No. 21-15923

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

vs.

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

– and –

THE GAP, INC.,
Nominal Defendant-Appellee.

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

APPELLANT'S PETITION FOR REHEARING *EN BANC*

BOTTINI & BOTTINI, INC.
Francis A. Bottini, Jr.
Yury A. Kolesnikov
7817 Ivanhoe Avenue, Suite 102
La Jolla, California 92037
Telephone: (858) 914-2001
Facsimile: (858) 914-2002

Attorneys for Plaintiff-Appellant Noelle Lee

Dated: June 24, 2022

Table of Contents

Table of Authorities

Cases

Constitution and Statutes

Regulations

Rules

Other Authorities

INTRODUCTION AND RULE 35(b)(1) STATEMENT

The Court should grant *en banc* review to resolve an inter-Circuit split created by the panel's decision. *See* FED. R. APP. P. 35(b)(1)(B); 9TH CIR. R. 35-1. Relying on *dicta* in an inapposite decision,[1] the panel upheld enforcement of a forum-selection clause that purports to foreclose suit in federal court of a claim subject to exclusive federal jurisdiction. Specifically, the panel held that a forum clause that designates the Delaware Court of Chancery as the exclusive forum is valid and enforceable as to Plaintiff's derivative claim for violation of § 14(a) of the Securities Exchange Act of 1934, even though it deprives Plaintiff of the ability to pursue this claim in ***any*** forum in direct violation of the Exchange Act's anti-waiver provision.

Rehearing *en banc* is necessary because the panel knowingly created a conflict with the authoritative decision of the Seventh Circuit in *Seafarers Pension Plan v. Bradway*, 23 F.4th 714 (7th Cir. 2022), which found an identical forum clause to be contrary to both Delaware and federal law. The panel

[1] *See Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018). Unless otherwise noted, all citations and quotation marks are omitted, and all emphasis is added.

acknowledged *Seafarers* but declined to follow it because it felt bound by *Sun*. Yet *Sun* does not bear the weight that the panel places on it. It did not involve the Exchange Act's anti-waiver provision and, ultimately, did not result in waiver of any substantive rights.

The Court should grant rehearing *en banc* to clarify that whatever precedential effect *Sun* has in this context, it cannot be stretched so far as to uphold a forum clause that results in a complete waiver of shareholder claims subject to exclusive federal jurisdiction. To the extent *Sun* purported to so hold, it was wrongly decided and should be overruled.

Rehearing *en banc* is also necessary because the decision substantially affects a rule of national application in which there is an overriding need for national uniformity. *See* 9TH CIR. R. 35-1. The panel's decision permits companies to enact bylaws designating *a state court forum* as the exclusive forum for a variety of claims—***including claims subject to the exclusive federal jurisdiction***. Under its logic, such clauses are enforceable even if they result in ***a complete waiver*** of substantive rights under federal law. A number of federal statutes provide causes of action that are subject to

exclusive federal jurisdiction. If the panel's decision is allowed to stand, it would allow companies to immunize themselves against such shareholder claims by simply designating a *state court forum* for these claims.

RELEVANT FACTS AND PROCEEDINGS

I. Factual Background

Gap is a Delaware corporation headquartered in San Francisco. As a publicly-traded company subject to federal securities laws, Gap files reports with the SEC, including annual proxy statements.

This derivative action stems from Defendants' false and misleading statements in Gap's 2019 and 2020 proxy statements regarding Gap's commitments to diversity on the Board and in management.

II. Forum-Selection Clause

As relevant here, Gap's forum clause designates the Delaware Court of Chancery as the exclusive forum for "any derivative action or proceeding brought on behalf of the Corporation." ER-046. Unlike other similar clauses, Gap's clause does ***not*** provide for an alternative forum (such as a federal court in Delaware) for claims subject to exclusive federal jurisdiction.

III. Procedural Background

Section 14(a) of the Exchange Act and its implementing regulation, SEC Rule 14a-9, prohibit material misstatements and omissions in proxy statements. 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a-9. "The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *J. I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964). Given that "[t]he injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from ***the damage done [to] the corporation,***" shareholders have a private right of action to prosecute a *derivative* claim for violation of § 14(a). *Id.* at 432–33. Federal courts have exclusive jurisdiction over such claims. 15 U.S.C. § 78aa(a).

Plaintiff is a Gap shareholder. She commenced this derivative action in the Northern District of California (where Gap is headquartered) on behalf of Gap and against certain of its officers and directors. The complaint alleges that Defendants made false and misleading statements regarding Gap's commitments to diversity in the 2019 and 2020 proxy statements in

violation of § 14(a). The complaint also alleges several state-law claims.

Without reaching the merits, the court dismissed all of Plaintiff's claims, including the § 14(a) claim, on the basis of Gap's forum clause.

IV. Panel's Decision

Plaintiff appealed the dismissal of her § 14(a) claim, arguing that Gap's clause was invalid and unenforceable because it deprived her of *any* forum in which to bring the claim in contravention of the Exchange Act's exclusive-jurisdiction and anti-waiver provisions. *See* 15 U.S.C. §§ 78aa(a), 78cc(a).

The panel affirmed in a published opinion dated May 13, 2022. First, the panel incorrectly concluded that Plaintiff "concede[d]" that Gap's clause was valid and, as a result, focused solely on enforceability. Ex. A at 6. Second, the panel concluded that Plaintiff failed to carry her burden of demonstrating that Gap's clause is unenforceable. Ex. A at 6–10.

Relying on *dicta* from *Sun*, the panel summarily concluded that the Exchange Act's anti-waiver provision was not, by itself, a sufficiently "clear declaration of public policy" against waiver of substantive rights guaranteed by the Exchange Act. *Id.* at 8. Next, the panel concluded that enforcement

of the clause would not violate the Exchange Act's exclusive-jurisdiction provision. *Id.* at 8–9. The panel next acknowledged the relevancy of Delaware law but dismissed Plaintiff's reliance on it because Plaintiff failed to demonstrate that "she could not get any relief" in Delaware. *Id.* at 9.

Finally, the panel acknowledged that the Seventh Circuit in *Seafarers* reached a contrary conclusion when it held that an identical forum clause violates the Exchange Act. *Id.* at 10. Nonetheless, relying on *Sun*, the panel refused to follow *Seafarers* and knowingly created an inter-Circuit split as to the validity and enforceability of such clauses under federal law.

On May 24, 2022, the Court extended until June 24, 2022, the deadline for Plaintiff to file any petition for rehearing or rehearing *en banc.*

ARGUMENT

I. The Forum Clause Is Invalid and Void Under the Exchange Act

The most straightforward way to analyze the issues in this appeal is under federal law which, pursuant to the Supremacy Clause, is part of Delaware law. *See* U.S. CONST. art. VI; *Claflin v. Houseman*, 93 U.S. 130, 136 (1876). Under this approach, Gap's forum clause is ***invalid*** under both

federal and Delaware law to the extent that it purports to deprive Plaintiff of any forum in which to prosecute her derivative § 14(a) claim in direct violation of the anti-waiver provision in Section 29(a) of the Exchange Act.[2]

Section 29(a) voids ***"[a]ny*** condition, stipulation, or provision binding any person acquiring any security to waive compliance with ***any*** provision of [the Exchange Act]." 15 U.S.C. § 78cc(a). Here, the application of Gap's clause to Plaintiff's § 14(a) claim deprives Plaintiff of the ability to bring this claim in ***any*** forum (Ex. A at 5)—thus, resulting in a ***complete waiver*** of the claim. As the Seventh Circuit observed, such result is "difficult to reconcile with Section 29(a) of the Exchange Act, which deems void contractual waivers of compliance with the requirements of the Act." *Seafarers*, 23 F.4th at 720. It is also impossible to reconcile with Delaware corporate law, which "respects federal securities law and does not empower corporations to use such techniques to opt out of the Exchange Act." *Id.* at 718.

---

[2] The panel incorrectly observed that Plaintiff somehow "concede[d]" that Gap's forum bylaw is valid. Ex. A at 6. Plaintiff made no such concession and has consistently argued that to the extent Gap's forum clause purports to apply to her § 14(a) claim, it is void under Section 29(a) and, thus, invalid. *See* Blue Br. at 28–29; Gray Br. at 20–24.

Accordingly, because Gap's clause purports to waive compliance with a provision of the Exchange Act (Plaintiff's ability to prosecute her derivative § 14(a) claim), it is "void" under Section 29(a) and, thus, is invalid.

The panel disregarded Section 29(a)'s plain language and the Supremacy Clause and, instead, simply assumed that the forum clause was valid and proceeded to decide enforceability. Ex. A at 6. By concluding that the clause as applied was valid, the panel created a conflict with the Seventh Circuit, which found an identical forum clause to be contrary to the Exchange Act. *See Seafarers*, 23 F.4th at 718 ("Applying the forum bylaw to this case is contrary to Delaware corporation law ***and federal securities law***."); *see also id.* at 717, 720 (holding that the application of the clause to bar plaintiff's derivative § 14(a) claim would be contrary to Section 29(a)).

Seafarers is directly on point. Although the Seventh Circuit framed its discussion in terms of *Delaware law*, it necessarily had to first resolve that the clause violates *federal law* before it could conclude that it also violates Delaware law. *See Seafarers*, 23 F.4th at 719 ("The most straightforward resolution of this appeal is under Delaware corporation law, ***which we read***

as barring application of the Boeing forum bylaw to this case invoking non-waivable rights under the federal Exchange Act."); *id.* at 720 ("As applied here, Boeing's forum bylaw violates Section 115 ***because it is inconsistent with the jurisdictional requirements of the Exchange Act of 1934***.").

The Seventh Circuit focused on 8 Del. C. § 115, which allows a company to enact a forum bylaw pointing to Delaware if it is "***consistent*** with applicable jurisdictional requirements." *Id.* Thus, the first step in its analysis was to determine whether Boeing's bylaw was "consistent" with the Exchange Act to the extent that it purported to apply to a derivative § 14(a) claim. *Id.* at 720–21. The Seventh Circuit concluded that the application of the forum clause under these circumstances would be "***inconsistent*** with the jurisdictional requirements of the Exchange Act." *Id.* at 720.

The panel in this case reached a contrary conclusion and, in so doing, became the ***only*** outlier decision to have applied a forum clause in such a manner as to ***completely deprive*** a shareholder of any forum in which to pursue a derivative § 14(a) claim. Because the panel's decision creates an inter-Circuit split and is gravely wrong on an issue as to which there is an

overriding need for national uniformity, rehearing *en banc* is necessary.

II. Enforcement of the Forum Clause Violates the Exchange Act

For largely the same reasons as discussed above, Gap's clause is also ***unenforceable*** to the extent that it purports to apply to Plaintiff's derivative § 14(a) claim. A forum clause is unenforceable if "enforcement would contravene ***a strong public policy of the forum*** in which suit is brought, whether declared by statute or by judicial decision." *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *see also Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 916 (9th Cir. 2019) (reversing and remanding where enforcement of the clause would violate Idaho's anti-waiver statute). Here, enforcement would contravene a strong public policy of the federal forum as declared in Sections 27(a) and 29(a) of the Exchange Act.

In Section 27(a), Congress made ***a public-policy decision*** to vest federal courts with "exclusive jurisdiction" over all actions brought to enforce any liability under the Exchange Act. 15 U.S.C. § 78aa(a). It did so "motivated by a desire to achieve greater uniformity of construction and more effective and expert application of that law." *Murphy v. Gallagher*, 761

F.2d 878, 885 (2d Cir. 1985). Indeed, Congress "deliberately decided to vest federal courts with exclusive jurisdiction" to adjudicate Exchange Act claims—including under § 14(a)—"claims that frequently arise *in the derivative setting*." *Cottrell v. Duke*, 737 F.3d 1238, 1248 (8th Cir. 2013).

And in Section 29(a), Congress made a public policy decision to declare that any attempt to waive compliance with "any provision" of the Exchange Act "shall be void." 15 U.S.C. § 78cc(a). As the Seventh Circuit recognized, the Exchange Act's prohibition against waiver is "woven ***into the public policy*** of the federal securities laws." *Seafarers*, 23 F.4th at 727.

The panel brushed aside these statutes, suggesting they are not enough—by themselves—to demonstrate that enforcement of the forum clause in this case would violate public policy. Ex. A at 8–9. To reach this conclusion, the panel relied on *Sun* for the proposition that "the strong federal policy in favor of enforcing forum-selection clauses … supersede[s] antiwaiver provisions in state statutes as well as federal statutes." *Id.* at 8. As explained below, *Sun* is inapposite and cannot be stretched so far as to allow enforcement of Gap's clause as to Plaintiff's § 14(a) claim.

A. *Sun* Does Not Bear the Weight that the Panel Places on It

To begin with, *Sun* involved a forum clause negotiated by sophisticated parties at arm's length. 901 F.3d a 1084–85. The lawsuit did not implicate the Exchange Act's anti-waiver provision and, unlike here, the forum clause actually provided that any claims subject to exclusive federal jurisdiction *can be brought in the Northern District of California*. *Id.* at 1085. More importantly, in *Sun*, there was no waiver of any substantive rights because plaintiffs retained the "opportunity to pursue *both* their Washington and California securities claims" in California. *Id.* at 1092–93.

Because *Sun* did not involve Section 29(a), its pronouncement as to the effect of a forum clause on a *federal* anti-waiver provision is *dicta* and the panel erred in relying on it. *See Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985); *People v. Knoller*, 41 Cal. 4th 139, 155 (2007).

In any event, to the extent *Sun* purports to hold that a unilaterally-enacted forum clause can supersede the Exchange Act's anti-waiver provision in a non-international context, it was wrongly decided and must be overruled. Notably, in making this pronouncement, *Sun* relied on

Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998) (*en banc*). *Richards*, however, was part of a unique set of cases that arose out of related Lloyds-of-London litigation in the 1990s and which focused on forum clauses *in truly international agreements*. In *Richards*, this Court framed the "primary question" as "whether the antiwaiver provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 void choice of law and choice of forum clauses ***in an international transaction***." *Id.* at 1291. Indeed, throughout the opinion, the Court relied heavily on case law dealing with enforcement of forum clauses *in international agreements* and repeatedly emphasized that principles of *international comity* were at play. *See id.* at 1291–95. No such principles of international comity are at play here.

In this regard, *Seafarers* is instructive. There, defendants similarly attempted to rely on a Lloyds-of-London case (*Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993)) for the proposition that a forum clause can supersede the Exchange Act's anti-waiver provision. *Seafarers*, 23 F.4th at 725. The Seventh Circuit rejected such reliance, observing that the result in *Bonny* was driven by the international nature of the transactions at issue and

the need for comity in enforcing international agreements. *Id.* at 726–27. As the Seventh Circuit cogently observed, extending *Bonny* to domestic investments "***would undermine the pivotal decisions by Congress in 1933 and 1934 to assume the dominant role in securities regulation***." *Id.* at 727.

The same is true here and the panel's decision to enforce Gap's forum clause as to Plaintiff's derivative § 14(a) claim undermines the pivotal decisions made by Congress in passing the Exchange Act, vesting federal courts with exclusive jurisdiction, and providing that any attempt to waive compliance with any provision of the Exchange Act shall be void. Because the panel's decision is wrong on the law with regard to this question of exceptional importance and because it conflicts with the authoritative decision of the Seventh Circuit on this issue, rehearing *en banc* is essential.

B. The Panel's Decision Is Contrary to Supreme Court's Guidance

As noted above, the panel's decision is an outlier in this context. Other courts faced with similar clauses have taken a more pragmatic approach of severing and dismissing the state-law claims, while retaining jurisdiction

over claims subject to exclusive federal jurisdiction.[3]

The panel's approach is also contrary to Supreme Court's guidance. Although the Supreme Court has emphasized presumptive enforceability of otherwise "valid" forum clauses,[4] it has consistently observed that forum clauses cannot be used to prospectively deprive parties of statutory rights. Thus, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, the Court went

---

[3] *See Luce v. Edelstein*, 802 F.2d 49, 57 (2d Cir. 1986) (affirming dismissal of most claims but agreeing that the district court correctly retained the Exchange Act claims); *KDH Consulting Grp. LLC v. Iterative Capital Mgmt. L.P.*, 2020 U.S. Dist. LEXIS 251221, at **23–24 (S.D.N.Y. June 27, 2020) ("The better result, in this Court's view, is to decline to enforce the forum selection clause, but only for the claims subject to Section 78cc. ***With this approach, the Court heeds Congress's clear intent to keep Exchange Act claims in federal court while upholding the contract negotiated by the parties.***"); *In re Facebook, Inc. S'holder Derivative Privacy Litig.*, 367 F. Supp. 3d 1108, 1120 (N.D. Cal. 2019) ("the Court has discretion to sever the federal claims and dismiss the remaining claims to be brought in the prescribed forum").

[4] *See, e.g.*, *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 62 (2013) ("When the parties have agreed to a ***valid*** forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause."). Notably, in *Atlantic Marine*, the Supreme Court emphasized that its analysis "presupposes ***a contractually valid*** forum-selection clause." *Id.* at 62 n.5. Here, to the extent that Gap's forum clause purports to result in a complete waiver of Plaintiff's derivative § 14(a) claim, it is ***contractually invalid*** because it violates Section 29(a).

out of its way to warn against the possibility of trying to avoid application of federal statutes through a forum clause, stating that "in the event the choice-of-forum and choice-of-law clauses operated in tandem *as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations*, [the Court] would have little hesitation in condemning the agreement *as against public policy*." 473 U.S. 614, 637 n.19 (1985); *accord Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (same).

Shearson/American Express v. McMahon, 482 U.S. 220 (1987), relied upon by the panel (Ex. A at 9), is not to the contrary. In finding that "compliance" with the predispute arbitration agreement in that case would not violate Section 29(a), the Court specifically observed that enforcement of the arbitration agreement ***would preserve the plaintiffs' ability to prosecute the Exchange Act claims in arbitration***. *See McMahon*, 482 U.S. at 229 ("where arbitration does provide an adequate means of enforcing the provisions of the Exchange Act, § 29(a) does not void a predispute waiver of § 27"). The same is ***not*** true here because enforcement of Gap's clause will result in a complete waiver of Plaintiff's derivative § 14(a) claim.

* * *

In sum, enforcement of Gap's clause as to Plaintiff's derivative § 14(a) claim would be against public policy as declared by two federal statutes — Sections 27(a) and 29(a) of the Exchange Act. Congress's enactment of these statutes is more than sufficient to demonstrate that enforcement of Gap's clause in this case would violate strong public policy of the federal forum. *See Bremen*, 407 U.S. at 15; *Gemini Techs.*, 931 F.3d at 916. And, to the extent a further judicial decision is necessary to demonstrate that these statutes do, in fact, reflect a strong public policy, the Seventh Circuit's decision in *Seafarers* more than fits the bill. *See* 23 F.4th at 727 ("Non-waiver is woven into the public policy of the federal securities laws because it is the express statutory law. And that law is binding — especially where, as here, there are no countervailing international policy interests at stake.").

For all these reasons, *en banc* rehearing is necessary to address this question of exceptional importance and to correct the inter-Circuit split created by the panel's decision. *See* FED. R. APP. P. 35(b)(1)(B).

III. The Forum Clause Is Invalid Under Delaware Law

Although Delaware law permits bylaws designating Delaware as the exclusive forum, any such bylaws must be "consistent with applicable jurisdictional requirements." 8 DEL. C. § 115. Here, to the extent Gap's clause results in a complete waiver of Plaintiff's derivative § 14(a) claim, it is ***inconsistent*** with the Exchange Act and, thus, is ***invalid*** under § 115. *See Seafarers*, 23 F.4th at 720 ("Boeing's forum bylaw violates Section 115 because it is inconsistent with the jurisdictional requirements of the Exchange Act").[5]

Notably, guidance from the Delaware legislature supports this reading of § 115. The synopsis accompanying the 2015 Amendments to the Delaware General Corporation Law specifically cautioned that the new § 115 was "***not*** intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction." S.B. 75, 148th Gen. Assemb., Reg. Sess.

[5] Contrary to the panel's conclusion, this argument is not waived because Plaintiff raised the clause's validity under Delaware law in the district court and on appeal. *See, e.g.*, Blue Br. at 14–16; Gray Br. at 24–26; *see also Lee v. Fisher*, No. 20-cv-6163-SK, Dkt. No. 52 at 27 (N.D. Cal.). In any event, the Court has discretion to address issues raised for the first time on appeal that concern a pure question of law, such as questions of statutory interpretation. *See Wong v. Flynn-Kerper*, 999 F.3d 1205, 1214 n.11 (2021).

(Del. 2015) (synopsis). By eliminating federal jurisdiction over Plaintiff's exclusively federal derivative § 14(a) claim, Gap's bylaw forecloses suit in a federal court based on federal jurisdiction. That's exactly what § 115 was "***not*** intended to authorize." *See id.*; *accord Seafarers*, 23 F.4th at 720.

This conclusion finds further support in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, in which then-Chancellor Strine observed that defendants attempting to dismiss a derivative § 14(a) claim on the basis of a forum bylaw designating Delaware Court of Chancery as the exclusive forum "would have trouble" because plaintiff would be able to argue that such application of the bylaw would result in the waiver of plaintiff's claim and "***such a waiver would be inconsistent with the antiwaiver provisions of [the Exchange Act]***." 73 A.3d 934, 962 (Del. Ch. 2013). Chancellor Strine's observation "signals clearly enough that Delaware law would not look kindly" on Defendants' effort to apply Gap's forum bylaw to Plaintiff's derivative § 14(a) claim. *See Seafarers*, 23 F.4th at 723–24.

The panel acknowledged the relevancy of Delaware law but dismissed Plaintiff's reliance on it because Plaintiff failed to demonstrate that "she

could not get any relief in the Delaware Court of Chancery." Ex. A at 9. This, however, is the wrong inquiry. As the Seventh Circuit observed, "the anti-waiver provision of Section 29(a) ***does not invite a determination of whether state law offers alternative remedies*** that might be deemed sufficient against an inchoate standard." *Seafarers*, 23 F.4th at 727. Rather, "[n]on-waiver is woven into the public policy of the federal securities laws ***because it is the express statutory law***." *Id.* The panel's contrary conclusion finds no support in relevant law and necessitates rehearing *en banc*.

IV. The Panel's Decision Would Allow Companies to Circumvent Federal Courts' Jurisdiction and to Immunize Themselves from Exclusively Federal Statutory Claims

The panel's decision is not limited to derivative § 14(a) claims but could have serious implications on other federal rights. A number of federal statutes, including the Exchange Act and the Sherman Act, vest federal courts with exclusive jurisdiction over the claims arising under those acts. Under the logic of the panel's decision, a company can unilaterally enact a forum bylaw requiring any of such claims to be brought in *a state court forum*. Because state courts would not have jurisdiction to hear those claims, such

bylaws would effectively result in *a complete waiver* of substantive federal rights, including, for example, direct or derivative claims for, among other things, securities fraud and antitrust violations.

The Court should not allow such an absurd result, particularly where viable alternatives exist. As discussed above, one alternative is to enforce such clauses as against state-law claims, while allowing federal courts to retain jurisdiction over exclusively federal claims. Another alternative is for companies to specify that any claims subject to exclusive federal jurisdiction can be brought in federal court. This would preserve the company's ability to choose a single forum state for all disputes without impermissibly encroaching upon the federal courts' jurisdiction. It would also be consistent with the approach endorsed by the Delaware legislature.

CONCLUSION

For all these reasons, the Court should grant rehearing *en banc*.

Dated: June 24, 2022

Respectfully submitted,

BOTTINI & BOTTINI, INC.
Francis A. Bottini, Jr.
Yury A. Kolesnikov

s/ Yury A. Kolesnikov
Yury A. Kolesnikov

7817 Ivanhoe Avenue, Suite 102
La Jolla, California 92037
Telephone: (858) 914-2001
Facsimile: (858) 914-2002

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) Case No. 21-15923

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is *(select one)*:

[x] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** 4,190.

(Petitions and responses must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature *s/ Yury A. Kolesnikov* **Date** June 24, 2022
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I certify that, on June 24, 2022, I caused the foregoing Appellant's Petition for Rehearing *En Banc* to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 24th day of June 2022, at La Jolla, California.

s/ Yury A. Kolesnikov
Yury A. Kolesnikov

EXHIBIT A

EXHIBIT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOELLE LEE, derivatively on behalf of The Gap, Inc, *Plaintiff-Appellant*, v. ROBERT J. FISHER; SONIA SYNGAL; ARTHUR PECK; AMY BOHUTINSKY; AMY MILES; ISABELLA D. GOREN; BOB L. MARTIN; CHRIS O'NEILL; ELIZABETH A. SMITH; JOHN J. FISHER; JORGE P. MONTOYA; MAYO A. SHATTUCK III; TRACY GARDNER; WILLIAM S. FISHER; DORIS F. FISHER; THE GAP, INC., Nominal Defendant, *Defendants-Appellees.*	No. 21-15923 D.C. No. 3:20-cv-06163-SK OPINION

Appeal from the United States District Court
for the Northern District of California
Sallie Kim, Magistrate Judge, Presiding

Argued and Submitted April 14, 2022
San Francisco, California

Filed May 13, 2022

Before: RICHARD R. CLIFTON and MILAN D. SMITH, JR., Circuit Judges, and CHRISTINA REISS,* District Judge.

Opinion by Judge Milan D. Smith, Jr.

SUMMARY**

Forum Selection

The panel affirmed the district court's dismissal of Noelle Lee's shareholder derivative action alleging that The Gap, Inc. and its directors (collectively, Gap) failed to create meaningful diversity within company leadership roles, and that Gap made false statements to shareholders in its proxy statements about the level of diversity it had achieved.

The district court dismissed the complaint based on its application of the doctrine of *forum non conveniens*, holding that Lee was bound by the forum-selection clause in Gap's bylaws, which requires any derivative action to be adjudicated in the Delaware Court of Chancery.

Lee conceded that the forum-selection clause is valid and, by its terms, applies to her lawsuit. Accordingly, the only question before this court was whether the clause is enforceable. Applying the doctrine of *forum non*

* The Honorable Christina Reiss, United States District Judge for the District of Vermont, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

conveniens, the panel wrote that a forum-selection clause creates a strong presumption in favor of transferring a case, that the plaintiff bears the burden to establish that transfer is unwarranted, and that the district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer. Noting that Lee did not contend that the forum-selection clause is invalid due to fraud, nor that litigating her derivative claim in the Delaware forum would be gravely difficult, the panel considered only the second factor derived from *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)—whether enforcement of the clause would contravene strong public policy. The panel held that Lee did not meet her burden to show that enforcing Gap's forum-selection clause contravenes federal public policy, rejecting as unavailing the evidence Lee identified as supporting her position: the Securities Exchange Act's antiwaiver provision and exclusive federal jurisdiction provision, Delaware state caselaw, and a federal court's obligation to hear cases within its jurisdiction. The panel therefore concluded that the district court did not abuse its discretion in dismissing the complaint.

COUNSEL

Yury A. Kolesnikov (argued) and Francis A. Bottini Jr., Bottini & Bottini Inc., La Jolla, California, for Plaintiff-Appellant.

Roman Martinez (argued), Susan E. Engel, and Michael Clemente, Latham & Watkins LLP, Washington, D.C.; Elizabeth L. Deeley and Morgan E. Whitworth, Latham & Watkins LLP, San Francisco, California; William J. Trach, Lathan & Watkins LLP, Boston, Massachusetts; for Defendants-Appellees.

OPINION

M. SMITH, Circuit Judge:

Plaintiff Noelle Lee brought a shareholder derivative action alleging that The Gap, Inc. and its directors (collectively, Gap) failed to create meaningful diversity within company leadership roles, and that Gap made false statements to shareholders in its proxy statements about the level of diversity it had achieved. Gap's bylaws contain a forum-selection clause that requires "any derivative action or proceeding brought on behalf of the Corporation" to be adjudicated in the Delaware Court of Chancery. Notwithstanding the forum-selection clause, Lee brought her derivative lawsuit in a federal district court in California, alleging a violation of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), along with various state law claims. The district court dismissed Lee's complaint based on its application of the doctrine of *forum non conveniens*, holding that she was bound by the forum-selection clause. We affirm the district court because Lee

has not carried her heavy burden to show that Gap's forum-selection clause is unenforceable.

FACTUAL AND PROCEDURAL BACKGROUND

Section 14(a) and its implementing regulation, Securities Exchange Commission Rule 14a-9, prohibit material misstatements or omissions in a proxy statement. 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a-9(a). Section 14(a) may be enforced by direct actions, in which shareholders assert their own rights, or by derivative actions, in which shareholders assert the rights of the corporation. Federal courts have exclusive jurisdiction over these claims, 15 U.S.C. § 78aa, but Gap's bylaws include a forum-selection clause designating the Delaware Court of Chancery as the exclusive forum for all derivative claims. Gap acknowledges that if its forum-selection clause is enforced, Lee will not be able to bring her derivative Section 14(a) claim in the Delaware Court of Chancery. *See* 15 U.S.C. § 78aa.

Defendants moved to dismiss this action based on the doctrine of *forum non conveniens*, citing Gap's forum-selection clause. The district court agreed that the clause was enforceable and dismissed the lawsuit. On appeal, Lee argues that Gap's forum-selection clause violates public policy and is unenforceable because it prevents her from bringing a derivative Section 14(a) claim in any court.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review for abuse of discretion the district court's dismissal of a complaint for failure to comply with an enforceable forum-selection clause. *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018).

ANALYSIS

I.

Lee concedes that Gap's forum-selection clause is valid and, by its terms, applies to her lawsuit. Accordingly, the only question before us is whether the clause is enforceable. "[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*." *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 60 (2013). In a "typical case not involving a forum-selection clause," courts evaluate factors such as convenience of the parties when conducting a *forum non conveniens* analysis. *Id.* at 62–63. "The calculus changes, however, when the parties' contract contains a valid forum-selection clause, which 'represents the parties' agreement as to the most proper forum.'" *Id.* at 63 (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)). A forum-selection clause, therefore, creates a strong presumption in favor of transferring a case, and the plaintiff "bears the burden" to establish that transfer is unwarranted. *Id.*

In *Atlantic Marine*, the Supreme Court established the general rule that "a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer." *Id.* at 52.[1] The Court did not define the term "extraordinary circumstances" in *Atlantic Marine*, and so we looked to its earlier decision in *M/S Bremen v. Zapata Off-Shore Co.*,

[1] Although the Supreme Court set forth this rule in context of a 28 U.S.C. § 1404(a) motion to transfer, "the same standards should apply to motions to dismiss for *forum non conveniens*" even though "a successful motion under *forum non conveniens* requires dismissal of the case." *See Atl. Marine*, 571 U.S. at 66 n.8.

407 U.S. 1 (1972) for guidance. *See Advanced China Healthcare*, 901 F.3d at 1088; *see also Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 914–15 (9th Cir. 2019). From *Bremen*, we identified three general principles that establish extraordinary circumstances, namely: (1) when the forum-selection clause is invalid because of "fraud or overreaching," (2) when enforcement of the clause "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision," or (3) when the forum would be "so gravely difficult and inconvenient" that the plaintiff "will for all practical purposes be deprived of his day in court." *Advanced China Healthcare*, 901 F.3d at 1088 (quoting *Bremen*, 407 U.S. at 15, 18).

On appeal, Lee does not contend that the forum-selection clause is invalid due to fraud, nor that litigating her derivative claim in the Delaware forum would be gravely difficult. Therefore, we consider only the second *Bremen* factor and ask whether enforcement of the clause would contravene strong public policy. We have developed a straightforward test to decide whether a forum-selection clause contravenes public policy. *See Advanced China Healthcare*, 901 F.3d at 1090; *Gemini Techs*, 931 F.3d at 915–16. First, we look to "the forum in which suit is brought." *Advanced China Healthcare*, 901 F.3d at 1090. Then we determine whether the plaintiff has identified "a statute or judicial decision" in that forum that "clearly states" strong public policy rendering the clause unenforceable. *Id.*

II.

Lee brought her lawsuit in a federal forum and identified the following as evidence of clear public policy supporting her position: (1) the Exchange Act's antiwaiver provision, 15 U.S.C. § 78cc(a); (2) the Exchange Act's exclusive

federal jurisdiction provision, 15 U.S.C. § 78aa; (3) Delaware state caselaw; and (4) a federal court's obligation to hear cases within its jurisdiction. Lee has not met her burden to show that the forum-selection clause is unenforceable.

Lee first points to the Exchange Act's antiwaiver provision as proof of strong public policy. This argument is unavailing because "the strong federal policy in favor of enforcing forum-selection clauses . . . supersede[s] antiwaiver provisions in state statutes as well as federal statutes, regardless whether the clause points to a state court, a foreign court, or another federal court." *Advanced China Healthcare*, 901 F.3d at 1090. Unlike the provision the plaintiffs in *Gemini* identified, explicitly stating any waiver of statutory rights "is void as it is against the public policy of Idaho," 931 F.3d at 916, the Exchange Act's antiwaiver provision does not contain a clear declaration of federal policy.

Similarly, the Exchange Act's exclusive federal jurisdiction provision, 15 U.S.C. § 78aa, does not provide us with a clear statutory declaration. That section states: "[t]he district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter." 15 U.S.C. § 78aa. It further provides that "[a]ny suit or action . . . may be brought in any such district or in the district wherein the defendant is found." *Id.* By its terms, this section forbids non-federal courts from adjudicating Section 14(a) claims. Gap's bylaws do not force the Delaware Court of Chancery to adjudicate Lee's derivative Section 14(a) claim. Rather, the bylaws result in this claim being dismissed in federal court. Therefore, enforcement of the forum-selection clause

does not violate any express statutory policy of the Exchange Act's exclusive federal jurisdiction provision. Moreover, the Supreme Court has held that the Exchange Act's exclusivity provision is waivable. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987) (explaining that "[b]ecause [the Exchange Act's exclusive jurisdiction provision] does not impose any statutory duties, its waiver does not constitute a waiver of 'compliance with any provision' of the Exchange Act.").

Lee also identifies Delaware caselaw in support of her public policy argument, citing *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013). Defendants contend that "Delaware law is irrelevant" to our inquiry because it is not federal law. It is true that we look for a strong public policy reflected in judicial decisions and statutes from "the forum in which suit is brought." *Advanced China Healthcare*, 901 F.3d at 1090 (quoting *Bremen*, 407 U.S. at 15). However, the law of the forum identified in the forum-selection clause is not "irrelevant" in determining whether the clause is enforceable. For example, under the second prong of the *Bremen* test, we consider the law of the forum identified in the forum-selection clause to determine whether plaintiffs have some "reasonable recourse" in that forum. *See Advanced China Healthcare*, 901 F.3d at 1089 & n.6 ("We note that we would give more weight to Washington's public policy interests if plaintiffs would be denied any relief in a California forum."). If Lee identified Delaware law clearly stating that she could not get any relief in the Delaware Court of Chancery, we would have little trouble considering the effect of that law as part of our public policy analysis. She has not done so.

In her reply brief, Lee cites the Seventh Circuit's recent decision in *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714 (7th Cir. 2022). In *Seafarers*, a divided panel held that an identical Boeing forum-selection clause was unenforceable because it was "contrary to Delaware corporation law and federal securities law." *Id.* at 718. The Seventh Circuit held that Section 115 of the Delaware General Corporation Law, 8 Del. Code § 115, "reject[ed] Boeing's use of its forum bylaw to foreclose entirely plaintiff's derivative action under Section 14(a)." *Id.* at 720. Although the bulk of the Seventh Circuit's reasoning focused on Delaware law, the court also held that Boeing's bylaw violated the Exchange Act's antiwaiver provision. *Id.* at 727. Lee did not identify Section 115 of Delaware corporate law in the district court or in her opening brief on appeal, and so has waived any reliance on that provision. Moreover, for the reasons previously discussed, our binding precedent forecloses reliance on the Exchange Act's antiwaiver provision. *See Advanced China Healthcare*, 901 F.3d at 1089–90.

Finally, Lee argues that federal courts have a "virtually unflagging obligation" to hear cases within their exclusive jurisdiction, citing abstention doctrine cases. *See, e.g.*, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). But this obligation is overcome by the strong presumption in favor of enforcing forum-selection clauses "regardless whether the clause points to a state court, a foreign court, or another federal court." *Advanced China Healthcare*, 901 F.3d at 1090.

CONCLUSION

Lee has not met her heavy burden to show that enforcing Gap's forum-selection clause contravenes strong federal

public policy. We therefore conclude that the district court did not abuse its discretion in dismissing the complaint.

AFFIRMED.