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Fall 9-1-2012

## The Power of a Suggestion: The Use of Forum Selection Clauses by Delaware Corporations

Thomas T. McClendon

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### Recommended Citation

Thomas T. McClendon, *The Power of a Suggestion: The Use of Forum Selection Clauses by Delaware Corporations*, 69 Wash. & Lee L. Rev. 2067 (2012).

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# The Power of a Suggestion: The Use of Forum Selection Clauses by Delaware Corporations

Thomas T. McClendon\*

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### I. Introduction

Delaware Vice Chancellor J. Travis Laster suggested in his decision *In re Revlon Inc. Shareholders Litigation*<sup>1</sup> that “if 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.”<sup>2</sup> Since *Revlon* was decided on March 16, 2010, over 195 Delaware corporations, including 27 in the S&P 500, have followed the Vice Chancellor’s suggestion and adopted a forum selection clause in their governing documents.<sup>3</sup>

Vice Chancellor Laster’s suggestion is a response to the perceived two-pronged problem of (1) duplicative litigation over corporate transactions in Delaware and other forums and (2) other state courts applying Delaware law.<sup>4</sup> From the viewpoint of a Delaware corporation, both prongs are problematic. First, duplicative litigation is more expensive than litigation in a single state and may even result in a split decision,

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1. See *In re Revlon Inc. S’holders Litig.*, 990 A.2d 940, 961 (Del. Ch. 2010) (holding that plaintiff’s lead counsel’s efforts to litigate the case had been inadequate and replacing the firm with a new lead counsel).

2. *Id.* at 960.

3. Claudia H. Allen, Study of Delaware Forum Selection in Charters and Bylaws 1 (Jan. 25, 2012) (unpublished manuscript) (finding that 195 Delaware corporations have adopted a forum selection clause as of December 31, 2011) (on file with the Washington and Lee Law Review). Corporations are governed by a charter and bylaws, which together make up a corporation’s governing documents. See ROBERT A. RAGAZZO & DOUGLAS K. MOLL, CLOSELY HELD BUSINESS ORGANIZATIONS 278–79 (2007).

4. While the inverse—Delaware applying another state’s law—is also problematic because Delaware’s corporate law is universally accepted as the most highly developed corporate case law, the application of Delaware’s law is a larger problem than the inverse.

with one state's court system siding with the corporation and the other state's court system siding with the plaintiff.<sup>5</sup> Second, other state courts applying Delaware law is—as one litigator has put it—“like taking Gallatorie's secret recipes and giving them to a Jack-In-The-Box short-order cook. It doesn't always work so well.”<sup>6</sup> While this statement shows the very high regard in which Delaware lawyers hold Delaware judges, this statement also illustrates the advantage of a system in which only the courts of the state whose law is to be interpreted rule on that law.<sup>7</sup>

This Note will argue that corporations and society in general are detrimentally affected by plaintiffs' bar filing in multiple jurisdictions against a single action or transaction; that Delaware corporations should enact a forum selection clause to protect themselves from these useless expenses; and that courts should enforce these clauses.

Part II will open by examining the evidence that plaintiffs' attorneys are choosing to file their cases against Delaware corporations outside of Delaware and will look at several explanations of their motivation in doing so. It will then argue that this trend is detrimental to corporate defendants and society in general. It will then examine the strength and utility of the internal affairs doctrine and forum non conveniens in preventing duplicative litigation.

Part III will propose the use of choice of forum clauses as the best potential solution to the aforementioned problem. This Note will examine the policy underlying choice of forum clauses. It will then examine the legal history of forum selection clauses in federal and Delaware courts. It will then discuss the likelihood of enforcement in both federal and state courts and the arguments

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5. Claims in multiple states are a common occurrence. A partner with New York-based firm Wachtell, Lipton, Rosen & Katz estimates that 50% of mergers and acquisitions transactions by Delaware-incorporated companies caused lawsuits in multiple jurisdictions. William Savitt, *Exclusive Venue Provisions For Corporate Cases*, NAT'L L.J., June 7, 2010, at 10.

6. *Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, M&A J., May 2007, at 17.

7. Of course, this statement ignores the response that the American judicial system allows the plaintiff to choose where to sue because failure to do so might prevent the plaintiff from having his day in court. This counterargument will be considered later in the Note. See *infra* Part III.A (discussing the policy behind forum selection clauses).

that should be made in a clause's favor in different courts. It will look at the previous use of these clauses by corporations, and will discuss the different choices that a corporation must make in drafting a proposed forum selection clause.

## *II. Problem of Cases Increasingly Decided Outside the State of Incorporation*

### *A. Evidence of Plaintiffs Fleeing Delaware Jurisdiction*

Delaware commentators have consistently found that cases involving Delaware corporations are increasingly being decided outside of Delaware courts.<sup>8</sup> A study of venue choice was conducted by John Armour, Bernard Black, and Brian Cheffins, who examined corporate law claims brought against directors of Delaware public corporations that resulted in written decisions from 1995 to 2009 and tracked the percentage of these decisions issued by Delaware courts, other state courts, and federal courts.<sup>9</sup> The study found that the number of written Delaware court opinions remained steady throughout the period, but the percentage of all written opinions in the field that were issued by Delaware courts declined slowly from a high of 80% in 1995 to 65% in 2002. During 2005–2009, however, Delaware's share had dropped precipitously to an average of 31% of cases involving claims against directors of Delaware public corporations.<sup>10</sup>

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8. See, e.g., John Armour, Bernard S. Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1351–64 (2012) [hereinafter Armour et al., *Balancing Act*]; John Armour, Bernard S. Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. (forthcoming 2012) [hereinafter Armour et al., *Losing Cases*], available at <http://ssrn.com/abstract=1578404>; Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 350 (2012); Brian M. Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 143–56 (2011).

9. Armour et al., *Balancing Act*, *supra* note 8, at 1353. The study included written decisions only because the authors wanted to focus on the significant decisions that would make a difference in the richness and value of Delaware law as precedent. See *id.* at 1353–54 (stating that written decisions were a “crude” proxy for determining whether Delaware's rich body of precedent was under threat).

10. *Id.* at 1354. The study shows a surprising growth of federal court opinions. The authors posit that this growth may have occurred due to the

Mergers and acquisitions (M&A) is one area in which this trend is most pronounced. A study of merger transactions by Brian Quinn revealed the same trend away from Delaware found by Armour, Black, and Cheffins.<sup>11</sup> Quinn examined 119 merger transactions of more than \$100 million that involved solvent Delaware public corporations.<sup>12</sup> Of 119 transactions, ninety-seven (82%) had subsequent merger-related litigation.<sup>13</sup> Of those transactions with subsequent litigation, eighty-two (85%) involved multiple lawsuits, with an average of 5.3 per transaction.<sup>14</sup> In addition, of those transactions that involved subsequent litigation, fifty were litigated in multiple jurisdictions.<sup>15</sup> Forty percent of the cases were litigated exclusively outside of Delaware.<sup>16</sup>

Jennifer Johnson conducted a similar study in 2010 by tracking in which forum M&A plaintiffs brought their claims. Johnson found that, of 193 M&A defendants incorporated in Delaware, roughly 40% of cases were filed in Delaware, another 40% were filed in other state courts, and the remaining 20% were filed in federal courts.<sup>17</sup>

In their study on venue choice, Armour, Black, and Cheffins also examined the twenty-five largest merger transactions each

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number of federal securities claims and the availability of supplemental jurisdiction that allows plaintiffs to attach these claims to claims over which the federal courts have jurisdiction.

11. Compare *id.* at 1358 (noting the trend away from Delaware, although expressing uncertainty when it began), with Quinn, *supra* note 8, at 148 tbl.2 (finding the same trend away from Delaware in public company mergers litigation).

12. Quinn, *supra* note 8, at 147. The study excluded buybacks, exchange offers, and partial acquisitions. *Id.* at 147 n.35.

13. *Id.* at 148 tbl.1.

14. *Id.* at 148 tbl.2; see also Johnson, *supra* note 8, at 372 fig.7 (comparing state class action filings in the M&A context with federal class actions in the same context).

15. Quinn, *supra* note 8, at 148 tbl.2.

16. *Id.*

17. See Johnson, *supra* note 8, at 374 fig.8 (finding that, of 193 M&A filings against defendants incorporated in Delaware, 103 were filed in Delaware, 115 were filed in other states, and 47 were filed in federal court). Johnson's study also shows a marked increase in M&A litigation in federal court during 2009 and 2010. See *id.* at 372 fig.7 (comparing the number of claims brought in state courts against the number of claims brought in federal court).

year during 1994–2009.<sup>18</sup> These large mergers are what Stevelman describes as the “crown jewels” and “the most value-producing ‘brands’ in Delaware corporate law.”<sup>19</sup> Of the 400 transactions studied, 256 involved companies incorporated in Delaware,<sup>20</sup> and shareholders filed suit in 121 of 256 transactions (47%).<sup>21</sup> Between 1994 and 2001, litigation contesting these mergers was filed in Delaware an average of 69% of the time.<sup>22</sup> After 2001, the average dropped to 31%.<sup>23</sup>

The study also notes that, prior to 2001, Delaware routinely hosted at least part of the litigation in any given case and was often the exclusive forum. Indeed, in 2001, Delaware provided the exclusive forum for all twenty-five mergers that the study examined during that year.<sup>24</sup> After 2001, however, Delaware became one of many forums, and, in roughly half of the cases studied, plaintiffs did not use Delaware’s courts at all.<sup>25</sup> Although the trend of completely excluding Delaware has shifted back significantly—only 20% of M&A litigation over the twenty-five largest transactions during 2009 was exclusively outside of Delaware<sup>26</sup>—Delaware no longer regularly serves as the exclusive forum. In 2009, none of the twenty-five M&A transaction disputes were litigated exclusively in Delaware, even when many of the transactions included Delaware-incorporated companies.<sup>27</sup>

Leveraged buyouts (LBOs) are another context in which the “flight from Delaware” has been found. Armour, Black, and Cheffins again provided the initial study. They studied 477 LBOs<sup>28</sup> that occurred from 1995 to 2009, of which 300 involved

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18. Armour et al., *Balancing Act*, *supra* note 8, at 1356. Armour, Black, and Cheffins studied the twenty-five largest mergers of publicly held, U.S.-based companies as measured by transaction value. *Id.*

19. Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware’s Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 74, 127 (2009).

20. Armour et al., *Balancing Act*, *supra* note 8, at 1356.

21. *Id.*

22. *Id.* at 1357.

23. *Id.*

24. *Id.* at 1358 fig.5.

25. *Id.* at 1358.

26. *Id.* at 1358 fig.5.

27. *Id.*

28. Armour, Black, and Cheffins only considered those public companies that had filings on EDGAR. *Id.* at 1359.

buyouts of Delaware corporations.<sup>29</sup> Of these 300 LBO transactions, 141 (47%) resulted in litigation.<sup>30</sup> Although the authors note that the frequency of LBOs rose or fell with market cycles, 73% of all LBO-related litigation filed before 2001 was filed in Delaware.<sup>31</sup> From 2002 to 2009, only 45% of LBO-related litigation involving a Delaware corporation was filed in Delaware.<sup>32</sup> For LBO-related litigation, however, the alternative venues were other state courts, not federal courts.<sup>33</sup>

Options backdating litigation formed the third area of study for Armour, Black and Cheffins.<sup>34</sup> They identified 127 Delaware corporations that faced 234 option backdating lawsuits asserting breach of fiduciary duty claims.<sup>35</sup> Of these lawsuits, only 26 (11%) were brought in Delaware, while 115 (49%) lawsuits were brought in federal courts, and another 93 (40%) actions were brought in state courts other than Delaware.<sup>36</sup> Compared to mergers and LBOs, the amount of options litigation in federal court is extremely high, but this is explained by the fact that options backdating cases generally meet federal diversity requirements.<sup>37</sup> The point is, however, that breach of fiduciary

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29. *Id.*

30. *Id.*

31. *Id.* at 1360.

32. *Id.*

33. *Id.* at 1360 & fig.7.

34. Option backdating occurs when the corporation gives an option to purchase stock to its directors or officers but falsifies records to show that the option was granted earlier when the stock price was lower. By backdating the grant of the option, the corporation did not have to report as compensation the difference between the exercise price (the market value on the date that the corporation supposedly gave the option) and the share's market value on the date when the executive exercises the option. This resulted in improper accounting and tax treatment, which in turn led to false compensation reports. See Christy L. Abbott, Comment, *The Shareholder Derivative Suit as a Response to Stock Option Backdating*, 53 ST. LOUIS U. L.J. 593, 597 (2009) (defining option backdating); Armour et al., *Losing Cases*, *supra* note 8, at 14. Armour, Black and Cheffins state that they chose options backdating because it was derivative litigation, not direct litigation like mergers and LBOs. See Armour et al., *Balancing Act*, *supra* note 8, at 1362.

35. Armour et al., *Balancing Act*, *supra* note 8, at 1363.

36. *Id.*

37. While plaintiffs also could bring an options backdating case as a securities class action, the derivative claims—as opposed to the disclosure



duty claims in option backdating cases could have been litigated in Delaware but were not. Like mergers and LBOs, option backdating litigation moved increasingly away from Delaware.

### *B. Why Are Plaintiffs Fleeing Delaware?*

Although both commentators and Delaware judges agree that there is a trend away from Delaware, it is not clear *why* the trend is occurring. This Note will examine several possible reasons for this trend.

The first theory is that the plaintiffs' bar believes that Delaware, particularly the Court of Chancery, is too "pro-management" to provide a fair forum.<sup>38</sup> They may base this belief on several opinions from the Court of Chancery, especially those from Chancellor Leo Strine and Vice Chancellor Laster. In his opinion *In re Cox Communications Inc. Shareholder Litigation*,<sup>39</sup> Chancellor Strine expressed his doubts about the true utility of the plaintiffs' bar, criticizing its members' tendency to follow takeover announcements with "hastily-filed, first-day complaints that serve no purpose other than for a particular law firm and its client to get into the medal round of the filing speed (also formerly known as the lead counsel selection) Olympics."<sup>40</sup>

Vice Chancellor Laster has also expressed frustration with several shareholder suits brought by the plaintiffs' bar. In *Revlon*, he took control of the case away from lead counsel, finding that

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claims under federal law—were more popular because a federal action under 17 C.F.R. § 240.10b-5 must allege a "material" misstatement. *Armour et al., Losing Cases*, *supra* note 8, at 15; *see also* Employment of Manipulative and Deceptive Practices, 17 C.F.R. § 240.10b-5 (1976).

38. Some plaintiffs' attorneys who responded to *Armour*, Black and Cheffins admitted that they preferred to avoid Delaware, but these were counterbalanced by those who always filed in Delaware and those who preferred to take a case-by-case approach. *See Armour et al., Balancing Act*, *supra* note 8, at 1350.

39. *In re Cox Comms., Inc. S'holders Litig.*, 879 A.2d 604, 642 (Del. Ch. 2005) (holding that the appropriate attorney fee award was \$1.275 million rather than \$4.95 million as agreed to in the settlement because the attorneys had not sufficiently contributed to the favorable settlement to merit the higher award and the hours worked were excessive).

40. *Id.* at 608.

the firm had not adequately represented its client.<sup>41</sup> The Vice Chancellor took the opportunity to comment further:

The resulting system involves little real litigation activity, generates questionable benefits for class members, provides transaction-wide releases for defendants, and offers a good living for the traditional plaintiffs' bar. In a legal system that values representative litigation as a positive force, the business model of filing and free-riding has nothing to commend it.<sup>42</sup>

Laster has maintained this stance in other cases. During a conference for the case *In re Compellent Technologies*,<sup>43</sup> the Vice Chancellor complained to the firms competing to be named lead counsel that “[t]he whole problem is the diversion of interests between entrepreneurial plaintiffs’ counsel and the class. You all maximize by getting the most fee for the least work.”<sup>44</sup> On another occasion, he criticized typical takeover suits, saying “[a] lot of these sue-on-every-deal cases are . . . worthless, they’re simply we see the announcement, then we file,” and even appointed special counsel to investigate possible collusion between plaintiffs and defense counsel in the case.<sup>45</sup>

In a system in which the plaintiffs’ bar depends on contingency fees from cases that the judge may dismiss and settlements that the judge must approve, the use of words such as “questionable benefits” and “free-riding” by the Vice Chancellor must worry the plaintiffs’ bar. It is unlikely, however, that words of frustration from two members of the Chancery would be enough to cause the widespread flight from Delaware, especially when the complaints are limited to takeover cases. While these opinions may be part of the reason why plaintiffs are more reluctant to file in Delaware, something more is at work.

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41. *In re Revlon Inc. S’holders Litig.*, 990 A.2d 940, 958 (Del. Ch. 2010).

42. *Id.* at 959–60.

43. *In re Compellent Tech., Inc. S’holders Litig.*, No. 6084-VCL, 2011 WL 6382523, at \*28 (Del. Ch. Dec. 9, 2011) (finding that plaintiffs’ lawyers gained significant results in settlement that resulted in modification of deal protection provisions and rescission of the Rights Plan and awarding \$2.3 million in attorney’s fees, but finding that the supplemental disclosures settlement was not significant and awarding only \$100,000 in attorney fees).

44. *In re Compellent Technologies*, C.A. No. 6084-VCL \*7 (Jan. 13, 2011).

45. *Scully v. Nighthawk Radiology Holdings*, Courtroom Status Conference \*16 (Del. Ch., December 17, 2010).

A second possibility explaining why plaintiffs are filing in forums other than Delaware is what Chancellor Strine derisively called the “filing speed . . . Olympics”<sup>46</sup> and the selection of lead counsel. In most states, the first firm to file a lawsuit against the defendant corporation regarding the litigated transaction gained an advantage in the race to become lead counsel, with its attendant financial rewards.<sup>47</sup> In Delaware, however, the Chancery has shifted to an approach similar to lead counsel selection in federal securities cases.<sup>48</sup> Former Chancellor William Chandler quantified this approach by identifying three factors that Delaware courts should consider when appointing lead counsel: the quality of the pleadings, the energy and enthusiasm demonstrated by the various attorneys, and the size of the economic stake each plaintiff has in the litigation.<sup>49</sup> Armour, Black, and Cheffins found that this approach resulted in giving priority to firms who have an elite reputation, have successfully represented clients in the past, and currently represent clients with a significant stake in the litigation.<sup>50</sup>

This rule likely supports plaintiffs’ firms mainly based in Delaware at the expense of outside firms that might not be as specialized or experienced in takeover litigation. An outside firm that is in a position to win the race to file is much more likely to file in a state that follows the “filing speed Olympics” than in Delaware, where it would be much less certain—perhaps even unlikely—that the firm would have the reputation, quality, or client to compete with the specialized corporate firms.

A final theory on why plaintiffs’ attorneys are filing outside of Delaware is that Delaware is more likely than other

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46. *In re Cox Comms., Inc. S’holders Litig.*, 879 A.2d 604, 608 (Del. Ch. 2005).

47. Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 656 (2002) (criticizing the lack of transparency in the lead counsel selection process).

48. *Compare TCW Tech. Ltd. P’ship v. Intermedia Commc’ns, Inc.*, 2000 WL 1654504, at \*4 (Del. Ch. Oct. 17, 2000) (listing the Chancery’s factors for consideration when appointing lead plaintiff), *with* 15 U.S.C. § 78u-4(a)(3)(B)(iii) (giving the factors used to find the “most adequate plaintiff”) (2012).

49. *TCW Tech.*, 2000 WL 1654504, at \*4.

50. *See* Armour et al., *Balancing Act*, *supra* note 8, at 1374 (analyzing Chancellor Chandler’s discussion in *TCW Tech* for criteria for appointing lead counsel).

jurisdictions to closely scrutinize and slash attorneys' fees when the judge believes such action is appropriate. Delaware courts base attorneys' fees on the relief obtained rather than the hours worked, which is the primary test in most states.<sup>51</sup> The Delaware approach was considered the more generous to the plaintiffs' bar,<sup>52</sup> but beginning in 2001, Delaware courts have routinely slashed plaintiff-side attorneys' fees in high-profile cases.

In 2001, former Chancellor Chandler cut a \$24.75 million fee to \$12.3 million after the firm gained a \$180 million settlement for shareholders.<sup>53</sup> In 2005, Vice Chancellor Strine in *Cox Communications sua sponte* reduced the attorney fee by 75%, even though the defendants had not objected to the fee during settlement.<sup>54</sup> During the same year, Vice Chancellor Stephen Lamb reduced the fee in a takeover case to 28% of the proposed fee.<sup>55</sup> In 2010, Vice Chancellor Donald Parsons, during his decision *In re Cox Radio*,<sup>56</sup> reduced a proposed \$3.6 million fee to \$490,000,<sup>57</sup> and Vice Chancellor Laster in *Brinkhoff v. Texas Eastern Products Pipeline Co.*<sup>58</sup> reduced a proposed \$19.5 million fee to \$10 million, even though he acknowledged that the firm had expended significant efforts in the litigation.<sup>59</sup>

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51. See Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 497 (1987) (describing the approach taken by Delaware on attorneys' fees, as established in *Dann v. Chrysler Corp.*, 215 A.2d 709 (Del. Ch. 1965), *aff'd*, 223 A.2d 384 (Del. 1966)); see also *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142 (Del. 1980) (defining Delaware's approach to attorneys' fees).

52. Macey & Miller, *supra* note 51, at 497.

53. Armour et al., *Balancing Act*, *supra* note 8, at 1371.

54. See *In re Cox Comms., Inc. S'holders Litig.*, 879 A.2d 604, 640–42 (Del. Ch. 2005) (finding that plaintiffs' attorneys took no appreciable risk and did little productive work, and therefore awarded a fee of \$1.275 million instead of the requested \$4.95 million).

55. See *In re Instinet Grp. Inc. S'holders Litig.*, No. Civ.A 1289-N, 2005 WL 3501708, at \*1 (Del. Ch. Dec. 14, 2005) (reducing the attorneys' fees from \$1.623 million to \$450,000).

56. *In re Cox Radio Inc. S'holder Litig.*, No. 4461-VCP, 2010 WL 1806616, at \*23 (Del. Ch. May 6, 2010).

57. *Id.*

58. *Brinckerhoff v. Tex. E. Prods. Pipeline Co.*, 986 A.2d 370, 396 (Del. Ch. 2010) (approving settlement as fair and reasonable, awarding \$10 million in fees and expenses to plaintiffs' counsel, and awarding \$80,000 in fees and expenses to objectors' counsel).

59. See *id.* (acknowledging plaintiffs' counsel's substantial efforts and

Each of these interrelated theories has some merit, and the answer is probably a mixture of each. It is most likely, however, that the “flight from Delaware” is motivated primarily by the reduced attorney fees, especially in cases that the Chancellor and Vice Chancellors are likely to view as weak or frivolous, and therefore likely to award very limited attorney’s fees.

*C. Is the “Flight from Delaware” Harmful?*

At this point, the reader might naturally feel indifferent as to whether corporate law cases are decided in Delaware, another state, federal courts, or all of the above. Indeed, from a litigation viewpoint, the effect of forum selection seems only to touch the plaintiff and defendant, with the winner at best gaining a favorable jurisdiction in which to bring his case. This hardly seems something for a judge or the legislature to view with alarm. When considered from an economic perspective, however, the view becomes radically different. Most of the defending corporations are public and sell stock to the general public,<sup>60</sup> which means that these shareholders—and thus the general public—profit or suffer losses according to the corporations’ fortunes. While the fact that corporations sell stock to the general public should not insinuate that corporations should be above the

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finding that counsel’s efforts created an asset worth \$100 million but reducing fee to \$10 million). There are signs that the Court of Chancery has realized that this may be a reason why the plaintiffs’ bar has filed in other jurisdictions and is moving to counteract this trend. For example, Chancellor Strine recently awarded attorney fees of \$304 million (15%) in a securities derivative suit. *In re S. Peru Copper Corp.*, No. 961-CS, 2011 WL 6382006, at \*1 (Del. Ch. Dec. 20, 2011), *vacated*, 2011 WL 6476919 (Del. Ch. Dec. 22, 2011). Commentators agree that Strine sought to send a message to the plaintiffs’ bar that Delaware is still willing to award large fees for plaintiffs’ lawyers who take large risks that pay off. See Alison Frankel, *Record \$285 ml Fee Is Strine’s Message to Plaintiffs’ Bar*, THOMSON REUTERS NEWS & INSIGHT (Dec. 20, 2011), <http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=35135&terms=@ReutersTopicCodes+CONTAINS+’ANV’> (last visited Nov. 14, 2012) (on file with the Washington and Lee Law Review).

60. This is especially true for Delaware companies, which make up 63% of the Fortune 500 and more than 50% of all U.S. publicly traded companies. Delaware Division of Corporations, *Why Choose Delaware as Your Corporate Home?*, <http://corp.delaware.gov/> (last visited Nov. 14, 2012) (on file with the Washington and Lee Law Review).

law—this would create even greater harm to society—it does mean that courts and legislatures should take action to prevent a corporation from being forced to spend money to defend against duplicative litigation, which requires more money to be spent on litigation to obtain the same result in multiple jurisdictions. As Vice Chancellor Laster noted:

Litigation is costly. So if you could envision this totality of stockholders, they would not want to sue willy-nilly and impose on their company the costs of defending multiple actions in multiple fora, where the cost of briefing on just a motion to dismiss, when you have experienced counsel from big firms, can approach seven figures. It's real money.<sup>61</sup>

The additional money spent on litigation would otherwise be available for dividends or improvements to grow the company. In addition, society must be taxed to pay for two courts to listen to the same dispute and perhaps issue divergent opinions, which in turn might produce additional opinions that attempt to consolidate the first two opinions. As a result, society suffers when litigation is not pursued efficiently in a single forum.

Once it is acknowledged that single-forum litigation is the most beneficial to society, the question then becomes: which forum? This Note will argue that the state of incorporation should provide the forum for cases involving its corporations.

First, each state has a competitive advantage over all other states in applying its law. Because of Delaware's highly developed corporate precedent, Delaware is a good example of a state that has a competitive advantage in applying its own law.<sup>62</sup> Ted Mirvis stated:

We can talk . . . in the Delaware courts about p2p and Footnote 10 of *Caremark* and how *Revlon* duties intersect with the *Unocal* scrutiny and the double helix of *Siliconix* . . . [but for a judge outside of Delaware] it can be a little unnerving. I mean, you say, "Here's five recent decisions each of which are

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61. Transcript of Record at 50:21–51:3, *La. Mun. Police Emps.' Ret. Sys. v. Pyott et. al.*, Case No. 595-VCL, Tr. at 50:21–51:3 (Del. Ch. Jan. 21, 2011) (Laster, V.C.).

62. See Joseph Grundfest, *Choice of Forum Provisions in Intra-Corporate Litigation: Mandatory and Elective Approaches* 16 (Rock Ctr. for Corporate Governance at Stanford Univ., Working Paper No. 91, 2010), available at <http://ssrn.com/abstract=1690561>.

94 pages long and you read those five decisions and you can sort of get a basic idea of the vocabulary.”<sup>63</sup>

The Chancellor and Vice Chancellors in the Court of Chancery spend the vast majority of their time deciding corporate law cases, and thus have an overwhelming competitive advantage due to their familiarity with Delaware corporate law cases.<sup>64</sup> Additionally, the court has streamlined procedures that help to provide both plaintiffs and defendants with relatively quick decisions.<sup>65</sup> Most importantly, the court has the advantage of understanding the policies and purposes behind Delaware corporate law because of the court’s in-depth familiarity gained through constant use and application. Out-of-state courts, on the other hand, are not as familiar with Delaware’s corporate law, and, without the advantage of familiarity gained through constant exposure, they are less able to comprehensively grasp the policies and details of judicially defined doctrines that would cause a chancellor or vice chancellor to decide in favor of one party.<sup>66</sup>

The same logic applies with much the same force to other states applying their own corporate law, especially those with specialized courts that gain comprehensive knowledge of the state’s corporate and business law. The nineteen states<sup>67</sup> that

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63. Mirvis, *supra* note 6, at 17.

64. See Allen, *supra* note 3, at 7 (noting that the Delaware courts have developed considerable experience in dealing with corporate law issues).

65. See Claudia H. Allen, Study of Delaware Forum Selection in Charters and Bylaws, at iv (Apr. 7, 2011) (unpublished manuscript) [hereinafter Allen 2011] (describing policy arguments in proxy statements supporting forum selection clauses requiring Delaware as forum) (on file with the Washington and Lee Law Review).

66. As one attorney said: “What I tell clients is that even though Delaware law is being applied, when it’s being applied by a bench that doesn’t have as much familiarity with these cases, the predictability goes down.” David Marcus, *Did Chancery Fee Rulings Chase Away Plaintiffs Lawyers?*, DEL. L. WKLY., Nov. 29, 2006, [http://www.delawarelawweekly.com/news.php?news\\_id=109](http://www.delawarelawweekly.com/news.php?news_id=109), (last visited Nov. 14, 2012) (on file with the Washington and Lee Law Review).

67. See John F. Coyle, *Business Courts and Inter-State Competition* 1 (Univ. of N.C. Legal Studies, Working Paper No. 1928108, 2011) (listing the different states that have established business and complex litigation courts in the past twenty years). These include North Carolina and New Jersey (1996), Pennsylvania, Massachusetts, and Nevada (2000), Rhode Island (2001), Maryland (2002), Florida (2004), Georgia (2005), Colorado and Oregon (2006), South Carolina (2007), Maine, New Hampshire, and Ohio (2008), and Alabama and Delaware (2010). *Id.*

have created business courts in the last two decades share this competitive advantage to a greater or lesser extent, based on the degree that their case law and statutes are highly developed. Even the remaining states where corporate cases are heard by courts of general jurisdiction retain a competitive advantage in deciding their own corporate law, simply by virtue of the fact that they are more likely to hear cases involving that state's corporation law than out-of-state courts.

Because duplicative litigation wastes society's resources and the best forum to decide cases involving the corporation's internal affairs is the state of incorporation, the legislature and judiciary have provided two doctrines that attempt to address the situation. This Note will show, however, that the internal affairs and forum non conveniens doctrines do not adequately address the problem, and will propose that forum selection clauses be utilized by companies and be upheld by the judiciary and legislature as the device that best addresses this problem of waste.

#### *D. Internal Affairs Doctrine*

Two doctrines govern the choice of law and forum for cases involving the relationship between a corporation and its officers, directors, and shareholders. The internal affairs doctrine is a specific doctrine that applies only to the corporation's internal affairs, governs the choice of law, and requires that, except in a very unusual case, the law of the state of incorporation applies.<sup>68</sup> Forum non conveniens, the second doctrine, is a broader doctrine that applies in all cases and affects the choice of forum by allowing courts to refuse to accept jurisdiction over a case that is in a proper forum but would be inconvenient,<sup>69</sup> although modern courts have generally regarded this choice as one of convenience and discretion.<sup>70</sup>

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68. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (1971) (defining internal affairs doctrine).

69. 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (3d ed. 2011).

70. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 313 (1971), Reporters Note (noting that the modern trend is that "jurisdiction will be exercised unless considerations of convenience or of efficiency or of justice point



The internal affairs doctrine (IAD) is a judicial doctrine that recognizes that ordinarily the state of incorporation's law must be applied to regulate the internal affairs of a corporation, which is defined as the relationship between the corporation and its current officers, directors, and shareholders.<sup>71</sup> The policy behind the doctrine is to promote certainty in the law for a corporation that might otherwise be faced with contradictory demands from the federal government and different state governments.<sup>72</sup> Thus, as a general matter, the law of the state of incorporation will govern cases that involve the internal affairs of a corporation.<sup>73</sup>

The latest cases from the United States Supreme Court on the subject support the assertion that each state has clear and (at least implicitly) exclusive authority over its domestic corporations. For example, in *Cort v. Ash*,<sup>74</sup> Justice Brennan stated: "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."<sup>75</sup> A decade

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to the courts of the state of incorporation as the appropriate tribunals").

71. See *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) (finding that Illinois has an interest in regulating the internal affairs of a domestic corporation, but finding that interest insufficient to allow the state to impose a substantial burden on interstate commerce); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (1971) ("The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties . . .").

72. See *Edgar*, 457 U.S. at 645 (noting that without the IAD, a corporation might otherwise be "faced with conflicting demands").

73. See, e.g., *Rogers v. Guar. Trust Co. of N.Y.*, 288 U.S. 123, 133 (1933) ("When, by acquisition of his stock, plaintiff became a member of the corporation he, like every other shareholder, impliedly agreed that, in respect of its internal affairs, the company was to be governed by the laws of the state in which it was organized.").

74. See *Cort v. Ash*, 422 U.S. 66, 79 (1975) (holding derivative suit with regard to the alleged violation of law prohibiting corporate involvement in election campaigns cannot be impliedly authorized under 18 U.S.C. § 610, and any remedy must be under Delaware's corporation law), *abrogated on other grounds by Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

75. *Id.*

later, in *CTS Corp. v. Dynamics Corp. of America*,<sup>76</sup> Justice Powell reiterated that “[n]o principle of corporate law and practice is more firmly established than a State’s authority to regulate domestic corporations.”<sup>77</sup> Implicit in the Court’s statement is the assertion that it is *not* within other states’ authority to regulate corporations that have been incorporated in other states.

From the standpoint of a corporation seeking certainty in the application of state law, however, there are two problems with the IAD. First, a state court may refuse to follow the IAD in extreme circumstances.<sup>78</sup> For example, the Wisconsin Supreme Court declared in *Beloit Liquidating Trust v. Grade*<sup>79</sup> that it would base a decision whether to apply the IAD on “whether the contacts of one state to the facts of the case are so obviously limited and minimal that application of that state’s law constitutes officious intermeddling.”<sup>80</sup> Courts, however, rarely disregard the IAD<sup>81</sup> and will only do so when a corporation has little to no contact with the state of incorporation other than the actual act of incorporation.<sup>82</sup>

More importantly, the IAD is a choice of law provision, and the doctrine is not applicable in determining forum.<sup>83</sup> This means

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76. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (holding the Indiana Control Share Acquisition Act was not preempted and did not violate the Commerce Clause).

77. *Id.*

78. See *Havlicek v. Coast-to-Coast Analytical Servs., Inc.*, 39 Cal. App. 4th 1844, 1853 (1995) (applying California law to inspection of records of a Delaware corporation); *Beloit Liquidating Trust v. Grade*, 677 N.W.2d 298, 307 (Wis. 2004) (applying Wisconsin law to Delaware corporation); see also RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 302(2) (1971).

79. See *Beloit*, 677 N.W.2d at 307 (Wis. 2004) (holding Wisconsin law applies even to a Delaware corporation due to an absence of contacts between the corporation and Delaware and because Wisconsin has not legislatively or judicially adopted the internal affairs doctrine).

80. *Id.* at 307.

81. See FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4223.50 n.14 (citing only three cases from two jurisdictions for the proposition that not all jurisdictions follow the internal affairs doctrine).

82. This was the case in *Beloit*, for example, in which the court found that the corporation had no contacts with Delaware other than the act of incorporation and filing bankruptcy. *Beloit*, 677 N.W.2d at 307.

83. See FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4223.50 (“[T]he internal affairs doctrine is a choice-of-law doctrine and not a bar to

that corporations may be required to defend cases in states other than the state of incorporation, even though that court will apply the law of the state of incorporation.

The United States Supreme Court has often considered the IAD in a forum non conveniens context. An early example is *Rogers v. Guaranty Trust Co. of New York*.<sup>84</sup> The Court in *Rogers* upheld the district court's dismissal of the case, explaining that the IAD applied and finding that "considerations of convenience, efficiency, and justice" warranted dismissal.<sup>85</sup> The Court, however, did not mandate dismissal in all cases or establish a definitive rule.<sup>86</sup> Instead, it analyzed the defendant company's activities in New Jersey to ensure that the company had not "organized in that state as a mere matter of convenience for the purpose of carrying on all its business in another state."<sup>87</sup> In *Rogers*, the Court stressed the comity due to the state of incorporation in a forum non conveniens analysis.<sup>88</sup>

In *Williams v. Green Bay & Western Railroad Co.*,<sup>89</sup> the Court ruled that IAD jurisprudence informed part of the forum non conveniens analysis.<sup>90</sup> Reversing the district court's dismissal of the case, the Court ruled "the fact that the corporate law of another State is involved does not set the case apart for special treatment."<sup>91</sup> Instead, the Court noted that the federal court's application of the law of a state outside its territorial jurisdiction was only one factor that could be considered in a forum non

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jurisdiction.").

84. See *Rogers v. Guar. Trust Co. of New York*, 288 U.S. 123, 133 (1933) (holding the district court properly dismissed the case "without prejudice to the enforcement of the rights of plaintiff, if any, in the courts of New Jersey").

85. See *id.* (finding the facts of the case clearly fit within the internal affairs of the company and that dismissal was appropriate).

86. See *id.* ("Obviously, no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal affairs of foreign corporations.").

87. *Id.*

88. See Stevelman, *supra* note 19, at 78–79 (arguing the Court applied a conservative approach to comity in *Rogers*).

89. See *Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 553 (1946) (ruling the doctrine of forum non conveniens was to be used as "an instrument of justice" and reversing the case's dismissal under that doctrine).

90. *Id.*

91. *Id.*

conveniens analysis.<sup>92</sup> In applying this case-by-case analysis designed “as an ‘instrument of justice,’” the Court stressed the ability of the federal court to decide the case and, in this instance, provide the requested relief.<sup>93</sup>

The Delaware Supreme Court also follows the IAD. In *McDermott, Inc. v. Lewis*,<sup>94</sup> the court concluded that application of the IAD to transfer of stock from a Panamanian corporation to a Delaware subsidiary—and thus application of Panamanian law—was required by due process, the Commerce Clause, and Delaware conflicts principles.<sup>95</sup> In so doing, it rejected *Norlin Corp. v. Rooney, Pace Inc.*,<sup>96</sup> a Second Circuit decision that applied New York law to a Panamanian corporation due to substantial contacts with New York.<sup>97</sup> The Delaware Supreme Court emphasized that the IAD involved “those matters which are peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders”<sup>98</sup> and suggested that the application of the IAD was supported by the Due Process Clause and Commerce Clause of the Constitution.<sup>99</sup>

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92. *See id.* at 554–57 (stating that forum non conveniens will turn on a case-by-case analysis and that there were no special circumstances that should have led the district court to decline to exercise jurisdiction).

93. *See id.* at 554, 557 (finding that the policy of fairness and justice behind the doctrine of forum non conveniens was not met in the present case).

94. *McDermott, Inc. v. Lewis*, 531, A.2d 206, 209 (Del. 1987) (holding that Panamanian law governs under the internal affairs doctrine and reaffirming that doctrine as “a major tenet of Delaware corporation law”).

95. *Id.* at 218.

96. *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255, 269 (2d Cir. 1984) (affirming the preliminary injunction of a transfer of 49% of stock to an Employee Stock Option Plan and Trust and a plan for the board of directors to vote those shares in anticipation of a hostile takeover attempt).

97. *Id.* at 261 (holding that New York law expressly applies to the Panamanian corporation and prohibiting the hostile takeover defense mechanism at issue).

98. *McDermott*, 531 A.2d at 214 (citing *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)).

99. *Id.* at 218 (finding that the Due Process Clause requires that the corporation’s agents “be given adequate notice of the jurisdiction whose laws will ultimately govern the corporation’s internal affairs,” and the Commerce Clause requires that Delaware law not apply to a Panamanian corporation).

While the doctrine may be important later in determining the enforceability of a forum selection clause,<sup>100</sup> the IAD does not determine which court or courts will hear the case, a situation that leaves corporations vulnerable to identical actions in multiple jurisdictions, even if each court will apply the incorporating state's law.

### *E. Forum Non Conveniens*

Another option for a corporation seeking to defend against litigation involving its internal affairs in the state of incorporation is a motion for change of venue on the basis of forum non conveniens.<sup>101</sup> A court may not grant a forum non conveniens motion if an adequate alternative forum is not available.<sup>102</sup> The United States Supreme Court in *Gulf Oil Co. v. Gilbert*<sup>103</sup> listed nine factors that are relevant in forum non conveniens analysis: (1) the private interest of the litigant; (2) the relative ease of access to sources of proof; (3) the availability of compulsory process and cost of attendance for witnesses; (4) possibility of view of premises if appropriate, (5) the pendency or nonpendency of a similar action in another jurisdiction; (6) the ability to exercise jurisdiction over all the individual defendants; (7) the relative advantages and obstacles to fair trial; (8) the enforceability of the judgment; and (9) any other practical

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100. See *infra* Part III.C (noting that the IAD might be important because it mandates that the court apply the law of the incorporating state in determining whether the forum selection clause is enforceable).

101. Courts may also grant stays of the action or may transfer the case to another jurisdiction under 28 U.S.C. § 1404(a), but both methods incorporate forum non conveniens policy. See, e.g., *Goodman v. Fleischmann*, 364 F. Supp. 1172, 1175 (E.D. Pa. 1973) (ruling that when considering a transfer under 28 U.S.C. § 1404(a), a court must confirm that it has jurisdiction over the case, and must then use the *Gulf Oil Corp.* factors to weigh the parties' interests to determine whether the transfer furthers the interest and convenience of the parties).

102. See *Dirienzo v. Philip Servs. Corp.*, 294 F.3d 21, 29 (2d Cir. 2002) ("A forum non conveniens motion cannot be granted absent an adequate alternative forum.").

103. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508 (1947) (holding that the district court has inherent power to dismiss a suit pursuant to the doctrine of forum non conveniens and properly applied that power in the case), *superseded by statute*, 28 U.S.C. §1404(a) (1982) (codifying forum non conveniens doctrine).

considerations that make trial of a case easy, expeditious, and inexpensive.<sup>104</sup> The Court also noted a public interest in “having localized controversies decided at home.”<sup>105</sup> In addition, the burden is on the defendant making the motion to show that the factors strongly weigh in favor of a change of venue,<sup>106</sup> and it is within the sound discretion of the court in granting or denying a forum non conveniens motion, which may only be reviewed for abuse of discretion.<sup>107</sup>

A forum non conveniens motion will only succeed if there is an adequate alternative forum and the court is satisfied that the defendant has met its burden in establishing that the balance of the factors weigh in favor of finding heavy hardship to defendants or the court.<sup>108</sup> It would then grant a motion to dismiss, stay, or transfer venue.<sup>109</sup> Although the governing law in cases involving internal affairs of the corporation will be that of the incorporating state under the IAD, other factors may not militate towards venue in the incorporating state. It is not certain, for example, that the proof in the second factor or the individual defendants in the fifth factor will be in the incorporating state. To the contrary, over 50% of all publicly traded companies are incorporated in

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104. *See id.* (giving factors to be considered by district court in analysis of forum non conveniens motion).

105. *Id.*

106. *See, e.g., id.* (“[U]nless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”). *But see* *Koster v. Am. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (giving less weight to plaintiff’s choice of forum in a derivative action in which there may be many different potential plaintiffs in many different fora or in which plaintiff has only a small financial interest and is acting on behalf of a widely scattered group of plaintiffs).

107. *See* *Rogers v. Guar. Trust Co. of N.Y.*, 288 U.S. 123, 130–31 (1933) (ruling that the district court was “free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate the plaintiff to an appropriate forum”).

108. *See, e.g., Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007) (finding that defendant faces a “heavy burden” when advocating dismissal under forum non conveniens); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (“Under *Gilbert*, dismissal will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.”).

109. *Id.*

Delaware,<sup>110</sup> and these national and worldwide corporations have the majority of their data and employees in states other than Delaware.<sup>111</sup> This does not change the fact, however, that the corporation's internal affairs are governed by the law of the incorporating state, and that each state's courts are best able to interpret its own state law.

Turning specifically to Delaware state law, the Delaware Supreme Court has established two doctrines to aid Delaware courts in ruling on forum non conveniens and stay motions.<sup>112</sup> In *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*,<sup>113</sup> the court ruled that Delaware courts will not grant a stay "as a matter of right by reason of a prior action pending in another jurisdiction involving the same parties and the same issues."<sup>114</sup> The court, however, supported a general rule that "litigation should be confined to the forum in which it is first commenced" and that the courts should be wary of defendants seeking to defeat plaintiff's choice of forum by "commencing litigation involving the same cause of action in another jurisdiction of its own choosing."<sup>115</sup> The court noted that the

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110. Delaware Division of Corporations, *Why Choose Delaware as Your Corporate Home?*, <http://corp.delaware.gov/> (last visited Nov. 14, 2012) (on file with the Washington and Lee Law Review).

111. See, e.g., Lucian Arye Bebchuck & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 578 (2002) (finding that 85% of corporations choosing to incorporate out of their headquarters state choose to incorporate outside of Delaware); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1570–74 (2002) ("[N]o state besides Delaware has had any meaningful success in attracting out-of-state firms going public.").

112. The Delaware Supreme Court has found no difference between a motion on grounds of forum non conveniens and a motion to stay. See *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 683 (Del. 1964) ("In principle we can see no difference between a stay based upon similar grounds and an actual dismissal of the action itself."), *overruled on other grounds by PepsiCo, Inc. v. Pepsi-Cola Bottling Co. of Asbury Park*, 261 A.2d 520 (Del. 1969).

113. *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970) (holding that the superior court abused its discretion in refusing to stay or dismiss the action pending in Delaware in light of an Alabama action between the same parties and involving the same issues).

114. *Id.*

115. *Id.*

policy underpinnings of comity and “the necessities of an orderly and efficient administration of justice” support this view.<sup>116</sup>

If there is no action pending in another jurisdiction, Delaware courts apply *General Foods Corp. v. Cryo-Maid, Inc.*,<sup>117</sup> which is a much tougher standard than *McWane*.<sup>118</sup> Under *Cryo-Maid*, the moving party must prove “overwhelming hardship”<sup>119</sup> through any or all of the *Cryo-Maid* factors: “(1) the relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of the view of the premises, if appropriate; (4) all other practical problems that would make the trial of the case easy, expeditious and inexpensive;” and (5) “whether or not the controversy is dependent upon the application of Delaware law which the courts of this state more properly should decide than those of another jurisdiction.”<sup>120</sup>

The IAD and forum non conveniens motions mandate the use of the incorporating state’s law and in some cases dismissal or stay of an action in another jurisdiction in favor of those of the incorporating state. While these are both positive developments, a defendant corporation may face actions in two courts, and must attempt to convince one or the other to grant a forum non conveniens motion to stay or dismiss.<sup>121</sup> Even if one court is willing to dismiss or stay the case, the corporation must litigate a forum non conveniens motion and pay the associated expenses. Frequently, however, both courts are unwilling to dismiss or stay

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116. *Id.*

117. *See Cryo-Maid*, 198 A.2d at 684 (affirming the vice chancellor’s stay of Delaware action in favor of later-filed Illinois action when factors established favor the later action).

118. *See* R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 13.5 (3rd ed. 2010) (noting that *Cryo-Maid* is a tougher standard to meet than *McWane* because defendants must prove “overwhelming hardship”).

119. *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964), *overruled on other grounds by Pepsico, Inc. v. Pepsi-Cola Bottling Co. of Asbury Park*, 261 A.2d 520 (Del. 1969).

120. *Id.*

121. The corporation may be forced to defend the same action in even more than two courts. In M&A transactions, for example, there are an average of four actions for each transaction, with one transaction resulting in forty-one separate suits. Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1769 (2004).



in favor of the other.<sup>122</sup> In this case, the corporation faces the unenviable position of defending the same litigation twice or more. The use of a forum selection clause in a corporation's governing document—if effective—would put an end to this unnecessary litigation. As the United States Supreme Court noted in another context: “[A] clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits . . . must be brought and defended.”<sup>123</sup>

### *III. Use of Forum Selection Clauses in Governing Documents*

#### *A. Policy Supporting Forum Selection Clauses*

The reasons why forum selection clauses are needed have been summarized by former Chancellor Chandler as “the multi-forum deal litigation” problem.<sup>124</sup> He observed:

[T]he fallout of [multi-forum deal litigation] has become increasingly problematic in recent years as more and more of these cases are filed in multiple jurisdictions. Judges, defense counsel, and the plaintiffs' bar are now routinely confronted with these sorts of disputes and have yet to come up with a workable solution. The potential problems, as one can imagine, are numerous. Defense counsel is forced to litigate the same case—often identical claims—in multiple courts. Judicial resources are wasted as judges in two or more jurisdictions review the same documents and at times are asked to decide the exact same motions. Worse still, if a case does not settle or consolidate in one forum, there is the possibility that two judges would apply the law differently or otherwise reach different outcomes, which would then leave the law in a confused state and pose full faith and credit problems for all involved. . . . The problems do not end there. In the event that

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122. Compare, e.g., *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 954 (Del. Ch. 2007) (denying motion to stay or dismiss because Delaware had a particularly strong interest in addressing new issues in its own law), with *In re Topps Co., Inc. S'holders Litig.*, No. 600715/07, 2007 WL 5018882, at \*3 (N.Y. Sup. Ct. June 8, 2007) (denying motion to stay or dismiss because the New York action was the first filed).

123. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991).

124. *In re Allion Healthcare Inc. S'holders Litig.*, No. 5022-CC, 2011 WL 1135016, at \*4 (Del. Ch. Mar. 29, 2011).

defense counsel settles in Delaware over another jurisdiction, leaving one set of plaintiffs' counsel out in the cold, the unfavored forum's plaintiffs' lawyers then often flock to Delaware to oppose the settlement (and vice versa). And there are the post-settlement or post litigation issues as well: class certification, approval of attorneys' fees, and then dividing those attorneys' fees between the various plaintiffs' counsel.<sup>125</sup>

Chancellor Chandler identifies three main concerns: the litigation cost of defending the same case in multiple jurisdictions, the judicial resources wasted in redundant decisions on the same issue, and the possibility of conflicting decisions on the same issue.<sup>126</sup> These concerns apply to all litigation against a corporation, but with different rationales depending on whether the claim is made directly against the company or by derivative action on behalf of the company.

These concerns are at their strongest in M&A litigation, which tends to be highly duplicative. In Cornerstone Research's study on security class action filings, thirty-eight of the forty M&A actions brought in federal court were also brought in state court.<sup>127</sup> The other two actions related to foreign companies.<sup>128</sup> One attorney estimates that 50% of all M&A transactions—not just the transactions that result in litigation—generate duplicative litigation.<sup>129</sup> In typical M&A litigation, the shareholder bringing the action will usually allege an unfair transaction price or claim that the directors gave shareholders inadequate or misleading information about the proposed transaction.<sup>130</sup> In other words, the shareholder is bringing a claim on behalf of the corporation as its agent or representative against the directors who proposed the transaction. Because the corporation is required to indemnify these directors if they are successful in defending themselves and are likely to indemnify

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125. *Id.*

126. *Id.*

127. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2010 YEAR IN REVIEW 33 (2011), available at [www.cornerstone.com/securities-filings-2010-year-in-review](http://www.cornerstone.com/securities-filings-2010-year-in-review).

128. *Id.*

129. Savitt, *supra* note 5.

130. See CORNERSTONE RESEARCH, *supra* note 127, at 33 (describing the typical M&A litigation).

them even if they are not,<sup>131</sup> a corporation would never file duplicative litigation when it will likely bear the costs of defending multiple cases on the same issue. While a single fiduciary duty action may increase the transaction's value to the company by requiring the board to prove the price was the best that it could obtain and that it fairly disclosed the advantages and risks of the transaction to the company, additional actions in other jurisdictions add no marginal value and even present possible holdout problems.<sup>132</sup>

While M&A litigation is the largest trouble spot for duplicative litigation, a corporation will usually be required to indemnify its directors for other duplicative derivative litigation. The corporation will indemnify the successful director for reasonable expenses as long as the action was "by reason of the fact" that the person was a director, which would include

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131. Directors and officers who are successful in defending themselves against derivative actions are usually entitled to indemnification as a matter of right in most jurisdictions. See 3 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS 259 (3d ed. 2010). Even if the director or officer is not successful in defending herself, she will be indemnified for her expenses (but not any fines, judgments, or settlements) if a court or a committee of independent directors determines that the director's or officer's conduct met the standards set forth in the indemnification statute. See *id.* at 262–63 (citing MBCA § 8.51(a) (2008) and DGCL tit. 8 § 145(a) (2001)). Therefore, if shareholders initiate suits in multiple jurisdictions and the director or officer is successful in defending, the corporation is liable for the additional expense. Even if the shareholder is successful, the corporation is likely to pay the expenses in order to attract skilled directors and officers. The typical corporation will also provide director and officer (D&O) insurance. This insurance consists of two parts: coverage to reimburse the corporation for its costs in indemnifying its directors and officers and coverage that extends directly to the individual officer or director for whom indemnification from the corporation is not available or immediately forthcoming.

132. For example, if a corporation faces two actions regarding a proposed merger and plaintiff *A* settles with the corporation, plaintiff *B* may seek a larger settlement than *A* because *B* is the only thing standing between the corporation and the merger. The corporation is likely to acquiesce. As Jim Pittinger noted: "Defendants have been settling too many of these suits in order to not hold up the underlying transaction. It's easy to lose a payoff in the hundreds of thousands, or even low millions, of dollars for plaintiffs' attorneys' fees' when you have a deal in the billions or tens-of-billions with fees already in the multimillions for assorted lawyers, underwriters, etc." CORNERSTONE RESEARCH, *supra* note 127, at 33. The absurdity of this reality is apparent when it is noted that an additional action adds no marginal value to the company, even if successful.

fiduciary-duty claims.<sup>133</sup> The unsuccessful director would be entitled to indemnification against a fiduciary duty claim if the court finds the defendant is “fairly and reasonably entitled to indemnification.”<sup>134</sup> Therefore, whether the action is successful or not, the corporation is likely to be required to indemnify its directors and officers for their expenses in defending against litigation brought “by reason of the fact” that the defendant was a director or officer.<sup>135</sup> Again, the corporation would never bring suit against a director or officer in multiple jurisdictions because it would, if unsuccessful, likely be forced to pay the defense’s expenses twice. It is illogical to allow a shareholder to bring the same claim on the corporation’s behalf in multiple jurisdictions.

In contrast to derivative litigation, a shareholder pursuing a direct action against the company or its directors or officers acts on her own behalf, and the understanding that the shareholder is acting as a representative of the corporation does not apply. There are reasons, however, why shareholders bringing direct litigation should be bound by a forum selection clause. When the shareholder bought the stock he either had notice of the forum selection clause if it had been adopted or notice that the board of directors had the authority to adopt such a provision. Indeed, the board of directors can only adopt a bylaw including a forum selection clause if the charter gives them this power.<sup>136</sup> All portions of the charter must be approved by the shareholders, either at the founding of the corporation or in an amendment.<sup>137</sup> Thus, the shareholder should be bound by either the prior vote to give the board authority to amend the bylaws—and his decision to buy stock in that company with knowledge of the board’s authority to do so—or by the vote of the shareholders to include a forum selection provision in the charter.<sup>138</sup>

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133. COX & HAZEN, *supra* note 131, at 257–58, 262.

134. *Id.* at 264.

135. *Id.* at 257–58.

136. See DEL. CODE ANN. tit. 8, § 109(a) (2011) (“[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors . . .”).

137. See *id.* §§ 102, 242 (defining adoption and amendment of the certificate of incorporation).

138. See *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 234 (Del. 2008) (“Bylaws, by their very nature, set down rules and procedures that bind a corporation’s board and its shareholders.”); 10 C.J.S. *Corporations* § 165 (2012)

A shareholder plaintiff may also argue that he should be entitled to file his claim in any court with jurisdiction because he would, in effect, lose his day in court due to his inability to travel to the selected forum. A California plaintiff, for example, may argue that, if the court enforces a Delaware forum selection clause, he will be unable to litigate his case in Delaware because of an inability to travel to Delaware because of health or travel expenses. Putting aside the ease of interstate travel, the practical realities of corporate litigation ensure that the plaintiff will not be materially hindered in bringing his case.<sup>139</sup> Unlike, for example, a tort claim, a shareholder's claim is not likely to require testimony from eyewitnesses or the plaintiff himself, but will instead involve facts gleaned from discovery and testimony from experts, all of which are equally available in the state of incorporation as in the plaintiff's selected forum.

## *B. Legal History of Forum Selection Clauses*

### *1. Federal Courts*

Cases on forum selection clauses in any area of law are sparse. The United States Supreme Court has decided two forum selection cases in admiralty law,<sup>140</sup> while the Delaware Supreme Court's headline case on forum selection clauses was decided in the limited liability company (LLC) context, and that decision was likely driven by policy considerations unique to that business arrangement.<sup>141</sup>

The United States Supreme Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*<sup>142</sup> signaled a shift in the federal courts'

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("Bylaws ordinarily are binding on the stockholders or members whether they expressly consent to them or not.")

139. *Cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (finding that Florida is not "a remote alien forum" for Washington plaintiffs).

140. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972); *Carnival Cruise*, 499 U.S. at 595.

141. *See Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 296 (Del. 1999) (using broad language on mandatory forum selection provisions in deciding the application of a forum selection provision in the LLC context).

142. *M/S Bremen*, 407 U.S. at 16 (holding that forum selection clauses are valid in international admiralty contracts unless the opposing party can show that enforcement would be unreasonable, unjust, or invalid for fraud or

view on forum selection clauses from disfavor on public policy grounds to acceptance and acknowledgement that such clauses were to be enforced unless some reason other than the mere existence of the clause was found.<sup>143</sup> The Court ruled that forum selection clauses are prima facie valid and would be enforced unless the resisting party “could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”<sup>144</sup>

Because there was no allegation of fraud or overreaching, the Court only considered whether the clause was unreasonable or unjust.<sup>145</sup> It noted that some courts have found that a forum selection clause may be unreasonable if it “is *seriously* inconvenient for the trial of action.”<sup>146</sup> The Court noted, however, that the defendant who was attempting to escape the clause was party to a freely negotiated contract that bound it to the London forum as specified in the contract, and questioned how the defendant could prove unreasonableness when it agreed in a freely negotiated contract to what it was opposing in court.<sup>147</sup>

In *Carnival Cruise Lines, Inc. v. Shute*,<sup>148</sup> the Court applied the *M/S Bremen* analysis to form contracts that had not been negotiated.<sup>149</sup> In *Carnival Cruise*, the company sent tickets that

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overreaching).

143. *See id.* at 12 (finding that the old “provincial attitude” against enforcing forum selection clauses is outdated and ruling that they should be upheld as a useful and sometimes necessary addition to business contracts).

144. *Id.* at 15.

145. *See id.* (“The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”).

146. *Id.* at 16.

147. *See id.* (“Of course, where it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable.”).

148. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (holding forum selection clause incorporated into ticket contract enforceable despite lack of bargaining and alleged inconvenience to the ticketholders).

149. *See id.* at 593 (noting that “common sense dictates that a ticket of this kind would be a form contract the terms of which are not subject to negotiation”).

incorporated by reference an attached notice that all litigation regarding disputes between the passengers and the cruise liner must be brought in the Florida courts.<sup>150</sup> While recognizing that, unlike in *M/S Bremen*, the parties in this case had unequal bargaining power, the Court rejected this distinction as a dividing line for enforcement of forum selection clauses.<sup>151</sup> The Court instead emphasized that forum selection clauses in form contracts should be scrutinized by the judiciary for fundamental fairness.<sup>152</sup> The Court equated fundamental fairness with the lack of bad-faith motives, and cited such factors as Carnival's principal place of business and that many of its cruises depart from and return to Florida ports as evidence of good faith.<sup>153</sup>

The single case that squarely addresses forum selection clauses in a corporation's governing documents is *Galaviz v. Berg*,<sup>154</sup> a California case involving Oracle, one of the first corporations to utilize a forum selection clause.<sup>155</sup> The *Galaviz* court applied federal common law, which requires a mutual agreement between the parties, even if the contract was one of adhesion, as in *Carnival Cruise*.<sup>156</sup> In the case at hand, the court highlighted the unilateral amendment of the bylaws by the directors after most of the alleged wrongdoing had occurred.<sup>157</sup>

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150. See *id.* at 588 (quoting contract language).

151. See *id.* at 593 (“[W]e do not adopt the Court of Appeals’ determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining.”).

152. *Id.* at 595.

153. See *id.* (finding that Carnival has its principal place of business in Florida and many of its cruises depart from and return to Florida ports as evidence of good faith in including a forum selection clause in the ticket contract).

154. *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011) (denying motion to dismiss based on forum selection clause specifying Delaware’s Court of Chancery as sole forum).

155. Oracle adopted a bylaw forum selection clause in 2006. See Allen 2011, *supra* note 65, at 24.

156. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (rejecting the court of appeals’ holding that “a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining”); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (finding “a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power”).

157. *Galaviz*, 763 F. Supp. 2d at 1174 n.4 (noting that Oracle would not have been able to accomplish a unilateral amendment of the bylaws under contract

“[W]here, as here, the bylaw was adopted by the very individuals who are named as defendants, and after the alleged wrongdoing took place, there is no element of mutual consent to the forum choice at all, at least with respect to shareholders who purchased their shares prior to the time the bylaw was adopted.”<sup>158</sup> It distinguished *Carnival Cruise* and its Ninth Circuit progeny, *Argueta v. Banco Mexicano S.A.*,<sup>159</sup> by characterizing these cases as “merely giving effect to the bilateral agreement between the parties”<sup>160</sup> in the case, while it emphasized that the Oracle forum selection clause had not been agreed to or ratified by the shareholders.<sup>161</sup>

The *Galaviz* court, however, was willing to enforce forum selection clauses when these clauses qualified as bilateral contracts.<sup>162</sup> It noted that if the clause fell under the *Carnival Cruise* and *Argueta* analysis, “there would be little basis to

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law).

158. *Id.* at 1171.

159. *Argueta v. Banco Mexicano S.A.*, 87 F.3d 320, 327 (9th Cir. 1996) (upholding forum selection clause). The *Argueta* court distilled three factors from *Carnival Cruise* and *M/S Bremen* that would destroy the enforceability of a contractual forum selection clause:

- (1) [I]ts incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power;
- (2) the selected forum is so gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived of its day in court; or
- (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought.

*Id.* at 325.

160. *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011). The court failed to take into account, however, the fact that shareholders authorized the board of directors to pass bylaws. If a forum selection clause in a contract of adhesion, such as that in *Carnival Cruise*, is permissible, it seems unreasonable to refuse to enforce such a clause in a bylaw that is authorized by the shareholders.

161. *Id.* at 1172. The *Galaviz* court found what it characterized as suspicious facts and, if it had not struck down the clause on a contract theory, may well have found that the facts meet the “fraud, undue influence, or overweening bargaining power” requirement of *Argueta*, 87 F.3d at 327. *See Galaviz*, 763 F. Supp. 2d at 1172 (finding that the board of directors passed the forum selection clause after the vast majority of alleged fraudulent overcharges had occurred).

162. *See Galaviz*, 763 F. Supp. 2d at 1174 (“Were the *Argueta* factors controlling here [because of a bilateral contract], there would be little basis for declining to enforce the venue provision of Oracle’s bylaws.”).



decline to enforce the venue provision.”<sup>163</sup> The court found more persuasive value in a charter amendment—that requires the approval of a majority of shareholders—than a bylaw approved solely by the board of directors.<sup>164</sup>

## 2. Delaware Courts

Like the federal courts, the Delaware Supreme Court has dealt with forum selection clauses, but not in a corporation’s governing documents. The main case decided by the Delaware Supreme Court in this field is *Elf Atochem North America, Inc. v. Jaffari*,<sup>165</sup> in which the court upheld a forum selection clause in a LLC agreement and found that the clause operated to strip jurisdiction from Delaware courts in favor of arbitration in California.<sup>166</sup> While the court’s decision in *Elf Atochem* was largely based on the Delaware LLC Act and its emphasis on freedom of contract between the parties to the LLC agreement,<sup>167</sup> the discussion in *Elf Atochem* on the Court of Chancery’s jurisdiction is relevant to a discussion of forum selection clauses in the corporation context.

In discussing the Delaware LLC Act’s vestment of jurisdiction in the Court of Chancery, the Delaware Supreme Court listed three purposes that this action achieved. The most

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163. *Id.*

164. *See id.* at 1175 (“Certainly were a majority of shareholders to approve such a charter amendment, the arguments for treating the venue provision like those in commercial contracts would be much stronger, even in the case of a plaintiff shareholder who had personally voted against the amendment.”). For in-depth discussion of this point, see *infra* Part III.E.3 (discussing the difference between charter and bylaw clauses).

165. *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291, 295 (Del. 1999) (holding that a forum selection clause mandating arbitration in California was enforceable due to the strong policies supporting “maximum effect to the principle of freedom of contract and to the enforceability of LLC agreements” and “in favor of arbitration”).

166. *Id.* at 287.

167. *See id.* at 291 (discussing the emphasis given to parties’ freedom to contract in LLC agreements and holding that parties may contract to avoid Delaware jurisdiction). The Court of Chancery followed *Elf Atochem* in a factually similar case. *See Douzinas v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1149 (Del. Ch. 2006) (applying choice of law provision to require arbitration in Texas).

important of these for purposes of this Note is the third, which reads: “[Vesting of jurisdiction in the Court of Chancery] tends to center interpretive litigation in Delaware courts with the expectation of uniformity.”<sup>168</sup> This observation illustrates the concern Delaware courts have about the interpretation of Delaware law by other courts, and would hold true in the corporate context as well.

Recent case law demonstrates that forum selection clauses would likely be upheld in corporations as well as LLCs. In *Baker v. Impact Holding, Inc.*,<sup>169</sup> Vice Chancellor Parsons noted that Delaware’s legislature had enacted legislation in response to *Elf Atochem*, effectively banning forum selection clauses that would bind nonmanager members and limited partners in the LLC and limited partnership contexts, respectively.<sup>170</sup> Vice Chancellor Parsons, however, also noted that the legislature did not amend the General Corporation Law in a similar way<sup>171</sup> and upheld the forum selection clause against a former director of the corporation.<sup>172</sup> In addition, as has already been discussed, Vice Chancellor Laster in *Revlon* agreed with Vice Chancellor Parsons in supporting the policy behind forum selection clauses.<sup>173</sup>

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168. *Elf Atochem*, 727 A.2d at 292. The court also listed as policy reasons favoring this forum selection:

- 1) it assured that the Court of Chancery has jurisdiction it might not otherwise have because it is a court of limited jurisdiction that requires traditional equitable relief or specific legislation to act[, and]
- (2) it established the Court of Chancery as the default forum in the event the members did not provide another choice of forum or dispute resolution mechanism.

*Id.*

169. *Baker v. Impact Holding, Inc.*, No. 4960-VCP, 2010 WL 1931032, at \*1 (Del. Ch. May 13, 2010) (holding forum selection clause mandating forum in Texas applicable and enforceable to director of corporation and dismissing case without prejudice).

170. *Id.* at \*2 (citing amended versions of Delaware LLC Act §§ 17-109(d) and 18-109(d)). The legislature likely amended these sections to keep Delaware LLCs and LPs from selecting another state as the exclusive jurisdiction.

171. *Id.*

172. *Id.* at \*15.

173. *See In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 960–61 (Del. Ch. 2010) (acknowledging that one possible effect of greater judicial oversight of “frequent filers” is that they may file elsewhere, but supporting use of forum selection clause if board of directors and shareholders believe appropriate).

The Delaware Supreme Court has also ruled on forum selection clauses in contracts. In *Ingres Corp. v. CA, Inc.*,<sup>174</sup> the court adopted the presumption of validity instituted by *M/S Bremen* and *Carnival Cruise*. In *Ingres*, the court defined the relationship between the *McWane* forum non conveniens doctrine and forum selection clauses. The court held that “where contracting parties have a legally enforceable forum selection clause, a court should honor the parties’ contract and enforce the clause, even if, absent any forum selection clause, the *McWane* principle might otherwise require a different result.”<sup>175</sup> The court also incorporated *M/S Bremen*’s presumption of validity and found that forum selection clauses would be enforced unless the opposing party “clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud and overreaching.”<sup>176</sup>

In summary, while Delaware courts have only tangentially touched on forum selection clauses in corporate governing documents<sup>177</sup>—and the Delaware Supreme Court has yet to address them at all—Delaware courts seem sympathetic to corporations utilizing these clauses to defend litigation in the state of incorporation and willing to enforce them.

### *C. Enforcement of Forum Selection Clauses*

The arguments on the enforceability of forum selection clauses will vary depending on whether the court is a federal court sitting in diversity or a state court. In ruling on a forum selection clause, a federal court sitting in diversity can take two

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174. *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1145 (Del. 2010) (holding that forum selection clauses trump the *McWane* principle).

175. *Id.*

176. *Id.*

177. Several new cases have recently been filed against nine corporations with bylaw forum selection clauses in the Court of Chancery. See Francis G.X. Pileggi, *Multiple New Suits Challenge Exclusive Forum Selection Bylaws in Delaware Court of Chancery* (Feb. 8, 2012, 11:42 PM), <http://www.lexisnexis.com/community/corpsec/blogs/corporate-law-blog/archive/2012/02/08/multiple-new-suits-challenge-exclusive-forum-selection-bylaws-in-delaware-court-of-chancery.aspx> (last visited Nov. 14, 2012) (on file with the Washington and Lee Law Review). These cases will help to provide precedent on this issue in Delaware.

approaches. First, it can analyze the clause under federal common law as articulated in *M/S Bremen* and *Carnival Cruise* and followed by *Galaviz*.<sup>178</sup> *Galaviz* declined to follow Delaware corporate law and held that federal common law applied to forum selection clauses because they are procedural in nature and thus governed by federal law.<sup>179</sup> In coming to this conclusion, *Galaviz* followed *Manetti–Farrow, Inc. v. Gucci American, Inc.*,<sup>180</sup> a Ninth Circuit case, which held that, under an *Erie–Hanna* analysis,<sup>181</sup> the federal interest in upholding the federal venue rules outweighed the state interest.<sup>182</sup> The Second, Fifth, and Eleventh Circuits have also held that federal law governs forum selection.<sup>183</sup>

If a federal court does find that federal common law controls, a corporation defending a bylaw or charter forum selection clause can argue these cases are a close analogy to the forum selection clause in *Carnival Cruise*. In that case, the Court noted:

First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause

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178. See Latham & Watkins, LLP, *Corporate Governance Update: New Challenges and Strategies for Designating Delaware as the Exclusive Jurisdiction for Intra-Corporate Disputes* (May 2011), [www.lw.com](http://www.lw.com) (last visited Nov. 14, 2012) (noting that *Galaviz* applied federal common law rather than Delaware corporate law) (on file with the Washington and Lee Law Review).

179. See *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011) (ruling that “the enforceability of a proported venue requirement is a matter of federal common law”).

180. *Manetti–Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512–13 (9th Cir. 1988) (holding that forum selection clause in exclusive dealership contract governed dealer’s tort and contract claims).

181. Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Hanna v. Plumer*, 380 U.S. 460 (1965), courts presiding over a diversity case must decide whether the issue is substantive or procedural in nature. Generally, if the issue is procedural, federal law applies. If the issue is substantive, state law applies. See A. BENJAMIN SPENCER, *CIVIL PROCEDURE: A CONTEMPORARY APPROACH* 360 (2d ed. 2008).

182. *Manetti–Farrow*, 858 F.2d at 512–13.

183. See *Int’l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 115 (5th Cir. 1996); *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990); *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1067–68 (11th Cir. 1987) (per curiam) (en banc), *aff’d on other grounds*, 487 U.S. 22 (1988).

establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.<sup>184</sup>

Each of these three policy reasons cited by the Court would be satisfied by a typical forum selection clause in a corporation's governing documents. First, a corporation, like a cruise line, has a special interest in limiting the fora in which it is potentially subject to suit because corporations typically operate in many different states and a single action or transaction has effects spread over many states. Second, because the forum is already specified, both the plaintiffs and the corporation can save litigation expenses and the states can conserve judicial resources. While less obvious, the corporation's shareholders will benefit under the forum selection clause because the corporation will not be indemnifying or advancing litigation costs to defending directors or officers in multiple jurisdictions.<sup>185</sup>

Corporations defending a bylaw forum selection clause under federal common law face an uphill battle in proving a bilateral agreement similar to that which was found in *M/S Bremen* and *Carnival Cruise*, especially in bylaw forum selection clauses that are passed by the board of directors. Corporations should stress, however, that shareholders must give the board of directors authorization to pass bylaws,<sup>186</sup> and this authorization arguably

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184. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991) (citations omitted).

185. See *supra* Part II.A (describing the additional, needless costs incurred by the corporation in indemnifying directors or officers for defending against the same claim in multiple jurisdictions).

186. See, e.g., DEL. CODE ANN. § 109(a) (2011) (“[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors.”); MODEL BUS. CORP. ACT § 10.20(b) (2011) (“A corporation’s board of directors may amend or repeal the corporation’s bylaws, unless . . . the shareholders in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw.”).

equates to the shareholders' half of a bilateral agreement that was required in *Galaviz*.<sup>187</sup> Uncertainty at this point, however, renders this mutual agreement requirement under federal common law the most persuasive argument in favor of charter, as opposed to bylaw, forum selection clauses.<sup>188</sup>

If a defending corporation decides to take a corporate, rather than contractual, approach, *Manetti-Farrow* and the cases following it have focused on the traditional forum selection clause in a contract,<sup>189</sup> and can be distinguished in the bylaw or charter forum selection clause context. In these cases, a corporation can point to the state's interest in enforcement of its substantive law governing the relationship between the shareholders, directors, officers, and the corporation itself. A corporation in this position should argue that the balance is shifted in the state's favor and that state's law should control. This argument is bolstered by the fact that the Third, Fourth, and Eighth Circuits have all held that state law governs forum selection.<sup>190</sup>

If a federal court follows state law, it would apply the law of the state of incorporation due to the IAD.<sup>191</sup> For Delaware corporations, this would mean Delaware corporate law. As discussed previously, it

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187. See *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011) (finding that the bylaw forum selection clause was a unilateral amendment to the "contract" between the corporation and shareholders and declining to enforce it).

188. See *infra* Part III.E.3 (comparing the advantages and shortcomings of charter and bylaw forum selection clauses).

189. See, e.g., *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 511 (9th Cir. 1988) (noting that the issue in the case was contracts that included identical forum selection clauses, which provided: "For any controversy regarding interpretation or fulfillment of the present contract, the Court of Florence has sole jurisdiction").

190. See *Nutter v. New Rents, Inc.*, No. 90-2493, 1991 WL 193490, at \*6 (4th Cir. Oct. 1, 1991); *Farmland Indus., Inc v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 852 (8th Cir. 1986) (choosing to apply state law to forum selection clauses); *Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356-57 (3d Cir. 1986). *But see* *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068-69 (8th Cir. 1986) (concluding in dicta that forum selection clauses involve venue issues and are therefore procedural clauses governed by federal law). *Farmland Industries* was decided after *Sun World Lines* and specifically distinguished *Sun World Lines* as an admiralty case. *Farmland Industries*, 806 F.2d at 852.

191. See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) ("No principle of corporate law and practice is more firmly established than a State's authority to regulate domestic corporations.").

seems likely that Delaware law would enforce charter or bylaw forum selection clauses, although the case law admittedly remains undeveloped.<sup>192</sup>

If a corporation seeks to enforce a forum selection clause in state court, the decision is simpler. Under the IAD, the court must apply the law of the state of incorporation, which for a Delaware corporation would be Delaware. If a court finds that Delaware law requires dismissal, it will only decline to enforce a forum selection clause if it finds that the state in which the court sits requires that result as a matter of public policy.

A potential example of this scenario might occur under § 2115 of the California Corporations Code, which provides that a corporation, the securities of which are not traded on a national exchange, which transacts more than half of its business in California, and which has more than half of its voting stock held by California residents, is subject to California corporate law.<sup>193</sup> Because California courts have applied § 2115 to corporations incorporated outside of California as long as they have sufficient contacts with the state,<sup>194</sup> it is possible, even likely, that a California court may refuse to stay or dismiss the action because it believes that California has the largest stake in protecting resident shareholders and employees and that this interest trumps Delaware's interest in regulating the internal affairs of its corporation.<sup>195</sup> However, if California courts take this approach, it

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192. See *supra* Part III.B.2 (discussing Delaware case law on forum selection clauses).

193. See CAL. CORP. CODE § 2115 (2012); see also Sara Lewis, *Transforming the "Anywhere but Chancery" Problem into the "Nowhere but Chancery" Solution*, 14 STAN. J.L. BUS. & FIN. 199, 201 (2008) (describing and discussing CAL. CORP. CODE § 2115).

194. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 8 Cal. Rptr. 3d 56, 68–69 (recognizing the validity of the internal affairs doctrine, but applying § 2115 to the corporation because of sufficient contacts with California).

195. *Id.* at 217. Proponents of Section 2115 would point to RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (1971), which provides that any state may apply its own law in "the unusual case" in which it has a more significant relationship to the occurrence and to the parties than the incorporating state. These proponents would argue that this is exactly what California's law accomplishes. The problem with this argument is that use of this exception is extremely rare. See FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4223.50 n.14 (citing only two cases that utilized this exception).

arguably conflicts with Supreme Court precedent and may result in a certiorari grant by the Supreme Court.<sup>196</sup>

*D. Previous Use of Forum Selection Clauses by Corporations*

The history of the forum selection clause really begins with *Revlon*. For the 195 Delaware corporations that have currently adopted or are in the process of adopting choice of forum provisions, 189 (96.9% of all forum selection clauses either adopted or in the process of being adopted) adopted the provision after *Revlon*.<sup>197</sup> By any standard, *Revlon* has had a substantial effect on corporations and corporate attorneys and heightens the need for clarity in this area.

Of the 192 Delaware corporations, 103 adopted forum selection clauses in connection with an initial public offering, making this by far the single most common scenario.<sup>198</sup> Another forty-six clauses (23.6%) were adopted concurrently with other bylaw amendments, usually as part of annual bylaw reviews.<sup>199</sup> Sixteen (8.2%) were adopted by board of directors on a stand-alone basis.<sup>200</sup> Five (2.6%) adopted forum selection clauses while emerging from bankruptcy protection.<sup>201</sup> Ten (5.1%) took advantage of forum selection clauses when reincorporating in Delaware.<sup>202</sup>

According to Joseph Grundfest, forum selection clauses have evolved in clusters, each based on an initial wording that was copied by “descendants” in that group.<sup>203</sup> Grundfest has termed the first attempt at forum selection clauses the Gibson Dunn cluster.<sup>204</sup>

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196. See *CTS Corp.*, 481 U.S. at 89 (“No principle of corporate law and practice is more firmly established than a State’s authority to regulate domestic corporations.”); Grundfest, *supra* note 62, at 23.

197. Allen, *supra* note 3, at 4.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. See Grundfest, *supra* note 62, at 3 (noting that forum selection clauses tended to occur in clusters).

204. *Id.* at 4.



Figure 1

Gibson Dunn Cluster	Any action brought by any stockholder against the Corporation or against any officer, director, employee, agent or advisor of the Corporation, including without limitation any such action brought on behalf of the Corporation, shall be brought solely in a court of competent jurisdiction located in the State of Delaware.
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This cluster included Standard Pacific, Inc. in 1991, CKE Restaurants, Inc. in 1994,<sup>205</sup> and Kennedy-Wilson, Inc. in 2009.<sup>206</sup> Identical in wording, these early attempts at forum selection limited jurisdiction over shareholder suits against “any officer, director, employee, agent or advisor of the company” to “a court of competent jurisdiction located in the State of Delaware.”<sup>207</sup>

Lasting development in forum selection clauses built upon clauses adopted by Oracle, Inc. in 2006, Netlist, Inc. in 2006, Netsuite, Inc. in 2007, and Financial Engines, Inc. in 2009.<sup>208</sup>

Figure 2

Oracle, Inc.	The sole and exclusive forum for any actual or purported derivative action brought on behalf of the Corporation shall be the Court of Chancery in the State of Delaware.
Netlist, Inc.	The Delaware Chancery Court shall be the sole forum and venue for any lawsuit or legal proceeding by the corporation against any of its directors or officers within the jurisdiction of that court. The state or federal courts located in the State of Delaware shall be the sole forum and venue for any lawsuit or legal proceeding by the corporation against any of its directors or officers not within the jurisdiction of the Delaware Chancery Court.
Netsuite, Inc.	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 DGCL, (iv) or any action asserting a claim governed by the internal affairs doctrine.

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205. *Id.*

206. *Id.* (grouping Standard Pacific and CKE Restaurants); Allen 2011, *supra* note 65, at 7 n.42 (noting that Standard Pacific, CKE Restaurants, and Kennedy-Wilson Holdings have identical forum selection clauses).

207. See Kennedy-Wilson Holdings, Inc., Bylaws (Form 8-K, § 8.5) (Sept. 24, 2009), available at [http://www.sec.gov/Archives/edgar/data/1408100/000104746909008529/a2194546zex-3\\_11.htm](http://www.sec.gov/Archives/edgar/data/1408100/000104746909008529/a2194546zex-3_11.htm) (on file with the Washington and Lee Law Review).

208. Grundfest, *supra* note 62, at 4.

Financial Engines, Inc.	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 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 DGCL, 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 Article VII, Paragraph D.
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The Oracle clause was the simplest. It encompassed all derivative actions and required these to be litigated in the Delaware Court of Chancery.<sup>209</sup> Netlist was similar, but bound the corporation to bring all actions against its directors and officers in the Delaware Court of Chancery, or, if the Chancery did not have jurisdiction, in Delaware state or federal court.<sup>210</sup> This seems to be a poorly worded option because it is not clear whether Netlist is attempting to follow Oracle in encompassing all derivative litigation or only circumstances in which the corporation itself sues a director or officer.

Netsuite's and Financial Engines' clauses were more complex and much broader than the language in either the Gibson Dunn cluster or the Oracle clause. Instead of covering only derivative actions as the previous clauses had done, the Netsuite/Financial Engines language covered both derivative actions and claims in which the Delaware courts would have a competitive advantage over other courts in applying Delaware law.<sup>211</sup> The difference between Netsuite's and Financial Engines' language, however, was the choice made between mandatory forum selection in the Netsuite clause and elective forum selection in Financial Engines.<sup>212</sup> The advantages and disadvantages of these options will be evaluated later.<sup>213</sup>

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209. See Oracle, Inc., Bylaws (Form 8-K, § 9.07) (Jul. 14, 2006).

210. See Netlist, Inc., Bylaws (Form S-1, § 5.12) (Oct. 23, 2006).

211. See Grundfest, *supra* note 62, at 16 (noting that "each state has a competitive advantage over other state courts in interpreting its own state's law").

212. Compare Netsuite, Inc., Bylaw (Form 8-K, art. 8) (Dec. 26, 2009) ("Delaware shall be the sole and exclusive forum . . ."), with Financial Engines, Inc., Charter (Form 10-Q, art. D) (Dec. 9, 2009) ("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 . . .").

213. See *infra* Part III.E.2.

After *Revlon* was decided on March 16, 2010, forum selection clauses proliferated.<sup>214</sup> Grundfest divides these clauses into the Skadden, Pillsbury, Simpson, K&E, and Grundfest clusters.<sup>215</sup>

Figure 3

Skadden cluster	Unless the Corporation (through approval of the Board of Directors) 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 actual or purported derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of fiduciary duty owed by any director or officer of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the GCL, (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 to have consented to the provisions of this Article FOURTEENTH.
Skadden cluster–Swift Transportation exception	Unless the Corporation otherwise consents to an alternative forum in writing, 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 or officer of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim against the Corporation arising pursuant to any provision of the DGCL or the Corporation's Certificate of Incorporation or By-Laws or (iv) any action asserting a claim against the Corporation 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 Article THIRTEENTH.
Pillsbury cluster	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 Article VII.

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214. See *supra* note 172 and accompanying text.

215. Grundfest, *supra* note 62, at 5. The Grundfest cluster consists exclusively of limited partnerships and limited liability companies, and thus will not be discussed in this Note.

Simpson cluster	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, employee or agent of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the DGCL, or (iv) any action asserting a claim governed by the internal affairs doctrine, in each such case subject to said Court of Chancery having personal jurisdiction over the indispensable parties named as defendants therein. 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 Article X.
K&E cluster	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 or officer of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim against the Corporation arising pursuant to any provision of the CGL or this Certificate or Incorporation or the Corporation's Bylaws or (iv) any action asserting a claim against the Corporation governed by the internal affairs doctrine.

The Skadden cluster<sup>216</sup> mainly tracks the elective Financial Engine language, but with two notable exceptions. Swift Transportation chose to include claims arising under the corporation's certificate of incorporation and bylaws as well as those arising under the Delaware General Corporation Law (DGCL).<sup>217</sup> All three clauses in the Skadden cluster assert that holders of corporate stock are deemed to have notice of the forum selection provision.<sup>218</sup>

Like the Skadden cluster, the Pillsbury cluster<sup>219</sup> tracks the elective Financial Engines language and adds a notice clause, but unlike the Skadden cluster, does not include claims arising under the certificate of incorporation or bylaws.<sup>220</sup>

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216. The Skadden cluster includes Swift Transportation Co., Primerica, and Liberty Mutual. Grundfest, *supra* note 62, at 4.

217. Swift Transp. Co., Charter (Form 10-K, art. 13) (Mar. 29, 2011). This language was not followed by Primerica or Liberty Mutual's clauses.

218. *See, e.g., id.*

219. The Pillsbury cluster includes Inphi Corporation, Meru Networks, Inc., and Chevron Corporation. Grundfest, *supra* note 62, at 4.

220. *See, e.g.,* Inphi Corp., Charter (Form 10-K, art. D) (Mar. 7, 2011).

The Simpson cluster<sup>221</sup> also tracks the elective Financial Engines language and, like both Skadden and Pillsbury, adds a notice clause. In addition, it provides that the forum selection clause shall not be binding unless “the Court of Chancery has personal jurisdiction over the indispensable parties named as defendants therein.”<sup>222</sup>

The K&E cluster<sup>223</sup> follows the mandatory Netsuite language, except that—like the Skadden cluster—it governs actions asserting a claim arising from the corporation’s certification of incorporation or bylaws.<sup>224</sup>

### *E. Content of Forum Selection Clauses*

#### *1. Claims Covered by a Forum Selection Clause*

For a company interested in adopting (or a corporate attorney who will be advising clients about) a forum selection clause, the first consideration is the coverage of the clause. As seen in the Oracle, Netlist, Netsuite, and Financial Engines clauses, a forum selection clause can be written to cover directors, employees, shareholders, or any combination of these.<sup>225</sup> Allen identified four categories of actions generally covered by forum selection clauses. These categories overlap to a considerable degree, allowing what Allen characterizes as a “belt and suspenders” approach.<sup>226</sup> The first is any derivative action or proceeding brought on behalf of the corporation.<sup>227</sup> While this would cover the majority of the claims against a corporation, it would arguably not cover nonfiduciary duty claims and would certainly not cover claims asserted against the corporations by

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221. The Simpson cluster includes LPL Investment Holdings, Inc. and FXCM, Inc. Grundfest, *supra* note 62, at 4.

222. See, e.g., FXCM, Inc., Charter (Form S-1, § 10.1) (Dec. 1, 2010).

223. The K&E cluster includes Charter Communications, Inc., Chemtura Corp., and Gordmans Stores, Inc. Grundfest, *supra* note 62, at 4.

224. See, e.g., Charter Commc’ns, Inc., Charter (Form 8-K, art. 11) (Aug. 20, 2010) (following the Netsuite language, but adding “or this Certificate of Incorporation or the Corporation’s Bylaws” to the third subsection).

225. See *supra* Figure 2.

226. See Allen, *supra* note 3, at 4.

227. *Id.* at 3.

shareholders, directors, or employees individually. Allowing plaintiffs to escape the forum selection clause by characterizing the action as something other than a derivative action seems unwise for a corporation undergoing the trouble to adopt a forum selection clause. While covering derivative actions may be a good start, forum selection clauses should include something more.

The second category covers any action asserting a claim of breach of fiduciary duty owed by any director or officer to the corporation or its stockholders.<sup>228</sup> This is more tailored than the first category and can be expanded to fiduciary duties owed by employees<sup>229</sup> or agents or advisors.<sup>230</sup>

The third and fourth categories are in line with the policy advocated by this Note. The third category covers any action asserting a claim arising pursuant to any provision of the DGCL.<sup>231</sup> This category aligns with the reality that each state has a competitive advantage in deciding matters involving its own law.<sup>232</sup> The fourth category covers any claim governed by the internal affairs doctrine.<sup>233</sup> This would have the blanket effect of requiring each state to decide claims governed by its own law and dismiss those that are not.

In addition, some companies have added other limiting factors designed to increase the equity of restricting forum and eliminating cases in which the court may be particularly willing to prevent an unfair forum restriction. This Note will discuss two of the most useful of these provisions.<sup>234</sup> The first provision is an

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228. *Id.*

229. *See id.* (finding 59.5% (116) of forum selection clauses in this category have also addressed fiduciary duties owed by employees).

230. *See id.* (finding that 15.4% (30) of forum selection clauses in this category have also addressed fiduciary duties owed by agents or advisors of the corporation).

231. *See id.* at 4.

232. *See Grundfest, supra* note 62, at 16 (noting a competitive advantage for each state court in deciding that state's law).

233. Allen, *supra* note 3, at 4.

234. The author is aware of three other special provisions, each of which simply follows existing law and is not particularly necessary or helpful. The first is an exception to the application of the Delaware forum selection clause when a federal court *supra* has assumed exclusive jurisdiction of a proceeding. Latham & Watkins, *supra* note 178, at 3. The second provision provides for the Delaware Chancery Court to be the exclusive forum "to the fullest extent" permitted by law. Allen, *supra* note 3, at 8. The third is a provision providing that any person

exception to application of the forum selection provision when the court of the chosen forum has determined that an indispensable party is not subject to the jurisdiction of that court. Forty-eight (24.6%) corporations with forum selection clauses included this provision.<sup>235</sup> This provision helps to prevent clearly unfair situations in which a plaintiff cannot obtain complete redress, and a court might be willing to decline to enforce the forum selection provision in that circumstance because it prevents the plaintiff from having his day in court.<sup>236</sup> While useful in restricting forum selection clauses to their legal limit, this provision should only encompass those situations in which it is possible to join the indispensable party in another jurisdiction.<sup>237</sup> Currently, only one corporation has adopted this language.<sup>238</sup>

Another useful provision would be language disclaiming retroactive application of the forum selection clause to acts or omissions occurring before adoption. This language responds to the *Galaviz* court's concern about the retroactive effect of Oracle's

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or entity purchasing or otherwise acquiring any interest in the corporation shall be deemed to have notice of and consent to the forum selection clause. Latham & Watkins, *supra* note 178, at 2. This merely follows case law concerning corporate governance documents. *See* CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 234 (Del. 2008) ("Bylaws, by their very nature, set down rules and procedures that bind a corporation's board and its shareholders.").

235. Allen, *supra* note 3, at 8.

236. *See* Argueta v. Banco Mexicano S.A., 87 F.3d 320, 325 (9th Cir. 1996) (holding that a court should decline to enforce the forum selection clause if doing so would prevent the plaintiff from having his day in court); *see also* Ingres Corp. v. CA, Inc., 8 A.3d 1143, 1145 (Del. 2010) (holding that the court will decline to enforce the forum selection clause if doing so would be "unreasonable and unjust").

237. *See* Latham & Watkins, *supra* note 178, at 3 (advocating this limitation).

238. *See* Avid Technology, Inc., Bylaws (Form 8-K, art. 17, § 1) (Oct. 21, 2011) (including an exemption for case in which a indispensable party could not be joined in Delaware or when a federal court has exclusive jurisdiction). The Avid Technology clause reads:

[P]rovided that the foregoing provision shall not apply in the event that (a) the action could not be brought in the Court of Chancery of the State of Delaware because of the inability to join an indispensable party, which party could be joined in the action in another form, or (b) a United States federal court has properly assumed exclusive jurisdiction over the action.

*Id.*

bylaw forum selection clause.<sup>239</sup> Currently, Boeing Company is the only corporation to include this provision,<sup>240</sup> although one other company stated in its amendment proposal that adoption of the forum selection clause would have no effect on pending derivative proceedings.<sup>241</sup>

## 2. *Mandatory or Elective Provision*

The second consideration is whether to choose a mandatory or elective provision. A mandatory forum selection clause requires the plaintiff to bring the action in the jurisdiction selected by the corporation, while an elective forum selection clause allows the corporation to consent in writing to the plaintiff's choice if it sees some advantage to defending in that jurisdiction.<sup>242</sup> The initial forum selection clauses in the Gibson Dunn cluster and by Oracle and Netlist were mandatory, but, starting with Netsuite and Financial Engines, the elective provision became an established option.<sup>243</sup> Currently, 56.1% of Delaware corporations with a forum selection clause specify that the corporation may consent in writing to the selection of an alternative forum.<sup>244</sup> To many corporations, elective forum selection clauses are an attractive option because they offer a "heads I win, tails you lose" alternative. If the selected forum is deemed to be in the company's best interest, it will enforce the clause. If, however, the forum in which the plaintiff brings the lawsuit is perceived to be more favorable to the defendant

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239. See *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011) ("A bylaw unilaterally adopted by directors, however, stands on a different footing. Particularly where, as here, the bylaw was adopted by the very individuals who are named as defendants, and after the alleged wrongdoing took place . . .").

240. The Boeing Co., Inc., Bylaws (Form 8-K, art. VII, § 5) (Oct. 4, 2011) ("With respect to any action arising out of any act or omission occurring after the adoption of this By-Law. . .").

241. Allen, *supra* note 3, at 8 (noting that InsWeb Corporation included this disclosure in its charter amendment proposal).

242. See Grundfest, *supra* note 62, at 6.

243. See *id.* at 5 (distinguishing between mandatory and elective forum selection clauses); see also Allen 2011, *supra* note 65, at vi (noting that the percentage of elective forum clauses has risen from 30.8% in July 2010 to 56.1% in August 2011).

244. Allen, *supra* note 3, at 8.



company than the jurisdiction selected by the forum selection clause, the company can consent to the alternative forum in writing and defend there.

While the upside is great for a corporation with an elective forum selection clause, there is some downside risk as well. With *Galaviz* being the only major case on point outside of Delaware, the enforceability of forum selection clauses in general is uncertain, and a court may be more willing take policy into account when deciding the enforceability of a forum selection clause. When a lawyer seeking to uphold a forum selection clause is required not only to argue the policy behind forum selection clause in general but also to support an elective provision, he may have an impossible task in convincing a judge who sees an elective forum selection clause as too advantageous to the corporation. The plaintiff will argue that an elective forum selection clause allows the corporation to forum shop while preventing the plaintiff–shareholder from doing the same.<sup>245</sup> While this is not an exceedingly persuasive argument, the advantages of an elective forum selection clause<sup>246</sup> do not seem to outweigh the risks.

### 3. Charter or Bylaws

The final decision that an advocate of a forum selection clause must make is whether to place the clause in the corporate charter or bylaws. Charters of Delaware corporations are governed by DGCL § 102. Section 102(b)(1) authorizes corporations to include in their charters:

- (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

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245. See Latham & Watkins, *supra* note 178, at 3 (discussing this argument).

246. The advantages of an elective clause seem few. A corporation might be willing to allow the plaintiff to continue the action if the action is in a favorable jurisdiction to the defendant. If, however, the jurisdiction were favorable to the defendant, why would the plaintiff bring the action there? In an adversarial system in which any benefit to the plaintiff is a detriment to the defendant, the benefit of an elective forum selection clause seems minimal.

the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State.<sup>247</sup>

Due to the broad nature of § 102(b)(1), corporations have wide-ranging authority to insert in the charter of the corporation what its directors and shareholders deem appropriate, and this would include inserting a forum selection clause. Charter provisions are binding on all shareholders, whether or not they voted for the provisions or whether or not they owned stock prior to the adoption of the provision.<sup>248</sup>

In deciding between charter and bylaw provisions, there are several risks and rewards that a corporation must balance. Courts agree that charter forum selection provisions, without exceptional circumstances, are going to be upheld. Even when striking the forum selection clause at issue, the *Galaviz* court noted: “Certainly were a majority of shareholders to approve such a charter amendment, the arguments for treating the venue provision like those in commercial contracts would be much stronger, even in the case of a plaintiff shareholder who had personally voted against the amendment.”<sup>249</sup> Combining this statement with the *Galaviz* court’s analysis of the dispute as a contract case under *M/S Bremen* and *Carnival Cruise*, one would predict that that court would likely have enforced a charter provision that was approved by the shareholders, even while it refused to uphold a bylaw provision passed by the board of directors.

Even *Revlon* does not expressly mention bylaw forum selection clauses but speaks of “charter provisions selecting an exclusive forum for intra-entity disputes.”<sup>250</sup> It does, however, mention Oracle’s bylaw forum selection clause and approve this possibility, at least by implication.<sup>251</sup>

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247. DEL. CODE ANN. tit. 8, § 102(1) (2011).

248. See *Centaur Partners, IV v. Nat’l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990) (“Corporate charters and by-laws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply.”).

249. *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1175 (N.D. Cal. 2011).

250. *In re Revlon, Inc. S’holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010).

251. *Id.* at 960 n.8.

With great reward, however, comes great risk. Shareholders may be unwilling to affirmatively vote in favor of a charter forum selection provision limiting their right to sue in the most advantageous forum available. For example, Allstate Corporation's recent attempt to place a forum selection clause in its charter gained support from only 41.7% of shareholders.<sup>252</sup> There are several ways that the corporation can persuade reluctant shareholders. The corporation can start by explaining the benefits to shareholders as a class. These include (1) avoiding the possibility of costly duplicative litigation and (2) the possibility of conflicting outcomes in different jurisdictions in the same case, both of which lead to money saved through decreased litigation expenses by the clause (and presumably distributed as dividends or invested back into the company which would increase the stock value). The corporation could also bundle the forum selection clause with shareholder-friendly proposals, as Life Technology Corporation did when it bundled a board declassification amendment with a forum selection clause.<sup>253</sup>

Bylaw forum selection clauses, on the other hand, are relatively easy to adopt as long as the board of directors has the authority to pass bylaws under the charter.<sup>254</sup> As is the case with charters, the DGCL has a sweeping bylaw statute. DGCL § 109(b) states: "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."<sup>255</sup> In a typical corporation that provides notice that the bylaws may be amended at any time, bylaws can be amended by the board of directors without shareholder consent and are binding on the shareholders.<sup>256</sup> This eliminates the possibility of shareholder rejection that is present in charter proposals, as occurred at

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252. Allen, *supra* note 3, at 5.

253. *Id.*

254. See DEL. CODE ANN. tit. 8, § 109(a) (2011) ("[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors . . .").

255. *Id.*

256. See CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 234 (Del. 2008) ("Bylaws, by their very nature, set down rules and procedures that bind a corporation's board and its shareholders.").

Allstate.<sup>257</sup> As long as a majority of the board of directors agrees on the need to pass a forum selection clause, which would be required to pass a charter provision anyway, the clause will be adopted.

The upside of the bylaw provision is also its downside. In *Galaviz*, the only case directly on point, the court refused to enforce a board-adopted bylaw forum selection clause and supported its holding by pointing to the unilateral way in which the clause was adopted. Analogizing the clause to a commercial contract, the court noted: “Here, in contrast, the venue provision was unilaterally adopted by the directors who are defendants in this action, after the majority of the purported wrongdoing is alleged to have occurred, and without the consent of existing shareholders who acquired their shares when no such bylaw was in effect.”<sup>258</sup> In distinguishing *Carnival Cruise*, the court made much of the bilateral agreement that contained the forum selection clause in *Carnival Cruise*, and emphasized the absence of a bilateral agreement in the case before it.<sup>259</sup> If other courts follow the *Galaviz* court in applying a contractual analysis to bylaw clauses, they could strike down these clauses with regularity.

While bylaw clauses offer easy adoptability, their enforceability is uncertain with *Galaviz* as the only case squarely on point. If a court does decline to enforce a corporation’s bylaw clause, the only thing that a corporation gains from the adoption is debts from litigating the disputed clause and additional unfavorable precedent. In addition, the corporation is unlikely to be able to pass a charter forum selection clause when its bylaw clause has been struck down by the courts.

Charter clauses, on the other hand, are much more likely to be enforced by the courts under the contractual approach taken by *Galaviz*.<sup>260</sup> They are bilateral agreements voted upon by the

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257. Allen, *supra* note 3, at 5.

258. *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011).

259. *See id.* (“Under contract law, a party’s consent to a written agreement may serve as consent to all the terms therein, whether or not all of them were specifically negotiated or even read, but it does not follow that a contracting party may thereafter unilaterally add or modify contractual provisions.”).

260. *See id.*

Modern federal law plainly favors the enforcement of

board of directors (acting for the company) and the shareholders (acting for themselves). A corporation that can fit the adoption of its forum selection clause into a bilateral contract approach will be almost certain to have it upheld under a *Carnival Cruise* analysis.<sup>261</sup>

#### 4. Proposed Forum Selection Clause

The best forum selection clause depends on the current situation of the corporation adopting one. If the corporation is in transition, such as being on the verge of an IPO, emerging out of bankruptcy, or reincorporating in Delaware, it should adopt a charter amendment that reads:

The Court of Chancery of the State of Delaware shall be<sup>262</sup> 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 or officer of the Corporation to the Corporation or to the Corporation's stockholders, (iii) any action asserting a claim against the Corporation arising pursuant to any provision of the Delaware General Corporation Law or the Corporation's Certificate of Incorporation or By-Laws, or (iv) any action asserting a claim against the Corporation governed by the internal affairs doctrine;<sup>263</sup> provided that the foregoing provision shall not apply in the event that (a) the action could not be brought in the Court of Chancery of the State of Delaware because of the inability to join an indispensable party, which party could be joined in the action

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contractual venue clauses, but even in the case of a form contract, a court merely gives effect to a bilateral agreement between the parties that any disputes they may have arising out of that agreement will be litigated in a particular forum.

261. See *Carnival Cruise Line, Inc. v. Shute*, 499 U.S. 585, 595 (1991). This is assuming, of course, that the corporation does not engage in actions that would cause a court to find the clause void for violating *Carnival Cruise's* fundamental fairness test.

262. This Note advocates use of a mandatory forum selection clause for reasons discussed earlier in Part III.E.2.

263. This Note advocates use of all four categories discussed earlier in Part III.E.1, including the Swift Transportation addition of "or the Corporation's Certificate of Incorporation or Bylaws."

in another forum, or (b) a United States federal court has properly assumed exclusive jurisdiction over the action.<sup>264</sup>

For a public corporation, there are many possible routes, ranging from adoption by the board of directors of a bylaw forum selection clause to a charter amendment with a forum selection clause. As long as its board of directors has the authority to adopt bylaws,<sup>265</sup> it could unilaterally adopt a bylaw forum selection clause, but the board must acknowledge the possibility that this provision may not be enforced by the courts, as happened to Oracle in *Galaviz*. If a corporation chooses this route, it should include the language in Boeing's clause disclaiming retroactive effect in an effort to avoid a court following *Galaviz* in striking it down as a unilateral amendment to a contract.<sup>266</sup>

There are two other options for a corporation not interested in the arduous task of passing a charter amendment. First, a board of directors can pass a bylaw forum selection clause and, at the shareholders' next meeting, propose that the shareholders ratify the directors' actions. This is similar to a charter amendment, but has the benefit of only requiring a majority of the shareholders present at the meeting rather than a majority of all shares outstanding.<sup>267</sup> A ratified bylaw clause would also address the *Galaviz* court's concern about a bilateral contract.<sup>268</sup>

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264. This proposed clause tracks the language of Avid Corporation's forum selection clause, which is the most comprehensive language of any forum selection clause. See Avid Technology, Inc., Bylaws (Form 8-K, art. 17, § 1) (Oct. 21, 2011).

265. See DEL. CODE ANN. tit. 8, § 109 (2011) (“[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors.”).

266. See The Boeing Co., Inc., Bylaws (Form 8-K, art. VII, § 5) (Oct. 4, 2011) (“With respect to any action arising out of any act or omission occurring after the adoption of this By-Law . . .”).

267. Compare DEL. CODE ANN. tit. 8, § 216 (2011) (stating that default quorum to amend corporation's bylaws is a simple majority of those present at the shareholders' meeting and a bylaw is passed with the approval of a majority of those present), with *id.* § 242 (requiring an affirmative vote of “a majority of the outstanding stock entitled to vote thereon” in order to pass a charter amendment).

268. See *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011) (“[A] court merely gives effect to a bilateral agreement between the parties that any disputes they may have arising out of that agreement will be litigated in a particular forum.”).

Alternatively, a board of directors can pass a bylaw forum selection clause while asking that the shareholders vote at the next shareholders' meeting on a proposal to *repeal* this bylaw. This allows the board to claim the status quo and allows the bylaw clause to proceed without affirmative shareholder action. It is uncertain, however, how the courts would react to what is essentially affirmation by inaction.

A third alternative that the board of directors can take is to propose a shareholder bylaw with a forum selection clause. This takes advantage of the lesser voting requirements under Delaware law for passing a bylaw rather than a charter amendment,<sup>269</sup> but has the contractual element required by *Galaviz*.

If a corporation is more concerned about enforcement of the forum selection clause than ease of adoptability, it should propose a charter amendment adding a forum selection clause. While the amendment must be approved by a majority of the shares outstanding,<sup>270</sup> the corporation can bundle the forum selection clause with other provisions to encourage adoption. Even without bundling, companies have had a high success rate when they put the issue to the shareholders.<sup>271</sup> If a corporation is able to pass a charter amendment, it is assured of enforcement.

#### IV. Conclusion

The need for forum selection clauses is driven by the proliferation of duplicative litigation over corporate transactions and alleged breaches of fiduciary duties. It has become increasingly common for a corporation to be required to defend

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269. Compare DEL. CODE ANN. tit. 8, § 216 (2011) (stating that default quorum to amend corporation's bylaws is a simple majority of those present at the shareholders' meeting and a bylaw is passed with the approval of a majority of those present), with *id.* § 242 (requiring an affirmative vote of "a majority of the outstanding stock entitled to vote thereon" in order to pass a charter amendment).

270. See *id.* § 242 (requiring an affirmative vote of "a majority of the outstanding stock entitled to vote thereon" in order to pass a charter amendment).

271. See Allen, *supra* note 3, at 5 (noting that, of the six corporations that proposed charter amendments, five succeeded); see also *supra* notes 252–53 and accompanying text (discussing these six corporations).

several different suits in multiple forums. This costs corporations additional litigation expenses that only benefit the additional lawyers required to litigate the duplicative actions. Not only does this harm corporations, it also harms society in general which purchases stock in the corporation and must pay for the judicial resources required in each action. The IAD and forum non conveniens, while useful in controlling duplicative litigation, do not adequately prevent this problem because neither jurisdiction is required to defer to the other.

This Note has proposed that corporations adopt forum selection clauses in their governing documents. As the Supreme Court noted: forum selection clauses “establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits . . . must be brought and defended.”<sup>272</sup> A corporation adopting a forum selection clause has many choices to make: which claims to include, mandatory or elective selection of forum, insertion into its charter or bylaw, and whether to include exceptions to the general rule in the absence of an indispensable party or for other specific circumstances. Through these choices, a corporation can craft a forum selection clause that best meets the company’s needs. A forum selection clause provides assurance to a corporation that, while it may be required to defend against litigation in one jurisdiction, it will not be forced to defend against the same claim in multiple forums.

*Appendix 1: Characteristics of the Prominent Forum Selection Clauses*

	Claims Covered by Clause	Mandatory or Elective	Charter or Bylaw
Gibson Dunn cluster	“any action brought by any stockholder against the Corporation or against any office, director, employee, agent or advisor of the Corporation.”	Mandatory	Bylaw
Oracle, Inc.	“any actual or purported derivative action brought on behalf of the Corporation.”	Mandatory	Bylaw
Netlist, Inc.	“any lawsuit or legal proceeding by the corporation against any of its directors or officers within the jurisdiction of [the Delaware Chancery Court].”	Mandatory	Bylaw

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272. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991).



Netsuite, Inc.	“(i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of a fiduciary duty owed by any director, officer or 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 DGCL, (iv) or any action asserting a claim governed by the internal affairs doctrine.”	Mandatory	Charter
Financial Engines, Inc.	“(i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of a fiduciary duty owed by any director, officer or 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 DGCL, (iv) or any action asserting a claim governed by the internal affairs doctrine.”	Elective	Charter
Skadden cluster	“(i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of a fiduciary duty owed by any director, officer or 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 DGCL, (iv) or any action asserting a claim governed by the internal affairs doctrine.”	Elective	Charter
Skadden cluster—Swift Transportation option	“(i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting claim of breach of a fiduciary duty owed by any director or officer of the Corporation to the Corporation or the Corporation’s stockholders, (iii) any action asserting a claim against the Corporation arising pursuant to any provision of the DGCL or the Corporation’s Certificate of Incorporation or By-Laws or (iv) any action asserting a claim against the Corporation governed by the internal affairs doctrine.”	Elective	Charter
Pillsbury cluster	“(i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting claim of breach of a fiduciary duty owed by any director or officer of the Corporation to the Corporation or the Corporation’s stockholders, (iii) any action asserting a claim against the Corporation arising pursuant to any provision of the DGCL or (iv) any action asserting a claim against the Corporation governed by the internal affairs doctrine.”	Elective	Bylaw

Simpson cluster	“(i) any derivative action or proceeding brought on behalf of the Corporation, 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 against the Corporation arising pursuant to any provision of the DGCL or the Corporation’s Amendment and Restated Certificate of Incorporation or bylaws or (iv) any action asserting a claim against the Corporation governed by the internal affairs doctrine.”	Mandatory	Charter
K&E cluster	“(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 or officer of the Corporation to the Corporation or the Corporation’s stockholders, (iii) any action asserting a claim against the Corporation to the Corporation or the Corporation’s stockholders, (iv) any action asserting a claim against the Corporation arising pursuant to any provision of the GCL or this Certificate of Incorporation or the Corporation’s Bylaws or (v) any action asserting a claim against the Corporation governed by the internal affairs doctrine.”	Mandatory	Charter