negative earnings and higher levels of cash on hand.¹¹⁹ Further, “the governance of firms that adopt [Federal Forum Provisions] tends to be more shareholder friendly than that of non-adopting firms,”¹²⁰ and are “less likely to have a dual class structure following the IPO.”¹²¹ The “good governance” characteristics of firms adopting Federal Forum Provisions are potentially significant from a public policy perspective, and are consistent with and reinforces the hypothesis that Federal Forum Provisions are adopted to promote stockholder interests. This perspective is buttressed by findings that the *Sciabacucchi* decision was contemporaneous with a statistically and economically significant decline in the value of issuers that had adopted Federal Forum Provisions.

E. Stock Price Effects.

Sciabacucchi's decision invalidating Federal Forum Provisions is correlated with a statistically and economically significant decline in the price of equity securities of issuers who have adopted Federal Forum Provisions.¹²² Depending on model specification, window size, sample definition, and other variations in statistical technique, the magnitude of the effect appears to range from about -1.39% to -9.085%.¹²³ Using the two-day window, the most commonly employed metric, the analysis finds a stock price effect in excess of 7 percent over this period. “Taken at face value, this suggests that the decision [in *Sciabacucchi*] reduced the [average] total market capitalization of a firm with a [Federal Forum Provisions] by 7%.”¹²⁴

¹¹⁴ SIC 7372 (prepackaged software) had 8 issuers; SIC 7370 (computer programming, data processing) had 4 issuers; there were 3 issuers in SIC 5961 (retail catalogue and mail order); two issuers in SIC 7374 (computer processing and data preparation); and one issuer in each of SIC 3674 (semiconductor and related devices), 7371 (computer programming services), and 3651 (household audio and video).

¹¹⁵ The three defendants in *Sciabacucchi* fit this pattern. Blue Apron, an online food service delivery platform, is categorized in SIC 5961; Roku, a cable device, in SIC 4841; and StitchFix, an online clothing and fashion service, in SIC 5961.

¹¹⁶ Aggarwal et al., *supra* note 83, at 14.

¹¹⁷ *Id.* at 15.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 16.

¹²² *Id.* at 20-21.

¹²³ *Id.* at 20-21, tbls. 6-9.

¹²⁴ *Id.* at 22.

This is a surprisingly large effect. While the study does not eliminate the possibility that confounding events may have inflated the estimate, “the size of the stock price effect strongly suggests that at the very least, it is safe to overrule the possibility that [*Sciabacucchi*] positively affected the stock price of firms that adopted [Federal Forum Provisions].”¹²⁵ Indeed, other studies provide support for a magnitude this large. “[G]iven the very high negative stock price effect of shareholder class action litigation valued by one study at almost 10 percent, and the impact that litigation in state courts as opposed to federal courts has on outcomes of litigation...it may be argued that the negative stock price effect does actually reflect the [magnitude of] the negative impact of [*Sciabacucchi*] on firm value.”¹²⁶

F. Disincentives to Innovation in Organic Corporate Documents

The fact that at least 58 issuers adopted Federal Forum Provisions but that only three are named as defendants in *Sciabacucchi* raises broader questions about the economics of fee awards, and underscores the value that issuers must perceive in Federal Forum Provisions. A litigation process that randomly selects defendants as a function of a random plaintiff attorney’s ability to identify plaintiffs who randomly happen to own stock in some randomly selected issuers, but not in other identically situated issuers, creates a first-mover disadvantage.¹²⁷ Any corporation that adopts a novel charter or bylaw provision has a rational concern that it alone will be singled out to bear all the costs associated with a plaintiffs’ challenge to the provision’s validity, or that it will be forced to defend with only a small number of co-defendants. This concern can only deter innovation in organic corporate documents.

Current practice in Delaware and elsewhere fails to mutualize the risk of innovation because it does not cause all issuers, past, present, or future, who benefit from an innovation, to share defense costs associated with validating that innovation. In markets characterized by risk aversion, the ability to load all defense costs onto an arbitrarily small subsample of first-adopters magnifies disincentives for innovation. Put another way, fee setting mechanisms in litigation challenging innovative provision in organic corporate documents generate negative externalities that deter innovation. The fact that issuers are, nonetheless, willing to innovate in certain instances indicates that the perceived benefits flowing from those innovations, if upheld, are sufficiently large to overcome the risk of being randomly selected to defend the provision on behalf of all issuers who have adopted or will in the future adopt the challenged provision. The large negative stock price effects observed upon the release of the *Sciabacucchi* opinion are consistent with the view that the perceived benefits of Federal Forum Provisions are large enough to overcome the first-mover and risk-aversion disadvantages associated with early adoption of a Federal Forum Provision.

Subsequent to *Sciabacucchi*’s invalidation of Federal Forum Provisions, some issuers have included in their organic documents a modified form of Federal Forum Provision that

¹²⁵ *Id.*

¹²⁶ *Id.* (citing Amar Gande & Craig M. Lewis, *Shareholder-Initiated Class Action Lawsuits: Shareholder Wealth Effects and Industry Spillovers*, 44 J. FIN. & QUANTITATIVE ANALYSIS 823 (2009) (finding a lawsuit related stock price decline of 9.79 percent)).

¹²⁷ *Sciabacucchi v. Salzberg*, No. 2017-0931 JTL, Transcript of Oral Argument on Motion for Fees and Expenses, Apr. 11, 2019, at 22, lines 7-8 (“The reason we sued these three is we had a client who stock in these three. That’s why we sued these three.”).

becomes effective only "contingent upon a final adjudication in the State of Delaware of the enforceability of such exclusive forum provisions."¹²⁸ The emergence of these "contingent" or "springing" Federal Forum Provisions, which to my knowledge have no precedent, further emphasizes the value that issuers must perceive in the ability to direct Section 11 claims to federal court or Chancery.¹²⁹ These issuers do not seek to adopt charter or bylaw provisions that are invalid under Delaware law, but also do not want to forego the opportunity to direct Section 11 claims away from state court. "Springing" Federal Forum Provisions thus evolved as a solution to this challenge, and are likely to continue to appear until Delaware's Supreme Court issues a final ruling addressing the validity of Federal Forum Provisions.

III. The Evolution of Organic Forum Selection Provisions in Delaware Law.

Delaware law governing the validity of forum selection provisions in organic corporate documents begins with *dicta* in *Revlon*, a 2010 opinion by Vice Chancellor Laster, suggesting that boards adopt intra-corporate forum selection provisions in corporate charters.¹³⁰ It proceeds through *Boilermakers*,¹³¹ a 2013 opinion by then-Chancellor Strine, upholding intra-corporate forum selection bylaws. The surge in Securities Act litigation from federal to state court, and the emergence of Federal Forum Provisions occurred subsequent to *Boilermakers*, and the law rests today with *Sciabacucchi*,¹³² a 2018 opinion in which Vice Chancellor Laster rejects Federal Forum Provisions as improper subject matter for organic documents of Delaware corporations.

A. Revlon

In *Revlon*, class counsel was replaced "for failing to provide adequate representation when agreeing to a non-substantive settlement."¹³³ Chancery calculated that "if Delaware sought to regulate abusive litigation, then plaintiffs' counsel might "accelerate their efforts to populate their portfolios by filing in other jurisdictions."¹³⁴ But boards are not defenseless. "[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes."¹³⁵ These *dicta* rely on the

¹²⁸ Uber Technologies, Inc., Form S-1, Final Prospectus, at 72, 265 (May 9, 2019), <https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm>. See also Beyond Meat, Inc., Amendment No. 6 to Form S-1, Preliminary Prospectus, at 143-144 (April 20, 2019), <https://www.sec.gov/Archives/edgar/data/1655210/000162828019004984/beyondmeats-1a6.htm>. The emergence of these "forward-looking contingent charter provisions" raises issues related to validity of Blue Apron's "savings clause" which can be viewed as a "backward-looking contingent charter provision." The effect of Blue Apron's savings clause provision was addressed in *Sciabacucchi*, 2018 WL 6719718, at *25. This article does not analyze the operation or validity of backward or forward looking contingent charter provisions because they present questions distinct from those raised by the Federal Forum Provisions at issue in *Sciabacucchi*.

¹²⁹ As explained *infra* in Section VI.C, Federal Forum Provisions will, in practice, direct Securities Act litigation to federal court, but if plaintiffs initially file a Securities Act claim in Delaware state court, then the claim will remain in Delaware state court.

¹³⁰ *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 964 n.8 (Del. Ch. 2010).

¹³¹ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013)

¹³² *Sciabacucchi v. Salzberg, et al.*, C.A. No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018).

¹³³ *Id.* at *8.

¹³⁴ *Id.* (citations omitted).

¹³⁵ *Id.* (citing *Revlon*, 990 A.2d at 960).

“expectation that a forum-selection provision implemented through the corporation’s constitutive documents only would extend to “intra-entity disputes.”¹³⁶

B. Boilermakers.

Boilermakers is the first Delaware decision formally to address the validity of a forum selection clause in an organic document of a Delaware corporation. It upholds intra-corporate forum selection provisions¹³⁷ in corporate bylaws and, by implication, in corporate charters.¹³⁸

Boilermakers implements a textualist approach. It emphasizes that “the most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it.”¹³⁹ Chancery examined the text of DGCL Section 109(b), which governs the subject matter for bylaws, and concluded that “[a]s a matter of easy linguistics, the forum selection bylaws 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 officers and directors.”¹⁴⁰ Forum selection bylaws “are process-oriented because they regulate where stockholders 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.”¹⁴¹

Boilermakers observes that “the bylaws only regulate suits brought by stockholders as stockholders in cases governed by the internal affairs doctrine.”¹⁴² The United States Supreme Court describes “internal affairs” as those “matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders,”¹⁴³ a definition also accepted by Delaware’s Supreme Court.¹⁴⁴ *Boilermakers* describes the forum selection provision at issue as governing lawsuits that “plainly relate to the “business of the corporation[s],” the “conduct of [their] affairs,” and regulate the “rights and powers of [their] shareholders.”¹⁴⁵

¹³⁶ *Id.* (citing *Revlon*, 990 A.2d at 960, 964 n.8).

¹³⁷ The provision at issue in *Boilermakers* reads as follows:

Unless the Corporation consents in writing to the selection of an alternative forum, 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, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, 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. 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].

73 A.3d at 942.

¹³⁸ Section 102(b)(1) provides that “[a]ny provision which is . . . permitted . . . to be stated in the bylaws may instead be stated in the certificate of incorporation.” 8 Del C. §102(b)(1) (2019).

¹³⁹ *Boilermakers*, 73 A.3d at 950.

¹⁴⁰ *Id.* at 950-51.

¹⁴¹ *Id.* at 951-52.

¹⁴² *Id.* at 939.

¹⁴³ *Id.* at 943 (quoting *Edgar v. Mite Corp.* 457 U.S. 624, 645 (1982)).

¹⁴⁴ *Id.* at 939, 963 n.5 (citing *VantagePoint Venture Partners 199 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005)).

¹⁴⁵ *Id.*; see also 8 Del C. §109(b) (“The 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.”).

In contrast, a forum selection bylaw would be “regulating external matters if the board adopted a bylaw that purported to bind a plaintiff, even a stockholder plaintiff, who sought to bring a tort claim against the company based on a personal injury that she suffered that occurred on the company’s premises or a contract claim based on a commercial contract with the corporation.”¹⁴⁶ Provisions of this sort are “beyond the statutory language” for the “obvious” reason that “the bylaws would not deal with the rights and powers of the plaintiff-stockholder *as a stockholder*.”¹⁴⁷ But the “defendants [in *Boilermakers*] themselves read the [provision] in a natural way to cover only internal affairs claims brought by stockholders *qua* stockholders.”¹⁴⁸

Boilermakers also invokes the Delaware Supreme Court holding in *Ingres Corp. v. CA, Inc.* that “forum selection clauses are presumptively valid and enforceable under Delaware law.”¹⁴⁹ Delaware follows the principles established by the United States Supreme Court in *The Bremen* “and its progeny, which requires courts to give as much effect as is possible to forum selection clauses and to only deny enforcement of them to the limited extent necessary to avoid some fundamentally inequitable result or a result contrary to positive law.”¹⁵⁰ “In fact, U.S. Supreme Court precedent reinforces that conclusion that forum selection bylaws are, as a facial matter of law, contractually binding.”¹⁵¹

Boilermakers was precise in characterizing the complaint as a facial challenge. Plaintiffs’ burden was thus “a difficult one: they must show that that the bylaws’ [forum selection provision] cannot operate lawfully or equitably *under any circumstance*.”¹⁵² They must show that the provisions “do not address proper subject matter” as defined by the statute “and can never operate consistently with law.”¹⁵³ There was accordingly no need to confront “how the [forum selection provision] might be applied in any future, real-world situation.”¹⁵⁴ “The presumption is not that the [bylaw] is invalid upon adoption because it might, under some undefined and hypothetical set of later-evolving circumstances, be improperly applied.”¹⁵⁵ If a bylaw is later improperly applied, the “answer ... is for the party facing a concrete situation to challenge the case-specific application of the bylaw, as in the landmark case of *Schnell v. Chris-Craft Industries*.”¹⁵⁶

Boilermakers refused to entertain a “salamagundi”¹⁵⁷ of hypotheticals that strayed from the four corners of the bylaw at issue. Plaintiffs “conjured up an array of purely hypothetical situations in which they say that the bylaws [at issue] might operate unreasonably.”¹⁵⁸ It would,

¹⁴⁶ *Boilermakers*, 73 A.3d at 952.

¹⁴⁷ *Id.* (emphasis in original).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 963 n.6 (citing *Ingres Corp.*, 8 A.3d 1143 (Del. 2010)).

¹⁵⁰ *Id.* at 941 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

¹⁵¹ *Id.* at 957.

¹⁵² *Id.* (emphasis in original).

¹⁵³ *Id.* at 949 (citing *Stroud v. Grace* 606 A.2d 75, 79 (Del. 1992); *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985)).

¹⁵⁴ *Id.* at 948.

¹⁵⁵ *Id.* at 954 (quoting Joseph A. Grundfest and Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic and Political Analysis*, 68 BUS. LAWYER 325, 331 (2013)).

¹⁵⁶ *Id.* at 949 (citing *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971)).

¹⁵⁷ *Id.* at 945.

¹⁵⁸ *Id.* at 940.

however, “be imprudent and inappropriate to address these hypotheticals in the absence of a genuine controversy with concrete facts.”¹⁵⁹ Delaware courts “do not render advisory opinions about hypothetical situations that may not occur.”¹⁶⁰ Plaintiffs “have no separate claims pending that are affected by the” forum selection provision so “they may not avoid their obligation to show that the [forum selection provisions] are invalid in all circumstances by imagining circumstances in which the [provisions] might not operate in a situationally reasonable manner.”¹⁶¹ This reasoning reflects that “the settled approach of [Delaware] law regarding bylaws is that courts should endeavor to enforce them to the extent that it is possible to do so without violating anyone’s legal or equitable rights.”¹⁶²

Boilermakers also observes that Delaware’s “Supreme Court long ago rejected the position that board action should be invalidated or enjoined simply because it involves a novel use of statutory authority.”¹⁶³ Citing the “iconic” *Unocal* decision, Chancery reiterated that “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.”¹⁶⁴

C. *Sciabacucchi*.

In holding Federal Forum Provisions invalid, *Sciabacucchi*’s major proposition is that, notwithstanding the statute’s plain text, a corporation’s organic documents can only regulate “internal affairs claims brought by stockholders *qua* stockholders.”¹⁶⁵ *Sciabacucchi* rejects the view that the plain text of DGCL 102(b)(1) is broad enough to encompass Federal Forum Provisions. Reasoning from “First Principles”¹⁶⁶ *Sciabacucchi* observes that the “contract that gives rise to the artificial entity [*i.e.*, the corporation] . . . is not an ordinary private contract among private actors.”¹⁶⁷ The state of incorporation “cannot use corporate law to regulate the corporation’s external relations.”¹⁶⁸ Accordingly, “Delaware can regulate the internal affairs of its corporate creations, regardless of their location, but only their internal affairs.”¹⁶⁹ Private ordering in organic documents is constrained to matters internal to the corporation.¹⁷⁰ It follows that Delaware’s “authority as the creator of the corporation does not extend to its creation’s

¹⁵⁹ *Id.* at 940.

¹⁶⁰ *Id.* at 959, 964 n.124 (citing *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1993) (“It is the nature of the judicial process that we decide only the case before us...”); *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 479 (Del. 1989) (“[T]his Court’s jurisdiction . . . does not require us to entertain suits seeking an advisory opinion or an adjudication of hypothetical questions” (citation and internal quotation marks omitted))).

¹⁶¹ *Id.* at 949.

¹⁶² *Id.* (citing Edward P. Welch, et al., *FOLK ON THE DELAWARE GENERAL CORPORATE LAW* § 109.4 (2009); R. Franklin Balotti & Jesse A. Finkelstein, *THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS*, § 1.10 (2014))).

¹⁶³ *Id.* at 953 (citing *Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1351 (Del. 1985); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 947, 957 (Del. 1985)).

¹⁶⁴ *Id.* at 952 (quoting *Unocal Corp.*, 493 A.2d at 957).

¹⁶⁵ 2018 WL 6719718, at *11 (quoting *Boilermakers*, 73 A.3d at 952).

¹⁶⁶ *Id.* at *18-23.

¹⁶⁷ *Id.* at *19.

¹⁶⁸ *Id.* at *20.

¹⁶⁹ *Id.* at *21.

¹⁷⁰ *Id.* at *22.

external relationships, particularly when the law of other sovereigns govern those relationships.”¹⁷¹

Sciabacucchi interprets *Boilermakers* as “drawing a line at internal-affairs claims,”¹⁷² and concludes that Federal Forum Provisions cross that line because “a 1933 Act claim is external to the corporation.”¹⁷³ Securities Act claims do not “turn on the rights, powers, or preferences of the shares, language in the corporation’s charter or bylaws, a provision of the DGCL, or the equitable relationships that flow from the internal structure of the corporation.”¹⁷⁴ Those claims “do[] not arise out of the corporate contract and do[] not implicate the internal affairs of the corporation.”¹⁷⁵ Thus, “[a] 1933 Act claim is an external claim that falls outside the scope of the corporate contract.”¹⁷⁶ Put another way, “Federal Forum Provisions purport to regulate the forum in which parties external to the corporation (purchasers of securities) can sue under a body of law external to the corporate contract (the 1933 Act). They cannot accomplish that feat, rendering the provisions ineffective.”¹⁷⁷

Sciabacucchi emphasizes that charters and bylaws cannot “dictate the forum for tort or contract claims against the company, even if the plaintiff happens to be a stockholder.”¹⁷⁸ “The reason why those kinds of bylaws would be beyond the statutory language . . . is obvious: the bylaws would not deal with the rights and powers of the plaintiff stockholder *as a stockholder*.”¹⁷⁹ *Sciabacucchi* observes that a ‘33 Act claim “resembles a tort or contract claim brought by a third-party plaintiff who was not a stockholder at the time the claim arose. At best for defendants, a 1933 Act claim resembles a tort or contract claim brought by a plaintiff who happens also to be a stockholder, but under circumstances where stockholder status is incidental to the claim.”¹⁸⁰

¹⁷¹ *Id.* at *2.

¹⁷² *Id.*

¹⁷³ *Id.* at *18.

¹⁷⁴ *Id.* at *1.

¹⁷⁵ *Id.* at *2.

¹⁷⁶ *Id.* at *18. *Sciabacucchi* also finds support from the fact that, in *ATP Tour, Inc. v. Deutscher Tennis Bund*, the court held that a bylaw that shifted litigation expenses was facially valid because it was expressly limited to a situation that “allocate[d] risk among parties in intracorporate litigation” *Id.* at *13 (citing *ATP Tour, Inc.*, 91 A.3d 554, 558 (Del. 2014)). The Delaware Supreme Court there “did not suggest that the corporate contract can be used to regulate other types of claims.” *Id.*

¹⁷⁷ *Id.* at *18.

¹⁷⁸ *Id.* at *1 (citing *Boilermakers*, 73 A.3d at 952).

A Delaware corporation that operates in other states must abide by the labor, environmental, health and welfare, and securities law regimes (to name a few) that apply in those jurisdictions. When litigation arises out of those relationships, the DGCL cannot provide the necessary authority to regulate the claims. This limitation applies even when the party asserting the claim happens to be a stockholder. Envision a customer who happens to own stock and who wishes to assert a product liability claim against the corporation. Even though the corporation’s relationships with its customers are part of its business and affairs, and even though the customer stockholder plaintiff would own stock, the shares are incidental to the operative legal relationship. Only a state exercising its territorial authority can regulate the product liability claim. Because the claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate.

Id. at *2. See also *id.* at *11, *34 (citing *Boilermakers*, 73 A.3d at 952).

¹⁷⁹ *Id.* at *11 (citing *Boilermakers*, 73 A.3d at 952 (emphasis in original)).

¹⁸⁰ *Id.* at *18.

Chancery finds further support in its interpretation of DGCL Section 115 which validated forum selection provisions in Delaware corporation's charters and bylaws, but only to "give statutory force to the *Boilermakers* decision."¹⁸¹ In *Sciabacucchi*'s interpretation, Section 115 "addressed only "internal corporate claims," defined to encompass claims covered by the internal affairs doctrine,"¹⁸² and because Securities Act claims are not internal in *Sciabacucchi*'s view, they also violate Section 115.

Sciabacucchi's second major rationale rests on the assertion that "at the time the predicate act occurs" giving rise to '33 Act liability, "the purchaser is not yet a stockholder and lacks any relationship with the corporation that is grounded in corporate law."¹⁸³ The cause of action therefore "does not arise out of or relate to the ownership of the share, but rather from the purchase of the share. At the moment the predicate act of purchasing occurs, the purchaser is not yet a stockholder and does not yet have any relationship with the corporation that is governed by Delaware corporate law."¹⁸⁴ *Sciabacucchi* also observes that Securities Act plaintiffs need not "continue to own the security to be able to assert a claim ...: the plaintiff can sue even if it subsequently sells and is no longer a stockholder."¹⁸⁵

In addition, *Sciabacucchi* asserts that prohibiting state court Securities Act litigation is "contrary to the federal regime,"¹⁸⁶ and observes that Federal Forum Provisions might be "pre-empted."¹⁸⁷ From this perspective, a state law prohibition on Federal Forum Provisions reinforces and is consistent with a pre-existing federal prohibition.

Sciabacucchi also offers a panoply of additional factors supporting its conclusion that Federal Forum Provisions are invalid in organic documents. The broad federal definition of the term "security" "underscores the absence of any meaningful connection between a 1933 Act claim and stockholder status" because, by Chancery's calculus, the 33 Act "could identify as few as fifty or as many as 369 different types of securities. Shares are just one of these many types of securities, and shares of a Delaware corporation are only one subset of that one type."¹⁸⁸ Accordingly, there is "no necessary connection between a 1933 Act claim and the shares of a Delaware corporation."¹⁸⁹ *Sciabacucchi* also observes that to be named a defendant in a Securities act claim, "[d]irector status is not required. Officer status is not required. An internal role with the corporation is not required."¹⁹⁰ This too distances Securities Act claims from internal claims.

¹⁸¹ *Id.* at *14 (citing Corporation Law Council, *Explanation of Council Legislative Proposal*, 9 (2015)).

¹⁸² *Id.* (citing Lawrence A. Hamermesh & Norman M. Monhait, *Fee-Shifting Bylaws: A Study in Federalism*, INSTITUTE OF DELAWARE CORPORATE AND BUSINESS LAW (June 29, 2015), <http://blogs.law.widener.edu/delcorp/2015/06/29/fee-shifting-bylaws-a-study-in-federalism/#sthash.O9AscFqH.dpbs>).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at *17.

¹⁸⁵ *Id.* (citing 15 U.S.C. §77k(e)).

¹⁸⁶ *Id.* at*1.

¹⁸⁷ *Id.* at *23.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

Sciabacucchi closes with reference to additional arguments presented by plaintiffs that the opinion does not formally reach, but upon which it comments. Plaintiffs argued that Federal Forum Provisions “took Delaware out of its traditional lane of corporate governance and into the federal lane of securities regulation.”¹⁹¹ *Sciabacucchi* observed that the “extent of infringement in this case might not seem significant (excluding one of the two forums that federal law permits), but the implications would be vast (asserting that state corporate law could be used to regulate federal claims)”¹⁹²

IV. Concurrent Jurisdiction, Federal Pre-Emption, and the Federal Law of Forum Selection.

Sciabacucchi states that “contrary to the federal regime, [Federal Forum Provisions] preclude a plaintiff from asserting a 1933 Act claim in state court.”¹⁹³ *Sciabacucchi* also speculates, citing plaintiff pleadings, that there “are also grounds to believe that because the Federal Forum Provisions conflict with the forum alternatives that the 1933 Act permits, the provisions could be pre-empted.”¹⁹⁴

The United States Supreme Court disagrees.

In *Rodriguez de Quijas v. Shearson/American Express Inc.*,¹⁹⁵ precedent not cited in *Sciabacucchi*, the United States Supreme Court upholds a contractual provision precluding state court litigation of Securities Act claims. Federal Forum Provisions are also entirely consistent with federal law governing enforcement of forum selection provisions more generally, as articulated in *The Bremen*¹⁹⁶ and its progeny. Also, nothing in the PSLRA, SLUSA, or *Cyan* limits a forum selection provision from designating federal court as the venue in which Securities Act claims must proceed. Simply put, nothing in federal law precludes enforcement of Federal Forum Provisions. Their operation is entirely consistent with the federal regime.

It is *Sciabacucchi*, not Federal Forum Provisions, that cannot be reconciled with federal law. Indeed, *Sciabacucchi* uses Delaware law to prohibit an act in federal court, under federal law, that is permitted by federal law. No other interpretation of Delaware law is so intrusive into and inconsistent with the federal regulatory regime. Instead of avoiding a Delaware-federal conflict, *Sciabacucchi* creates one.

A. Rodriguez and Securities Act Concurrent Jurisdiction.

Rodriguez enforces an arbitration agreement that prohibits Securities Act litigation in both federal and state court. *Rodriguez* explains that arbitration provisions are “in effect, a specialized kind of forum-selection clause.”¹⁹⁷ In *Scherk v. Alberto-Culver Co.*, the United States

¹⁹¹ *Id.* at *23.

¹⁹² *Id.*

¹⁹³ *Sciabacucchi*, 2018 WL 6719718, at *1.

¹⁹⁴ *Sciabacucchi*, 2018 WL 6719718, at *23 (citations omitted).

¹⁹⁵ *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477 (1989).

¹⁹⁶ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

¹⁹⁷ 490 U.S. 477, 483 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)).

Supreme Court explains that arbitration provisions “posit[] not only the situs of suit but also the procedure to be used in resolving the dispute.”¹⁹⁸

Rodriguez conclusively establishes that there is no immutable right to litigate Securities Act claims in state court. If such a right existed, *Rodriguez* could not have been decided as it was. Indeed, if the Supreme Court will enforce a provision that prohibits litigation in federal or state court when the statute provides for concurrent jurisdiction in both federal and state court, the Supreme Court will, *a fortiori*, enforce a provision that permits litigation in federal court. Claims that Federal Forum Provisions improperly constrain plaintiffs’ right to designate a state court forum for the resolution of Securities Act claims thus conflict with controlling United States Supreme Court precedent and must fail.¹⁹⁹ *Sciabacucchi’s* speculation that Federal Forum Provisions might be pre-empted is thus also precisely backwards.

The facts and analysis in *Rodriguez* are simple and instructive. Plaintiffs “signed a standard customer agreement” with a broker that included a “clause stating that the parties agreed to settle any controversies ‘relating to [the] accounts’ through binding arbitration.”²⁰⁰ The arbitration agreement was “unqualified, unless it is found to be unenforceable under federal or state law.”²⁰¹ Plaintiffs argued that the agreement violated the anti-waiver language of Section 14 of the Securities Act, which states as follows:

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.²⁰²

The Supreme Court disagreed. It explained that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”²⁰³ By identical logic, when agreeing to litigate a Securities Act claim in federal court, a party does not forgo any substantive right; it submits to the resolution of a federal claim in a federal forum, rather than in a federal or state forum, with the exception of the possibility that the Securities Act claim will be litigated in Delaware state court.²⁰⁴ Obviously, if *Rodriguez’s* proposition upholding arbitration is true, even though the Securities Act nowhere mentions arbitration as a forum for the resolution of Securities Act claims, then the latter proposition upholding litigation in federal court is surely true, inasmuch as the Securities Act expressly designates federal courts as a proper forum for the

¹⁹⁸ *Scherk*, 417 U.S. at 519.

¹⁹⁹ *Sciabacucchi* observes that “[t]here are also grounds to believe that because the Federal Forum Provisions conflict with the forum alternatives that the 1933 Act permits, the provisions could be preempted,” but does not rely on those arguments in reaching its holding. 2018 WL 6719718 at *23.

²⁰⁰ *Rodriguez*, 490 U.S. at 478 (alteration in original) (quoting the customer’s agreement).

²⁰¹ *Id.*

²⁰² 15 U.S.C. § 77o (2017).

²⁰³ *Rodriguez*, 490 U.S. at 481 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). To be sure, the choice of forum can have economic value to litigants. As explained in Section II, *supra*, Section 11 claims are less frequently dismissed in state than in federal court, and are therefore likely more valuable to plaintiffs, on average, if filed in state court. The Supreme Court’s analysis, however, does not credit the influence of forum location decisions as they impact the value of the substantive claim. The analysis in *Boilermakers* is identical. *Boilermakers*, 73 A.3d at 960 n.129.

²⁰⁴ *See infra*, Section VI.C.

resolution of Securities Act claims. Subsequent enactment of the PSLRA, SLUSA, and the Supreme Court’s opinion in *Cyan*,²⁰⁵ do not alter this conclusion.²⁰⁶

Standard objections to arbitration, including a lack of transparency and the loss of rights that are standard in federal or state court,²⁰⁷ are meaningless when assessing a Federal Forum Provision that directs federal claims to an open federal court where the Federal Rules of Civil Procedure and Federal Rules of Evidence apply. Thus, if a Securities Act arbitration agreement is enforceable, notwithstanding policy concerns regarding arbitration, a Federal Forum Provision directing Securities Act claims to federal court is *a fortiori* enforceable.

Rodriguez overruled *Wilko v. Swan*,²⁰⁸ an opinion that invalidated Securities Act arbitration agreements. The Court’s rationale in overturning *Wilko* powerfully supports the validity of Federal Forum Provisions under federal law:

Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that §14 is properly construed to bar any waiver of these provisions. Nor are they so critical that they cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers.²⁰⁹

The Court expressly rejects the notion that concurrent Securities Act jurisdiction is, in any sense, un-waivable or unalterable by a forum selection clause. The court also rejects the notion that the Securities Act is intended to “place buyers of securities on an equal footing with sellers” by providing them with a right to a forum that cannot be governed by a forum selection provision.²¹⁰ This logic also rejects the notion that *Rodriguez* is somehow distinguishable because it involves an arbitration agreement and invokes the Federal Arbitration Act. If that were the case, *Rodriguez* would not have to reject the notion that the Securities Act places buyers and sellers on equal footing. It could instead have relied on a far narrower propositions relating exclusively to enforcement of arbitration provisions. This logic reversing *Wilko* and upholding mandatory Securities Act arbitration, therefore reinforces the validity of Federal Forum Provisions as a matter of federal law.

Objections based on concern that charter provisions are, in the context of public offerings, nonnegotiable “contracts of adhesion” are also of no avail. The standard brokerage agreement at issue in *Rodriguez* was a nonnegotiable contract of adhesion, and courts commonly reject challenges complaining that stockholders can’t negotiate over charter or bylaw

²⁰⁵ *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018).

²⁰⁶ See *infra* Section IV.D.

²⁰⁷ See, Letter from Jeffrey P. Mahoney, Gen. Counsel, Council of Institutional Inv’rs, to Jay Clayton, Chairman, U.S. Secs. & Exch. Comm’n (Jan. 31, 2019), (summarizing related concerns in the context of arbitrating Securities Act claim),

https://www.cii.org/files/issues_and_advocacy/correspondence/2019/January%2031%202019%20SEC%20letter%20on%20mandatory%20arbitration.pdf.

²⁰⁸ 346 U.S. 427 (1953).

²⁰⁹ *Rodriguez*, 490 U.S. at 481.

²¹⁰ *Id.*

provisions.²¹¹ *Boilermakers* also dismisses these concerns, explaining that “[i]n sum, stockholders contractually assent to be bound by bylaws that are valid under the DGCL—that is an essential part of the contract agreed to when an investors buys stock in a Delaware corporation,”²¹² even if those bylaws were not in place when they initially purchased their shares. Further, the charter provisions at issue in *Sciabacucchi* were all in place prior to plaintiff’s purchase, and plaintiff was on notice of those provisions.

Efforts to distinguish *Rodriguez* by arguing that it addresses a brokerage agreement that differs fundamentally from corporate charters or bylaws²¹³ also cannot succeed. *Rodriguez* does not turn on the form of the agreement containing the forum selection clause, nor on the presence or absence of the Federal Arbitration Act. *Rodriguez* turns on the interpretation of the Securities Act, and Securities Act Section 14. The key point from that perspective is *Rodriguez’s* observation that “the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that §14 is properly construed to bar any waiver of these provisions. Nor are they so critical that they cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers.”²¹⁴ Thus, even if one agrees that a “contract” as defined for purposes of the Federal Arbitration Act, does not include corporate charters or bylaws – a question irrelevant to the resolution of *Sciabacucchi* – that is a distinction without a difference, given *Sciabacucchi’s* rationale, because either form of agreement would suffice to preclude state court litigation of Securities Act claims.

Contemporary SEC policy also supports the validity of Federal Forum Provisions. The Commission’s staff views mandatory Securities Act arbitration as contrary to the public interest and refuses to accelerate registration statements of issuers whose organic documents mandate Securities Act arbitration.²¹⁵ In contrast, Commission staff have never denied acceleration to a registration statement of an issuer with a Federal Forum Provision in its organic documents. The Commission’s staff, which opposes arbitration on public policy grounds, apparently has no objection to a requirement that a federal claim be heard in federal court. Any such objection would be more than a bit quizzical, and perhaps even embarrassing, to an agency that litigates all of its non-administrative matters in federal court. Or, to put it another way, if federal courts are

²¹¹ See, e.g., *Drulias v. 1st Century Bancshares, Inc.*, 241 Cal. Rptr. 3d 843, 852 (Cal. Ct. App. 2018) (“[N]either California nor Delaware law requires forum selection clauses be freely negotiated to be enforceable. A forum selection clause need not be subject to negotiation to be enforceable . . . Rather, a forum selection clause contained in a contract of adhesion, and thus not the subject of bargaining, is ‘enforceable absent a showing that it was outside the reasonable expectations of the weaker or adhering party or that enforcement would be unduly oppressive or unconscionable.’” (quoting *Furda v. Superior Court*, 207 Cal. Rptr. 646, 651 (Cal. Ct. App. 1984) (citing, *inter alia*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (applying federal law); *Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 987 (Del. Super. Ct. 2000) (applying Delaware law))).

²¹² *Boilermakers*, 73 A.3d at 958.

²¹³ See, e.g. Ann M. Lipton *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583, 601-39 (2016)

²¹⁴ *Rodriguez*, 490 U.S., at 488.

²¹⁵ See Jay Clayton, Chairman, *Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions*, U.S. SEC. & EXCH. COMM’N (Feb. 11, 2019), <https://www.sec.gov/news/public-statement/clayton-statement-mandatory-arbitration-bylaw-provisions>. See also Zachary D. Clopton & Verity Winship, *A Cooperative Federalism Approach to Shareholder Arbitration*, 128 YALE L. J. FORUM 169, 178 (2018) (“the agency has long indicated its opposition to the inclusion of mandatory arbitration clauses in charters and bylaws. It has refused, for example, to accelerate registration statements with charters that contain such a clause.”)

good enough for the Securities and Exchange Commission, they are also good enough for private party plaintiffs with Securities Act complaints, particularly when Supreme Court precedent clearly holds that private agreements can preclude state court litigation. Staff comment letters mentioning Federal Forum Provisions have been limited to observations regarding disclosure issues, and no objections have been raised as to the effectiveness or substance of any Federal Forum Provision under federal securities law.²¹⁶

By invalidating Federal Forum Provisions *Sciabacucchi* prohibits a forum selection mechanism that is entirely legitimate as a matter of United States Supreme Court precedent and consistent with current SEC practice. This inconsistency takes Delaware “out of its lane” and creates unnecessary friction between Delaware and federal law.²¹⁷

B. The Federal Law of Forum Selection

In *The Bremen*, the United States Supreme Court holds that forum selection clauses are “*prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”²¹⁸ A forum selection provision “should control absent a strong showing that it should be set aside.”²¹⁹

The law in Delaware is identical. “[T]he principles set down by the United States Supreme Court in *Bremen* [were] adopted explicitly by [Delaware’s] Supreme Court in *Ingres Corp. v. CA, Inc.*”²²⁰ Federal and Delaware law are of a single mind: forum selection provisions are presumptively valid.

The “presumption [of validity] is not that the [forum selection provision] is invalid upon adoption because it might, under some undefined and hypothetical set of later-evolving circumstances, be improperly applied.”²²¹ Hypothetical circumstances not before the court in which Federal Forum Provisions might be deemed invalid under federal, Delaware, or any other body of law, are irrelevant on a facial challenge.

Boilermakers also emphasizes that forum selection provisions are subject to an additional level of scrutiny by courts in which complaints challenging forum provisions are filed. The ensuing “[r]eview under *Bremen* and its progeny is genuine, not toothless.”²²² Indeed, “the *Bremen* doctrine exists precisely to ensure that facially valid forum selection clauses are not used in an unreasonable manner in particular circumstances.”²²³ Contemplating conditions under which an “as applied” analysis might invalidate a Federal Forum Provision is thus unnecessary on the facts of *Sciabacucchi*, which is a facial challenge and where the presumption of validity

²¹⁶ See, Jay Knight & Taylor Wirth, *Exclusive Forum Provisions in Charters and Bylaws: An Area of Frequent SEC Comment*, BASS, BERRY & SIMS’ SEC. L. EXCHANGE (Apr. 5, 2019), <https://www.bassberrysecuritieslawexchange.com/exclusive-forum-provisions>.

²¹⁷ See *infra* Section VII.A.

²¹⁸ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

²¹⁹ *Id.* at 15.

²²⁰ *Boilermakers*, 73 A.3d at 940 (citing *Bremen*, 407 U.S. 1; *Ingres*, 8 A.3d 1143 (Del. 2010)).

²²¹ *Id.* at 954 (quoting *Grundfest & Savelle*, *supra* note 6 at 331).

²²² *Id.* at 958.

²²³ *Id.* at 958-59.

prevails. An “as applied” analysis, while unnecessary at this stage is nonetheless perhaps instructive because it underscores that courts will rarely, if ever, refuse to enforce a Federal Forum Provision.

In an “as applied” context, *The Bremen* specifies three circumstances in which forum selection provisions might be invalidated. First, a forum selection provision will not be enforced when doing so might be “unreasonable and unjust.”²²⁴ To challenge a provision on these grounds, a resisting party must demonstrate that “trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.”²²⁵ Otherwise, “there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.”²²⁶

Litigating federal Securities Act claims in federal court is neither unreasonable nor unjust. The statute itself designates federal courts as a permissible forum, and it is neither unreasonable nor unjust to require that a matter be resolved in a forum designated by Congress. Federal courts are also the traditional forum for resolving Securities Act claims, and have a comparative advantage in resolving those disputes. The selection of a sufficiently remote forum might, under some circumstances, be viewed as unreasonable,²²⁷ but with ninety-four district court throughout the nation, and with at least one in every state, and with one in Delaware, the state of incorporation, no such objection can be raised against Federal Forum Provisions that allow plaintiffs to select any federal district court in the nation in which to file a claim.

Second, a provision might be “invalid for such reasons as fraud or overreaching.”²²⁸ Federal Forum Provisions are, however, fully disclosed in the charter or bylaws and are described in the prospectus. The Provisions’ operation is apparent on the face of the document. There is no opportunity for the sort of fraud or overreaching contemplated in *The Bremen*.²²⁹ There is also no undue influence or overweening bargaining power. The United States Supreme Court is clear that forum selection provisions are enforceable even if contained in contracts of adhesion.²³⁰ Indeed, if Federal Forum Provisions are objectionable on these grounds, the argument proves too much because then every IPO charter provision is objectionable as the result of overreaching, undue influence, or excessive bargaining power.

The Bremen’s third concern is that a forum selection clause “contravene[s] a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”²³¹ Procedurally, the merits of any such hypothetical objection cannot be assessed in the abstract because there is no forum in which any suit is currently pending. It is thus impossible to identify a specific jurisdiction whose strong public policy might be contravened. Precedent

²²⁴ *Bremen*, 407 U.S. at 15.

²²⁵ *Id.* at 18.

²²⁶ *Id.*

²²⁷ *Id.* at 16-17.

²²⁸ *Id.* at 15.

²²⁹ See also 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3803.1 n.36 (4th ed. 2013) (collecting cases).

²³⁰ See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

²³¹ *Bremen*, 407 U.S. at 15.

and logic suggest, however, that state-law based public policy arguments against the litigation of federal claims in federal court will likely fail.

C. State Law Public Policy Concerns.

A review of leading treatises²³² finds no indication that any extant state law or policy stands for the proposition that a forum selection provision directing that federal courts address federal claims would “contravene[] a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”²³³ The absence of such precedent is not surprising. In order for such a “strong public policy” to exist, a state would have to conclude that federal courts adjudicating a federal claim would reach results that systematically differ from state court resolutions in a manner that is, in some sense, inimical to the state’s interests. This would amount to nothing less than a full frontal assault on the fairness and competence of the federal judiciary.

The Supremacy Clause issues raised by any such public policy position are also obvious on the face of the proposition. In the case of Federal Forum Provisions, the state would have to conclude that federal court resolution of federal Securities Act claims is objectionable even though federal courts have greater expertise in adjudicating Securities Act claims than do state courts. Moreover, the effect of any such policy at the state level would be to divest federal courts of jurisdiction over federal claims as a matter of state policy, and not as a consequence of a private contract. Indeed, simply stating the proposition helps explain why the public policy exception would not, on an “as applied” basis, invalidate Federal Forum Provisions.

The Ninth Circuit's decision in *Gemini Technologies v. Smith & Wesson Corp.*²³⁴ illustrates the point. Idaho has adopted perhaps the most aggressive statutory public policy against extraterritorial litigation. But not even this statute, would invalidate Federal Forum Provisions.

Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing this rights under the contract in Idaho tribunals . . . is void as it is against the public policy of Idaho. Nothing in this section shall affect contract provisions relating to

²³² See 3 CYCLOPEDIA OF FEDERAL PROCEDURE § 4:14 (3d ed.); 16 MOORE’S FEDERAL PRACTICE § 107.130 (3d ed.); 14D WRIGHT, MILLER, ET AL. *supra* note 229, § 3803.1 (collecting cases). The types of cases where courts strike down forum selection clauses present starkly different scenarios than that in *Sciabacucchi*. In *America Online, Inc. v. Superior Court*, the court struck down a forum selection clause that would have required California residents seeking relief under California law to litigate in Virginia state court, because California public policy strongly favored consumer class actions, which were not available in Virginia courts, and because enforcement of the clause would violate California statute. 108 Cal. Rptr. 2d 699, 710-12 (Cal. Ct. App. 2001); *see also* *DHX, Inc. v. Allianz AGF MAT Ltd.*, No. CV 02–06397 PA, 2002 WL 31421952 (C.D. Cal. Oct. 17, 2002) (striking down a forum selection clause selecting English court because it, combined with a choice of law clause, would have deprived the plaintiff of the constitutional and statutory right to jury trial). In other cases, even local law that “expressly proscribes the enforcement of [forum selection] clauses” will not defeat enforcement of a clause. *Renaissance Mktg., Inc. v. Monitronics Int’l, Inc.*, 606 F. Supp. 2d 201, 212 (D.P.R. 2009); *see also* *Brahma Grp., Inc. v. Benham Constructors, LLC*, No. 2:08-CV-970TS, 2009 WL 1065419 (D. Utah 2009).

²³³ *The Bremen*, 407 U.S. at 15.

²³⁴ *Gemini Tech., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911 (9th Cir. 2019).

arbitration so long as the contract does not require arbitration to be conducted outside the state of Idaho.²³⁵

Based on this language, the Ninth Circuit refused to enforce a forum selection provision requiring that litigation relating to an Asset Purchase Agreement be brought in Delaware, reasoning that enforcement would contravene [Idaho's] strong public policy "and is therefore unenforceable."²³⁶ The Ninth Circuit observed that only four other states, Montana, North Dakota, Oklahoma, and North Carolina "have statutes similar to Idaho's."²³⁷

But even Idaho's statutory provision would not defeat enforcement of the Federal Forum Provisions at issue in *Sciabacucchi* because its strong public policy would still permit litigation in federal court in Idaho. More fundamentally, if a plaintiff argued that, under Idaho law, litigation would have to be brought in Idaho state court, the argument would fail because of Supremacy Clause concerns, and because it would be contrary to the plain text of the statute which does not preclude federal court litigation in Idaho. Federal Forum Provisions, as drafted in *Sciabacucchi*, thus raise no credible concern of being void as against state public policy.²³⁸

D. The PSLRA, SLUSA, and Cyan.

Sciabacucchi relies in part on the observation that, in *Cyan*,²³⁹ the Supreme Court barred removal of Section 11 actions from state to federal court and reaffirmed concurrent jurisdiction under the Securities Act.²⁴⁰ While correct, this observation is irrelevant to the question presented. *Sciabacucchi* also cites to the PSLRA and SLUSA.²⁴¹ Those statutes also do not suggest that Federal Forum Provisions are unenforceable.

Cyan addressed a question relating to removal and remand in the absence of a forum selection provision. The law governing removal and remand is distinct from the law governing the operation of forum selection provisions. When a plaintiff files in a forum precluded by a forum selection clause, the parties litigate over the proper application of *The Bremen* and related precedent and have no need to cite *Cyan*, because that opinion says nothing about the enforcement of forum selection provisions. And, when parties litigate over removal and remand in the absence of a forum selection provision, *Cyan* is potentially relevant, but there is no need to cite to *The Bremen* or to related forum selection precedent that says nothing about removal and remand.

²³⁵ IDAHO CODE §29-110(1).

²³⁶ *Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 917 (9th Cir. 2019). The case was remanded "so that the district court may apply a traditional *forum non conveniens* balance analysis." *Id.*

²³⁷ *Id.* at 916.

²³⁸ This analysis does not address Federal Forum Provisions that designate a specific federal district court in which a claim must be brought.

²³⁹ *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018).

²⁴⁰ *Sciabacucchi*, 2018 WL 6719718, at *1 ("In 2018, the Supreme Court of the United States held that state courts continue to have concurrent jurisdiction over claims by private plaintiffs and that defendants cannot remove actions filed in state court to federal court." (citing *Cyan*, 138 S. Ct. 1061)).

²⁴¹ *Id.* at *4-6.

It is a dramatic and unwarranted misreading of *Cyan* to suggest that, *sub silentio*, and with no briefing or mention of the law governing forum selection, the opinion overturns *Rodriguez*, *The Bremen*, and all other forum-selection related precedent as applied to Securities Act claims. Indeed, Federal Forum Provisions and *Cyan* coexist in perfect harmony. In the absence of a Federal Forum Provision *Cyan* governs disputes over removal and remand. But when a Federal Forum Provision exists, then *Rodriguez*, *The Bremen*, and the law of forum selection govern the provision's enforcement.

The PSLRA and SLUSA also do not read on the enforceability of Federal Forum Provisions. Nothing in the text of either statute, nor a word of either statute's legislative history, suggests that Congress considered the operation of forum selection provisions in the context of Securities Act claims, much less that Congress legislated in a manner to constrain the operation of forum selection provisions, or to limit the reach of *Rodriguez*, or of *The Bremen*, or of any related precedent.

“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”²⁴² To conclude that the PSLRA or SLUSA in any sense reverse, override, or modify *Rodriguez* or *The Bremen*, or to conclude that the Supreme Court did so in *Cyan*, is to conclude that Congress and the Court hid three very large elephants in one small mousehole. That's three elephants too many.

V. Presumptions, Assumptions, First Principles, and Internal Affairs.

A. *Sciabacucchi* is a Facial Challenge.

Sciabacucchi and *Boilermakers* are facial challenges to forum selection provisions. Plaintiffs' burden in a facial challenge is “a difficult one: they must show that the [forum selection provision] cannot operate lawfully or equitably *under any circumstances*.”²⁴³ Plaintiffs must show that the provisions “do not address proper subject matter” as defined by the statute, “and can *never* operate consistently with law.”²⁴⁴ “The plaintiffs voluntarily assumed this burden by making a facial validity challenge, and cannot satisfy it by pointing to some future hypothetical application . . . that might be impermissible.”²⁴⁵ “The answer to the possibility that a statutorily and contractually valid bylaw may operate inequitably in a particular scenario is for the party facing a concrete situation to challenge the case-specific application of the bylaw, as in the landmark case of *Schnell v. Chris-Craft Industries*.”²⁴⁶

Plaintiffs in *Sciabacucchi*, as in *Boilermakers*, “have no separate claims pending that are affected by” Federal Forum Provisions.²⁴⁷ Plaintiffs therefore “may not avoid their obligation to show that the [provisions] are invalid in all circumstances by imagining circumstances in which

²⁴² *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

²⁴³ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 948 (Del. Ch. 2013) (emphasis in original).

²⁴⁴ *Id.* at 949 (emphasis added).

²⁴⁵ *Id.* (citations omitted).

²⁴⁶ *Id.* (citing *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971)).

²⁴⁷ *Id.* at 941.

the [provisions] might not operate in a situationally reasonable manner.”²⁴⁸ “The settled approach of [Delaware] law regarding bylaws is that courts should endeavor to enforce them to the extent that it is possible to do so without violating anyone’s legal or equitable rights.”²⁴⁹ Identical principles govern charter provisions.²⁵⁰

Sciabacucchi neither recites nor applies the standards governing facial challenges. It does not demonstrate that Federal Forum Provisions can never operate lawfully or equitably “*under any circumstance.*” The opinion relies on incorrect assumptions of fact, and dilates on concerns regarding hypothetical forum selection provisions yet to be invented as they might apply to tort, contract, conversion or other claims not before the court, and that might never come before any court. *Sciabacucchi* deviates from the “settled approach of Delaware law.”

B. Charter Provisions are Presumptively Valid.

Charter provisions are “presumed to be valid, and the courts will construe the [charter provisions] in a manner consistent with the law rather than strike down the [charter provisions].”²⁵¹ *Sciabacucchi* fails to address or apply this presumption, and nowhere endeavors to construe Federal Forum Provisions “in a manner consistent with the law.”

C. Purchasers, Sellers, and Stockholders.

Sciabacucchi’s analysis rests critically on a distinction between purchasers and stockholders. The opinion asserts that no fiduciary duty is owed to Section 11 plaintiffs because they are purchasers, not stockholders, at the time of the transaction. *Sciabacucchi* reasons that the Section 11 claim “does not arise out of or relate to the ownership of the share, but rather from the purchase of the share. At the moment the predicate act of purchasing occurs, the purchaser is not yet a stockholder and does not yet have any relationship with the corporation that is governed by Delaware corporate law.”²⁵² Thus, “even when the investor does purchase a share of stock . . . the predicate act is the purchase. The cause of action does not arise out of or relate to the ownership of the share, but rather from the purchase of the share.”²⁵³ The pervasive assumption is that no fiduciary duties are owed to Securities Act plaintiffs because those plaintiffs are never

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 949; see 1 EDWARD P. WELCH ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 109.04 (6th ed. 2015) (“Bylaws are presumed to be valid. Courts will interpret a bylaw in a manner consistent with the law rather than striking it down. The rules of construction used to interpret statutes, contracts, and other written instruments apply to bylaws.” (citations omitted)); cf. *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 342–43 (Del. 1983) (noting that “the rules which are used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters and bylaws”).

²⁵⁰ *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010); see also *Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc.*, No. 2017-0785-AGB, 2018 WL 4057012, at *20 & n.174 (Del. Ch. Aug. 27, 2018).

²⁵¹ *Cedarview*, 2018 WL 4057012, at *20 n.174 (alteration in original) (citation omitted) (“*Boilermakers* involved challenges to bylaws, rather than a charter provision, but Delaware courts have held that the legal principles relevant to interpreting a charter provision and a bylaw are identical.” (citing *Boilermakers*, 73 A.3d at 948 n.55)); see also *Stroud v. Grace*, 606 A.2d 75, 96 (Del. 1992) (supporting the presumptive validity of bylaws); *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985) (same).

²⁵² *Sciabacucchi*, 2018 WL 6719718, at *17.

²⁵³ *Id.*

existing stockholders at the time of purchase, and charters cannot regulate transactions with persons who are not already stockholders.

Sciabacucchi's assumptions of fact and descriptions of law relating to Securities Act transactions are problematic for five distinct reasons:

1. The opinion's assertions regarding purchasers as not being existing stockholders are presented with no citation support;
2. Those unsupported assertions are inconsistent with a public record documenting that Securities Act purchasers are commonly also existing stockholders to whom fiduciary obligations are owed;
3. Delaware law permits charter and bylaw provisions that regulate transactions with purchasers to whom no fiduciary duties are owed;
4. Officers and directors, in registered offerings, sell their personal shares to new and/or existing stockholders in transactions that involve fiduciary obligations that are nowhere considered in the opinion; and
5. The opinion fails to address trenchant critiques of the purchaser-stockholder distinction in fraud-related contexts that date back even farther than Judge Learned Hand's classic commentary.

1. Securities Act Plaintiffs are Stockholders.

The assertion that Section 11 purchasers are not pre-existing stockholders and do not have "any relationship with the corporation that is governed by Delaware corporate law" is unsupported and demonstrably incorrect. Registration statements filed with the SEC document that purchasers in initial public offerings include preexisting stockholders to whom fiduciary duties are owed.²⁵⁴ They also establish that pre-existing holders purchase in follow-on offerings.²⁵⁵ The burden is on plaintiffs to demonstrate that Securities Act claimants can never be stockholders to whom fiduciary duties are owed. Plaintiffs cannot carry that burden.

²⁵⁴ For example, the final prospectus for the initial public offering of Inspire Medical Systems, Inc. discloses that "[i]n connection with our IPO, certain of our existing stockholders and members of our board of directors purchased shares of our common stock from the underwriters at the initial public offering price of \$16.00 per share, and on the same terms as other investors in our IPO." Inspire Med. Sys., Inc., Prospectus (Form 424B4) 146 (Dec. 6, 2018), available at <https://www.sec.gov/Archives/edgar/data/1609550/000104746918007527/a2237281z424b4.htm>; see also Kiniksa Pharm., Ltd., Prospectus (Form 424B) 179 (Jan. 31, 2019), available at <https://www.sec.gov/Archives/edgar/data/1730430/000104746919000331/a2237624z424b4.htm> ("Baker Brothers and HH RSV-XVII Holdings Limited, each a beneficial owner of more than 5% of our Class A common shares, purchased 3,000,000 and 1,388,888 Class A common shares, respectively, in our initial public offering at the initial public offering price of \$18.00 per share."); Verrica Pharm., Inc. Prospectus (Form 424B) 131 (June 14, 2018), available at <https://www.sec.gov/Archives/edgar/data/1660334/000119312518194500/d361077d424b4.htm> ("Certain of our existing beneficial owners of more than 5% of our voting securities, including entities affiliated with certain of our directors, have agreed to purchase an aggregate of 1,500,000 shares of our common stock in this offering at the initial public offering price per share.").

²⁵⁵ The final prospectus supplement for a follow-on offering by Intercept Pharmaceuticals, Inc., for example, explains that "[o]ur Chief Executive Officer and certain members of our Board of Directors have agreed to purchase

This problem is, however, far more profound than suggested by examples drawn from registration statements. Plaintiffs in Section 11 proceedings include aftermarket purchasers who can trace their shares so as to demonstrate Section 11 standing.²⁵⁶ “In financial markets, traders often slice large orders into smaller ones.”²⁵⁷ Split orders emerge as part of “an attractive strategy for minimizing trading costs” because “transacting in a smaller size can enable [traders] to conceal their information advantage more effectively.”²⁵⁸ A substantial literature explores optimal rules for transacting so as not to reveal private information that could cause a market to move against a trader’s position.²⁵⁹ While trade splitting is more common among “more active and . . . larger-size traders,”²⁶⁰ it can occur in connection with any transaction, and in today’s markets, orders are often split into multiple transactions across trading venues,²⁶¹ to avoid detection when making large transactions,²⁶² or simply out of necessity.²⁶³ Algorithmic trading programs can split orders as a matter of course.²⁶⁴ Traders are also incentivized to split orders to avoid reporting requirements²⁶⁵ or minimize price impact.²⁶⁶ Smaller transactions are also split

an aggregate of 16,795 shares of our common stock in this offering at the price offered to the public and on the same terms as the other purchasers in this offering.” Intercept Pharm., Inc, Final Prospectus Supplement (Form 424B5), at S-5 (Apr. 5, 2018), *available at* https://www.sec.gov/Archives/edgar/data/1270073/000114420418019603/tv490441_424b5.htm; *see also* Axovant Sci. Ltd., Prospectus Supplement (Form 424B5), at S-12 (Dec. 14, 2018), *available at* <https://www.sec.gov/Archives/edgar/data/1636050/000104746918007702/a2237357z424b5.htm> (“RSL, our majority shareholder, has agreed to purchase 10,000,000 common shares in this offering at the public offering price of \$1.00 per share on the same terms as those offered to the public.”); Akebia Therapeutics, Inc, General Statement of Acquisition of Beneficial Ownership (Schedule 13D/A) 9 (Jan. 19, 2016), *available at* https://www.sec.gov/Archives/edgar/data/1376359/000114420416076141/v429206_sc13da.htm (“On January 12, 2016, in connection with a secondary sale of the Issuer’s Common Stock to the public, [preexisting stockholders with positions in excess of five percent of an equity class of the issuer’s securities] acquired from the Issuer an aggregate of 444,444 shares of the Issuer’s Common Stock for a purchase price of \$9.00 per share, or an aggregate of \$4,000,000.”).

²⁵⁶ See, e.g., Joseph A. Grundfest, *Morrison, the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 J. CORP. L. 1 (2015).

²⁵⁷ Ryan Garvey et al., *Why Do Traders Split Orders?*, 52 FIN. REV. 233, 255 (2017).

²⁵⁸ *Id.* at 234 (citing James J. Angel et al., *Equity Trading in the 21st Century*, 1 Q.J. FIN. 1 (2011)); James J. Angel et al., *Equity Trading in the 21st Century: An Update*, 5 Q.J. FIN. 1 (2015); Michael J. Barclay & Jerold B. Warner, *Stealth Trading and Volatility: Which Trades Move Prices?*, 34 J. FIN. ECON. 281 (1993); Sugato Chakravarty, *Stealth Trading: Which Traders’ Trades Move Stock Prices?*, 61 J. FIN. ECON. 289 (2001); Gordon J. Alexander & Mark A. Peterson, *An Analysis of Trade-Size Clustering and Its Relation to Stealth Trading*, 84 J. FIN. ECON. 435 (2007)).

²⁵⁹ See, e.g., Gerry Tsoukalas et al., *Dynamic Portfolio Execution*, 65 MGMT. SCI. 1949, 2015 (2019) and citations therein.

²⁶⁰ *Id.* at 2035.

²⁶¹ Valeriia Klova & Bernt Arne Ødegaard, *Equity Trading Costs Have Fallen Less Than Commonly Thought: Evidence Using Alternative Trading Cost Estimators*, 11 (Uis Working Papers in Econ. & Fin., Paper No. 2018/4, 2019), https://ideas.repec.org/p/hhs/stavef/2018_004.html.

²⁶² Soohun Kim & Dermot Murphy, *The Impact of High-Frequency Trading on Stock Market Liquidity Measures 2* (June 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278428.

²⁶³ Gabriella Vaglica et al., *Statistical Identification with Hidden Markov Models of Large Order Splitting Strategies in an Equity Market*, 12 NEW J. PHYSICS 075031, at 2 (2010) (collecting scholarship).

²⁶⁴ Maureen O’Hara et al., *What’s Not There: Odd Lots and Market Data*, 79 J. FIN. 2199, 2200 (2014) (observing that “[a]lgorithmic trading routinely slices and dices orders into smaller pieces).

²⁶⁵ *Id.* at 2215.

²⁶⁶ Klova & Ødegaard, *supra* note 261, at 2; *id.* at 1 (noting that “innovation has led to a huge drop in order sizes due to order splitting”).

because of market conditions, even if investors do not direct that orders be split.²⁶⁷ Order splitting is so common that, as of 2014, “the median trade size on the NASDAQ is 100 shares.”²⁶⁸

The ubiquity of order splitting implies that the overwhelming majority of shares acquired by Section 11 aftermarket plaintiffs represent purchases by existing holders. “Institutions own about 78% of the market value of the U.S. broad-market Russell 3000 index, and 80% of the large-cap S&P 500 index.”²⁶⁹ An institutional investor who seeks to acquire 100,000 shares of a recently issued IPO will likely not purchase all 100,000 shares in a single trade. The order might instead be split into 100 trades of 1,000 shares each. By *Sciabacucchi*’s reasoning, no fiduciary duty is owed in connection with the acquisition of the first 1,000 shares, and the charter cannot regulate the acquisition of those first 1,000 shares. However, as to each subsequent purchase, the purchaser is a preexisting holder to whom fiduciary duties are owed. *Sciabacucchi*’s analysis would therefore, by its own terms, not apply to 99,000 of the acquired shares. The vast majority of institutional Section 11 plaintiffs are therefore likely existing holders as to whom fiduciary obligations are owed and potentially breached. Similar analysis applies to retail investors whose orders can also be split, even when investors are unaware of that fact.

Intriguingly, the complaint in *Sciabacucchi* alleges dates on which the plaintiff purchased an unspecified number of shares in the three nominal defendant corporations, but nowhere describes the number of trades used by plaintiff to acquire those shares, nor whether any of those trades were split.²⁷⁰ While these specific facts are irrelevant on a facial challenge, it is nonetheless informative that the plaintiff in *Sciabacucchi* is himself potentially a purchaser who was an existing holder at the time of purchase, contrary to the court’s assumption.

The public record thus refutes an assumption of fact that is foundational to *Sciabacucchi*’s holding. Because this assumption is so pivotal, it is impossible to discern how Chancery would resolve the question presented if, instead of incorrectly assuming that purchasers are never existing holders, *Sciabacucchi* accurately recognized that Securities Act purchasers are frequently existing holders protected by fiduciary obligations.

2. The DGCL Regulates Purchasers as Purchasers.

Even if Securities Act purchasers are not stockholders, the proposition that purchasers cannot be regulated by charter or bylaw is contrary to the plain text of the DGCL. Sections

²⁶⁷ See, e.g., Garvey et al., *supra* note 257, at 240 (providing the example of a trader who submits an order into an electronic trading platform to purchase 1000 shares and finds that “400 shares execute through two separate 200-share trades”).

²⁶⁸ O’Hara et al., *supra* note 264, at 2200.

²⁶⁹ Charles McGrath, *80% of Equity Market Cap Held by Institutions*, PENSIONS & INV. (Apr. 25, 2017), <https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions>.

²⁷⁰ Verified Class Action Complaint for Declaratory Judgement at ¶ 13, *Sciabacucchi v. Salzberg* No. 2017-0931, 2018 WL 6719718 (Del. Ch. Dec. 29, 2017).

152,²⁷¹ 157,²⁷² 166,²⁷³ and 202²⁷⁴ all regulate transactions with purchasers prior to their becoming stockholders. Delaware law does not require that charters or bylaws regulate only stockholders *qua* stockholders, because it also clearly permits the regulation of purchasers *qua* purchasers. That result is entirely sensible because of a straightforward isomorphism (*i.e.*, a one-to-one correspondence between two sets): every purchaser becomes a stockholder, and every stockholder was once a purchaser. It is impossible to become a stockholder without having been a purchaser, and it is impossible to be a purchaser without becoming a stockholder. Indeed, while *Boilermakers* speaks extensively of stockholders *qua* stockholders, nothing in *Boilermakers* rejects the notion that the DGCL can also regulate purchasers *qua* purchasers.

3. Directors and Officers as Securities Act Sellers.

Sciabacucchi fails to consider implications of situations in which existing officers or directors sell their stock, along with the corporation's, as part of a registered offering. For example, Travis Kalanick, while a director of Uber Technologies, Inc., sold 3,376,000 shares in the Uber initial public offering for gross proceeds of \$151,920,000.²⁷⁵ Closer to home, in the Roku initial public offering—one of the nominal defendants in this action—the Menlo Funds sold 6 million shares, at \$14.00 per share, for aggregate proceeds of \$84 million.²⁷⁶ Mr. Shawn Carolan, a managing member of the Menlo Funds, was a director of Roku as of the effective date of the offering.

It cannot be assumed, on a facial challenge, that the transaction does not involve a sale by a person who owes a fiduciary obligation to purchasers who are either already stockholders or, certainly, about to become stockholders. Yet, *Sciabacucchi* assumes precisely that.

In *In re American International Group, Inc.*, Chancery refused to dismiss a *Brophy* claim against senior officers who allegedly sold stock while aware of undisclosed “pervasive, earnings-inflating frauds.”²⁷⁷ Identical conduct in a registered public offering would, according to

²⁷¹ Section 152 of the DGCL regulates the forms of “subscriptions to, or the purchase of, the capital stock” and specifies that consideration “shall be paid in such form and in such manner as the board of directors shall determine.” The board may authorize “consideration consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof.” A charter provision regulating the form of acceptable consideration by, for example, requiring that all payments be in cash, regulates a transaction with a person who is not a stockholder and to whom no fiduciary duty is owed. Del. Code Ann. tit. 8, § 152.

²⁷² Section 157 of the DGCL permits the creation of rights on options entitling persons who were not previously stockholders to acquire shares in the corporation. The terms of acquisition upon exercise “shall be such as stated in the certification of incorporation, or board resolutions.” *Id.* § 157(b).

²⁷³ Section 166 of the DGCL provides that a “subscription for stock of a corporation . . . shall not be enforceable against a subscriber, unless in writing and signed by the subscriber or by such subscriber’s agent.” *Id.* § 166. A corporate charter can define the nature of the writing sufficient to establish an enforceable subscription agreement. Such a restriction would not violate Section 102(b)(1), despite the fact that it governs a purchaser who is not yet a stockholder.

²⁷⁴ Section 202 of the DGCL permits charter and bylaw provisions that act as transfer restrictions on purchasers who are not yet stockholders. *Id.* § 202. Section 202 is analyzed in greater detail, *infra*, in Section V. D.2.

²⁷⁵ Uber Techs., Inc., Prospectus (Form 424B) 266 (Apr. 11, 2019), available at <https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm> (indicating the sale of 3,376,000 shares in the initial offering for total, gross proceeds of \$151,920,000).

²⁷⁶ Roku, Inc., Prospectus (Form 424B) 133 (Sept. 27, 2017), available at <https://ir.roku.com/node/6671/html>.

²⁷⁷ 965 A.2d 763, 800–801 (Del. Ch. 2009).

Sciabacucchi, raise no concern under Delaware law because the purchasers are not existing stockholders to whom fiduciary duties are owed, and the transaction is therefore external. The tension between *Sciabacucchi* and *American International Group* is apparent.

4. The Learned Hand Critique.

Sciabacucchi's strong reliance on a purchaser-stockholder distinction implicates a question of fiduciary law that drew attention from judge Learned Hand, a judge "numbered among a small group of truly great American judges of the twentieth century, a group that includes Oliver Wendell Holmes, Jr., Louis Brandeis, and Benjamin Cardozo."²⁷⁸ Judge Hand has been quoted more frequently by legal scholars and by the United States Supreme Court than any other lower-court judge.²⁷⁹

The purchaser-seller distinction gathers most attention in the context of insider trading law.

[M]uch of insider trading law depends on the defendant having a fiduciary duty to the persons with whom the insider traded shares. This presents a question of whether different rules apply when a director sells shares to an outsider rather than buying them from an existing shareholder of the company. . . . Assuming *arguendo* that the director's fiduciary duties to shareholders proscribe buying shares from them on the basis of undisclosed material information, the logic of that rule does not necessarily extend to cases in which the director sells to an outsider.²⁸⁰

But that logic "seems an absurd elevation of form over substance"²⁸¹ because it creates liability for insider purchases but not for insider sales. Judge Hand addressed this challenge head on. He rejected *Sciabacucchi*'s approach and concluded that transacting with a purchaser generates a fiduciary obligation to the purchaser even if the purchaser is not a pre-existing stockholder.

[T]he director or officer assumed a fiduciary relation to the buyer by the very sale; for it would be a sorry distinction to allow him to use the advantage of his position to induce the buyer into the position of a beneficiary, although he was forbidden to do so, once the buyer had become one. Certainly this is true, when the buyer knows he is buying of a director or officer, for he expects to become the seller's *cestui que* trust [*i.e.*, a beneficiary having an equitable interest in a trust, with the legal title being vested to the trustee]. If the buyer does not know, he is

²⁷⁸ GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE*, Preface at xv (2d ed. 2011).

²⁷⁹ GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 200* (2004).

²⁸⁰ STEPHEN M. BAINBRIDGE, *INSIDER TRADING LAW AND POLICY* 8 (2014).

²⁸¹ *Id.*

entitled to assume that if his seller in fact is already a director or officer, he will remain so after the sale.²⁸²

Sciabacucchi leans hard on Judge Hand’s “sorry distinction.” Judge Hand emphatically rejects the logic upon which *Sciabacucchi* relies, and his rejection “is now well accepted as a matter of federal law.”²⁸³ Indeed, because the purchaser in a registered offering knows that he is typically taking from the issuer pursuant to a registration statement prepared under the board’s supervision in a process that requires the exercise of fiduciary duties, the purchaser “expects to become the seller’s *cestui que* trust.” That expectation is reinforced when the prospectus discloses that corporate officers or directors are selling personal holdings in the registered offering, a scenario that is doubly challenging for *Sciabacucchi*’s assumptions and for the logic that hinges critically on those assumptions.

Judge Hand’s framing of the question, which rests on principles of equity, might in this context have found some traction in Chancery, which is a court of equity. But it apparently did not. Significantly, Judge Hand’s views are consistent with those of the United State Securities and Exchange Commission,²⁸⁴ the Second Circuit,²⁸⁵ and the American Law Institute’s Principles of Corporate Governance, Analysis and Recommendations.²⁸⁶

D. Extraterritorial Effects.

Sciabacucchi’s first principles analysis is motivated by concern that the DGCL will be used to regulate corporate conduct that occurs outside of Delaware. *Sciabacucchi* applies its internal affairs constraint to protect against such extraterritorial application.

Delaware’s authority as the creator of the corporation does not extend to its creation’s external relationships, particularly when the laws of other sovereigns govern those relationships. Other states exercise territorial jurisdiction over a Delaware corporation’s external interactions. A Delaware corporation that operates in other states must abide by the labor, environmental, health and welfare, and securities law regimes (to name a few) that apply in those jurisdictions. When litigation arises out of those relationships, the DGCL cannot provide the necessary authority to regulate the claims Because the claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate.²⁸⁷

This logic is deeply flawed. It reasons that, but-for the imposition of a “first principles” analysis that generates a novel internal affairs constraint, the DGCL can be broadly applied to

²⁸² Gratz v. Claughton, 187 F.2d 46, 49 (2d Cir. 1951).

²⁸³ BAINBRIDGE, *supra* note 280, at 9.

²⁸⁴ “We cannot accept [the] contention that an insider’s responsibility is limited to existing stockholders and that he has no special duties when sales of securities are made to non-stockholders.” Matter of Cady, Roberts & Co., 40 S.E.C. 907 (Nov. 8, 1961).

²⁸⁵ “The insider’s fiduciary duties, is should be noted, run to a buyer (a shareholder-to-be) and to a seller (a pre-existing shareholder) of securities, even though the buyer technically does not have a fiduciary relationship with the insider prior to the trade.” U.S. v. Chestman, 947 F.2d 551, 565 n.2 (2d Cir. 1991).

²⁸⁶ PRINCIPLES OF CORP. GOVERNANCE § 5.04 cmt. d (Am. Law. Inst. 1994).

²⁸⁷ *Sciabacucchi*, 2018 WL 6719718, at*2.

regulate the extraterritorial conduct of Delaware-chartered corporations. This concern ignores a substantial body of United States and Delaware Supreme Court precedent that already precludes extra-territorial application of the DGCL. This robust, uncited, constraining precedent undermines the logic that is foundational to *Sciabacucchi*'s "first principles" analysis. It also eliminates the stated need for an internal affairs constraint. If anything, this uncited precedent demonstrates that *Sciabacucchi*'s proposed internal affairs constraint is both unnecessary and problematic.

It is unnecessary because Delaware's own Supreme Court has already explained that "[t]here is, of course, a presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted."²⁸⁸ The United States Supreme Court explains that, "[l]egislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."²⁸⁹ Thus, "the legislature need not qualify each law by saying 'within the territorial jurisdiction of this state.' That is how statutes have always been interpreted"²⁹⁰

The United States Constitution's Commerce Clause also guarantees that the DGCL will not have inappropriate extraterritorial effect. The Court has invalidated regulation when there is no valid local purpose,²⁹¹ or when the regulation unduly burdens interstate commerce.²⁹² It has applied a balancing test that weighs local benefits against burdens imposed on interstate commerce.²⁹³ A vibrant body of law thus already prohibits extraterritorial applications, and Delaware courts have additionally demonstrated a common-sense, text-based ability to defend against overzealous extensions of Delaware law, even in the absence of *Sciabacucchi*'s self-imposed, divergent internal affairs constraint.²⁹⁴

Sciabacucchi's internal affairs constraint is also problematic because if the constraint is to have any "bite"—if it is to constrain Delaware law in any manner by which it is not already constrained—then it has to be more restrictive than existing principles, including Commerce Clause doctrine, that already govern extraterritorial application of Delaware law. Otherwise, the novel internal affairs constraint is an ineffectual lesser included constraint. But *Sciabacucchi* never describes any deficiency in current doctrine that limits extraterritorial application of state

²⁸⁸ *Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977), *overruled on other grounds by* *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *see also* *Hilton v. Guyot*, 159 U.S. 113, 163 (1894); *Brocalso Chem. Co. v. Langsenkamp*, 32F.2d 725 (6th Cir. 1929); *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 855–57 (Del. Ch. 2016) (citing *Singer*, 380 A.2d at 981–82); *Eurofins Panlabs, Inc. v. Ricerca Biosciences, LLC*, C. A. No. 8431–VCN, 2014 WL 2457515, *18 (Del. Ch. May 30, 2014); *McBreen v. Iceco, Inc.*, 139 N.E.2d 845 (Ill. App. Ct. 1956); *Gillespie v. Blood*, 17 P.2d 822 (Utah 1932); 73 AM. JUR. 2D *Statutes* §§ 357–59; 69 AM. JUR. 2D *Securities Regulation, State* § 8; 79 C.J.S. SUPP. *Securities Regulation* § 189; 14 FLETCHER, CYCLOPEDIA CORPORATIONS § 6742 (1975).

²⁸⁹ *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918).

²⁹⁰ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 268–69 (2012).

²⁹¹ *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978).

²⁹² *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

²⁹³ *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

²⁹⁴ For example, Chancellor Bouchard's opinion in *FdG Logistics LLC*, 131 A.3d at 855–56 interprets 6 Del. C. §2708 "as intending to permit contracting parties to incorporate the law of Delaware, which primarily would concern its common law, to decide questions concerning the interpretation and enforceability of a contract. What Section 2708 does not stand for, in my view, is a mechanism for the wholesale importation of every provision of Delaware statutory law into the commercial relationship of contracting parties."

law. Nor does it describe how its internal affairs constraint might cure that undefined deficiency. *Sciabacucchi* never even attempts to define the gap in the law that the internal affairs doctrine is designed to fill, and never explains why its novel articulation of a self-imposed internal affairs test is a reasonable approach to the problem.

Finally, *Sciabacucchi*'s proposed internal affairs constraint is not a rule of general applicability that would govern any other state's law, or be imposed through federal law. It is unique to Delaware. But *Sciabacucchi* never explains why the problem of extraterritorial application is such that Delaware should self-impose a limitation that reaches beyond existing doctrine and that applies to no other jurisdiction. To rationalize such a result, one has to assume that Delaware and the DGCL pose a special extraterritorial threat that requires a unique and additional constraining principle. *Sciabacucchi* nowhere describes Delaware's unique threat or how the self-imposition of an internal affairs constraint that diverges from established precedent promotes a rational objective.

E. A Divergent Definition of "Internal Affairs".

"Adherence to precedent is 'a foundation stone of the rule of law'" and overturning it is "never a small matter."²⁹⁵ United States and Delaware Supreme Court decisions define "internal affairs." *Sciabacucchi* nowhere respects that precedent. It nowhere addresses the deviation between its proposed definition of "internal affairs" and established law. It nowhere explains why its proposed definition, which materially narrows the Supreme Courts' definition, is appropriate or justifiable.

In *Edgar v. MITE Corp.*, the United States Supreme Court defines internal affairs as "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because [if multiple states had the authority to regulate a corporation's internal affairs] a corporation could be faced with conflicting demands."²⁹⁶ In *VantagePoint Venture Partners 1996 v. Examen, Inc.*, Delaware's Supreme Court explains that the "internal affairs doctrine applies to those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders."²⁹⁷ *VantagePoint* also observes that "the conflicts practice of both state and federal courts has consistently been to apply the law of the state of incorporation to 'the entire gamut of internal corporate affairs.'"²⁹⁸ The *MITE* and *VantagePoint* definitions are substantially identical. *Boilermakers* expressly follows *MITE*.²⁹⁹

²⁹⁵ *Kisor v. Wilkie*, 588 U.S. ___, 139 S. Ct. 2400, 2422 (2019) (citing *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015); *Michigan v. Bay Mills Indian Cmty*, 572 U.S. 782, 798 (2014)).

²⁹⁶ 457 U.S. 624, 645 (1982); see *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1082 (Del. 2011) ("The term 'internal affairs' encompasses 'those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders.' The doctrine requires that the law of the state . . . of incorporation must govern those relationships." (footnote omitted) (quoting *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112 (Del. 2005))); *McDermott Inc. v. Lewis*, 531 A.2d 206, 214 (Del. 1987); see also *Kamen v. Kamper Fin. Servs., Inc.*, 500 U.S. 90, 106 (1991).

²⁹⁷ 871 A.2d at 1113.

²⁹⁸ *Id.* (quoting *McDermott*, 531 A.2d at 216).

²⁹⁹ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 943 (Del. Ch. 2013).

But instead of applying controlling precedent, *Sciabacucchi*, with no citation support, invents a narrower definition of “internal affairs.” This novel definition explains that whether a provision is internal “turn[s] on the rights, powers, or preferences of the shares, language in the corporation’s charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation.”³⁰⁰ *Sciabacucchi* concludes:

[A] federal claim under the 1933 Act is a clear example of an external claim. The plaintiff is a purchaser of securities, and the source of the cause of action is the sale of a security that violates the federal regulatory regime. The defendants need not be directors or officers of the corporation; they can be anyone that the 1933 Act identifies as a viable defendant. The fact that the plaintiff might have purchased shares in a Delaware corporation is incidental to the claim; shares are but one type of security covered by the 1933 Act. Even if the purchase did involve shares, the event giving rise to the claim takes place just before the plaintiff becomes a stockholder, before the corporate contract applies. Nor is continuing stockholder status necessary to assert a 1933 Act claim: the plaintiff can sue even if it sells and is no longer a stockholder. The federal claim does not invoke the stockholder’s legal or equitable rights under the state law corporate contract.³⁰¹

Put aside for the moment the contestable nature of some of these unsubstantiated assertions (*e.g.*, the characterization of purchasers as not also being existing stockholders to whom fiduciary duties are owed). *Sciabacucchi*’s litany of perceived distinctions adds to the Supreme Court’s definition of internal affairs a set of new conditions that are entirely unrelated to whether any matter is “peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.” A matter can obviously be “peculiar” to intra-corporate relationships even if it implicates purchasers; the cause of action is federal; some defendants are not officers or directors; the operative federal statute applies to instruments other than shares of Delaware corporations; and the plaintiff has since sold her shares.³⁰² These new conditions are narrowing constraints that conflict with established Supreme Court precedent.

The shared definition of “internal affairs” adopted by the United States and Delaware Supreme Courts, but not followed in *Sciabacucchi*, critically and logically does not hinge on the formalities of whether a cause of action arises under one state’s laws or another’s. Nor does it depend on whether a cause of action is federal. The Supreme Courts’ definition clearly allows for the existence of internal affairs that are regulated by federal statute, yet still remain internal. The Supremacy Clause plainly allows federal law to regulate internal affairs without generating the inter-state disputes that the internal affairs doctrine is designed to prevent. The Supreme Courts’ definition is functional and pragmatic. It looks to the facts of the underlying dispute, and not to labels applied by litigants. To suggest, as *Sciabacucchi* does, that a claim cannot be internal if it

³⁰⁰ *Sciabacucchi*, 2018 WL 6719718, at *1.

³⁰¹ *Id.* at *22.

³⁰² See also Manesh, *The Contested Edges of Internal Affairs* (August 9, 2019). Available at SSRN: <https://ssrn.com/abstract=3435165> or <http://dx.doi.org/10.2139/ssrn.3435165>, at 54 (“The fact that the relevant rights arise under federal securities law—and not state corporate law—should not make a difference. After all, forum selection provisions covering state corporate law claims regulate a shareholder’s rights arising not just under state corporate law, but also under generally applicable rules of civil procedure.”).

is federal is to misapprehend both the plain text of the Supreme Courts' definitions, and the rationale for those definitions.

By the Supreme Courts' shared definition, Federal Forum Provisions are entirely internal. Thus, even if an internal affairs standard consistent with the Supreme Courts' definition is grafted onto the DGCL, Federal Forum provisions survive as valid charter provisions. On a facial challenge, a court can assume that a Section 11 claim arises because directors sitting in a boardroom willfully craft a fraudulent prospectus covering shares that the directors themselves are selling to purchasers who are pre-existing stockholders to whom the directors owe a fiduciary duty. This is an internal affair that simultaneously supports a Delaware fiduciary breach claim and a federal Section 11 complaint. The fact that the claim supports a federal Section 11 filing does not render the claim external under any interpretation of governing Supreme Court precedent. Reaching that conclusion requires the invention of a far narrower and inconsistent definition of internal affairs. That's what *Sciabacucchi* does.

More generally, Section 11 complaints will very frequently, if not always, be internal. Section 11, by its express terms, presumes that directors and officers are liable together with the corporation for misrepresentations or omissions in the registration statement.³⁰³ Directors and officers can rebut the presumption only if they bear the burden of demonstrating their exercise of due diligence in their individualized participation in preparing the registration statement. The registration statement is signed by the directors, and prepared under the board's control. Officers and directors can be jointly or severally liable with the corporation. The corporation is strictly liable for any material misrepresentation or omission in the registration statement. The entire process of preparing and filing the registration statement is internal. Nothing external happens when a board signs and authorizes the filing of a registration statement.³⁰⁴ Moreover, on a facial challenge, plaintiffs have not demonstrated, and cannot possibly demonstrate, that a Securities Act claim can never be internal. Section 11 thus clearly implicates "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."

On a related note, if the process of preparing a registration statement is viewed as external, and thereby subject to the competing regulatory demands of sister states, Delaware corporations would confront the very "conflicting demands" that *MITE* explains the doctrine is designed to avoid.³⁰⁵ The result would be to license sister state intrusions into boardroom matters in a manner that Delaware is likely to view as inimical.

But no matter. Even if one accepts *Sciabacucchi*'s divergent definition of internal affairs, Federal Forum Provisions are internal because Section 11 claims easily "turn on . . . the equitable relationships that flow from the internal structure of the corporation." A defective registration statement cannot be filed without the board's consent, and constitutes a lie to existing stockholders. That lie is fully actionable as an equitable fiduciary breach under Delaware law.³⁰⁶ Section 11 embeds a statutory presumption that directors are personally liable unless they can

³⁰³ For a more detailed discussion of Section 11 liability, *see infra* Section V.G..

³⁰⁴ *See infra* Section V.G for additional discussion of Section 11 of the Securities Act.

³⁰⁵ *See infra* Section VI for a fuller discussion of these public policy implications of *Sciabacucchi*.

³⁰⁶ *See infra* Section V.F.

establish a due diligence defense.³⁰⁷ Section 11 thus always implicates the equitable care with which directors, individually and as a group, prepare and review the registration statement. Indeed, plaintiffs commonly allege that boardroom failures giving rise to defective registration statements breach the directors' and officers' equitable, fiduciary obligations that flow from the internal structure of the corporation.³⁰⁸ As *Boilermakers* explains, "it is common for derivative actions to be filed in state court . . . coincident to the filing of federal securities claims exclusively within the jurisdiction of the federal courts."³⁰⁹ The facts alleged in the parallel federal and state lawsuits are often substantially identical because the same misrepresentations and failures of loyalty or care that suffice to allege a Section 11 claim also suffice to allege a Delaware *Malone* and/or *Caremark* claim. Plaintiff thus commonly take positions inconsistent with *Sciabacucchi*'s conclusion that Section 11 violations are external.

At this level of analysis, the fly in *Sciabacucchi*'s ointment is not its insistence that charter provisions be limited to internal affairs. Nor is it even that *Sciabacucchi* fails to honor governing precedent. The problem is, instead, that the opinion nowhere analyzes the elements of the Section 11 cause of action, and nowhere maps those elements against its own or any other definition of internal affairs. It therefore fails to recognize that the Section 11 cause of action is ineluctably internal even by *Sciabacucchi*'s divergent standard.

At a higher level of abstraction, *Sciabacucchi*'s invented definition of "internal affairs" is potentially problematic for Delaware, separate and apart from its conflict with Supreme Court precedent. Delaware might prefer not to have multiple definitions of "internal affairs" floating about, and might not prefer a definition that facilitates sister state intrusion into matters traditionally reserved for Delaware Law. Delaware might thus clarify that *MITE* and *VantagePoint* control, and expressly reject *Sciabacucchi*'s standard, regardless of whether Delaware appends an "internal affairs" test to all of the DGCL.

F. *Malone* and *Caremark*: Section 11 Claims as Fiduciary Breach Claims.

Every Section 11 violation involves a material misrepresentation or omission to current stockholders, purchasers, and to the market. Every Section 11 claim establishes a critical predicate for a claim that a board has breached Delaware duties of care and loyalty set forth in *Malone v. Brincat*³¹⁰ and/or *Caremark*.³¹¹ *Boilermakers* recognizes that fact when it observes that "it is common for derivative actions to be filed in state court on behalf of corporations coincident to the filing of federal securities claims exclusively within the jurisdiction of the federal courts."³¹² These Delaware claims are frequently described as "tag-along" claims because they recite facts substantially identical to the allegations of a federal Section 11 claim, and cannot give rise to liability under Delaware law unless there is first a judgment or settlement under the predicate federal claim. Section 11 claims and their clone, tag-along Delaware fiduciary claims,

³⁰⁷ 15 U.S.C. § 77k(b)(3) (2017).

³⁰⁸ See *infra* Section V.G.

³⁰⁹ 73 A.3d at 961.

³¹⁰ 722 A.2d 5 (Del. 1998).

³¹¹ *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

³¹² 73 A.3d at 961 (citing *Bach v. Amedisys, Inc.*, No. 10-395-BAJ-CN, 2010 WL 4318755 (M.D. La. Oct 22, 2010)) (characterizing *Bach* as one "describing four securities class actions and four derivative suits that arose out of the same facts").

are “merely two sides of the same coin”³¹³ that arise from a common set of facts. This pattern of federal claims giving rise to Delaware fiduciary violations arises because the “historic roles played by state and federal law in regulating corporate disclosures have been not only compatible but complementary.”³¹⁴

Malone v. Brincat. In *Malone v. Brincat*, Delaware’s Supreme Court explains that:

Whenever directors communicate publicly or directly with shareholders about the corporation’s affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty. It follows *a fortiori* that when directors communicate publicly or directly with shareholders about corporate matters the *sine qua non* of directors’ fiduciary duty to shareholders is honesty. . . . The duty of disclosure obligates directors to provide the stockholders with accurate and complete information material to a transaction or other corporate event that is being presented to them for action.³¹⁵

The issue is “not whether [the] directors breached their duty of disclosure.”³¹⁶ The issue is instead “whether they breached their more general fiduciary duty of loyalty and good faith by knowingly disseminating to the stockholders false information about . . . the company.”³¹⁷

Malone explains that directors can breach fiduciary duties through three different types of communication: “public statements made to the market, including shareholders; statements informing shareholders about the affairs of the corporation without a request for shareholder action; and, statements to shareholders in conjunction with a request for shareholder action.”³¹⁸

Section 11 violations can fit any of these three categories. A defective registration statement is a “public statement[] made to the market, including shareholders.” A defective registration statement is disseminated with the board’s active participation and approval. It remains alive in the market until corrected, and causes stockholders to whom the board owes fiduciary obligations to transact at prices distorted by the registration statement’s materially false information. A defective registration statement “inform[s] shareholders about the affairs of the corporation without a request for shareholder action.” When a defective registration statement is incorporated by reference into a proxy statement seeking a stockholder vote, it becomes a “statement to shareholders in conjunction with a request for shareholder action.”

³¹³ *In re Groupon Derivative Litig.*, 882 F. Supp. 2d 1043, 1051 (N.D. Ill. 2012).

³¹⁴ *Malone*, 722 A.2d at 13.

³¹⁵ *Id.* at 10 (footnote omitted). Delaware’s definition of materiality is identical to that applied in federal securities law. *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985); *see also Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994).

³¹⁶ *Malone*, 722 A.2d at 10.

³¹⁷ *Id.* The “duty of disclosure is not an independent duty, but derives from the duties of care and loyalty.” *Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del. 2009) (quoting *Pfeffer v. Redstone*, No. 2317-VCL, 2008 WL 308450, at *8 (Del. Ch. Feb. 1, 2008)).

³¹⁸ *Malone*, 722 A.2d at 11.

As Vice Chancellor Laster explains, a complaint that alleges “systematic governance failures and a pattern of false disclosures [in SEC filings] designed to conceal them” describes a situation in which “it is reasonably conceivable that plaintiffs could obtain damages or another remedy [under Delaware law] for the alleged misstatements in the Form 8-K [SEC filing].”³¹⁹ By identical logic, materially defective registration statements giving rise to Section 11 claims can generate traditional derivative fiduciary breach violations, where it is “reasonably conceivable that plaintiffs could obtain damages or other remedies” under Delaware law.

To prevail under a *Malone* claim when there is no request for shareholder action, plaintiffs have to demonstrate scienter, reliance, causation, and damages.³²⁰ This is consistent with the observation that “[t]he decision by the [Delaware] Supreme Court to set a high bar for *Malone*-type claims was not . . . inadvertent.”³²¹ The goal was “to ensure that [Delaware] law was not discordant with federal standards.”³²² And that is precisely the point. Section 11 allegations commonly support fiduciary breach claims precisely because the causes of action are complementary: both are ineluctably rooted in the assertion that the board itself has authorized a false statement to stockholders and to the public. While the level of intent required to establish a Section 11 claim is lower than is required to establish a Delaware fiduciary breach claim based on identical underlying facts,³²³ and while burdens of proof differ, those distinctions do not cause the federal claim to become external while the cloned, tag-along, Delaware claim based on identical facts remains internal.

Sciabacucchi concludes that filing a false registration statement is not an internal affair, notwithstanding *Malone*’s plain text which clearly reaches false securities filings, and notwithstanding the fact that defective registration statements are also directed at existing stockholders who acquire additional shares in transactions covered by Section 11. How does *Sciabacucchi* reach this conclusion? How is it that a board’s lies that generate Section 11 liability are external when precisely the same lies support a *Malone* claim that the board has breached its fiduciary duties? *Sciabacucchi* never analyzes the full operation of the Section 11 cause of action, and never considers Section 11’s relationship to *Malone* or to any other aspect of Delaware law that frowns on officers and directors who lie to stockholders and to purchasers.

³¹⁹ Heng Ren Silk Road Invs. LLC v. Chen, No. 2019-0010-JTL, 2019 WL 3207210, at *4 (Del. Ch. July 16, 2019).

³²⁰ “To successfully state a duty of loyalty claim against directors for providing information in the absence of a request for shareholder action, a stockholder must allege that he received ‘false communications’ from directors who were ‘deliberately misinforming shareholders about the business of the corporation.’” Wilkin v. Narachi, No. 12412-VCMR, 2018 WL 1100372, at *14 (Del. Ch. Feb. 28, 2018) (quoting Orloff v. Shulman, No. Civ.A. 852-N, 2005 WL 3272355, at *14 (Del. Ch. Nov. 23, 2005)). “[W]hen shareholder action is absent, plaintiff must show reliance, causation, and damages’ in order to establish a breach of the duty of loyalty.” *Id.* (quoting A.R. DeMarco Enters., Inc. v. Ocean Spray Cranberries, Inc., No. Civ. A. 19133-NC, 2002 WL 31820970, at *4 n.10 (Del. Ch. Dec. 4, 2002)).

³²¹ *Id.* (third alteration in original) (quoting Metro Commc’n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 158 (Del. Ch. 2004)).

³²² *Id.* (alteration in original) (quoting Metro Commc’n, 854 A.2d at 158).

³²³ “[The] standard for evaluating a claim under *Malone* [is] ‘similar to but more stringent than, the level of scienter required for common law fraud.’ Metro Comm’n, Corp. BVI v. Advance Mobile Comm Techs, Inc. 854 A.2d 121, 158 (Del. Ch. 2004). For a common law fraud claim, a plaintiff can show reckless indifference, but *Malone* requires knowing misconduct. *Id.* at 158 n. 88.” Clark v. Davenport, C.A. No. 2014-0839-JTL, 2019 WL 3230928, at *9 (Del. Ch. July 18, 2019).

Caremark. *Sciabacucchi*'s relationship with *Caremark* is also fraught. As crisply explained by Vice Chancellor Glasscock, unlawful acts, such as violations of Section 11, "can result in fines, penalties, third-party damages, and other losses on the part of the entity. The essence of a *Caremark* claim is an attempt by the owners of the company, its stockholders, to force the directors to personally make the company whole for these losses."³²⁴ A Section 11 settlement or judgment generates corporate liability that, in turn, can serve as the basis for a *Caremark* derivative claim under Delaware law. This is a variant of the classic tag-along derivative claim.

In *Stone v. Ritter*, Delaware's Supreme Court explains that *Caremark* liability attaches where "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."³²⁵ Because an internal control failure is a necessary precondition to Section 11 liability, possibly as a consequence of an utter failure to implement adequate controls, or possibly as a consequence of a conscious failure adequately to monitor extant controls, Section 11 claims can establish a predicate that is necessary but not sufficient to establish *Caremark* liability. More to the point, this *Caremark* exposure is an internal matter governed by Delaware law and can potentially be demonstrated with precisely the same facts necessary to establish individual director liability under Section 11.

In order to succeed in a *Caremark* claim, plaintiffs generally have to demonstrate scienter,³²⁶ a state of mind more extreme than the failure to demonstrate due diligence that serves as a Section 11 defense. *Caremark* claims are also among the most difficult to prove in Delaware corporate law.³²⁷ But the fact that a *Caremark* claim arising from a Section 11 violation requires proof of scienter, and may well fail even if Section 11 liability is established, does not change the essential observation that the facts supporting both claims are not only substantially similar, but can be absolutely identical and profoundly internal. It makes no sense to assert that facts giving rise to an internal *Caremark* claim are no longer internal when pled in support of a Section 11 claim. The more logical view is that the federal Section 11 claim grows out of the internal conduct that also supports the *Caremark* claim.

Stay Litigation. The prevalence of stay litigation, in which defendants petition to stay derivative claims while federal class action claims are pursued in another court, underscores an essential identity between some federal securities complaints and traditional Delaware fiduciary breach complaints. The Groupon derivative litigation is an instructive example. There,

Plaintiffs filed federal complaints alleging that Groupon violated federal securities law by issuing "materially false and misleading statements regarding the company's business practices and financial results and failed to disclose negative trends in the company's business."³²⁸ A separate

³²⁴ *Oklahoma Firefighters Pension & Ret. Sys. v. Corbat*, No. 12151-VCG, 2017 WL 6452240, at *1 (Del. Ch. Dec. 18, 2017).

³²⁵ 911 A.2d 362, 370 (Del. 2006) (emphasis in original).

³²⁶ *Corbat*, 2017 WL 6452240, at *14.

³²⁷ *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

³²⁸ *In re Groupon Derivative Litig.*, 882 F. Supp. 2d 1043, 1047 (N.D. Ill. 2012).

set of plaintiffs filed a derivative action alleging that individual defendants, including the corporation's directors, "breached their fiduciary duties . . . and abused their control . . . by permitting Groupon to function with deficient accounting controls thereby harming the company. These deficient controls came to light in the months proceeding [sic] and immediately following Groupon's IPO."³²⁹

This derivative claim is derivative in two distinct senses of the term. It is derivative because the plaintiff stands in the shoes of the corporation. It is also derivative in a second sense because there is no recovery under the derivative Delaware claim, unless there is predicate liability under the federal securities claim. "Courts that have considered the interplay between derivative and securities actions have often found that derivative claims 'cannot be adjudicated in full (or even in large measure) until the [securities class] [a]ction is tried.'"³³⁰ Indeed, "[a]s for the similarity of the facts, both sets of plaintiffs rely on the same documents to support their claims" including the registration statement, the prospectus (which is Part I of the registration statement), and other press releases and news documents.³³¹ The court concluded that "both actions rest on the same or closely related transactions, happenings or events, and thus will call for the determination of the same or substantially related questions of fact."³³² It follows that "these alternate theories are merely two sides of the same coin, and courts have regularly stayed one action in favor of the other despite the different nature of the claims."³³³

G. Section 11 Claims Are Internal.

Sciabacucchi is a facial challenge, so plaintiff's burden is to demonstrate that a Section 11 claim can never be internal. This is an impossible burden. Consider a board of directors, sitting in its boardroom, knowingly drafting a materially misleading prospectus that will be used to sell securities to existing stockholders and that will enrich them at the expense of stockholders to whom they owe fiduciary obligations. This conduct is clearly internal. It can be a classic Delaware fiduciary breach, as described in *Malone* or *Caremark*. But, *Sciabacucchi* asserts that "claims alleging fraud in connection with a securities sale"³³⁴ "do not concern corporate internal affairs."³³⁵ The tension with controlling Delaware Supreme Court precedent is again obvious, but nowhere discussed.

While it is unnecessary as a formal matter to demonstrate that Section 11 claims are always internal, even under *Sciabacucchi*'s standard, such a demonstration helps illuminate the gap between real world securities practice and the picture painted, with no citation support, in *Sciabacucchi*. Applying the definition shared by *MITE*, *VantagePoint*, and *Boilermakers*, Section 11 claims always relate to matters "peculiar to the relationships among or between the

³²⁹ *Id.* at 1046.

³³⁰ *Id.* at 1048 (alterations in original) (quoting *Brudno v. Wise*, No. Civ.A. 19953, 2003 WL 1874750, at *4 (Del. Ch. Apr. 1, 2003)).

³³¹ *Id.* at 1050.

³³² *Id.* (quoting *Cucci v. Edwards*, No. SAVC 07-532 PSG, 2007 WL 3396234, at *2 (C.D. Cal. Oct. 31, 2007)).

³³³ *Id.* at 1051.

³³⁴ *Sciabacucchi*, 2018 WL 6719718, at *21.

³³⁵ *Id.* This argument is distinct from the proposition that the claim is external because it "does not involve rights or relationships that were established by or under Delaware law." *Id.* at *2.

corporation and its current officers, directors, and shareholders.” As the United States Supreme Court explains:

Section 11 of the 1933 Act allows purchasers of a registered security to sue certain enumerated parties . . . when false or misleading information is included in a registration statement. The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering. . . . Liability against the issuer of a security is virtually absolute, even for innocent misstatements. Other defendants bear the burden of demonstrating due diligence.³³⁶

Officers and directors are among the enumerated parties liable with the corporation unless they bear the burden of establishing a due diligence defense.³³⁷ Section 11 defines the standard for “what constitutes reasonable investigation and reasonable ground for belief” as “that required of a prudent man in the management of his own property.”³³⁸ This defense “is calibrated to the objective reasonable person in each defendant’s position.”³³⁹ The defense is individualized: a director with experience as an investment banker is held to a different standard than a director who is a physician, sales executive, or attorney.³⁴⁰ Outside directors’ “minimal conduct” will not support a due diligence defense.³⁴¹ “Passive and total reliance on company management” is insufficient.³⁴²

Section 11 thus always implicates the care with which directors reviewed the allegedly defective registration statement. It always challenges the internal processes that cause the filing of a defective registration statement. It always questions the collective and individual conduct of the board of directors. It always implicates the “equitable relationships that flow from the internal structure of the corporation,” as required by *Sciabacucchi*’s own definition of “internal affairs.”

Captions on complaints cannot transform internal affairs into external matters. Slapping a California caption on a fact pattern that relates exclusively to a Delaware internal affair cannot transform an internal affair, that should be resolved under Delaware law, into an external claim that can be resolved under California law. If that logic is correct, then the entire internal affairs doctrine is rendered a nullity because clever pleading practices can allow sister states to regulate every corporation’s internal affairs.

By the same token, slapping a federal caption onto an internal affairs claim does not transmute the claim from internal to external. The claim remains internal as it gives rise to both a cause of action alleging a breach of duty actionable under the DGCL and a federal Section 11

³³⁶ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381–82 (1983) (footnotes omitted).

³³⁷ 15 U.S.C. § 77k(a).

³³⁸ *Id.* § 77k(c).

³³⁹ *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1174 (C.D. Cal. 2008).

³⁴⁰ *In re WorldCom, Inc. Sec. Litig.*, No. 02-Civ-3288, 2005 U.S. Dist. LEXIS 4193, at *24–25 (S.D.N.Y. 2005); *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 697 (S.D.N.Y. 1968).

³⁴¹ *BarChris*, 283 F. Supp. at 688.

³⁴² *WorldCom*, 2005 U.S. Dist. LEXIS 4193, at *37 n.12 (quoting *Laven v. Flanagan*, 695 F. Supp. 800, 812 (D.N.J. 1988)).

claim. Just as federal securities laws allow for cumulative remedies in which the same underlying fact pattern supports Section 11 and Rule 10b-5 claims,³⁴³ a single fact pattern can generate a DGCL claim and a Section 11 claim. Delaware and federal law are “not only compatible but complementary.”³⁴⁴ A fact pattern can be entirely internal and simultaneously constitute both a Delaware and a federal violation.³⁴⁵ To state this point even more starkly, imagine that Section 11 did not exist. If a board then made material misrepresentations or omissions to existing stockholders in connection with the sale of securities to those stockholders to whom they owe fiduciary duties, then the conduct would support an internal fiduciary breach claim. Introducing a federal Section 11 claim that covers identical conduct does not cause the internal fiduciary breach claim to disappear or to become external. Put yet another way, Section 11 liability does not preempt state law fiduciary breach liability covering precisely the same conduct that gives rise to the Section 11 claim.

Chancery’s contrary conclusion results from a failure to consider the liability regime inherent in the Section 11 cause of action and the realities of the processes of preparing a

³⁴³ *Herman and MacLean*, 459 U.S. at 387.

³⁴⁴ *Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998).

³⁴⁵ Plaintiff counsel in *Sciabacucchi* suggest that I have been inconsistent in my position regarding the validity of Federal Forum Provisions as internal matters. In their complaint, after observing that I had proposed the Federal Forum Provision, plaintiffs state “[i]nterestingly, Professor Grundfest previously took a different view and recognized that a provision limiting plaintiff’s ability to bring securities claims ‘would not be seeking to regulate the stockholder’s rights as a stockholder’ and, so, ‘would be extended beyond the contract that defines and governs the stockholders’ rights.’” Verified Class Action Complaint for Declaratory Judgement at ¶ 47 n.18, *Sciabacucchi v. Salzberg* No. 2017-0931, 2018 WL 6719718 (Del. Ch. Dec. 29, 2017) (quoting Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 370 (2013)).

This matter is put to rest by quoting the full passage from the relevant text, and admiring the art with which plaintiff’s language, here italicized, is extracted from the original. “Charter provisions are interpreted as though they are contract provisions, and inasmuch as contract rights can legitimately be regulated through forum selection provisions, it follows that stockholders’ rights to pursue intra-corporate claims can also be regulated through ICFS [Intra-Corporate Forum Selection] provisions. To be sure, this conclusion would arguably not follow (or not hold as strongly) if the forum selection provision sought to regulate the right to pursue causes of action that were not intra-corporate in nature because then the provision *would not be seeking to regulate the stockholder’s rights as a stockholder* and *would be extended beyond the contract that defines and governs the stockholders’ rights*.” Grundfest & Savelle, *supra*, at 369–70 (emphasis added) (footnotes omitted).

As is apparent from the full text, the quoted snippet is carefully qualified in the original and does not support the far broader proposition for which it is cited. The full text begins with the observation that the conclusion would “*arguably not follow (or not hold as strongly)*.” The snippet fails to reference that essential qualification, and incorrectly suggests that the quoted language is unconditional. Further, the article from which the quote is extracted addresses the intra-corporate nature of the claim as supporting a sufficiency condition. It does not suggest that the intra-corporate nature of the ICFS provision is a necessity constraint. In that regard, the article and then-Chancellor Strine’s opinion in *Boilermakers*, are of a single mind. It is *Sciabacucchi* and Plaintiffs’ complaint that seek, unnecessarily, to transform *Boilermakers*’ sufficiency analysis into a necessity condition.

Moreover, it is apparent in context that the challenge addressed by intra-corporate forum selection provisions arises in connection with merger-related disclosure litigation that gives rise to Exchange Act claims, not Securities Act claims, if litigated under federal law. Exchange Act claims are, however, subject to exclusive federal jurisdiction. Federal Forum Provisions are unnecessary in that context. It stretches the article’s logic beyond reason to assume that an analysis that applies to Exchange Act claims (where Federal Forum Provisions are unnecessary) also applies to Securities Act claims (where concurrent jurisdiction creates a demand for Federal Forum Provisions).

registration statement. In addition to the fact that nothing external can cause the filing of a defective registration statement, Section 11 differs from every other federal securities fraud claim in the Securities Act or Exchange Act because it is the only one that creates a presumption of liability for the corporation's executives and directors. Further, the issuer is always exposed to strict liability under Section 11. The internal processes followed by management and the board must therefore, under *Caremark*, be tuned to that high level of exposure. Every Section 11 violation thus reaches deeply into the corporate boardroom in a manner that profoundly implicates the corporation's internal affairs.

The internal nature of the Section 11 claims can be demonstrated with greater granularity by examining five distinct factors that support Section 11's "internality."

First, the allegedly defective registration statement must contain material misrepresentations or omissions. These defects can only result from a failure of procedures and controls internal to the corporation, and must implicate the corporation's internal reporting, oversight, and due diligence practices. These failures call into question management's and the board's integrity and competence. Nothing external to the corporation can cause the filing of a registration statement containing a material omission or misrepresentation. A defective registration is a self-inflicted wound resulting from a failure of internal controls. Filing a defective registration statement is, perhaps, as internal a corporate act as can be imagined.

For directors and officers, "their fiduciary duties and corporate responsibilities demand a prudent focus on due diligence" in the process of preparing the registration statement.³⁴⁶ "The responsibilities and duties of directors and officers [under state law] encompass the preparation and contents of the Form S-1 and the IPO process."³⁴⁷ The task of preparing a registration statement therefore also implicates the proper exercise of state law fiduciary obligations.

The internal nature of the registration statement preparation process is underscored by the fact that directors or officers who sign the registration statement "cannot avoid liability by suggesting that he or she did not read or understand it."³⁴⁸ Directors or officers "must inquire about the portions of the Form S-1 with which they are unfamiliar or that they do not understand."³⁴⁹ A director "cannot rely exclusively on assurances from senior management that the Form S-1 is accurate and complete."³⁵⁰ For a director, "[a] cursory review of the Form S-1, by itself, is insufficient."³⁵¹ A director "who is deeply involved with the preparation of the Form S-1 is held to a higher standard of investigation than other directors."³⁵² And, "a director or officer cannot rely exclusively on the company's lawyers and auditors to make sure the Form S-1 is accurate and complete, especially if the director or officer has reason to believe parts of the

³⁴⁶ David A. Westenberg, INITIAL PUBLIC OFFERINGS: A PRACTICAL GUIDE to GOING PUBLIC § 12:3 (2d ed. 2012).

³⁴⁷ *Id.* § 12:7.1.

³⁴⁸ *Id.* § 12:7.2[A] (citing *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968)).

³⁴⁹ *Id.* (citing *BarChris*, 283 F. Supp. 643).

³⁵⁰ *Id.* (citing *BarChris*, 283 F. Supp. 643).

³⁵¹ *Id.* (citing *BarChris*, 283 F. Supp. 643).

³⁵² *Id.* (citing *BarChris*, 283 F. Supp. 643).

Form S-1 are inaccurate.”³⁵³ All of these practices are entirely internal, and Section 11 litigation can implicate them all.

Common “best practice” counsel to directors and officers of issuers filing registration statements is that:

to build a strong due diligence defense to present at summary judgment, an outside director will establish his or her attendance at board and committee meetings; dialogue with management about key policies and practices, the state of the business, and unusual developments; reasonable reliance on management, the company’s retained professionals, and other sources; and that he or she believed the challenged statements were consistent with his or her knowledge of the company at the time. . . . The outside director should show his or her attendance at board and committee meetings, how he or she prepared for those meetings, and information (relevant to the case) to which he or she paid particular attention.

Each outside director also should describe what he or she did over the course of his or her tenure, before the statement at issue was made, to become familiar with the company The outside director also should describe processes within the company, particularly those that he or she was aware of, for drafting and verifying the statement at issue before it reached the outside director. On this point, before litigation, outside directors should consider requesting an annual briefing on how the company prepares its SEC filings.³⁵⁴

Again, these inquiries go to the heart of each individual director’s potential liability under Section 11. They are personalized, intrusive, and inexorably internal as to the collective and individual processes by which the registration statement was prepared, and as to the good faith of the participants in the process.

The mandatory content of the registration statement further underscores the extent to which the process of preparing a registration statement is an internal affair. The registration statement calls for disclosure and discussion, *inter alia*, of the issuer’s business, its property, legal proceedings, risk factors, management discussion and analysis, extensive financial data, use of proceeds, capital structure, selling shareholders, and plan of distribution.³⁵⁵ All of this information is internal. The process of gathering, processing, reviewing, and approving the presentation of this information is internal. Filing a registration statement is an act of self-description.

Second, the issuer is strictly liable for all material misrepresentations and omissions in the registration statement as declared effective.³⁵⁶ The internal procedures followed by management and by the board must therefore be calibrated to recognize that issuers typically

³⁵³ *Id.* (citing *BarChris*, 283 F. Supp. 643).

³⁵⁴ D. Anthony Rodriguez, *Building the Section 11 “Due Diligence” Defense for Outside Directors*, BUS. L. TODAY, July 2012, at 1, 2.

³⁵⁵ 17 C.F.R. § 239.11 (2019).

³⁵⁶ 15 U.S.C. § 77k(b)(2017).

have no effective defense once a material defect is established. Strict liability of this magnitude heightens the level of care that Delaware law expects of a board expressly charged with responsibility for reviewing a document that exposes the corporation to that degree of liability.

Third, the corporation's directors are expressly liable under Section 11,³⁵⁷ and are personally required to sign the registration statement.³⁵⁸ This level of mandatory directorial engagement and liability amplifies the internal nature of the Section 11 claim. Indeed, intra-corporate disputes governed by forum selection provisions that are clearly valid under *Boilermakers* need not implicate any boardroom conduct at all. In contrast, every Section 11 claim creates boardroom exposure. It makes no difference to the analysis that some of the directors' liability arises under federal law because the directors' fiduciary obligation to comply with federal law is governed also by Delaware law. Directors are commonly exposed to *Caremark* liability for breaches of fiduciary duty arising from failures to comply with a range of federal requirements.

Fourth, directors who fail to establish a due diligence defense can be liable with the corporation under Section 11.³⁵⁹ The board is thus always exposed to potential personal liability in every Section 11 claim. Directors avoid Section 11 liability only if they establish a due diligence defense by bearing the burden of demonstrating that they satisfied the "standard of reasonableness [that] shall be that required of a prudent [person] in the management of his [or her] own property."³⁶⁰ This standard probes deeply into the board's internal procedures, and looks expressly to each directors' personal experience in the context of their review of the registration statement. These matters are all internal to the board's processes.

Fifth, Section 11 allocates liability between and among the corporation and individual defendants through a complex attribution scheme. This regulation of the purely internal matter of liability allocation further amplifies the internal nature of the Section 11 claim.

Section 11 expressly provides a right to contribution that implicates a complex, entirely internal, inquiry as to which defendants "knowingly" violated the statute, among other factors.³⁶¹

³⁵⁷ *Id.* § 77k(a)(2).

³⁵⁸ *Id.* § 77f(a).

³⁵⁹ Section 11(f)(1) of the Securities Act creates joint and several liability, but subparagraph (f)(2)(A) limits the liability of outside directors in accordance with Section 21D of the Exchange Act. 15 U.S.C. § 77k(f). Section 21D in turn requires that the "trier of fact specifically determine[] that such covered person knowingly committed a violation of the securities laws." *Id.* § 78u-4(f)(2)(A).

³⁶⁰ *Id.* § 77k(c).

³⁶¹ "The PSLRA, through § 21D(f) of the Exchange Act, instituted proportionate rather than joint and several liability for any violation that is not 'knowingly committed' by a 'covered person.' The term 'covered person' is defined as one liable under either the Exchange Act or, in the case of outside directors, under § 11 of the Securities Act. The provision also creates an explicit right of contribution: 'covered persons' have an explicit right to contribution from (1) other 'covered persons' held proportionately or jointly and severally liable, or (2) any other person responsible for the violation. Moreover, for purposes of § 21D(f) only, 'reckless conduct by a covered person shall not be construed to constitute a knowing commission of a violation of the securities laws by that covered person.' A defendant is liable for an uncollectible share in proportion to his share, up to 50 percent of the dollar amount of the defendant's original proportionate share. If an individual plaintiff has a net worth of \$200,000 or less and the judgment is equal to more than 10 percent of her net worth, all defendants are jointly and severally liable for the uncollectible share." Paul Vizcarrondo, Jr. & Bradley R. Wilson, *Liabilities Under the Federal Securities Laws*,

The personal liability incurred by WorldCom’s directors in settling Section 11 litigation underscores the point.³⁶² Ten former directors paid \$18 million out of their own pockets—with no indemnification or insurance—to settle claims against them as individuals.³⁶³ These payments constituted “20 percent of the directors’ aggregate net worth, not counting their primary residences and retirement accounts.”³⁶⁴ The individualized nature of the inquiry leading to these liability and settlement amounts emphasizes the personal, internal exposure facing Section 11 defendant directors. Nothing external drives that liability exposure.

The possibility of conflict among sister states provides further support for Section 11’s internal status. Delaware can, if it wishes, enact legislation governing procedures that boards of directors must follow when filing registration statements because those procedures are entirely internal. The fact that Section 11 creates independent federal liability for the failure of those procedures and controls does not diminish the internal nature of the conduct generating that liability. Nor does it divest Delaware of the ability to adopt additional requirements regulating boardroom conduct in the preparation of registration statements.

Other states cannot, however, consistent with the internal affairs doctrine, govern the process by which directors of Delaware-chartered corporations file registration statements with the SEC. Any other conclusion leads to preposterous results. Is California permitted to regulate the internal process by which a board prepares and reviews a registration statement because *Sciabacucchi* holds that Section 11 liability is external? If so, then many aspects of corporate conduct commonly considered internal will have to be recategorized as external, with potentially significant adverse effects for Delaware. It is doubtful that Delaware intends or welcomes this logical consequence of *Sciabacucchi*’s reasoning.

H. A Gedankenexperiment: Illuminating *Sciabacucchi*’s Internal Contradictions.

Internal contradictions inherent in *Sciabacucchi*’s analysis can be illustrated with a *Gedankenexperiment* involving identical triplets who own the same number of shares in the same Delaware-chartered corporation, purchased in three separate transactions covered by the same defective registration statement. The corporation’s relationship with each triplet is identical.

The first triplet files a claim in Delaware Chancery under Delaware law alleging a *Malone* breach of fiduciary duty by the board in preparing the registration statement. The second files a claim in California state court alleging that precisely the same conduct violates California law governing boardroom conduct. Assume that the California claims expose the corporation’s directors to liability far more substantial than they face in Delaware and require a far weaker showing of intent. The third triplet files a Section 11 claim alleging that precisely the same conduct alleged in the Delaware and California complaints violates Section 11.

at 59 (Dec. 2016), <https://docslide.net/documents/liabilities-under-the-federal-securities-prepare-the-original-version-of-this-outline.html> (quoting 15 U.S.C. § 78u-4).

³⁶² *In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp.2d 628 (S.D.N.Y. 2004).

³⁶³ Gretchen Morgenson, *10 Ex-Directors from WorldCom to Pay Millions*, N.Y. TIMES (Jan.6, 2005), <https://www.nytimes.com/2005/01/06/business/10-exdirectors-from-worldcom-to-pay-millions.html>.

³⁶⁴ *Id.*

The Delaware claim is internal. By the logic of *Sciabacucchi* and *Boilermakers* that claim can be regulated by a forum selection provision. The California claim is also internal. It is based on precisely the same set of facts and alleges precisely the same internal relationships. That claim can also be regulated pursuant to a forum selection provision that could prevent it from proceeding in California. The Section 11 claim is identical to and just as internal as the Delaware and California claims. *Rodriguez* establishes that there is no federal impediment to a Federal Forum Provision that precludes Securities Act litigation in state court. The Section 11 claim should therefore also be regulable pursuant to a Federal Forum Provision.

But *Sciabacucchi* would have us conclude that the Delaware and California actions are internal but the federal action based on precisely the same facts is not.³⁶⁵ Ironically, *Sciabacucchi*'s failure to respect the internal nature of the claim is invoked in order to prevent the operation of a forum selection provision that is fully consistent with federal law and relates exclusively to federal law. *Sciabacucchi* thus causes Delaware law to prevent a federal practice under federal law that is consistent with federal law. *Sciabacucchi* cannot have it both ways. This *Gedankenexperiment* underscores that the caption on the complaint and the source of the liability alleged in the complaint whether it is Delaware law, California law, or federal law—is irrelevant to determining whether a claim is internal or external. That categorization turns on the facts underlying the claim, and whether those facts are “peculiar” to the relationship between corporations, boards, and stockholders,” and not on anything else.³⁶⁶

VI. The Statutory Text.

The “most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it.”³⁶⁷ It is “axiomatic that a statute . . . is to be interpreted according to its plain and ordinary meaning.”³⁶⁸ Thus, “[w]here the language of the statute is unambiguous, no interpretation is required and the plain meaning of the words controls.”³⁶⁹ The court must “give the statutory words their commonly understood meanings”³⁷⁰ and is to “read

³⁶⁵ To be sure, if I am misreading *Sciabacucchi*, and if the implication of that opinion is that Delaware is ready to concede to California and to other states the authority to regulate boardroom conduct that has traditionally been viewed as internal, and subject to Delaware's exclusive control, then the internal contradiction is resolved because Delaware will have voluntarily agreed to abandon a large part of the authority by which it regulates Delaware-chartered entities. This step would constitute a major retreat from the position adopted by Delaware's Supreme Court in *VantagePoint*, and could be the first step in the unravelling of Delaware's position as the pre-eminent chartering jurisdiction. See generally, Manesh, Mohsen, *The Contested Edges of Internal Affairs* (August 9, 2019), SSRN: <https://ssrn.com/abstract=3435165> or <http://dx.doi.org/10.2139/ssrn.3435165>.

³⁶⁶ *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

³⁶⁷ *Boilermakers*, 73 A.3d at 950 (citing *New Cingular Wireless PCS v. Sussex Cty. Bd. of Adjustment*, 65 A.3d 607, 611 (Del. 2013); *Scattered Corp. v. Chi. Stock Exch., Inc.*, 671 A.2d 874, 877 (Del. Ch. 1994)).

³⁶⁸ *New Cingular Wireless PCS v. Sussex Cty. Bd. of Adjustment*, 65 A.3d 607, 611 (Del. 2013).

³⁶⁹ *Del. Comp. Rating Bureau, Inc. v. Ins. Comm'r*, No. 4318-VCL, 2009 WL 2366009, at *4 (Del. Ch. July 24, 2009) (quoting *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000)); *Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000); *Fid. & Deposit Co. of Md. v. State of Del. Dep't of Admin. Servs.*, 830 A.2d 1224, 1228 (Del. Ch. 2003); see also *In re Adoption of Swanson*, 623 A.2d 1095, 1096-97 (Del. 1993) (“If the statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the words used, the court’s role is limited to an application of the literal meaning of those words. However, where . . . the Court is faced with a novel question of statutory construction, it must seek to ascertain and give effect to the intention of the General Assembly as expressed by the statute itself.” (citation omitted)).

³⁷⁰ *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 230 (Del. 1982).

and examine the text of the act and draw inferences concerning the meaning from its composition and structure.”³⁷¹ A “determination of the General Assembly’s intent must, where possible, be based on the language of the statute itself. In divining the legislative intent, ‘[s]tatutory language, where possible, should be accorded its plain meaning.’”³⁷²

“Delaware case law is well settled that undefined words are given their plain meaning based upon the definition provided by a dictionary.”³⁷³ Without any accompanying definition from the Legislature, the Court finds that [a] dictionary provides ‘fair warning of the nature of the conduct proscribed.’”³⁷⁴ The United States Supreme Court relies extensively on dictionary definitions, and when a statute does not expressly define a term, courts assume that “Congress uses common words in their popular meaning, as used in the common speech of men” and women.³⁷⁵ Delaware’s reliance on dictionary definitions is consistent with a far broader judicial trend that relies on dictionary definitions as the lodestar for statutory interpretation. “[T]he biggest change in the search for word meaning in the past twenty years is the . . . attention courts now pay to dictionaries, including using them as authorities for ordinary meaning.”³⁷⁶

Delaware courts also rely on the doctrine of *in pari materia*. “Under this rule, related statutes must be read together rather than in isolation.”³⁷⁷ “It is a canon of construction that statutes *in pari materia* should be construed together, so that ambiguities in one statute may be resolved by looking at another statute on the same subject.”³⁷⁸ The doctrine is invoked “if a statutory provision is ambiguous,” in which case Delaware’s Supreme Court will “consider the statute as a whole, rather than in parts, to produce a harmonious interpretation of a given provision.”³⁷⁹ It follows that “[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory.”³⁸⁰ Courts favor interpretations that “accord[] more coherence” to statutory text,³⁸¹ and “read and examine the text of the act and draw inferences concerning the meaning from its composition and structure.”³⁸²

³⁷¹ Klotz v. Warner Commc’ns, Inc., 674 A.2d 878, 879 (Del. 1995) (quoting 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.01 (5th ed. 1992)).

³⁷² Scattered Corp. v. Chi. Stock Exch., Inc., 671 A.2d 874, 877 (Del. Ch. 1994) (alteration in original) (quoting State v. Lillard, 531 A.2d 613, 617 (Del. 1987)).

³⁷³ State v. Taye, 54 A.3d 1116, 1121 (Del. Super. Ct. 2009).

³⁷⁴ *Id.* (citing DEL. CODE, tit. 11, § 201(2)); *see also* Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 738 (Del. 2006) (“Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract.”).

³⁷⁵ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

³⁷⁶ Lawrence M. Solan, *The New Textualists’ New Text*, 38 LOY. L.A. L. REV. 2027, 2055 (2005).

³⁷⁷ Richardson v. Bd. of Cosmetology & Barbering, 69 A.3d 353, 357 (Del. 2013).

³⁷⁸ ANTONIN SCALIA & BRYAN A GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 430 (2012).

³⁷⁹ Pellicone v. New Castle Cty., 88 A.3d 670, 673 (Del. 2014).

³⁸⁰ SCALIA & GARNER, *supra* note 290, at 180; *see* WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1198 (5th ed. 2014) (“Avoid interpreting a provision in a way that is inconsistent with the overall structure of the statute or with another provision” (citations omitted)); *see also* Lindh v. Murphy, 521 U.S. 320, 336 (1997) (favoring the interpretation that “accords more coherence” to statutory text).

³⁸¹ *Lindh*, 521 U.S. at 336.

³⁸² Klotz v. Warner Commc’ns, Inc., 674 A.2d 878, 879 (Del. 1995) (quoting 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.01 (5th ed. 1992)).

The presumption of consistent usage³⁸³ counsels that terms should be identically defined in a single statute, and is closely related to the rule that reads statutes *in pari materia*. It provides a simple text-based mechanism for avoiding DGCL regulation of tort, contract, conversion, and other non-corporate claims.

“The text of the law is the law. As Justice Kagan recently stated, ‘we’re all textualists now.’”³⁸⁴ Textualism concludes that Federal Forum Provisions are valid under the DGCL. Textualism rejects *Sciabacucchi*’s logic and holding as inconsistent with the statute’s plain meaning. Textualism also resolves all of *Sciabacucchi*’s concerns regarding tort, contract or conversion claims, and makes clear that the DGCL does not regulate those matters, domestically or extraterritorially. It achieves that result without any resort to first principles or to novel, divergent definitions of internal affairs.

A. DGCL Section 202.

Sciabacucchi nowhere addresses the text of DGCL Section 202 which establishes that: (1) the DGCL expressly authorizes charter provisions that regulate purchasers who are not pre-existing holders; (2) Federal Forum Provisions would be valid transfer restrictions, if framed as transfer restrictions; and (3) reading the statute *in pari materia* concludes that because Federal Forum Provisions are permissible restraints on alienation under Section 202, they are *a fortiori* permissible as charter provisions of general applicability that do not restrain alienation under DGCL Section 102(b)(1).

1. Charters May Regulate Purchases by Non-Stockholders

Section 202 authorizes charter provisions that impose “[r]estrictions on transfer and ownership of securities.”³⁸⁵ These provisions can prohibit transactions with or limit the number of shares sold to non-stockholders, including sales to unaccredited investors, to persons refusing to be bound by SEC resale restrictions, and to foreigners who are not pre-existing stockholders.³⁸⁶ Section 202 also “permits certain persons to be excluded *ab initio*.”³⁸⁷ Section 202 is nowhere limited to restraints on existing stockholders, and the statute’s plain text makes it clear that any such reading is irrational. Section 202’s plain text thus contradicts *Sciabacucchi*’s

³⁸³ SCALIA & GARNER, *supra* note 290, at 170.

³⁸⁴ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (book review) (quoting Elena Kagan, Justice, U.S. Supreme Court, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, at 8:09 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation>).

³⁸⁵ Section 202 states in material part that “[a] written restriction or restrictions on transfer . . . or on the amount of the corporation’s securities that may be owned by any person or group of persons, if permitted by this section and noted conspicuously on the certificate or certificates representing the security or securities so restricted . . . may be enforced against the holder of the restricted security or securities, or any successor or transferee . . . Unless noted conspicuously on the certificate . . . a restriction, even though permitted by this section, is ineffective except against a person with actual knowledge of the restriction.”

³⁸⁶ See, e.g., 2 DAVID A. DREXLER, ET AL., *DELAWARE CORPORATION LAW AND PRACTICE* §22.01 (Matthew Bender, ed. 2018); Jesse A. Finkelstein, *Stock Transfer Restriction Upon Alien Ownership Under Section 202 of the Delaware General Corporation Law*, 38 BUS. LAW. 573 (1983).

³⁸⁷ Robert L. Reed, *Section 202 on the Delaware Corporation Law-Per Se Rules for Stock Transfer Restrictions*, 9 BOSTON COLL. INDGS. & COMM. L. REV. 405, 417 (1968).

suggestion that charter provisions cannot regulate transactions with persons who are not already stockholders because no fiduciary duties are owed to them, or for any other reason. DGCL Sections 152, 157, and 166 also regulate transactions with persons who are not pre-existing holders.³⁸⁸

2. Federal Forum Provisions Are Valid Transfer Restrictions

Section 202(c)(5) authorizes transfer restrictions that “[p]rohibit[] . . . the transfer . . . or the ownership of restricted securities by[] designated persons or classes of persons or groups of persons” provided only that the “designation is not manifestly unreasonable.”

But what is “manifestly unreasonable”? Section 202(d) explains that “[a]ny restriction on the transfer . . . of the securities of a corporation . . . for any of the following purposes shall be conclusively presumed to be for a reasonable purpose: . . . (2) Maintaining any statutory or regulatory advantage . . . under applicable local, state, federal or foreign law.” Section 202(d)(2) thus establishes the conclusive validity of provisions designed to comply with federal law, “such as restrictions imposed on transfers of unregistered stock by the Securities Act of 1933 . . .”³⁸⁹

In *Capital Group Cos. v. Armour*,³⁹⁰ Chancery granted declaratory relief enforcing a restriction on a stock transfer to a spouse in a dispute relating to a divorce settlement. The court expressly found that “[t]he policy of restricting the number of record shareholders to avoid public company reporting and filing requirements is clearly a valid purpose under section 202(d). Not having to comply with the burdensome and costly filing and disclosure requirements is an obvious “statutory or regulatory advantage.””³⁹¹

Federal Forum Provisions are restrictions for the purpose of maintaining a “statutory or regulatory advantage” under “applicable . . . federal law.” As a matter of federal law, *Rodriguez* blesses contractual provisions that prohibit state court Securities Act litigation. Thus, just as a corporation can impose a transfer restriction in order to avoid the expense of registration under the federal securities laws, a perfectly legitimate business purpose, or to insure compliance with Securities Act resale restrictions, also a perfectly legitimate business purpose, so too can a corporation impose transfer restrictions requiring that Securities Act litigation be brought in federal court, another perfectly legitimate business purpose. Federal Forum Provisions are thus presumptively for a reasonable purpose and are permissible as transfer restrictions under Section 202. This presumption is “conclusive[.]”

Sciabacucchi reaches the opposite conclusion. It does so without ever considering the plain text of Section 202. Because Federal Forum Provisions are external by *Sciabacucchi*’s analysis, they would be just as prohibited under Section 202 as transfer restrictions as they are under Section 102(b)(1). But Federal Forum Provisions are clearly permissible as transfer restrictions under Section 202. *Sciabacucchi* thus conflicts with the plain text of the statute, and

³⁸⁸ See *supra* notes 271-274.

³⁸⁹ 2 DAVID A. DREXLER, ET AL., DELAWARE CORPORATION LAW AND PRACTICE §22.01 (Matthew Bender) (2018).

³⁹⁰ *The Capital Group Companies, Inc. v. Armour*, 2005 WL678654 (Del. Ch. 2005).

³⁹¹ *Id.* at *9.

does far more than simply add an atextual gloss to the DGCL. It creates a direct contradiction with the statutory text that it nowhere mentions, analyzes, or resolves.

3. Reading the Statute In Pari Materia: Implications for Section 102(b)(1)

Section 202 can be read *in pari materia* with Section 102 only if Section 202 is understood as authorizing a subset of charter provisions that are otherwise permissible under Section 102 (as standard charter provisions that do not restrain alienation) to act as more onerous transfer restrictions that restrain alienation pursuant to Section 202's additional restrictions and notice requirements.³⁹² Any other interpretation forces the illogical conclusion that Delaware's legislature intends to permit transfer restrictions under Section 202 that it would forbid under Section 102 if the identical language is simply framed as a less restrictive standard charter provision that imposes no restraint on alienation.

Put another way, if the statute is to be read as a coherent whole, it cannot be that a charter provision framed as a transfer restriction, and that is conclusively valid as being for a reasonable purpose under Delaware law as an onerous transfer restriction, becomes invalid when reframed as a less intrusive standard charter provision that imposes no restraint on alienation. It follows that Federal Forum Provisions that are validly framed as transfer restrictions under Section 202 must also be valid under Section 102(b)(1) when re-framed as standard charter provisions.

B. DGCL Section 102(b)(1): Permissible Charter Provisions.

Section 102(b) of the DGCL provides, in relevant part, that:

In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders . . . ; if such provisions are not contrary to the laws of this State.³⁹³

The “plain and ordinary meaning” of Section 102(b)(1) is that Federal Forum Provisions are proper subject matter for Delaware corporate charters as “a matter of easy linguistics.”³⁹⁴

The first clause of Section 102(b)(1) permits “any” charter provision “for the management of the business and for the conduct of the affairs of the corporation.” The increased

³⁹² To be valid and enforceable DGCL Section 202(a) requires that transfer restrictions must be conspicuously noted on the certificate. Absent such notice, restrictions are effective only as against persons with actual knowledge. These notice restrictions do not apply to Federal Forum Provisions because they are not framed as transfer restrictions.

³⁹³ DEL. CODE ANN. tit. 8, § 102 (West 2019).

³⁹⁴ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 950 (Del. Ch. 2013).

risk of Section 11 litigation in state rather than federal court is well-documented.³⁹⁵ Retentions and premiums for directors and officers liability insurance coverage of initial public offerings have significantly increased.³⁹⁶ Every Federal Forum Provision identified to date is in connection with an initial public offering, the precise form of transaction most exposed to the form of litigation risk addressed by Federal Forum Provisions.

It is rational that Delaware corporations, “for the management of the business and for the conduct of the affairs of the corporation,” and in a manner entirely consistent with controlling United States Supreme Court precedent, to seek to control litigation risk and insurance costs by directing that complex federal claims traditionally litigated in federal court continue to be litigated in federal court where the judiciary has a comparative advantage in resolving those disputes and where plaintiffs have identical substantive rights. Federal Forum Provisions are thus “for the management of the business and for the conduct of the affairs of the corporation,” in a manner that has no adverse effect on any stockholder’s substantive rights.³⁹⁷ Federal Forum Provisions govern affairs entirely internal to the corporation. The affected parties are the stockholders, the corporation, directors, and executives—constituencies expressly enumerated by statute. Federal Forum Provisions cannot, by their very structure, ever reach beyond a Securities Act claim to address any sort of tort, contract, or conversion claim. Federal Forum Provisions are thus narrowly tailored to achieve a targeted objective related solely to the corporation’s affairs in a manner that implicates only the parties’ interests in the corporation in a context that relates exclusively to the corporation’s operations.

Sciabacucchi fails to address this first portion of Section 102(b)(1), and proceeds as though that text does not exist. It instead focuses on the second portion of Section 102(b)(1), which permits “any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders.” Restricting the analysis in this manner does not alter the conclusion because dictionary definitions of the statute’s terms confirm the validity of Federal Forum Provisions. To eliminate concern over “dictionary shopping,” this analysis relies on Black’s Law Dictionary for legal terms defined therein, and Webster’s Third New International Dictionary for all other terms. These dictionaries are most frequently cited by the United States Supreme Court in each respective context.³⁹⁸

“Create”³⁹⁹ is defined as “to bring into existence”⁴⁰⁰ Federal Forum Provisions bring into existence a rule that governs the forum in which a dispute with stockholders is litigated, and where the corporation’s officers and directors are liable unless they bear the burden of proof to establish that they exercised due diligence. Federal Forum Provisions thereby create the power of

³⁹⁵ See *supra* Section II.

³⁹⁶ *Id.*

³⁹⁷ To be sure, there are powerful procedural reasons for corporations to prefer federal courts and for plaintiffs to prefer state courts. See *supra*, Section II. But the United States Supreme Court in *Rodriguez*, and Chancery in *Boilermakers*, focus on the equivalence of substantive standards while giving no weight to procedural distinctions. *Rodriguez*, 490 U.S., at 481; *Boilermakers*, 73 A.3d at 963. This analysis follows the judicial precedent.

³⁹⁸ Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 MARQUETTE L. REV. 77, 94 (2010).

³⁹⁹ The statute employs the gerundive form of the verbs “create,” “define,” “limit,” and “regulate,” and for ease of reference, the cited definitions are of the verb that serves as the root of the corresponding gerund.

⁴⁰⁰ *Create*, Webster’s Third New International Dictionary of the English Language, Unabridged (1993) [hereinafter Webster’s Third].

the corporation, directors, and stockholders mutually to agree to resolve federal claims in federal court in a manner that preserves all substantive rights under federal law. And, in accordance with federal law, including *Rodriguez*, Federal Forum Provisions are “process-oriented because they regulate *where* stockholders 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.”⁴⁰¹

“Define” means “[t]o fix or establish (boundaries or limits).”⁴⁰² Federal Forum Provisions fix and establish the boundaries and limits of stockholder power to bring federal claims outside of federal court. They do so in a manner that preserves all stockholder substantive rights under federal law and is consistent with federal law as established in *Rodriguez*.

“Limit” means “to assign to or within certain limits.”⁴⁰³ Federal Forum Provisions assign Securities Act claims to federal court and again in a manner that preserves all stockholder substantive rights under federal law, and complies with *Rodriguez*.

“Regulate” means to “control (an activity or process) esp. through the implementation of rules.”⁴⁰⁴ Federal Forum Provisions control the activity or process of Securities Act litigation through the implementation of a forum selection rule that specifies the forum in which certain federal claims involving statutorily enumerated parties are litigated. The regulation again operates in a manner that preserves all stockholder substantive rights under federal law, and complies with *Rodriguez*.

Federal Forum Provisions thus create, define, limit, and regulate stockholder power exclusively within the context of a stockholder’s ability to sue the corporation, its directors, and its officers, for conduct relating to materially false disclosures in registration statements filed with the SEC, in a manner approved by the United States Supreme Court. Materially false statements contained in registration statements, combined with the board’s failure to oversee the internal processes that generate those materially false statements, can also violate officers’ and directors’ Delaware fiduciary obligations.⁴⁰⁵ Federal Forum Provisions address no relationships other than those that arise as a consequence of material misrepresentations or omissions by the corporation and its directors and officers made to the corporation’s existing stockholders and to new purchasers of the corporation’s shares, as well as to the market as a whole.

Section 102(b)(1) also requires that charter provisions not be contrary to Delaware law. Delaware’s Supreme Court has explained that “[f]orum selection [] clauses are ‘presumptively valid.’”⁴⁰⁶ A presumptively valid provision under Delaware law is not contrary to Delaware law. Further, no Delaware law or policy opposes the adoption of a forum selection provision that directs a federal claim to federal court in a manner consistent with United States Supreme Court precedent, and with DGCL Section 202.

⁴⁰¹ *Boilermakers*, 73 A.3d at 951-52 (emphasis in original).

⁴⁰² *Define*, BLACK’S LAW DICTIONARY (11th ed. 2009) [hereinafter BLACK’S].

⁴⁰³ *Limit*, WEBSTER’S THIRD, *supra* note 400.

⁴⁰⁴ *Regulate*, BLACK’S, *supra* note 403.

⁴⁰⁵ *See supra* Section IV.G.

⁴⁰⁶ *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010) (second alteration in original) (quoting *Capital Grp. Cos. v. Armour*, No. Civ.A. 422-N, 2004 WL 2521295, at *3 (Del Ch. Nov. 3, 2004)).

This conclusion does not invoke more expansive interpretations that can be implied from Delaware precedent indicating that Section 102(b)(1) should be interpreted expansively.⁴⁰⁷ That additional form of analysis would only reinforce the conclusion that Federal Forum Provisions are proper subject matter for Delaware charters.

C. DGCL Section 115: Federal Forum Provisions Comply with Statutory Text.

Section 115's plain text and its legislative history further confirm that Federal Forum Provisions are proper subject matter for Delaware corporate charters. *Sciabacucchi* reaches a contrary conclusion only by gliding over Section 115's plain text and legislative history, and relying on a secondary source that conflicts with that plain text and legislative history.

The Plain Text of Section 115. Section 115 of the DGCL, adopted in 2015, states in full:

The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. "Internal corporate claims" means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.⁴⁰⁸

Section 115's second sentence defines "internal corporate claims" as including those "based upon a violation of a duty by a current or former director or officer." On a facial challenge, because a Section 11 claim can arise from a violation of a Delaware fiduciary obligation by an officer or director, the presumption is that such a violation has occurred. Indeed,

⁴⁰⁷ "Delaware corporate law is routinely touted as being broadly enabling, containing few mandatory rules, and permitting an expansive freedom for the private ordering of internal corporate governance through the provisions of a corporation's governing documents." Mohsen Manesh, *The Contested Edges of Internal Affairs*, 41-42 & n.220 (unpublished manuscript) (August 9, 2019), <https://ssrn.com/abstract=3435165> or <http://dx.doi.org/10.2139/ssrn.3435165> (citing *Shintom Co. v. Audiovox Corp.*, 888 A.2d 225, 227 (Del. 2005) (describing Delaware's corporation statute as "an enabling statute that provides great flexibility")); *Jones Apparel Gp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 845 (Del. Ch. 2004) (Strine, V.C.) (noting that Delaware corporate law "is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints"); *Matter of Appraisal of Ford Hldgs., Inc. Preferred Stock*, 698 A.2d 973, 976 (Del. Ch. 1997) (Allen, C.) (explaining that "unlike the corporation law of the nineteenth century, modern corporation law contains few mandatory terms; it is largely enabling in character"); Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CAL. L. REV. 373, 379 (2018) ("By virtue of its largely enabling structure, Delaware corporate law is consistent with the private ordering approach."); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1783 (2006) ("There has been a strong tendency in Delaware corporate policymaking to broaden that room for private ordering."). Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or A Diamond in the Rough? A Response to Kahan & Kamar's Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257, 1260 (2001) (describing Delaware's approach to corporate law as one that is "largely enabling and provides a wide realm for private ordering").

⁴⁰⁸ DEL. CODE ANN. tit. 8, § 115 (West 2019).

while it is unnecessary to reach this conclusion, it can also be argued that a very large percentage, if not all, of Section 11 claims are in fact based upon a violation of a duty by a current or former director or officer who failed in a due diligence obligation. Otherwise there would be no Section 11 violation. Significantly, Section 115's plain text does not require that the violated duty be expressed as a DCGL cause of action, or that it not also be a violation of federal law. Any such constraint would create tension with *Malone* and other Delaware precedent. Indeed, any such interpretation would also defeat the statute's essential purpose because it would allow parties to avoid Section 115 by alleging all the factual predicates of a Delaware fiduciary breach, but then bringing that internal claim in the court of a different state and asserting a cause of action under the sister state's laws.⁴⁰⁹

Similarly, if a "violation of a duty by a current or former director or officer" also gives rise to a federal violation, the underlying violation remains an internal corporate claim under Section 115's plain text. The fact that an internal corporate claim simultaneously generates a federal claim does not mean that the internal corporate claim is no longer an internal corporate claim. A claim can be both federal and internal. That is the plain text. To be sure, federal claims can provide for exclusive federal jurisdiction, as is the case under the Exchange Act. Section 115 is irrelevant under those circumstances because those federal actions must remain in federal court. But when a federal statute provides for concurrent jurisdiction, as is the case under the Securities Act, the plain text of Section 115 permits the operation of a Federal Forum Provision.

The statute's first sentence states that internal corporate claims may (not must) be brought "solely and exclusively in any or all of the courts *in* this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts *of* this State." (emphasis supplied) This sentence is susceptible of two interpretations. Either reading concludes that Federal Forum Provisions are internal corporate claims.

The first interpretation assumes that the United States District Court for the District of Delaware is both a court *in* and *of* Delaware. Federal Forum Provisions then clearly comply with this provision because they do not prohibit bringing claims in Delaware District Court, which is then a court *of* the State. They also allow bringing internal corporate claims in courts *in* Delaware, which includes the federal district court in Delaware.

An alternative interpretation distinguishes between the usage "*in* this State" and "*of* this state."⁴¹⁰ Chancery and the Superior Court are then courts *of* Delaware. The federal District Court is a court *in* Delaware. No part of a Federal Forum Provision prohibits plaintiffs from bringing Securities Act claims in Chancery or Superior Court, and the corporation can always agree to litigate the matter in Chancery or Superior Court. Federal Forum Provisions thus do not prohibit bringing Section 11 claims in the courts *of* Delaware. Moreover, as a practical matter,

⁴⁰⁹ Section 115 also does not require that internal claims be based exclusively on violations by directors or officers. *Sciabacucchi*'s suggestion that an outsider's participation causes internal claims to become external is inconsistent with Section 115's text. See *infra* Section VII.A.

⁴¹⁰ A similar analysis and distinction is found in the Model Business Corporations Act's Forum Selection Provisions, which expressly authorizes the inclusion of "additional specified courts or all courts of this state or courts in this state (such as federal courts) or in one or more additional jurisdictions with a reasonable relationship to the corporation. In addition, the provision may prioritize among the specified courts." MODEL BUS. CORP. ACT § 2.08 cmt. (2016).

any corporation facing a Securities Act claim filed in a court *of* Delaware would rationally consent to litigate in that court because, if it failed to do so, plaintiffs could argue that, on an “as applied” basis, the Federal Forum Provision then at issue violates Section 115 because it prohibits the claim from being adjudicated in the courts “*of* this state.” Federal Forum Provisions therefore comply with Section 115’s “*of*” test even under this alternative reading. Indeed, this observation demonstrates that Federal Forum Provisions have real teeth in forcing Section 11 litigation either into federal court or into a court *of* Delaware because any effort to preclude litigation in a court *of* Delaware could invalidate the Federal Forum Provision itself.

The fact pattern in which a Section 11 claim is filed in a court *of* Delaware and the corporation refuses to allow it to proceed in that court is not before the court. Indeed, for reasons described, that fact pattern is likely never to arise, and presents a hypothetical that *Boilermakers* warns against.⁴¹¹ The hypothetical does, however, indicate that the practical implication of Federal Forum Provisions will be to direct Section 11 claims against Delaware-chartered entities either to Federal District Court or to a court of Delaware. Federal Forum Provisions are thus Delaware-tropic, although the strength of that tropism is currently conjectural.

Section 115’s Legislative History. The legislative synopsis for Section 115 is reproduced in its entirety in the margin, with the most relevant text italicized.⁴¹² The synopsis explains that “Section 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction.”⁴¹³ Federal Forum Provisions do not foreclose suit in federal court based on federal jurisdiction. *Sciabacucchi* forecloses suit in federal court based on federal jurisdiction.

Federal Forum Provisions direct suits raising federal claims to federal courts in a manner consistent with the federal law of forum selection and with the plain text of Section 115. Moreover, because *Rodriguez* makes clear that federal law has no objection to contractual provisions that preclude state law litigation of Securities Act claims, the Synopsis is consistent with a reading that views Delaware’s legislature as welcoming provisions that direct federal litigation to Federal Court based on federal jurisdiction and Supreme Court precedent. This

⁴¹¹ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013).

⁴¹² “New Section 115 confirms, as held in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.3d 934 (Del. Ch. 2013), that the certificate of incorporation and bylaws of the corporation may effectively specify, consistent with applicable jurisdictional requirements, that claims arising under the DGCL, including claims of breach of fiduciary duty by current or former directors or officers or controlling stockholders of the corporation, or persons who aid and abet such a breach, must be brought only in the courts (including the federal court) in this State. Section 115 does not address the validity of a provision of the certificate of incorporation or bylaws that selects a forum other than the Delaware courts as an additional forum in which internal corporate claims may be brought, but it invalidates such a provision selecting the courts in a different State, or an arbitral forum, if it would preclude litigating such claims in the Delaware courts. Section 115 is not intended, however, to prevent the application of any such provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced. Section 115 is not intended to foreclose evaluation of whether the specific terms and manner of adoption of a particular provision authorized by Section 115 comport with any relevant fiduciary obligation or operate reasonably in the circumstances presented. For example, such a provision may not be enforceable if the Delaware courts lack jurisdiction over indispensable parties or core elements of the subject matter of the litigation. *Section 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction*, nor is Section 115 intended to limit or expand the jurisdiction of the Court of Chancery or the Superior Court.” S. 75 § 5 synopsis, 148th Gen. Assemb. (Del. 2015) (emphasis added).

⁴¹³ *Id.* (emphasis added).

approach keeps Delaware out of the federal lane. Federal Forum Provisions are thus not only consistent with the legislative history, they reflect the legislature's clear intent as expressed in the Synopsis that federal matters can and should stay in federal court.

And, therein lies an irony. The effect of *Sciabacucchi*'s holding that Federal Forum Provisions are invalid is precisely to "foreclose suit in a federal court based on federal jurisdiction," when *Rodriguez* clearly permits foreclosing state court litigation to allow the matter to proceed in federal court. *Sciabacucchi*'s interpretation on Section 115 leads to a consequence that conflicts directly with the synopsis.

Post-Adoption Commentary. *Sciabacucchi*'s Section 115 analysis launches from the observation that "[a]s the parties recognize, Section 115 does not say explicitly that the charter or bylaws cannot include forum-selection provisions addressing other types of claims."⁴¹⁴ If that is the case, and Section 115 is silent as to the question presented, then the matter is resolved on a textual basis by reference to Sections 102(b)(1) and 202, both of which affirm the validity of Federal Forum Provisions in corporate charters. But *Sciabacucchi* instead turns to post-adoption commentary to conclude that Section 115 invalidates Federal Forum Provision. That logic fails because the commentary does not adequately support the proposition for which it is cited.

Sciabacucchi reasons that "[t]he omission comports with the precedent leading up to Section 115, which recognized that the charter and bylaws can only address internal-affairs claims."⁴¹⁵ But this statement is *a non sequitur*: Section 115 itself expressly defines "internal corporate claims" so that Federal Forum Provisions fit comfortably with the statutory definition and legislative synopsis. The analysis thus seeks to solve a problem that does not exist, and the only reason to rummage outside the four corners of the statutory text and legislative synopsis is in search of arguments to support conclusions that are inconsistent with the governing text and legislative history.

The statement is also not a precise description of the "precedent leading up to Section 115," *i.e.* *Boilermakers*. *Boilermakers* relied on the internal affairs doctrine as a sufficiency condition supporting its conclusion. It nowhere frames the internal affairs doctrine as a necessary condition for the validity of all Delaware charter and bylaw provisions, or for the entirety of the DGCL. Here again, *Sciabacucchi* makes an unsupported leap.

It is in this posture that *Sciabacucchi* turns to a post-adoption article authored by "[t]wo past presidents and leading members of the Corporation Law Council."⁴¹⁶ Citing the article,

⁴¹⁴ *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718, at *14 (Del. Ch. Dec. 19, 2018).

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* (citing Lawrence A. Hamermesh & Norman M. Monhait, *Fee-Shifting Bylaws: A Study in Federalism*, INST. DEL. CORP. & BUS. L. (June 9, 2015), <http://blogs.law.widener.edu/delcorp/2015/06/29/fee-shifting-bylaws-a-study-in-federalism>.) Hamermesh and Monhait caution that the views expressed in their article are "solely those of the authors, and do not necessarily represent the views of the Association, the Section, or its Council." Hamermesh & Monhait, *supra*, at n.1. The article also appeared subsequent to the enactment of Section 115. To the extent that the authors' involvement was viewed by Chancery as a relevant form of legislative history, it bears emphasis that there is substantial precedent against deference to such post-enactment statements. *See, e.g.,* *Massachusetts v. EPA*, 549 U.S. 497, 530 n. 27 (2007) (citing *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005)) ("[P]ost-enactment history is not only oxymoronic but inherently entitled to little weight."); *Sullivan v. Finkelstein*, 496 U.S. 617 631-

Sciabacucchi asserts that “a securities law claim is not an ‘internal corporate claim’ within the meaning of the amendments,”⁴¹⁷ and explains that “because the corporate charter and bylaws could not be used to regulate external claims . . . , the Council ‘saw no reason for a statutory amendment that purported to reach beyond the confines of internal governance litigation’”⁴¹⁸ The flaw in this argument is apparent from the article’s full text, including passages not cited by *Sciabacucchi*.

The article states that federal securities claims do not “typically fall within clause (i) of the definition of ‘internal corporate claims,’”⁴¹⁹ and refers primarily to liability arising under Rule 10b-5 of the Exchange Act. The authors thus do not categorically assert that federal securities claims “never” fall within clause (i), which is accurate because federal securities claims can and do fall within clause (i), as is the case with Section 11 claims. This locution is critical in the context of a facial challenge because it demonstrates that plaintiffs cannot establish the absence of any circumstance in which a Federal Forum Provision qualifies under clause (i). The modifier “typically” concedes that the requisite showing of impossibility is an impossibility. That ends the debate in a manner that defeats *Sciabacucchi*'s application of the commentary to Federal Forum Provisions.

The article continues: “The predominant form of federal securities class action litigation is based on Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, and most commonly involves allegations that a material misstatement or omission induced class members to purchase securities before the misstatement or omission was corrected.”⁴²⁰ True enough, but Federal Forum Provisions govern Securities Act claims and have nothing to do with Exchange Act Rule 10b-5 claims. Federal Forum Provisions are limited to Securities Act claims. Exchange Act claims are, in any event, subject to exclusive federal jurisdiction. Raising Rule 10b-5 concerns is an irrelevant distraction as applied to Federal Forum Provisions.

The article also states that “[a]ccordingly, any duty breached under Rule 10b-5 (or under Sections 11 or 12 of the Securities Act of 1933) does not arise from a director or officer’s duty to the corporation or its stockholders, and a Rule 10b-5 claim should not be considered an ‘internal corporate claim’ within the meaning of new Section 115.”⁴²¹ There are four problems with this sentence, particularly with its parenthetical. First, the statement is unsupported. The article nowhere analyzes the elements of any Securities Act claim; nowhere recognizes that a Section 11 claim can be generated by lies told by directors who profit from their own lies; nowhere considers the implications of Section 11’s statutory presumption of directorial liability; nowhere contrasts Section 11 liability with the Rule 10b-5 claim; and nowhere considers that Section 11 claims implicate *Malone* and *Caremark* liability. Second, the parenthetical contradicts the statute’s plain text and legislative history. As already explained, the plain text of the statute’s definition of “internal corporate claims” covers Section 11 claims. Third, the sentence

32 (1990) (Scalia, J. concurring in part) (post-enactment legislative history “should not be taken seriously”); *Bruesewitz v. Wyeth*, 562 U.S. 223 (2011) (“Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.”)

⁴¹⁷ *Sciabacucchi*, 2018 WL 6719718, at *14.

⁴¹⁸ *Id.* (final alteration in original) (quoting *Hamermesh & Monhait*, *supra* note 182).

⁴¹⁹ *Hamermesh & Monhait*, *supra* note 182 (emphasis added)

⁴²⁰ *Id.* (footnotes omitted).

⁴²¹ *Id.* (footnote omitted).

contradicts other parts of the same article. The article elsewhere recognizes that federal securities claims do not “typically” fall within clause (i) and thereby correctly concedes that some federal securities claims can be “internal corporate claims.” But here, it appears to take a contrary position that no Securities or Exchange Act claim can ever be an “internal corporate claim.” This contradiction calls into question the article’s precision of analysis. Fourth, directors and officers have clear Delaware-based duties not to lie to stockholders and to the market when selling shares. That is *Malone*. The duty breached under the Securities Act thus does “arise from a director or officer's duty to the corporation or its stockholders.”

D. Tort, Contract, and Conversion Claims.

Sciabacucchi’s efforts to restrict Section 102(b)’s scope are motivated, in part, by concern that validating Federal Forum Provisions could facilitate charter-based regulation of tort, contract, or conversion claims between the corporation and its stockholders.⁴²² The obvious response is that Federal Forum Provisions cannot possibly be applied to regulate tort, contract, conversion or any other sort of claim with persons who randomly happen also to be stockholders. Securities Act claims relate exclusively to violations of a federal law that cannot support tort, or contract, or any other non-securities form of claim. Federal Forum Provisions are, moreover, narrowly drafted. They direct stockholders to bring federal Securities Act claims arising under federal law, exclusively because of the stockholders’ investment relationship with the corporation, in federal court. They have nothing to do with anything else. To raise concerns over tort, contract, or conversion claims in the context of Securities Act litigation is to engage in the form of hypothetical imagineering against which Delaware precedent strongly warns.

Sciabacucchi’s concern with “conversion” claims is noted in passing, and with no accompanying analysis. This concern is mysterious because the DGCL addresses the question. Section 167 addresses claims of lost or stolen stock certificates, and allows the corporation to demand a bond “sufficient to indemnify it against any claim that may be made against it on account of the alleged loss [or] theft.”⁴²³ Section 168 authorizes Chancery to address charges that the corporation improperly failed to issue shares following a claim of theft or loss of a certificate. “If, upon hearing, the court is satisfied that the plaintiff is the lawful owner,”⁴²⁴ Chancery can compel the issuance of shares, but a bond shall be required. If *Sciabacucchi*’s passing observation means that Delaware courts can’t address claims of conversion, the statute’s plain text is to the contrary. If the concern is over a different scenario then, a more precise articulation of *Sciabacucchi*’s concern is needed to allow for a response.

E. Consistent Usage and “Necessity” as Text-Based Limiting Principles.

If the concern is that Federal Forum Provisions invite charter provisions that stray from the statute’s plain text, it is valuable to observe that textualism contains further limiting principles that do not require resort to “first principles,” atextual references, the invention of new definitions of “internal affairs,” or even the application of traditional definitions of “internal affairs,” to resolve the question. The DGCL is naturally interpreted as regulating relationships

⁴²² *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718, at *16 (Del. Ch. Dec. 19, 2018).

⁴²³ DEL. CODE ANN. tit. 8 § 167 (West 2019).

⁴²⁴ DEL. CODE ANN. tit. 8, § 168(b) (West 2019).

between and among corporations and stockholders, including transactions by which purchasers become stockholders, provided that the regulation is necessarily rooted in the stockholder or purchaser relationship. This limiting principle is inherent in the statutory text, and can be expressed with greater precision through a simple “necessity” test: if being or becoming a stockholder (one cannot be a stockholder without becoming a stockholder and one cannot become a stockholder without being a stockholder) is not required to state a claim governed by a forum selection provision, then the provision in question does not create, define, limit, or regulate the powers of the stockholder as a stockholder. The provision is invalid because it then regulates something else.

The text of Section 115 is instructive in this regard. It speaks of “violations of a duty by a current or former director or officer or stockholder *in such capacity*” (emphasis supplied). The director must be acting as a director; the officer as an officer; and the stockholder as a stockholder. This natural reading of the text also avoids all of *Sciabacucchi*’s imaginary concerns without having to resort “first principles” or to divergent interpretations of internal affairs.

More formally, the presumption of consistent usage provides that “identical words used in different parts of the same act are intended to have the same meaning.”⁴²⁵ Section 115 refers to, “stockholder *in such capacity*” (emphasis supplied). The presumption of consistent usage applied across Sections 102(b)(1) and 115 would harmonize both sections as referring to stockholders only “in such capacity,” and not in the capacity of tort, contract, or conversion litigants, or in the capacity of any other form of litigant. Neither the text nor legislative history of either provision suggest any different interpretation. This interpretation is also consistent with statutory text that regulates purchasers as purchasers. There too, the natural reading is that, just as stockholders are regulated “in such capacity,” purchasers are also regulated “in such capacity” as purchasers. The presumption of consistent usage thus renders it unnecessary to resort to first principles or to novel definitions of internal affairs to prevent DGCL regulation of tort, contract or conversion claims. Textualism addresses the challenge efficiently.

This necessity test and the presumption of consistent usage lead immediately to the conclusion that a charter provision governing a tort, contract, or conversion claim is invalid. Stockholder status is not necessary to state a tort claim between a corporation and an injured person who happens to be a stockholder. Nor is stockholder status relevant to a contract claim. Indeed, pleading stockholder status in a tort or contract claim is a *non sequitur* that could be stricken from the complaint.⁴²⁶ The tort or contract claim has nothing to do with a person’s status as a stockholder and thus fails the necessity test. It also does not relate to the stockholder “in such capacity” as stockholder, to borrow the locution of Section 115.

Delaware’s treatment of stolen or lost share certificates is consistent with this analysis. Certificates can exist as collectors’ items, or as evidence of positions that have been transferred or cancelled. Sections 167 and 168 of the DGCL do not address those situations, and do not purport to resolve disputes over pieces of paper that randomly happen also to be certificates. The focus is instead on the necessity of being recognized as a stockholder on the corporation’s books

⁴²⁵ *Atlantic Cleaners & Dyers Inc. v. United States*, 286 U.S. 427, 433 (1932). See also Scalia & Garner, *supra* note 290, at 170.

⁴²⁶ FED. R. CIV. P. 12; DEL. CH. R. 12.

and records, and on the ability to exercise the rights associated with stockholder status. Stealing a certificate does not make the thief a stockholder. The DGCL expressly addresses that distinction and limits the scope of its regulatory domain to the legal relationship between the stockholder and the corporation as stockholder and as corporation. The DGCL does not intrude into questions of theft of a piece of paper.

Digressions into the law of torts, contracts, and conversion are, as the statutory text demonstrates, irrelevant to determining the validity of Federal Forum Provisions. If anything, the digressions underscore the wisdom of limiting judicial inquiries to facts before the court and of compelling courts not to speculate over hypotheticals, as *Boilermakers* repeatedly emphasizes.

F. The Dangers of Reaching Beyond Textualism.

Textualism ends the inquiry right here. Textualism does so by recognizing the validity of Federal Forum Provisions while not opening the door to claims unrelated to the corporation's operations, or its relationships with its stockholders, directors, and management, in their capacities as such.

A textualist approach that ends the analysis at this point has the further virtue of avoiding problems created by *Sciabacucchi*'s search for a bright line rule prescribing, for all conceivable circumstances, precise conditions under which charter provisions yet to be invented might or might not be proper subject matter for corporate charters that do not yet exist. Resolving the validity of Federal Forum Provisions does not compel the invention of categorical imperatives of Kantian dimension, particularly by resorting to atextual analysis and imposing a newly invented internal affairs requirement on all of the DGCL in a manner that inevitably affects the interpretation of myriad charter and bylaw provisions not before the court.

But that approach is core to *Sciabacucchi*: the opinion unnecessarily staples a divergent internal affairs requirement on to all of the DGCL so as to resolve a salmagundi of imaginary questions that might never arise in any court. Delaware might at some point in the future find it appropriate to adopt an express internal affairs restriction that limits permissible subject matter for organic corporate documents. But given the statutory text and the operation of Federal Forum Provisions, this is not that point. Delaware does not have to address that question on the facts presented by Federal Forum Provisions.

Boilermakers avoids this error. The “wisdom of declining to opine on hypothetical situations that might or might not come to pass is evident.”⁴²⁷ Accordingly, “Delaware courts ‘typically decline to decide issues that may not have to be decided or that create hypothetical harm.’”⁴²⁸ It is “imprudent and inappropriate to address these hypotheticals in the absence of a genuine controversy with concrete facts.”⁴²⁹ The United States Supreme Court is “acutely aware . . . that [it] sit[s] to decide concrete cases and not abstract propositions of law.”⁴³⁰ It has

⁴²⁷ *Boilermakers*, 73 A.3d at 963.

⁴²⁸ *Id.* at 940 (quoting 3 STEPHEN A. RADIN, *THE BUSINESS JUDGEMENT RULE: FIDUCIARY DUTIES OF CORPORATE OFFICERS* 3498 (6th ed. 2009)).

⁴²⁹ *Id.*

⁴³⁰ *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981).

therefore “decline[d] to lay down . . . broad rule[s] . . . to govern all conceivable future questions in [an] area.”⁴³¹

Sciabacucchi's challenge is better addressed through respect for the plain text of the statute and by a common law process that considers future proposed charter amendments on their merits given the text of the DGCL and in light of continuously evolving precedent. This common law process affords the judiciary the benefit of experience over time. It allows views to evolve in response to changed circumstance. It avoids speculation over the validity of charter provisions yet to be invented as they might apply to facts that don't yet exist. And, it avoids concern that application of *Sciabacucchi*'s internal affairs test will inspire substantial litigation challenging the validity of charter and bylaw provisions that are today viewed as uncontroversial.

G. Arbitration of Securities Act Claims.

Some observers are concerned that the SEC will permit mandatory arbitration of Securities Act claims.⁴³² They support *Sciabacucchi* because they perceive it as a state-law bulwark against mandatory arbitration. They reason that if state law prohibits mandatory arbitration in organic documents, then even if the Commission later permits arbitration under federal law, state law will constrain the propagation of arbitration provisions.⁴³³ From this perspective, Federal Forum Provisions pose a threat, not because they direct federal claims to federal court, but because they describe a glide path to mandatory Securities Act arbitration.

This concern is not only misplaced, but has the argument backwards. Federal Forum Provisions are anti-arbitration because they unambiguously direct Securities Act litigation to federal court and clearly preclude arbitration. If every charter included a Federal Forum Provision, then mandatory arbitration of Securities Act claims would be impossible. It stands logic on its head to argue that a provision that prohibits arbitration facilitates it.

Moreover, this article's rationale supporting the validity of Federal Forum Provisions categorically precludes mandatory Securities Act arbitration provisions for all Delaware

⁴³¹ *Id.*; see also *New York v. United States*, 326 U.S. 572, 575 (1946) (“One of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract.”); *United States v. Blackburn*, 461 F.3d 259, 262 n.2 (2d Cir. 2006) (noting that courts are “empowered to decide concrete cases and not abstract principles”).

⁴³² See, e.g., Clopton & Winship, *supra* note 215; Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L.J. 583 (2016); Andrew Rhys Davies, *The Legality of Mandatory Arbitration Bylaws*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sep. 13, 2018), <https://corpgov.law.harvard.edu/2018/09/13/the-legality-of-mandatory-arbitration-bylaws>; Lawrence A. Hamermesh, *Delaware Law Status of Bylaws Regulating Litigation of Federal Securities Law Claims*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Nov. 29, 2018), <https://corpgov.law.harvard.edu/2018/11/29/delaware-law-status-of-bylaws-regulating-litigation-of-federal-securities-law-claims>; Ann Lipton, *Litigation Limits, Corporate Governance, and Securities Law—A New Hope*, BUS. L. PROF. BLOG (Dec. 19, 2018), https://lawprofessors.typepad.com/business_law/2018/12/litigation-limits-corporate-governance-and-securities-law-a-new-hope.html; Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions, Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n (Feb. 11, 2019), <https://www.sec.gov/news/public-statement/clayton-statement-mandatory-arbitration-bylaw-provisions>.

⁴³³ Jacob Hale Russell, *Mandatory Securities Arbitration's Impermissibility Under State Corporate Law: An Analysis of the Johnson & Johnson Shareholder Proposal* (Rock Ctr. for Corp. Governance, Working Paper Series, Paper No. 237, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3332853.

corporations, even if they have not adopted Federal Forum Provisions. Section 11 claims are “internal corporate claims” subject to Section 115 regardless of whether the corporation has a Federal Forum Provision. Section 115 prohibits mandatory arbitration of internal corporate claims.⁴³⁴ The logic of this article’s analysis thus concludes that mandatory arbitration of Section 11 claims is prohibited for all Delaware corporations, and no further legislative action is necessary in Delaware to achieve that result. This is hardly a pro-arbitration analysis.

Opponents of mandatory Section 11 arbitration who support *Sciabacucchi* would have Delaware pay an unnecessarily high price in order to achieve their preferred policy objective, which relates exclusively to a matter of federal, not state law. They would have Delaware adopt an overly-narrow conceptualization of the internal affairs doctrine, thereby allowing other states to govern boardroom conduct, just so that they have an argument—that need not be accepted by any other jurisdiction⁴³⁵—against the propagation of mandatory arbitration provisions. This is not a wise bargain for Delaware. Other states could easily reject *Sciabacucchi*’s narrow conceptualization of the internal affairs doctrine.⁴³⁶ Delaware would then have sacrificed a broad definition of internal affairs for less than nothing: the state law bulwark against mandatory arbitration would be gone and a narrow conceptualization of internal affairs would prevail.

The interpretation of Section 115 proposed in this article solves the Securities Act arbitration challenge for all Delaware chartered entities. This is no small achievement. Delaware charters approximately 66% of the Fortune 500 and more than half of all publicly traded corporations.⁴³⁷ It asks too much of Delaware to solve the Securities Act arbitration challenge for the entire nation, particularly when Delaware cannot do so.⁴³⁸ From this perspective, the easy response to opponents of mandatory arbitration is that they should embrace this article’s interpretation of Section 115, and then direct their residual concerns to Congress and to the Commission because their objections relate entirely to matters of federal law that are exclusively within federal control. Urging that Delaware contort its definition of internal affairs so that arbitration’s opponents have a fallible argument that might or might not work outside of Delaware makes little sense. Indeed, Delaware would clearly be intruding into the “federal lane”

⁴³⁴ As the legislative synopsis explains, Section 115 “invalidates such a [forum selection] provision selecting . . . an arbitral forum, if it would preclude litigating such claims in the Delaware courts.” S. 75 § 5 synopsis, 148th Gen. Assemb. (Del. 2015). *See also*, Manesh, *Supra* note 302, at 46-47, quoting Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 Geo. L.J. 583, 588 (2016) (Delaware’s “ban [on arbitration] – quietly enacted as part of the 2015 DGCL amendments – is essential to Delaware’s corporate law enterprise. By prohibiting arbitration of state corporate law claims, Delaware law ensures that its state courts – the crown jewel of the state’s corporate law – remain the central regulatory authority for the nation’s corporations, and that those courts continue to produce new precedents to address emergent and novel issues relevant to corporations. . . . For this reason, arbitration has been described as an “existential threat” to Delaware corporate law.”)

⁴³⁵ Manesh, *supra* note 302 at 5, 56-60 (the boundaries of internal affairs may be contested by other states, and other states may have a perspective that differs from Delaware’s. Typically, other states will prefer narrower definitions of internal affairs because narrower definitions allow them to intrude more aggressively into matters traditionally regulated by Delaware.)

⁴³⁶ *See, e.g.*, Mohsen Manesh, *The Contested Edges of Internal Affairs*, *supra* note 302, at 55-62.

⁴³⁷ *See* Del. Div. of Corps. Ann. Rep. Statistics (2018).

⁴³⁸ Also, the separate possibility exists that the Federal Arbitration Act can be interpreted to pre-empt the space, in which case any state law rule prohibiting arbitration – including Section 115 – would be rendered invalid. *See, e.g.*, Clopton and Winship, *supra* note 215.

by interpreting its corporations code in an effort calculated to interfere with federal policy, as objectionable as some might find that policy to be.⁴³⁹

VII. Public Policy Considerations.

A. Delaware's Lane.

1. Sciabacucchi Conflicts with Federal Law.

Delaware is sensitive to its role in the federal system and seeks not to intrude into matters that are federal or to generate conflict between Delaware and federal law.⁴⁴⁰ “The historic roles played by state and federal law in regulating corporate disclosures have been not only compatible but complementary.”⁴⁴¹ *Sciabacucchi* recites plaintiff’s position that “Federal Forum Provisions take Delaware out of its traditional lane of corporate governance and into the federal lane of securities regulation.”⁴⁴² *Sciabacucchi* also cites scholarship explaining that “the focus of the federal lane has always been, and should always be, market fraud and disclosure. On the other hand, monitoring the structure of internal corporate governance is the focus of the state lane.”⁴⁴³

The reality, however, is that *Sciabacucchi* steers Delaware into a headlong collision with federal law. Federal law rejects the thesis that plaintiffs have an immutable right to litigate Securities Act claims in state court. Federal courts enforce private agreements that preclude state court litigation of Securities Act claims.⁴⁴⁴ But *Sciabacucchi*, with no citation support or analysis of precedent, does precisely the opposite. It divests parties of the federally recognized right to designate the forum in which a Securities Act claim will be heard. Indeed, by using Delaware law to preclude a federal practice in federal court under a federal statute that is permissible under federal law, *Sciabacucchi* creates unprecedented and unnecessary tension with the federal regime.

2. Matsushita v. Epstein.

The interplay between federal and Delaware law was explored by the United States Supreme Court in *Matsushita Electric Industrial Co. v. Epstein*.⁴⁴⁵ There, the Court held that Delaware courts can settle claims subject to exclusive federal jurisdiction even if Delaware courts cannot adjudicate those claims. “[T]he release of federal claims pursuant to a settlement of a state court proceeding does not violate the federal courts’ exclusive jurisdiction.”⁴⁴⁶ If federal courts are not offended when Delaware courts dismiss federal claims that they cannot adjudicate, then federal courts will not be offended when Delaware, following controlling Supreme Court

⁴³⁹ See Section VII.A below for a discussion of Delaware law and the “federal lane.”

⁴⁴⁰ See, e.g., Manesh, *supra* note 302, at 43-48 (explaining that Delaware interprets its law to avoid conflicts with federal law that might lead to federal pre-emption of state corporate law).

⁴⁴¹ 722 A.2d 5, 13 (Del. 1998).

⁴⁴² *Sciabacucchi*, 2018 WL 6719718, at *23.

⁴⁴³ *Id.* at *23 n.6 (quoting Myron T. Steele, *Sarbanes-Oxley: The Delaware Perspective*, 52 N.Y.L. SCH. L. REV. 503, 506-07 (2008)).

⁴⁴⁴ See, *supra*, Section IV.A.

⁴⁴⁵ 516 U.S. 367 (1996).

⁴⁴⁶ 6 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 17:8 (7th ed. 2016).

precedent, allows parties to direct federal claims to federal court where there is concurrent jurisdiction.

In *Matsushita*, a common set of facts generated Delaware fiduciary claims and Exchange Act claims that are subject to exclusive federal jurisdiction. *Matsushita* tendered for the shares of MCA, a Delaware corporation. Procedurally,

[f]irst, a class action was filed in the Delaware Court of Chancery against MCA and its directors for breach of fiduciary duty in failing to maximize shareholder value. The complaint was later amended to state additional claims against MCA's directors for, *inter alia*, waste of corporate assets by exposing MCA to liability under the federal securities laws. In addition, *Matsushita* was added as a defendant and was accused of conspiring with MCA's directors to violate Delaware law. The Delaware suit was based purely on state-law claims.

While the state class action was pending, . . . suit was filed in Federal District Court in California. The complaint named *Matsushita* as a defendant and alleged that *Matsushita*'s tender offer violated Securities Exchange Commission (SEC) Rules 10b-3 and 14d-10.⁴⁴⁷

Chancery entered an order approving settlement of the state and federal claims, while recognizing that it had no jurisdiction over the federal Exchange Act claims. As *Matsushita* explains, “[w]hile § 27 prohibits state courts from adjudicating claims arising under the Exchange Act, it does not prohibit state courts from approving the release of Exchange Act claims in the settlement of suits over which they have properly exercised jurisdiction, *i.e.*, suits arising under state law or under federal law *for which there is concurrent jurisdiction*.”⁴⁴⁸ The order approving the settlement has preclusive effect “notwithstanding the fact that [shareholders] could not have pressed their Exchange Act claims in the Court of Chancery.”⁴⁴⁹ *Matsushita* also references *Nottingham Partners v. Dana*.⁴⁵⁰ There, Delaware’s Supreme Court approved a settlement releasing claims pending in federal court, and eliminated the requirement that settled “claims could have been raised in the suit that produced the settlement.”⁴⁵¹

Matsushita and *Nottingham* support an easy *a fortiori* argument. If neither of those cases offend federal law then, *a fortiori*, Delaware does not inappropriately swerve into the federal lane by upholding Federal Forum Provisions that keep federal claims in federal court in a manner consistent with controlling United States Supreme Court precedent.

B. The Legislature’s Lane and *Sciabacucchi*’s “Proto-Marbury” Implications.

Sciabacucchi’s implications are not limited to Federal Forum Provisions. *Sciabacucchi*’s holding constrains all of Delaware’s legislative activity to comply with its conceptualization of

⁴⁴⁷ *Matsushita*, 516 U.S. at 370.

⁴⁴⁸ *Id.* at 381 (emphasis supplied).

⁴⁴⁹ *Id.* at 378.

⁴⁵⁰ 564 A.2d 1089 (Del. 1989).

⁴⁵¹ *Matsushita*, 516 U.S. at 376.

“first principles.” *Sciabacucchi* makes clear that “[a]s the sovereign that created the entity, Delaware can use its corporate law to regulate the corporation’s internal affairs But Delaware’s authority as the creator of the corporation does not extend to its creation’s external relationships.... [When] the claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate.”⁴⁵² “Delaware can regulate the internal affairs of its corporate creations, regardless of their location, but only their internal affairs.”⁴⁵³

Sciabacucchi thus commands that all past, present, and future legislative activity in the corporate sphere must comply with *Sciabacucchi*’s internal affairs test. *Sciabacucchi* is, by its own “first principles,” an expansive, muscular ruling that forces all of Delaware corporate law to fit within its divergent definition of “internal affairs.” *Sciabacucchi* holds fast to this rule, even though its definition of “internal affairs” appears nowhere in the United States or Delaware constitutions, and conflicts with existing precedent. *Sciabacucchi* thus forces a “proto-*Marbury*”⁴⁵⁴ constraint on Delaware’s legislature: Delaware’s courts can invalidate the Delaware legislature’s enactments if the legislation is either unconstitutional or if it violates *Sciabacucchi*’s internal affairs standard. This is a novel judicial restriction on the legislature’s activity.

Sciabacucchi adopts this sweeping constraint on all of Delaware corporate law with no analysis of the implications. In so doing, it fails to recognize that Delaware courts “must ... respect the broadly enabling nature of the DGCL, and [w]here the markets begin to use the DGCL’s breadth in new ways, it is the General Assembly, not the courts, that should evaluate whether, on public policy grounds, the statute’s authorizing breadth should be narrowed.”⁴⁵⁵ But in *Sciabacucchi*, it is the court, not the General Assembly that decides to narrow the statute’s authorizing breadth. From this perspective, *Sciabacucchi* veers Delaware’s judiciary into both the Legislature’s lane and the federal lane. At the same time.

Careful deliberation is appropriate before imposing a sweeping judicial constraint on all past and future conduct by the General Assembly, particularly when the question presented can be resolved on far narrower grounds that adhere to the statutory text, that avoid significant interpretive challenges presented by “first principles,” do not require the application of a divergent definition of internal affairs, and that do not conflict with numerous decisions of the United States and Delaware Supreme Courts.

C. Efficiency Rationales and Neutral Principles.

Federal Forum Provisions promote judicial economy. They direct complex federal Securities Act claims to federal courts with a comparative advantage in resolving Securities Act

⁴⁵² *Sciabacucchi*, 2018 WL 6719718 at *2.

⁴⁵³ *Id.* at *21.

⁴⁵⁴ *Marbury v. Madison*, 5 U.S. 137 (1803), (establishing the foundational principle that courts can invalidate legislative actions that violate the Constitution).

⁴⁵⁵ Del. State Bar Assoc. Corp. L. Council, Explanation of Counsel Legislative Proposal (2015), at 10, available at <https://www.corporatedefensedisputes.com/files/2015/03/COUNCIL-SECOND-PROPOSAL-EXPLANATORY-PAPER-3-6-15-U0124513.pdf>.

disputes. They also eliminate the need for expensive jurisdictional wrangling as to whether Securities Act claims should proceed in federal or state court.

These efficiency gains are consistent with the neutral principle that litigation is best resolved by courts with a comparative advantage in adjudicating disputes. Just as Delaware courts have a comparative advantage in interpreting Delaware law, and just as California courts have a comparative advantage in interpreting California law, federal courts have a comparative advantage in interpreting federal law. The fact that Federal Forum Provisions generate gains through the application of neutral principles that are not designed to advantage either plaintiffs or defendants further reinforces their benefit to society, to the corporation, and to stockholders.

D. Are Federal Courts Inferior?

Unless plaintiffs can demonstrate that resolving Securities Act claims in federal court is contrary to the corporation's best interests, or against the interests of stockholders, or of society, Federal Forum Provisions' efficiency gains provide a sufficient public policy rationale for their enforcement. Simply put, if society can achieve equally fair outcomes in both fora, but one is more efficient, the efficient forum should rationally be preferred. But plaintiffs never assert that litigating Securities Act claims in federal courts is in any sense unfair or inimical to the best interests of the corporation, its stockholders, or of society. *Sciabacucchi* supports no such finding. The interests of plaintiffs' attorneys are, however, a different matter.

E. Conflicts of Interest.

Derivative claims exist to promote the corporation's best interests.⁴⁵⁶ *Sciabacucchi* is a derivative claim.⁴⁵⁷ *Sciabacucchi*, however, promotes the interests of plaintiffs' counsel at the expense of the corporation, and thus raises the specter of conflict. The fact that stock prices declined in response to *Sciabacucchi*⁴⁵⁸ indicates that *Sciabacucchi* more likely serves the best interests of plaintiffs' counsel, not the best interests of the corporation or of its stockholders.

Class and derivative litigation are plagued by agency problems that are well documented in the literature.⁴⁵⁹ In run-of-the-mill product-liability-style class action litigation, plaintiffs and

⁴⁵⁶ 13 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5949 (“A shareholder cannot bring a derivative proceeding unless it will promote justice and the best interests of the corporation.”); *see also* Kelly v. Fuqi Int’l, Inc., No. 6797-VCG, 2013 WL 135666, at *7 n.84 (Del. Ch. Jan. 2, 2013) (“[A] derivative plaintiff . . . steps into the shoes of the corporation . . .”) (first alteration in original) (quoting Parfi Holding AB v. Mirror Image Internet, Inc., No. Civ.A. 18507, 2006 WL 903578, at *2 n. 4 (Del.Ch. Apr.3, 2006)); 3 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 15:2 (3d ed.) (“The derivative suit plaintiff . . . presents himself as spokesman for the corporate interest.”).

⁴⁵⁷ Verified Class Action Complaint for Declaratory Judgment ¶ 60, *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018)

⁴⁵⁸ *See* Aggarwal, Dhruv and Choi, Albert H. and Eldar, Ofer, Federal Forum Provisions and the Internal Affairs Doctrine (August 18, 2019), SSRN: <https://ssrn.com/abstract=3439078>. *See also, supra* Section II.

⁴⁵⁹ *See, e.g., In re MCA, Inc. S'holder Litig.*, 785 A.2d 625, 639 (Del. 2001) (“It has been recognized that there is an inherent conflict when class counsel seeks to settle claims on behalf of a class whose claims have been asserted globally in different jurisdictions on different grounds . . . Courts have recognized the problem inherent in this situation and have established standards to prevent class counsel from selling out the class merely to collect that fee.”); Brief of Special Counsel at 12-26, 31-35, *Scully v. Nighthawk Radiology Holdings, Inc.*, No. 5890-VCL

defendants are in an adverse relationship: the mass tort claimant has no legal reason to be concerned over defendant's best interests. Agency problem arise in that context because of incentive incompatibility between plaintiffs and counsel.

Additional conflicts arise in tag-along derivative litigation that alleges Securities Act violations. Derivative tag-along counsel have powerful incentives to argue, against the corporation's interest, that the corporation violated the securities laws. Indeed, if the corporation successfully defends the predicate Securities Act claim then the predicate claim evaporates. Without a successful predicate claim a tag-along derivative counsel collects nothing. Victory for the corporation in the federal securities claim is utter defeat for tag-along derivative counsel. The corporation's interests in the Securities Act litigation are thus diametrically opposed to tag-along counsel's interests. This is a conflict. And, in part because of this conflict, courts commonly stay derivative tag-along claims until the predicate litigation is resolved.⁴⁶⁰

(Del. Ch. Mar. 11, 2011) (discussing judicial scrutiny of potentially collusive class settlements in multijurisdictional litigation under both Delaware and federal law, as well as the role that courts should play in preventing such collusion); Lynn A. Baker et al., *Is the Price Right?: An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371 (2015) (providing an empirical study of fees in securities class actions and proposing reforms); Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427 (2012) (tracing trends of the plaintiff's bar in recent decades and describing the behaviors through which poor incentives play out); John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 L. & CONTEMP. PROBS. 5, 12 (1985) (analyzing the problem and proposing reforms to align plaintiff's attorneys' interests with shareholders'); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 680 (1986) (describing the central role of fees in motivating shareholder litigation); Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 OHIO ST. L.J. 829, 841-42 (2014) ("This agency problem strikes at the very heart of most stockholder litigation[.]"); Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733, 1743-45 (1994) (suggesting that the contingent fee regime distorts litigation incentives); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 22-27 (1991) (analysis of the economic incentives facing plaintiffs' attorneys in class action and derivative litigation); Brian J.M. Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U. CAL. DAVIS. L. REV. 137, 149, 151 (2011) ("[c]ontrol over litigation and access to fees are an important motivating factor in this competition amongst plaintiff groups" and "[t]his type of litigation is highly susceptible to agency costs because the interests of counsel will not always align with the interests of their purported clients, the shareholders"); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 57 (1991) ("attorneys' incentives are the key factor in shareholder litigation"); *id.* at 65 ("the principal beneficiaries of cash payouts in shareholder suits are attorneys"); *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 685 (2001); Robert S. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 148 (2004) ("If class counsel have tremendous discretion to run the litigation, they may do so in a manner that maximizes their benefit, even at the expense of the interests of their putative clients."); Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1855 (2004) ("Our other findings (and economic theory) all suggest it is far more likely that plaintiffs' attorneys are motivated primarily by self-interest and that their litigation efforts, shaped as they are by the incentives provided by Delaware law, produce little in the way of meaningful benefits for the shareholders that those attorneys purport to represent."); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2064-66 (1995) (analyzing agency-cost issues and the misalignment of incentives between plaintiffs' attorneys and plaintiff classes in securities class actions).

⁴⁶⁰ See, *supra*, Section V.G.

Plaintiff's counsel in *Sciabacucchi* described Securities Act counsel's incentives regarding Federal Forum Provisions as follows:

I think if you talk to plaintiffs, the plaintiffs' bar, this [*Sciabacucchi*] is a very important issue to them. They believe that they get better settlements and judgments in state court '33 Act actions than they do in federal court. And so, that's why, in part, this is such a hot issue.⁴⁶¹

But that is precisely the problem. "They," the "plaintiffs' bar," in plaintiff counsel's own words, do "get better settlements and judgments" in state court. These settlements and judgments are better for plaintiff counsel in the predicate Securities Act claims, and therefore also better for tag-along derivative counsel. But are these "better settlements and judgments" in state court also better for the corporation whose interests must be placed first in the context of derivative litigation, such as *Sciabacucchi*? The recent empirical evidence is not: stock prices declined in response to *Sciabacucchi*, suggesting that Chancery's opinion did more to help plaintiff counsel than the corporation or stockholders whose interests are theoretically paramount.⁴⁶²

This negative stock price response is easily explained by the fact that plaintiffs' "better" settlements and judgments can result from the survival of weaker state court claims that would have been dismissed in federal court, and from state court procedural advantages that allow plaintiffs to extract state court settlements greater than would have been obtained had the same claim been litigated in federal court.⁴⁶³ To the extent that these "better" state court results for plaintiff counsel arise from the litigation of weaker or non-meritorious claims, pushing Securities Act litigation to state court harms the corporation and its stockholders. "Better" for plaintiffs' counsel is here worse for the corporation and stockholders. Therefore, by working to keep Securities Act litigation in state court, counsel in *Sciabacucchi* advocate an outcome that is inimical to the corporations' best interests.

Plaintiff derivative counsel in *Sciabacucchi* is thus urging a position that disadvantages the three nominal defendants whose interests they are charged to protect. Counsel's position in *Sciabacucchi* is analogous to that of derivative counsel in a tag along claim who takes affirmative steps to disadvantage the nominal defendant corporation in the predicate securities litigation. That strategy benefits derivative tag along counsel who stands to earn higher fees, but it harms the corporation and its stockholders. *Sciabacucchi's* situation is parallel. The conflicting incentives are clear.

An immediate response to this critique is that corporations are not permitted to adopt invalid charter provisions, regardless of the parties benefitted or harmed by the challenged provision. The weakness in this argument, however, rests in its formalist nature. This defense nowhere contends that invalidating Federal Forum Provisions ever promotes the corporation's best interests. Instead, the argument is that, because the dispute is over the validity of an organic provision, derivative counsel is permitted to advocate a position that is inimical to the

⁴⁶¹ Transcript of Oral Argument on Plaintiffs' Motion for Fees & Expenses at 57, *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018) (Apr. 11, 2019).

⁴⁶² See Aggarwal, *et al.*, *supra* note 83.

⁴⁶³ See *supra*, Section II.

corporation's and stockholders' best interests. To the extent this defense is effective, it concedes the conflict but argues that the conflict is permissible when litigating the validity of a charter provision. The conflict does not disappear.

F. Implications of an Under-Inclusive Definition of Internal Affairs.

Sciabacucchi's narrow conceptualization of "internal affairs" is contrary to Delaware's interest and inimical to effective operation of the internal affairs doctrine. Section 11 violations are inexorably internal. Nothing external causes an issuer to file a defective registration statement. Section 11 litigation also allocates liability between and among the corporation, directors, and officers, intrudes into the collective operation of boardroom processes, and interrogates the individualized conduct of officers and directors.⁴⁶⁴

But if Section 11 is external, as *Sciabacucchi* holds, then sister states can cite to *Sciabacucchi* as support when adopting legislation that would govern the procedures by which boards prepare registration statements. They might mandate that boards spend a minimum number of hours reviewing registration statements, adhere to prescribed diligence procedures, and keep records in various forms, including video files of diligence review sessions. From here, a very slippery slope kicks in. If a board's processes in preparing and reviewing a registration statement are external, then why are any other board processes ever internal and not external? Why then could a sister state not require that all corporations headquartered in the sister state adhere to boardroom procedures set by the headquarters state and not the chartering state? Where is the distinguishing principle? After all, *Sciabacucchi* holds that boardroom processes and the conduct of individual directors in the performance of directorial functions are not internal.

Recent events establish that sister states face strong political incentives to legislate in a manner that intrudes on Delaware's traditional conceptualization of internal affairs, and that sister states are not shying from that conflict. California's recently enacted SB 826⁴⁶⁵ establishes a minimum number of women directors that must serve on the boards of all publicly held corporations headquartered in California, even if chartered in Delaware.⁴⁶⁶ When confronted with claims that the legislation violates the internal affairs doctrine, the bill's proponents responded by referring to another California statutory provision that purportedly allows California to regulate the internal affairs of foreign corporations headquartered in California, but that Delaware has already rejected as violating the internal affairs doctrine.⁴⁶⁷ New Jersey⁴⁶⁸ and Illinois⁴⁶⁹ are considering similar measures that would impose gender and other quota-like

⁴⁶⁴ See *supra* Section V.H.

⁴⁶⁵ S. 826, 2018 Leg., Reg. Sess., 2018 Cal. Stat. § 954.

⁴⁶⁶ See generally Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* (Rock Ctr. for Corp. Governance, Working Paper Series, Paper No. 232, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791.

⁴⁶⁷ *Id.*

⁴⁶⁸ Gen. Assemb. 4726, 218th Leg. (N.J. 2018). The bill would require public corporations headquartered in New Jersey to have one woman on their boards by the end of 2019, and then up to three women, depending on the size of the board, by the end of 2021. At time of publication, no action had been taken on the bill. *A4726*, N.J. ST. LEGISLATURE, <https://www.njleg.state.nj.us/bills/BillView.asp> (last visited June 10, 2019).

⁴⁶⁹ H.R. 3394, 101st Gen. Assemb., Reg. Sess. (Ill. 2019). The bill originally mandated the inclusion of women and minorities on boards; the version as passed only requires disclosure of demographics. See John T. Blatchford et al., *Illinois General Assembly Passes Bill to Require Annual Reporting of Board Diversity Information*, NAT'L L. REV.

restrictions on board composition, or disclosure requirements, and that would apply to Delaware-chartered corporations headquartered in those states.

States like California and New York, which “host significant economic activity within their borders” generated by Delaware chartered entities, “are most likely to adopt a narrow view of the [internal affairs] doctrine. Doing so gives these states wider latitude, with respect to the foreign corporations within their jurisdiction, to regulate matters that would be otherwise off-limits if the internal affairs doctrine was accorded a more expansive interpretation.”⁴⁷⁰ The prospect that a narrow conceptualization of the internal affairs doctrine will come to predominate, would “chip away at the hegemony of Delaware. Aspects of corporate governance once the exclusive province of Delaware corporate law will become subject to regulation by other states. And each such regulation will incrementally diminish the value of being chartered in Delaware.”⁴⁷¹ *Sciabacucchi*, if it stands, would be a powerful impetus in this direction, and could trigger a cascade of state law decisions adopting narrow interpretations of the internal affairs doctrine. After all, if Delaware, the state with perhaps the strongest interest in an expansive definition of the internal affairs doctrine, adopts a novel, narrow definition, then Delaware has little moral, legal, or political standing to complain if sister states simply do what *Sciabacucchi* has already done. Sauce for the goose is sauce for the gander.

All of these analytic challenges are avoided if the Section 11 claim is recognized for what it is: a federal claim creating federal liability for conduct that can be purely internal and that can be regulated at the state level only by the state of incorporation, under the existing Supreme Court definitions of internal affairs. *Sciabacucchi* strays far from that articulation and threatens Delaware’s ability to exercise exclusive control over a broad range of internal boardroom matters. Indeed, *Sciabacucchi* appears to be the only decision in the history of Delaware law that advocates a narrow conceptualization of the internal affairs doctrine.⁴⁷² To the extent that *Sciabacucchi* does so to avoid creating a conflict with federal law, its analysis is precisely backwards because federal law expressly permits that which *Sciabacucchi* seeks to forbid.

VIII. Miscellaneous Considerations

Sciabacucchi raises several small points in an effort to distinguish Securities Act claims as external. All are easily addressed.

(June 5, 2019), <https://www.natlawreview.com/article/illinois-general-assembly-passes-bill-to-require-annual-reporting-board-diversity>. At time of publication, the modified version had passed both houses and was awaiting signing by the governor. *Bill Status of HB3394*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3394&GAID=15&DocTypeID=HB&LegId=119985&SessionID=108&GA=101> (last visited June 10, 2019).

⁴⁷⁰ Manesh, *supra* note 302, at 57.

⁴⁷¹ *Id.*, at 58.

⁴⁷² *Id.* at 5 (“*Sciabacucchi* represents a departure from Delaware precedents. Rather than invoking the [internal affairs] doctrine to fend off incursions into Delaware’s regulatory domain, the court in *Sciabacucchi* invoked the doctrine to limit the regulatory reach of Delaware.”)

A. Outsider Liability Does Not Externalize Section 11 Claims.

Sciabacucchi observes that for Section 11 liability, “[d]irector status is not required. Officer status is not required. An internal role with the corporation is not required.”⁴⁷³ The fact that Section 11 allows claims against persons other than officers or directors, and that a formal internal role with the corporation is not a prerequisite to liability, does not cause the claim to become external for at least five distinct reasons.

First, on a facial challenge, the test is not whether the charter provision can be applied in every conceivable scenario, it is whether the provision can be applied in any conceivable scenario. *Sciabacucchi*’s framing of the question adroitly, but inappropriately, flips the controlling presumption.

Second, whether defendants include officers or directors is irrelevant to whether a claim is internal under U.S. and Delaware Supreme Court precedent, as well as under *Sciabacucchi*’s own narrower test. None of those tests hinge on officer or director status.

Third, even though officer or director status is not required for Section 11 liability, every director and officer signing the registration statement is presumed liable unless they establish a due diligence defense. Thus, if a non-officer or non-director faces a Section 11 claim, the registrant’s directors and officers are virtually certain to be sued for failing to exercise due diligence in identifying and preventing the alleged wrongdoing. *Sciabacucchi* fixates on a hypothetical pattern that, as a matter of fact, is highly unlikely to occur precisely because of the statute’s structure.

Fourth, internal claims can proceed against officers and directors, even if “outsiders,” such as investment bankers, accountants, lawyers, and others are deeply engaged in the alleged fiduciary breach. Delaware courts impose aiding and abetting liability on outsiders in connection with internal activities, and the presence of outsider liability does not transmute the claim from internal to external.⁴⁷⁴ Fifth, each of the “outsiders” named as potentially liable in Section 11 are so named only because they participate in the inevitably internal act of preparing the registration statement. From that perspective, and to borrow a locution common in the analysis of insider trading law, those persons are “temporary insiders”: they assist the officers and directors responsible for preparing and signing the registration statement. They assume Section 11 liability without diminishing any officer’s or director’s liability, and without transforming the process of prospectus preparation from an internal affair to an external one.

B. The Definition of “Security” Does Not Externalize Section 11 Claims.

Sciabacucchi states that the broad federal definition of the term “security” “underscores the absence of any meaningful connection between a 1933 Act claim and stockholder status because, by Chancery’s calculus, the ‘33 Act “could identify as few as fifty or as many as 369 different types of securities. Shares are just one of these many types of securities, and shares of a

⁴⁷³ *Sciabacucchi*, 2018 WL 6719718 at *16-17.

⁴⁷⁴ See, e.g., *RBC Cap. Mkts., LLC. V. Jervis*, 129 A.3d 816 (Del. 2015).

Delaware corporation are only one subset of that one type.”⁴⁷⁵ Therefore, in Chancery’s view, there is “no necessary connection between a 1933 Act claim and the shares of a Delaware corporation.”⁴⁷⁶

Putting aside potential challenges to the precision of Chancery’s mathematics, even if its observation is numerologically correct, it is logically irrelevant. A “necessary connection” between a ’33 Act claim and the shares of a Delaware corporation is unnecessary to support a determination that a cause of action is internal. Again, none of the definitions of internal affairs, even *Sciabacucchi*’s own definition, turn on this consideration. Further, on a facial challenge, it is irrelevant to ask whether every application of ’33 Act liability generates an internal claim. The proper question is whether any application generates an internal claim. Again, the presumption is flipped. Finally, internal claims regularly arise from violations of positive law where the positive law is not limited to violations of statutes that target the shares of Delaware corporations. Violations of food safety⁴⁷⁷ and anti-pollution laws⁴⁷⁸ can form the basis for allegations of fiduciary breach under *Caremark* or *Malone*. They can be the foundation for stating internal claims, even though there is “no necessary connection between” food safety and anti-pollution laws “and the shares of a Delaware corporation.”

C. Sections 12(a) (1) and (2) and Section 15 of the Securities Act.

The analysis to this point has focused primarily on Section 11 liability even though the text of Federal Forum Provisions reaches more broadly to encompass all private rights of action arising under the Securities Act. Sections 12(a)(1) and (2) and Section 15 of the ’33 Act are the only other provisions of the Securities Act that support private rights of action. The analysis under each supports a conclusion identical to the analysis under Section 11.

Section 12(a)(1) liability arises if there is a sale of unregistered securities in violation of Section 5 of the ’33 Act. Such violations arise from process and control failures internal to the corporation. No external force is necessary to cause a corporation to sell unregistered shares without a valid exemption in violation of Section 5. The 12(a)(1) violation is thus readily described as an internal affair. This conclusion is trivial on a facial challenge.

Section 12(a)(2) liability attaches only to the use of a “prospectus.”⁴⁷⁹ As is the case with a Section 11 violation, a defective prospectus arises from a flaw internal to the issuer. No external force is necessary to induce such a failure. The Section 12(a)(2) cause of action is thus also easily generated by an internal affair, and, again, this conclusion is trivial on a facial challenge.

⁴⁷⁵ *Sciabacucchi*, 2018 WL 6719718, at *17.

⁴⁷⁶ *Id.*

⁴⁷⁷ See, e.g., *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

⁴⁷⁸ See, e.g., *City of Birmingham Retirement and Relief System v. Good*, 177 A.3d 47 (Del. 2017).

⁴⁷⁹ The U.S. Supreme Court explains that the term “prospectus” in the context of Section 12(a)(2) “is a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 583-584 (1995).

Section 15 imposes joint and several secondary liability on controlling persons for primary liability arising in connection with violations of Sections 11 and 12 of the Securities Act. Absent a primary violation, there is no Section 15 control person liability. The addition of control person liability thus does not alter any of the analysis as to whether the underlying primary conduct is or is not internal for purposes of Delaware law. Section 15, at most, expands the number of persons who might be liable under federal law.

IX. Conclusion.

An alternative resolution of the question presented in *Sciabacucchi* hews more faithfully to the norm that the “most important consideration for a court interpreting a statute is the word the General Assembly used in writing it.”⁴⁸⁰ It also abides more closely by the rule that, on a facial challenge, plaintiffs’ burden is “a difficult one: they must show that [Federal Forum Provisions] cannot operate lawfully or equitably *under any circumstance*.”⁴⁸¹ It applies standard textualist techniques, including dictionary definitions and a presumption of consistent usage, to conclude that, on a facial challenge, Federal Forum Provisions are valid under Delaware law.

This approach avoids all “first principle” concerns that inspire the invention of a divergent definition of “internal affairs.” Textualism does not require counter-factual assumptions, does not conflict with United States or Delaware Supreme Court precedent, does not cause Delaware to constrain federal practice in a manner inconsistent with federal law, does not advocate policy positions inimical to Delaware’s interest, and does not require that the courts dilate over hypothetical fact patterns that might never arise as they might apply to charter provisions that might never be written.⁴⁸² Textualism interprets the DGCL to constrain the ability of all Delaware corporations to adopt mandatory arbitration of Securities Act claims. Textualism also validates Federal Forum Provisions in a manner that precludes the adverse, hypothetical, collateral consequences that animate *Sciabacucchi*’s fragile analysis. There is no possibility of extraterritorial expansion of the DGCL, or that Federal Forum Provisions will be applied to govern claims unrelated to Securities Act claims. Textualism achieves these objectives without generating any of *Sciabacucchi*’s difficult *sequelae*.

The question presented in *Sciabacucchi* can thus be resolved with a narrow holding that Federal Forum Provisions are not facially invalid. The narrowness of this holding bears emphasis because it preserves plaintiffs’ opportunity to litigate the validity of every future exercise of a Federal Forum Provision on an “as applied basis,” in the context of a concrete case and controversy. Those disputes will, in the first instance, arise in the state court in which a Securities Act claim is filed. The defendant corporation will then invoke the Federal Forum Provision on a motion to dismiss, or through some other equivalent pleading procedure. Plaintiffs are thus guaranteed the right to argue, in state court, that enforcement of any Federal Forum Provision offends a strong public policy of the state in which the complaint is filed. The

⁴⁸⁰ *Boilermakers*, 73. A.3d at 950.

⁴⁸¹ *Id.* at 948.

⁴⁸² *Id.* at 940 (“it would be imprudent and inappropriate to address ... hypotheticals in the absence of a genuine controversy with concrete facts. Delaware courts ‘typically decline to decide issues that may not have to be decided or that create hypothetical harm.’” (quoting 3 Stephen A. Radin, *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE OFFICERS* 3498 (6th ed. 2009))).

ability to challenge the operation of every Federal Forum Provision every time one is exercised, combined with *Schnell*'s protections against inequitable conduct, provide powerful additional assurances against the inappropriate application of Federal Forum Provisions.⁴⁸³

⁴⁸³ *Boilermakers*, 73 A.3d. at 949 (citing *Schnell v. Chris-Craft Industries*, 285 A.2d 437 (Del. 1971)).