
Note

Oh the Places Stockholders Will Go! A Guide for Navigating Forum Selection Bylaws Outside of Delaware

Stephanna F. Szotkowski*

Until 2010, the law regarding intra-corporate disputes was relatively settled: stockholders initiated derivative suits in the state of incorporation on behalf of and in the name of the corporation.¹ More often than not, litigants chose Delaware, the state of incorporation for most corporations.² Vice Chancellor Laster of the Delaware Court of Chancery questioned this presumptive default in his 2010 *In re Revlon* opinion.³ He suggested that corporations could adopt charter provisions selecting an exclusive forum for intra-corporate litigation.⁴ These unprecedented words appeared to give corporate boards of directors the green light to confine certain types of suits to the Delaware Court of Chancery, eliminating shareholders' opportunities for multi-

* J.D. Candidate 2014, University of Minnesota Law School; B.A. 2010, University of Wisconsin-Madison. I would like to thank Professors Jessica Clarke, Claire Hill, John Matheson, and Brett McDonnell as well as Mary Eaton and Joel Greenberg for their invaluable guidance in preparing this Note. Special thanks to Melissa Card, Rachel Kitze, Robin Lehninger, Kim Sriver, Emily Willborn, and the members of the *Minnesota Law Review* for their comments and editing assistance. Finally, deepest thanks to my parents, Peter and Nancy, my brothers, Peter and Sam, and Daniel Eck for their love and support. Copyright © 2014 by Stephanna F. Szotkowski.

1. See Joseph A. Grundfest, *The History of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 336-37 n.10 (2012).

2. See Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 578 (2002) (stating that 85% of corporations that incorporated out-of-state choose to incorporate in Delaware).

3. See *In re Revlon Inc., S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010) (“[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”).

4. *Id.*

forum litigation and forum shopping.⁵ This simultaneous existence and lack of a choice had never before been self-evident.⁶ The Vice Chancellor mentioned certificates of incorporation, but not bylaws⁷—it remained unclear whether forum selection bylaws would be enforceable.⁸

The first case outside of Delaware testing these new parameters was *Galaviz v. Berg*.⁹ Oracle Corporation's board of directors amended its bylaws after (later-alleged) wrongdoing to provide for exclusive litigation in Delaware.¹⁰ The District Court for the Northern District of California refused to enforce the forum selection clause.¹¹ The court reasoned that as a matter of federal common law and not Delaware General Corporation Law (DGCL), directors could not control forum selection by unilateral action in a manner that could not be achieved in contract law, which requires mutual assent to contractual modifications.¹²

Together, *In re Revlon* and *Galaviz* generated significant questions about the utility and enforceability of forum selection clauses in the corporate context. They reignited an ongoing debate about the proper role of the corporate board in relation to stockholders; they drew attention to the phenomenon of multi-jurisdictional litigation and entrepreneurial plaintiffs that drove the need for forum selection.¹³ Practitioners advised their

5. The forum selection clause would apply in four types of suits: derivative, fiduciary duties, suits involving Delaware General Corporate Law, and internal affairs suits. *See, e.g.*, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 950–51 (Del. Ch. 2013); Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 358 n.156 (2013).

6. Grundfest, *supra* note 1, at 336–38.

7. *In re Revlon*, 990 A.2d at 960 n.8.

8. Commentators generally agreed that forum selection clauses in corporate charters were enforceable. *See, e.g.*, Brian J.M. Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 141–42 (2011). Due to the greater consensus in this area, the enforceability of forum selection clauses in charter provisions will not be the focus of this Note.

9. 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011).

10. *Id.* at 1171–72 (overcharging the United States government millions of dollars in the sale of software and licenses).

11. *Id.* at 1171.

12. *Id.* at 1174–75.

13. *See, e.g.*, John C. Coffee, Jr., *Foreword: The Delaware Court of Chancery: Change, Continuity—and Competition*, 2012 COLUM. BUS. L. REV. 387, 390–92.

clients to include such clauses, “just in case.”¹⁴ Proxy advisor groups encouraged corporations not to adopt clauses in their bylaws.¹⁵ Stockholder plaintiffs challenged directors’ unilateral adoption of forum selection bylaws through derivative litigation.¹⁶ Proponents countered with director authority and fiduciary duty analyses.¹⁷ Then, on June 25, 2013, the Delaware Court of Chancery handed down a much-anticipated decision that arose from a wave of derivative suits filed in February 2012.

In *Boilermakers*, Chancellor Strine upheld forum selection bylaws unilaterally adopted by the boards of directors of Chevron and FedEx, two Delaware corporations that faced derivative suits.¹⁸ The ruling limited its analysis to clarifying that bylaws are statutorily and contractually valid; it did not discuss fact-laden fiduciary duties.¹⁹ The decision erased much of the uncertainty surrounding forum selection bylaws, but significant questions remain.²⁰ The impact of the holding outside of Delaware for Delaware corporations remains tenuous.²¹ Poten-

14. See, e.g., Bonnie White, Note, *Reevaluating Galaviz v. Berg: An Analysis of Forum-Selection Provisions in Unilaterally Adopted Corporate Bylaws as Requirements Contracts*, 160 U. PA. L. REV. PENNUMBRA 390, 391 n.4 (2012).

15. See, e.g., COUNCIL OF INSTITUTIONAL INVESTORS, CORPORATE GOVERNANCE POLICIES 1.9 (2013), available at http://www.cii.org/corp_gov_policies. Proxy advisor groups make recommendations for and gather most of their data from proxy seasons, the time of the year when most corporations hold their annual stockholder meetings. See, e.g., Paul Rose, *On the Role and Regulation of Proxy Advisors*, 109 MICH. L. REV. FIRST IMPRESSIONS 62, 62–63 (2011). Their impact comes primarily from increased stockholder scrutiny generated by their recommendations; they are highly influential in corporate governance. See, e.g., *id.*

16. See, e.g., Verified Complaint at ¶ 74, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2012) (No. 7220), 2012 WL 485390 [hereinafter *Boilermakers Verified Complaint*].

17. See Grundfest & Savelle, *supra* note 5, at 330; see also *infra* Part II(B).

18. *Boilermakers*, 73 A.3d at 939.

19. *Id.* at 950–58 (explaining that forum selection clauses that relate to “internal affairs” are proper subject matter of bylaws and that they constitute “flexible,” unilaterally-adopted contracts between the stockholders and the board).

20. See Theodore Mirvis, *Surrender in the Forum Selection Bylaw Battle*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Oct. 28, 2013, 9:21 AM), <http://blogs.law.harvard.edu/corpgov/2013/10/28/surrender-in-the-forum-selection-bylaw-battle>.

21. Since the plaintiffs in *Boilermakers* withdrew their appeal to the Delaware Supreme Court, the decision from the Delaware Court of Chancery stands. It is therefore only persuasive precedent for non-Delaware courts, which will have to choose whether to accept Chancellor Strine’s reasoning. BONNIE J. ROE ET AL., *THE FUTURE OF EXCLUSIVE FORUM BYLAWS* (2013),

tial choice of law, choice of forum, fiduciary duties, and judicial applications of public policy permutations will likely result in non-uniform interpretation of the decision.²² Stockholders have brains in their heads, feet in their shoes, and may steer themselves in any direction they choose, but courts are the ones who must decide where they go.²³

This Note aims to provide a guide for courts outside of Delaware to determine the enforceability of forum selection bylaws. Though *Boilermakers* established that forum selection bylaws are likely enforceable in Delaware, foreign courts must contend with how to interpret and apply the decision.²⁴ This guide will focus on DGCL law, which presumptively applies to “internal affairs” disputes of Delaware corporations.²⁵ It will also limit analysis to how courts should grapple with highly fact-intensive, potential fiduciary duties cases that *Boilermakers* did not address.²⁶ The guide aims to craft a middle position between directors’ multi-jurisdictional concerns and stockholders’ fiduciary duties worries. Part I describes the terrain: the corporate-contractual structure, the “Out of Delaware” trend, and the *In re Revlon*, *Galaviz*, and *Boilermakers* progression. Part II dissects arguments for and against the enforceability of forum selection bylaws, with a focus on policy, authority, and fiduciary duties arguments that structure the multi-step solution. Part III proposes and applies a framework of decision for use in non-Delaware jurisdictions. The solution suggests that directors have the authority to adopt forum selection bylaws, as upheld in *Boilermakers*.²⁷ Stockholder-plaintiffs may rebut this presumption by showing that directors have breached their fi-

available at http://http://www.cohengresser.com/assets/publications/11_1_2013_The_Future_of_Exclusive_Forum_Bylaws_BJR_DHT_JHH.pdf.

22. See *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1175 (N.D. Cal. 2011) (suggesting that directors may lack the power to unilaterally adopt forum selection clauses); see also *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 922 F. Supp. 2d 445, 459–63 (S.D.N.Y. 2013) (finding a forum selection clause unenforceable).

23. See generally, DR. SEUSS, OH, THE PLACES YOU’LL GO! (1990).

24. Besides fiduciary duties, they must confront other issues beyond the scope of this Note—including potential choice of law, choice of forum, and judicial applications of public policy—which will likely result in non-uniform interpretation of the decision.

25. See, e.g., *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 937 (Del. Ch. 2013).

26. *Id.* at 947.

27. *Id.* at 939–41. Forum selection bylaws are “flexible,” binding contracts that are presumptively enforceable because of directors’ authority. *Id.* at 939.

duciary duties in adopting a forum selection clause.²⁸ If they are successful, directors must demonstrate the “entire fairness” of the forum selection bylaw to the stockholders.²⁹ At all times, directors may waive the forum selection bylaws if their fiduciary duties so require.³⁰ Hypothetical scenarios demonstrate the contours of this approach for breaches of the duty of care and loyalty.³¹ Ultimately, this structure provides a solution for non-Delaware courts that mediates stockholders’ and directors’ respective fiduciary duties and multi-jurisdictional litigation concerns.

I. FROM CORPORATE STRUCTURE TO FORUM SELECTION

In re Revlon, Galaviz, and Boilermakers have recently shaken the world of intra-corporate, derivative litigation. Each involves forum selection clauses that require derivative suits brought by stockholder-plaintiffs in foreign courts, outside the state of incorporation, to be dismissed or transferred.³² To understand the cumulative import of these cases, the questions that they leave unanswered, and the framework for how foreign courts may respond, it is necessary to understand the basics. This section addresses corporate structure and the history of forum selection in the corporate context: the bedrock of this debate.

A. CORPORATE STRUCTURE

The basic corporate structure informs and defines the enforceability of forum selection bylaws. Forum selection bylaws contain corporate attributes, which will first be analyzed, that arise from the legal model of a corporation and its organic corporate documents. Forum selection introduces a contractual element to the corporate structure that will be analyzed in terms

28. See *infra* Part III.

29. See *infra* Part III.

30. See *infra* Part III.

31. See *Brown v. Slenker*, 220 F.3d 411, 424 (5th Cir. 2000) (explaining that a fiduciary duties analysis is necessarily case-by-case and highly fact-dependent); see also *Stroud v. Grace*, 606 A.2d 75, 95–96 (Del. 1992) (cautioning against determining issues involving hypothetical harm).

32. See *Grundfest & Savelle*, *supra* note 5, at 326 (“[These] provisions are thus nothing more than licenses that permit corporations to appear before foreign courts to petition for the dismissal of foreign-filed complaints so that the litigation can be pursued in the courts of the chartering jurisdiction.”).

of its impact on the certificate and bylaws, as well as its binding precedent.

1. The Legal Model of the Corporation

Corporations are statutory creatures, viewed as separate legal entities from their stockholder-owners.³³ Stockholders' main duties include electing directors and voting on fundamental corporate actions.³⁴ Directors constitute the decision-making and managerial body of the corporation.³⁵ The board of directors selects officers.³⁶ Both directors and officers, the corporate management organs, have fiduciary duties, contractual requirements, and agency obligations to act in the best interests of the corporation.³⁷ Good faith, loyalty, and due care form the triad of fiduciary duties in the corporate context, although due care and loyalty predominate.³⁸ In litigation, the business judgment rule creates a rebuttable presumption that directors acted pursuant to their fiduciary duties.³⁹ If stockholders rebut this presumption, courts review the transaction at issue under

33. BLACK'S LAW DICTIONARY 365 (8th ed. 2004) (defining a corporation as "[a]n entity . . . having authority under law to act as a single person distinct from the shareholders who own it.").

34. See, e.g., WILLIAM L. CARY, CASES AND MATERIALS ON CORPORATIONS 150 (4th ed., 1969).

35. See, e.g., *id.* ("[T]he business of a corporation shall be managed by its board of directors.").

36. See, e.g., *id.*

37. See John H. Matheson, *Choice of Organizational Form for the Start-Up Business*, 1(2) MINN. J. BUS. L. & ENTREPRENEURSHIP 7, 16 (2002).

38. See *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). To fulfill their duty of care, directors must engage in a process of informed deliberation. *Id.* Directors' standard of care for liability is gross negligence. See, e.g., *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 750 (Del. Ch. 2005) (defining gross negligence as "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason" (internal quotation marks omitted)). The duty of loyalty requires directors to act in the best interest of the corporation and its stockholders, rather than their own personal interests. *Aronson v. Lewis*, 473 A.2d 805, 812, 816 (Del. 1984). Self-dealing, when a director is on both sides of a transaction, is a classic example. See *id.* at 812. Directors are independent if they make decisions based on corporate merits, not personal, extraneous considerations. *Id.* at 816. Delaware courts have considered the duty of good faith a subsidiary element of the fundamental duty of loyalty. *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006) (quoting *Guttman v. Huang*, 823 A.2d 49, 506 n.34 (Del. Ch. 2003)). As such, I will focus on the two fundamental fiduciary duties—care and loyalty.

39. *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989).

an entire fairness standard.⁴⁰ In addition to fiduciary duties, organic corporate documents, the certificate of incorporation and bylaws bind shareholders, directors, and officers and structure internal corporate affairs.⁴¹

2. Organic Corporate Documents: Certificate of Incorporation & Bylaws

The certificate of incorporation and bylaws serve as the main corporate governance and operating documents, respectively.⁴² In Delaware, after the certificate is filed with the Secretary of State, the board must propose any amendments that stockholders approve by a simple majority vote.⁴³ Bylaws govern internal corporate affairs and relationships among directors, officers, and stockholders.⁴⁴ Under the DGCL, “[t]he bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”⁴⁵ The power to approve, amend, or repeal bylaws vests primarily with stockholders, but can be delegated concurrently to directors in the charter.⁴⁶ Bylaw adoptions are binding on directors and stockholders, but they remain subordinate to

40. See *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362–64 (Del. 1993), *modified*, 636 A.2d 956 (Del. 1994); *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993).

41. 1 JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 3:12 (3d ed. 2013).

42. See Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205, 209 (2005). Varying by jurisdiction, the certificate is also called the articles of incorporation or the charter. *Id.* These terms will be used interchangeably.

43. DEL. CODE ANN. tit. 8, §§ 103(a)(1) (West 2013) (filing with the Secretary of State), 242(b)(1) (process for amending bylaws).

44. *CA, Inc. v. AFSCME Emp. Pension Plan*, 953 A.2d 227, 234–35 (Del. 2008); COX & HAZEN, *supra* note 41, at § 3.12; McDonnell, *supra* note 42, at 207, 217, 221 (delineating bylaws’ procedural and corporate governance attributes and defining certain bylaws as a poison pill and a “leading antitakeover defense”).

45. Tit. 8, § 109(b).

46. See *id.* § 109. However, delegation of concurrent power does not limit stockholders’ power to amend bylaws. See, e.g., *Rogers v. Hill*, 289 U.S. 582, 588 (1933); *Kidsco, Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995), *aff’d*, 670 A.2d 1338 (Del. 1995); Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware’s Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 132 (2009). Nor does it limit stockholders’ plenary, statutory, default right. See *Rogers*, 289 U.S. at 588–89.

both statutes and charters.⁴⁷ This governance model has analogs in contract law.

3. Contractual Views of the Certificate and Bylaws

Judicial decisions, including *Galaviz* and *Boilermakers*, have grappled with how to square the corporate management structure with corporations' contractual attributes.⁴⁸ Different theories define corporations as a nexus of contracts⁴⁹ or as a legal entity, distinct from its aggregate members.⁵⁰ Delaware courts have historically and recently labeled certificates and bylaws in contractual terms.⁵¹ In *Boilermakers*, the court explained that forum selection provisions constitute binding, "flexible" contracts between the corporation and its stockholders.⁵² The *Galaviz* court, in contrast, sought to explicitly divorce corporate from contract law.⁵³ However, as *Boilermakers* showed, courts may apply U.S. Supreme Court's *Bremen* precedent that had previously only applied to contractual forum selection clauses.⁵⁴

4. Forum Selection Provisions Are Valid in Contracts

Since the United States Supreme Court's 1972 decision in *Bremen*, the modern trend is that contractual forum selection clauses are *prima facie* valid.⁵⁵ The Court strengthened this position in *Carnival Cruise Lines*.⁵⁶ Parties challenging contractual forum selection provisions must overcome this presump-

47. See tit. 8, §§ 102(b)(1), 109(b).

48. See *infra* notes 52–53 and accompanying text.

49. REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 6 (2d ed. 2009) (defining a corporation's entity as a "nexus of contracts" and a "nexus for contracts").

50. *Id.*

51. See, e.g., *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders.").

52. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013).

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

54. *Boilermakers Local 154 Ret. Fund*, 73 A.3d at 940 ("Therefore, this court will enforce the forum selection bylaws in the same way it enforces any other forum selection clause, in accordance with the principles set down by the United States Supreme Court in *Bremen*.").

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

56. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593–95 (1991) (extending *Bremen*'s presumption of enforceability to standardized form contracts that are contracts of adhesion).

tion of enforceability.⁵⁷ When courts encounter these clauses, they dismiss, transfer, or stay cases.⁵⁸ Until very recently, forum selection clauses abounded in contracts, but not in organic corporate documents.⁵⁹ The trend to superimpose contractual structures in the corporate context grew from the “Out of Delaware” trend and the phenomenon of multi-jurisdictional litigation.⁶⁰

B. FORUM SELECTION IN CORPORATE LAW

Stockholder-plaintiffs who brought derivative suits historically, presumptively sued in the state of incorporation. This was usually Delaware.⁶¹ Delaware and its court system confer many benefits on its corporations: network externalities, a well-developed infrastructure of professionals and expert corporate judges, equitable corporate law, predictability and expediency of decisions, and prestige.⁶² The Delaware court system was and is “the Mother Court of corporate law.”⁶³ Pursuant to the internal affairs doctrine, the DGCL presumptively governs de-

57. *Hadley v. Shaffer*, No. Civ.A. 99-144-JJF, 2003 WL 21960406, at *4 (D. Del. 2003) (holding that forum selection contractual provisions are presumptively valid unless “(i) [the forum selection clause] is a result of fraud or overreaching; (ii) enforcement would violate a strong public policy of the forum; or (iii) enforcement would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable”); see also Sara Lewis, Note, *Transforming the “Anywhere but Chancery” Problem into the “Nowhere but Chancery” Solution*, 14 STAN. J.L. BUS. & FIN. 199, 207–09 (2008).

58. See FED. R. CIV. P. 12(b)(1), 12(b)(3), 12(b)(6); 28 U.S.C. §§ 1404(a), 1406 (2012). Or courts apply the doctrine of *forum non conveniens* for permissive forum selection clauses. See Grundfest & Savelle, *supra* note 5, at 50–51. The Delaware Court of Chancery uses motions to dismiss for improper venue under Court of Chancery Rule 12(b)(3). *Id.* at 62–63 and its *McWane* presumption disfavors granting stays for later-filed actions. Stelman, *supra* note 46, at 62.

59. Grundfest, *supra* note 1, at 338.

60. John Armour et al., *Is Delaware Losing Its Cases?*, 33–34 J. EMPIRICAL LEGAL STUD. 605, 638–39 (2012).

61. Stelman, *supra* note 46, at 66–67; Bebchuk & Hamdani, *supra* note 2, at 578.

62. See, e.g., John Armour et al., *Delaware’s Balancing Act*, 87 IND. L.J. 1345, 1348–50 (2012); Bebchuk & Hamdani, *supra* note 2, at 556, 588, 596–97.

63. Armour et al. *supra* note 60, at 1346; see John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 679–84 (1986); Stelman, *supra* note 46, at 71–72 (adding that eighty-five to ninety percent of Delaware Court of Chancery’s opinions are not appealed, affirming the acknowledged superiority of their judgments).

rivative disputes.⁶⁴ Businesses incorporate in Delaware, knowing that their implicit choice of law is “sticky” and will presumptively govern outside of Delaware.⁶⁵ Historically, choice of forum for intra-corporate disputes also “stuck.”⁶⁶ The prevailing belief was that both plaintiffs and defendants preferred the Delaware court system.⁶⁷ However, scholars have documented the movement of intra-corporate litigation out of Delaware since the beginning of the twenty-first century.

Changes in federal securities laws, plaintiffs’ strategies, and the Delaware Court of Chancery’s responses have coalesced into the “Out of Delaware” trend.⁶⁸ Delaware courts traditionally took a hands-off approach to multi-jurisdictional litigation.⁶⁹ The plaintiffs’ bar responded by what Chancellor Strine has deemed the “lead counsel Olympics race.”⁷⁰ The first entrepreneurial plaintiff to file won a lion’s share of the eventual award and an effectual stay of later-filed, substantially similar complaints.⁷¹ This approach resulted in a flurry of low-quality pleadings due to the significant first-mover advantage.⁷² Vice

64. See Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine* 6 (Emory L. & Econ. Research Paper, No. 06-04, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=686592.

65. Stevelman, *supra* note 46, at 80. Known as “Lex Incorporationis,” this phenomenon explains that the law of the incorporating state “sticks” to the corporation’s internal affairs and provides a “clear, stable rule for resolving conflicts of laws questions.” *Id.*

66. Armour et al. *supra*, note 60, at 637–38.

67. Grundfest, *supra* note 1, at 374 (citing ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 41 (1993) (“[P]laintiffs do not perceive it to be undesirable to litigate in Delaware and instead take advantage of its valuable asset of legal capital.”)). Practically, this legal capital included a historical *laissez faire* approach to awarding attorneys’ fees to plaintiffs. The parties would agree on the amount and the court would approve it. See Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 *TEX. L. REV.* 469, 496 (1987).

68. See *infra* notes 70–80.

69. See Armour et al., *supra* note 60, at 622–25. Multiple suits stemming from the same set of facts is one of the most noted scenarios underlying the “Out of Delaware” trend. Generally, Delaware courts required lawyers to organize themselves. *Id.*

70. Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs’ Bar*, 2012 *COLUM. BUS. L. REV.* 427, 483–84 (2012).

71. Stevelman, *supra* note 46, at 107.

72. Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?* 37 *DEL. J. CORP. L.* 1, 9–10 (2012); Quinn, *supra* note 8, at 147 (explaining that this probably is acute in the merger context, “[w]here there were multiple suits filed, the average number of lawsuits was 5.3 per transaction, with a median of four lawsuits per transaction”); MARK LEBOVITCH ET AL., BERNSTEIN LITOWITZ

Chancellor Chandler responded by identifying factors that the court would use to determine lead counsel.⁷³ The Delaware Court of Chancery also began to more closely scrutinize attorneys' fee arrangements reached by parties.⁷⁴

Plaintiffs considered themselves hostages to corporate defendants' interests; they began filing outside of Delaware.⁷⁵ Changes in federal securities laws only augmented these incentives.⁷⁶ Plaintiffs' forum-shopping and settlement posturing tactics increased litigation costs for defendants.⁷⁷ They forced foreign courts to decide matters of Delaware law.⁷⁸ Corporate defendants prefer Delaware because of the unpredictability of foreign courts and judges' understanding of corporate law.⁷⁹ Multi-jurisdictional litigation also leaves open the possibility of

BERGER & GROSSMAN, MAKING ORDER OUT OF CHAOS: A PROPOSAL TO IMPROVE ORGANIZATION AND COORDINATION IN MULTI-JURISDICTIONAL MERGER-RELATED LITIGATION 4-5 (2011), available at http://www.blbgilaw.com/misc_files/MakingOrderoutofChaos.

73. Cheffins et al., *supra* note 70, at 483 (listing "the quality of the pleadings filed, the energy and enthusiasm demonstrated by the attorneys, and the economic stake that each plaintiff had in the litigation").

74. Armour et al., *supra* note 60, at 1359-60; see *In re Cox Communications, Inc. S'holders Litigation*, 879 A.3d 604, 643 (Del. Ch. 2005); see, e.g., *In re Instinent Group Inc., S'holders Litigation* (Del. Ch., 2005) (reducing a \$1.62 million fee agreement to \$450,000).

75. See Stelman, *supra* note 46, at 97-98 ("Prior to their tenure . . . most Delaware judges were members of corporate/defense-side Wilmington law firms.").

76. In the 1980s, securities class action litigation boomed. *Id.* In response, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA), that included a heightened pleading standard. Pub. L. No. 105-353, 112 Stat. 3227 (1998). Plaintiffs moved to state court to avoid the PSLRA. See Coffee, *supra* note 63, at 684. Congress responded by passing the Securities Litigation Uniform Standards Act of 1998 (SLUSA). 112 Stat. 3227. However, SLUSA contained a "Delaware 'carve-out' exception that exempted actions based on corporate law of a corporation's state of incorporation. Armour et al., *supra* note 60, at 1378. Plaintiffs responded by filing "parallel" or "tagalong" derivative suits under state corporate law to qualify and to proceed to discovery that would be unavailable in PLSRA litigation. *Id.* This did not work in Delaware. *Id.* Delaware courts stay suits when a motion to dismiss is pending. *Id.* at 1378-79. Multi-jurisdictional litigation flourished.

77. Micheletti & Parker, *supra* note 72, at 6-7.

78. Stelman, *supra* note 46, at 64-65 (detailing Delaware judges' "h uristic" claim on the development of their law, but noting that foreign rulings have no precedential effect on Delaware law, but may serve a policing function).

79. Micheletti & Parker, *supra* note 72, at 30 ("Company-side lawyers [have] said . . . that judges in state courts outside of Delaware were far less likely to be expert in corporate law and that their reaction to stockholder suits was harder to predict—never a good thing.").

inconsistent outcomes from different judges.⁸⁰ It wastes judicial resources because cases could be consolidated or litigated only in one forum.⁸¹ In the end, however, stockholders suing on behalf of the corporation suffer most because multi-jurisdictional litigation increases costs to the corporation.⁸² In response, the Delaware Court of Chancery has hesitated to stay concurrent proceedings, has attempted to lure plaintiffs back, and has emphasized the comparative advantage, predictability, and efficiency of interpreting its own corporate law.⁸³ Against this backdrop, *In re Revlon Galaviz*, and *Boilermakers* changed the nature of derivative litigation.

C. *IN RE REVLO, GALAVIZ, & BOILERMAKERS CHANGE INTRA-CORPORATE LITIGATION*

Prior to Vice Chancellor Laster's *In re Revlon* decision in 2010, no opinion had ever considered the possibility of forum selection bylaw or certificate provisions.⁸⁴ The only persuasive Delaware case prior to 2010 involved an arbitration clause in a LLC agreement.⁸⁵ Enter *In re Revlon*.⁸⁶ Vice Chancellor Laster suggested in dicta that corporations may consider adopting forum selection clauses in their certificates.⁸⁷ He did not mention bylaws. *Galaviz* was the first case to apply the *In re Revlon* proposition to bylaws.⁸⁸ The court held that the director-defendants, who amended the corporation's bylaws after al-

80. See Lebovitch et al., *supra* note 72, at 2 (posing full faith and due credit problems).

81. Quinn, *supra* note 8, at 152.

82. *Id.*

83. Grundfest, *supra* note 1, at 344 (citing *In re Southern Peru Copper Corp.*, 52 A.3d 761, 819 (Del. Ch. 2011) (awarding plaintiffs \$304 million in attorneys' fees, \$1.347 billion in damages, and pre-judgment interest)).

84. Grundfest, *supra* note 1, at 338. Prior to 2010, only sixteen publicly traded entities had forum selection clauses in their organic corporate documents. *Id.* at 352. Eight were LLCs or LLPs and eight were corporations. *Id.* The earliest clauses appeared in 1991, 1992, and 1994 and then there was a twelve year gap until 2006, when Oracle did so, which would later become the subject of *Galaviz*. See *id.* The first mention of the possibility of using a bylaw to introduce a forum selection clause was proposed in 2007. *Id.* at 338 (crediting Theodore Mirvis, a partner at Wachtell, Lipton, Rosen & Katz).

85. Lewis, *supra* note 57, at 207 (upholding the provision because the Delaware LLC Act does not prohibit such clauses in an LLC agreement).

86. *In re Revlon, Inc. S'holders Litigation*, 990 A.2d 940, 960 (Del. Ch. 2010).

87. *Id.*

88. See generally *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

leged wrongdoing to include a forum selection clause, could not disregard the plaintiffs' choice of forum.⁸⁹

After these watershed cases, uneven acceptance and derivative litigation have defined forum selection bylaws' short history until *Boilermakers* in June 2013.⁹⁰ To date, 250 publicly-traded corporations have adopted forum selection provisions.⁹¹ At the same time, proxy advisor groups have been influential in discouraging adoption of forum selection bylaws.⁹² In 2012 alone, stockholders initiated sixteen derivative suits over adoptions of or proposals for forum selection bylaws.⁹³ Most of the cases have been resolved by settlement in the stockholders' favor, with the exception of derivative litigation against Chevron and FedEx, which the Delaware Court of Chancery consolidated in the *Boilermakers* case.⁹⁴

89. *Id.* at 1174–75 (basing its decision on federal common law).

90. *See infra* notes 88–91.

91. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 944 (Del. Ch. 2013); Claudia H. Allen, *Delaware Corporations Seek to Counter Forum Shopping*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Feb. 14, 2012), <http://blogs.law.harvard.edu/corpgov/2012/02/14/delaware-corporations-seek-to-counter-forum-shopping/#more-25698>. *Contra* Quinn, *supra* note 8, at 171–72 (noting that during 2010, several high-profile Delaware firms went public, including Toys “R” Us, Inc., General Motors Company, and Tesla Motors, Inc., and none of them included exclusion forum provisions in their corporate charters).

92. *See* Frank Aquila & Anna Kripitz, *Forum-Selection Provisions in Delaware*, SULLIVAN & CROMWELL LLP, <https://www.sullcrom.com/Frank-Aquila-and-Anna-Kripitz-Author-Article-on-Delaware-Selection-Provisions-08-27-2012/> (last visited Mar. 28, 2014); *see also* COUNCIL OF INSTITUTIONAL INVESTORS, *supra*, note 15 at 1.9 (“Companies should not attempt to restrict the venue for shareowner claims by adopting charter or bylaw provisions that seek to establish an exclusive forum.”); GLASS LEWIS & CO., PROXY PAPER GUIDELINES, 2012 PROXY SEASON, 34 (2012), *available at* <http://www.summitinvestmentpartners.com/PDFs/ProxyVotingPolicy1.pdf> [hereinafter GLASS LEWIS].

93. CLAUDIA H. ALLEN, EXCLUSIVE FORUM PROVISIONS: PUTTING ON THE BRAKES, BLOOMBERG BNA CORPORATE ACCOUNTABILITY REPORT (2012), *available at* <http://www.ngelaw.com/files/Uploads/Images/exclusive-forum-provisions-putting-on-the-brakes.pdf>. Katie Wagner, *Exclusive-Forum Provisions Spur a Backlash: Suits Against Them Are Being Resolved in Stockholders' Favor*, AGENDA, May 7, 2012, at 10.

94. ALLEN, *supra* note 93, at 2. In February 2012, the firms Prickett, Jones & Elliott, P.A. and Kessler Topaz Meltzer & Check LLP filed substantially similar suits against 12 Delaware corporations that had adopted the same forum selection clauses via bylaws (Air Products and Chemicals, Inc., AutoNation, Inc., Chevron Corporation, Curtiss-Wright Corporation, Danaher Corporation, FedEx Corporation, Franklin Resources, Inc., Navistar International Corporation, priceline.com incorporated, SPX Corporation, and Superior Energy Services, Inc.). *Id.* Jack in the Box, Inc. was sued in April 2012. *Id.* In

In *Boilermakers*, the Delaware Court of Chancery limited its inquiry to two grounds: whether forum selection bylaws are statutorily and contractually valid.⁹⁵ It replied in the affirmative on both accounts.⁹⁶ The court in *Boilermakers* did not attempt a robust fiduciary duties analysis because it chose to address facial challenges to legality before it engaged in a “fact-laden” analysis.⁹⁷ Chancellor Strine explained forum selection clauses regulate proper subject matter per DGCL 109(b), which outlines the board’s authority.⁹⁸ In regulating where stockholders may bring derivative, fiduciary duties, DGCL, and internal affairs suits, forum selection bylaws relate to the “internal affairs” of the corporation – the “business of the corporation,” “the conduct of its affairs,” and the “rights or powers of stockholders.”⁹⁹ Contractually, the clauses are *prima facie* valid and presumptively enforceable under *Bremen*, akin to contractual forum selection clauses.¹⁰⁰ These clauses are “flexible,” binding contracts between the corporation and stockholders so long as the certificate confers power on the board to unilaterally adopt bylaws under DGCL 109(a).¹⁰¹ The court refused to entertain plaintiffs’ hypothetical “parade of horrors” of the detrimental

April 2012, the two firms also filed derivative lawsuits against four companies that planned to address forum selection provisions at their 2012 annual stockholder meeting, either via charter amendments (Calix, Inc., Cameron International Corporation, and Fairchild Semiconductor International, Inc.) or via bylaw (Hittite Microwave Corporation). *Id.* at 3. Of the original twelve corporations, only two have fought the suits; the other ten have repealed the bylaws in question and the Delaware Court of Chancery has dismissed the cases as moot. *Id.* In March 2012, a second lawsuit was filed against Chevron Corporation in the Northern District of California, the same court that decided *Galaviz*. *Id.* The California court stayed the case on August 9, 2012 for one year, pending the Delaware Court of Chancery proceedings. *Id.* During the 2012 proxy season, Amalgamated Bank Longview Funds, Roper Industries, Inc., Superior Energy Services, Inc., Chevron Corporation, and United Rentals, Inc. received stockholder repeal proposals. *Id.* at 5. Stockholders also sued Chevron Corporation and Superior Industries, Inc. *Id.* Roper Industries sought a no-action letter from the SEC, arguing that the stockholder proposal interfered with its ordinary business operations, but the SEC denied the request of Roper Industries, along with Superior Energy Services repealed their bylaws. *Id.* The remaining two corporations allowed the proposals, both of which were defeated. *Id.*

95. *Boilermakers*, 73 A.3d at 939.

96. *Id.*

97. *Id.* at 947.

98. *Id.* at 950–51.

99. *Id.* at 939.

100. *Id.* at 955.

101. *Id.* at 957.

effects of forum selection bylaws in the absence of a genuine controversy with concrete facts.¹⁰²

The next step in this progression is unclear and complicated. The impact of *Boilermakers* will depend on how and if courts outside of Delaware apply its holding.¹⁰³ The stockholder plaintiffs in *Boilermakers* dropped their appeal to the Delaware Supreme Court, leaving Chancellor Strine's June 2013 decision as the authoritative word on the subject, for now.¹⁰⁴ Since the Delaware Court of Chancery held that forum selection clauses bylaws relate to the internal affairs of the corporation, the DGCL will apply as substantive law and the *Boilermakers* decision will govern.¹⁰⁵ However, it is possible that non-Delaware judges may construe choice of forum as a procedural issue, meaning that the law of the forum would govern.¹⁰⁶ This Note focuses on how courts outside of Delaware will apply *Boilermakers* to potential breaches of fiduciary duties by corporate directors and officers—issues that Chancellor Strine did not reach. Therefore, it is necessary to delve into arguments for and against in forum selection bylaws in the fiduciary duties context to understand how to guide non-Delaware courts in adjudicating such cases. *Boilermakers* was groundbreaking, but it will not be the last word.

II. ARE THEY ENFORCEABLE? AN OVERVIEW OF THE COUNTERPARTIES' AUTHORITY, FIDUCIARY DUTIES, AND POLICY ARGUMENTS

In order for courts outside of Delaware to determine the enforceability of forum selection bylaws in fiduciary duties cases, they will need to interpret *Boilermakers* in the fiduciary duties context. No court has directly confronted a fiduciary duties

102. *Id.* at 958.

103. In the aftermath of *Boilermakers*, Claudia Allen has noted that “The interesting part will come when [Delaware corporations] are sued in another state.” *Partner Claudia Allen Discusses Forum Selection Bylaws with Reuters*, KATTEN MUNCHIN ROSENMAN LLP (Sept. 4, 2013), <http://www.kattenlaw.com/35869>.

104. Mirvis, *supra* note 20 (“It is now plain that board-adopted forum selection bylaws are valid and enforceable under Delaware law.”).

105. Tung, *supra* note 64, at 6.

106. See, e.g., *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 922 F. Supp. 2d 445, 459 (S.D.N.Y. 2013) (construing the forum selection clause procedurally and using Second Circuit precedent to determine its enforceability as to derivative plaintiffs); see also *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174–75 (N.D. Cal. 2011) (denying motion to dismiss for improper venue on corporate law grounds and instead relying on federal common law).

analysis based on the DGCL to determine the enforceability of forum selection bylaws. Chancellor Strine in *Boilermakers* explicitly refused to reach the necessarily “fact-laden,” case-by-case fiduciary duties analysis of whether a boards’ use of its bylaws powers is inconsistent with its fiduciary duties.¹⁰⁷ What exists, and what courts will be confronted with, are divergent views from stockholder-plaintiffs and proxy advisors in one camp and scholars,¹⁰⁸ now backed by *Boilermakers*, in another.¹⁰⁹ Neither group fully incorporates forum selection bylaws into the necessary fiduciary duties framework that exists in other areas of corporate law. The solution fills this void by proposing a step-by-step method of analyzing forum selection challenges. It builds on DGCL precedent regarding directors’ authority, fiduciary duties, and policy inquiries. In order to reach this Solution, this Part will first analyze and refute opponents’ authority, fiduciary duties, and policy arguments. Next, it will show why proponents’ multi-jurisdictional concerns and authority arguments are warranted and correct, but why they are incomplete in relation to the necessary fiduciary duties inquiry and why the “fiduciary out” alternative should be rejected.

A. THE OPPONENTS: FORUM SELECTION BYLAWS ARE BAD POLICY, THE BOARD LACKS AUTHORITY, & THE CLAUSES VIOLATE DIRECTORS’ FIDUCIARY DUTIES.

Proxy advisor groups, such as Glass, Lewis & Co., and stockholder-plaintiffs are influential and adamantly against forum selection bylaws.¹¹⁰ Their views form the policy rationales, director authority positions, and fiduciary duties arguments that underlie opponents’ criticisms of these clauses.¹¹¹ The proxy advisors have cautioned stockholders against board efforts to include forum selection bylaws, arguing that the clauses are detrimental to stockholder interests.¹¹² Some proxy advisory groups have proposed requiring a case-by-case analysis of whether the board meets certain good governance practices; others suggest an outright ban.¹¹³ Stockholders-plaintiffs appear to be listening to proxy advisor groups and have chal-

107. *Boilermakers*, 73 A.3d at 947.

108. *See infra* Part II(A).

109. *See infra* Part II(B).

110. *See infra* Part II(A)(1).

111. *See infra* Part II(A)(1)–(2).

112. *See infra* notes 118–19.

113. *See infra* Part II(A)(1).

lenged forum selection bylaws on authority and fiduciary duties grounds, among others.¹¹⁴ Opponents' positions, however, are an inadequate solution to determining the enforceability of forum selection bylaws outside of Delaware.¹¹⁵ They rest on a shaky DGCL foundation that has been soundly rejected in the *Boilermakers* case.¹¹⁶ The opponents' arguments will be analyzed and critiqued; they are organized based on the source of the criticism – proxy advisor groups or stock-holder plaintiffs.

1. Proxy Advisory Groups: Forum Selection Hurts Stockholders

Proxy advisory groups' stances are based on similar visions of appropriate corporate governance policy. They range from an unconditional ban to a mediated position that requires certain corporate governance features. The Council of Institutional Investors unequivocally opposes adoption of all forum-selection provisions because they are not in the best interest of stockholders.¹¹⁷ Glass, Lewis & Co., a governance analysis and proxy voting firm, recommends against forum selection bylaws with limited exceptions.¹¹⁸ MSCI/Institutional Shareholder Services Inc. (ISS) has taken a more militated approach. During the 2011 and 2012 proxy seasons, ISS recommended against forum-selection provisions unless a corporation follows four "best-practices governance features."¹¹⁹ These best practices included

114. See *infra* Part II(A)(2).

115. See *infra* Part III.

116. See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013); *infra* Part II(B).

117. See COUNCIL OF INSTITUTIONAL INVESTORS, *supra* note 15, at 1.9 ("Companies should not attempt to restrict the venue for shareholder claims by adopting charter or bylaw provisions that seek to establish an exclusive forum.").

118. John F. Olson et al., *ISS, Glass Lewis, and the 2013 Proxy Season*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Feb. 11, 2013, 9:20 AM), <http://blogs.law.harvard.edu/corpgov/2013/02/11/iss-glass-lewis-and-the-2013-proxy-season>. This is a change from Glass Lewis's previous position. GLASS LEWIS, *supra* note 92, at 34 ("Glass Lewis believes that charter or bylaw provisions limiting a shareholder's choice of legal venue are not in the best interests of shareholders. Such clauses may effectively discourage the use of shareholder derivative claims by increasing their associated costs and making them more difficult to pursue For this reason, we recommend that shareholders vote against any bylaw or charter amendment seeking to adopt an exclusive forum provision."); see also ALLEN *supra*, note 93, at 5 (adding that Glass Lewis also opposes these provisions because they discourage stockholder derivative suits by increasing costs).

119. Acquila & Kripitz, *supra* note 92.

having an annually elected board, a majority vote standard for uncontested director elections, no poison pills, and a meaningful special meeting right for stockholders.¹²⁰ During the 2012 proxy season, ISS modified its position by proposing a case-by-case balancing test that weighs good governance features against whether the company has been materially harmed by stockholder litigation outside its state of incorporation.¹²¹ These groups' recommendations have effectively slowed forum selection clause adoption via bylaws.¹²²

Overall, stockholders appear to be listening, but data from the last few proxy seasons is mixed. During the 2011 proxy season, stockholders marginally approved certificate forum selection clauses, but did not repeal any unilaterally, board-adopted forum selection bylaws.¹²³ Results from four corporations during the 2012 proxy season provide some support for exclusive forum provisions, but lack predictive value.¹²⁴ However, in recent 2012 derivative litigation in the Delaware Court of Chancery, stockholders in ten of twelve suits have succeeded in having forum selection clauses or proposals for them removed; *Boiler-makers* is the exception.¹²⁵

2. The Stockholders: Authority & Breach of Fiduciary Duties

Stockholder-plaintiffs' complaints are nearly identical and levy the same primary arguments against the enforceability of forum selection clauses, many of which go beyond the focus of this Note.¹²⁶ This Note will limit analysis to authority and fidu-

120. *Id.*

121. *Id.* (removing the "meaningful special meeting" requirement as well).

122. Grundfest & Savelle, *supra* note 5, at 327.

123. Acquila & Kripitz, *supra* note 92.

124. *Id.* (detailing how stockholders did not approve repealing such bylaws, but conceding that only two corporations faced this question and that the other two repealed the bylaws in question).

125. *See* Wagner, *supra* note 93, at 10.

126. Besides the violation of fiduciary duties, they argue that the bylaws are: overbroad and apply even if the court lacks personal or subject matter jurisdiction, they are not a proper application of the board's power, they lack mutual consent and notice, they conflict with federal constitutional and statutory provisions, they are unreasonable and therefore, invalid, and they force the Delaware Court of Chancery to decide non-Delaware law issues. *Id.* Plaintiffs have also argued that they have a vested right under existing bylaws to choose their litigation forum. Grundfest & Savelle, *supra* note 5, at 327-28 (citing 4 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 25:4 (3d ed. 2011) ("In Delaware, the vested-rights doctrine is generally recognized as a dead letter, and no contemporary decision is likely to be resolved on this basis.)); *see also* Kidsco, Inc. v. Dinsmore, 674 A.2d 483,

ciary duties propositions.¹²⁷ Stockholders argue that such bylaws regulate external matters and not internal corporate governance and are therefore beyond the board's authority.¹²⁸ In contractual terms, stockholders have argued that bylaws are part of an internal governance contract that the board or stockholders have the power to amend.¹²⁹ Furthermore, forum selection bylaws lack stockholders' mutual consent¹³⁰ and impermissibly regulate litigation, an external corporate activity, instead of intra-corporate affairs.¹³¹

However, on these authority grounds, stockholder-plaintiffs ignore the board of director's broad mandate to manage the "business and affairs of every corporation."¹³² This power includes the ability to adopt bylaws that regulate both procedural and corporate governance matters, which arguably include forum selection provisions.¹³³ In *Boilermakers*, Chancellor Strine unequivocally agreed that such clauses are statutorily valid under DGCL section 109(b) and relate to the "internal affairs" of the corporation.¹³⁴ Stockholder-plaintiffs have a statutory, sacrosanct check under DGCL section 109(a) that enables them to remove forum selection bylaws, a more efficient remedy than pursuing derivative litigation.¹³⁵

Stockholders also argue that adopting forum selection clauses violate directors' fiduciary duties. They identify directors' self-interest and the uninformed basis of their decisions, breaches of the duty of care and loyalty, respectively.¹³⁶ Directors' arguably have a material interest in the adoption of forum

492 (Del. Ch. 1995), *aff'd*, 670 A.2d 1338 (Del. 1995) ("[W]here a corporation's by-laws put all on notice that the by-laws may be amended at any time, no vested rights can arise that would contractually prohibit an amendment.?).

127. ALLEN, *supra* note 93, at 2.

128. See DEL. CODE ANN. tit. 8, § 109(b) (West 2013); see, e.g., *Boilermakers Verified Complaint*, *supra* note 16, at ¶ 4.

129. See, e.g., *Boilermakers Verified Complaint*, *supra* note 16, at ¶ 53.

130. *Id.*; *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174-72 (N.D. Cal. 2011) (disputing the layering of corporate and contract law regarding forum selection bylaws).

131. *Boilermakers Verified Complaint*, *supra* note 16, at ¶ 74.

132. DEL. CODE ANN. tit. 8, §§ 109(a), 141(a) (West 2013); see *infra* Part III(A).

133. *Grundfest & Savelle*, *supra* note 5, at 373-74; see *infra* Part III(A).

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

135. *Id.* at 956 ("[T]he power cannot be non-consensually eliminated or limited by anyone other than the legislature itself."); see *Rogers v. Hill*, 289 U.S. 582, 588-89 (1933); *infra* Part III(A).

136. ALLEN, *supra* note 93, at 3.

selection clauses because they can confine litigation to a forum in which they are more likely to win, they avoid a jury trial, and it is difficult to bring certain claims against them.¹³⁷ In *Boilermakers*, the stockholders-plaintiffs in fact conceded that in abstract hypotheticals, forum selection bylaws would work without any problem.¹³⁸ Directors also may have adopted a forum selection bylaw without negotiation or independent consideration of the Bylaw.¹³⁹ Since no cases exist interpreting fiduciary duties under the DGCL outside of Delaware, proponents' positions must form the counterpoint to opponents' criticism of forum selection bylaws.

B. PROPONENTS: A SOLUTION TO THE MULTI-JURISDICTIONAL PROBLEM, DIRECTORS' AUTHORITY, AND SATISFACTION OF FIDUCIARY DUTIES

Proponents of forum selection clauses address and refute proxy advisor groups and stockholder-plaintiffs' policy, authority, and fiduciary duties arguments.¹⁴⁰ Professor Joseph Grundfest has led the pro-enforceability charge.¹⁴¹ In addition to advocating, he is responsible for crafting the prototypical forum selection bylaw.¹⁴² Corporate defendants who have fought the February 2012 barrage of stockholder derivative litigations augment Grundfest's arguments.¹⁴³ They establish a counterpoint to plaintiffs' charges. The *Boilermakers* decision has

137. See, e.g., *Boilermakers Verified Complaint*, *supra* note 16, at ¶ 105.

138. *Boilermakers*, 73 A.3d at 964.

139. Derivative Complaint for Shareholders, at ¶ 106, *Bushansky v. Armacost*, No. C 12-01597 WHA, 2012 WL 3276937 (N.D. Cal. Aug. 9, 2012) (adding that "the limited disclosure of the Bylaw provides virtually no information as to the reasons for and effects of the Bylaw . . . the Bylaw will have numerous negative effects on Plaintiff and on the members of the Class").

140. Corporate defendants advance more arguments, but analysis will be limited to fiduciary duties and proper bylaw subject matter. Defendants *inter alia* cite the travails of multi-jurisdictional litigation, the failure of alternative solutions to forum selection bylaws, and plaintiffs' parade of horrors. See generally Brief for Defendant, *Boilermakers*, 73 A.3d 934 [hereinafter Brief for Defendant, *Boilermakers Local 154 Ret. Fund*]. Forum selection clauses have also been upheld under the Delaware LLC Act. See, e.g., *Elf Atochem North Am., Inc. v. Jaffari*, 727 A.2d 286, 288-89, 293 (Del. 1999) (upholding the forum selection provision in arbitration agreement based on the policy of contractual freedom of the parties).

141. See, e.g., Grundfest, *supra* note 1 *passim*.

142. *Id.* at 16 (identifying the Netsuite model for 92% of charter and bylaw adoptions as of June 30, 2011).

143. See Brief for Defendant, *Boilermakers Local 154 Ret. Fund*, *supra* note 140 *passim*.

largely affirmed their efforts.¹⁴⁴ Grundfest is not alone; many others have supported forum selection bylaws as a useful response to the prospect of multi-jurisdictional litigation and entrepreneurial plaintiffs.¹⁴⁵ Scholars and practitioners alike have pointed to how forum selection stymies costly and inefficient litigation by limiting it to one forum.¹⁴⁶ In addition, proponents have argued and *Boilermakers* has affirmed directors' authority to enact forum selection bylaws.

The bylaws are a proper application of directors' authority and are a tool of internal corporate governance. Section 109(a) of the DGCL empowers directors to adopt bylaws if the charter so provides.¹⁴⁷ Bylaw provisions are contracts; contract case law considers forum selection clauses *prima facie* valid.¹⁴⁸ The board possesses a broad mandate under section 109(b) of the DGCL to promulgate bylaws.¹⁴⁹ Both Chevron and FedEx adopted exclusive forum selection provisions for intracorporate disputes including derivative, fiduciary duties, DGCL, and other internal actions.¹⁵⁰ These are matters of corporate governance.¹⁵¹ Proponents' authority arguments have been accepted by the Delaware Court of Chancery in *Boilermakers*, but the court refused to enter the thicket of fact-intensive fiduciary duties analysis.¹⁵² The solution proposed by this Note relies on the court's interpretation of the directors' authority, and fits it into the larger structure of how to determine the enforceability of forum selection bylaws in cases with fiduciary duties challenges.

Leading proponents suggest that forum selection bylaws should not be enforced if they violate directors' fiduciary duties.¹⁵³ This "fiduciary out" provides corporate directors the op-

144. *Boilermakers*, 73 A.3d at 964.

145. *Id.* at 944 n.31.

146. *Id.* at 943.

147. DEL. CODE ANN. tit. 8, § 109(a) (West 2013).

148. See *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders; therefore, our rules of contract interpretation apply."); see also *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593-95 (1991).

149. See *supra* Part I(A)(2).

150. Brief for Defendant, *Boilermakers Local 154 Ret. Fund*, *supra* note 140, at 27-35.

151. Compare *id.*, with *Boilermakers Verified Complaint*, *supra* note 16, at ¶ 53.

152. *Boilermakers*, 73 A.3d at 964.

153. Grundfest & Savelle, *supra* note 5, at 400-01.

portunity to consent to the plaintiffs' choice of forum if their fiduciary duties are implicated.¹⁵⁴ Proponents argue that directors' choice of forum would not involve their fiduciary duty, "unless plaintiffs can demonstrate that Delaware courts will fail to hold directors properly responsible for their actions."¹⁵⁵ Effectively, plaintiffs would be charging that they cannot rely upon the Delaware judiciary to enforce the boards' fiduciary duties.¹⁵⁶ The nature of fiduciary duty claims depends on the facts and circumstances of individual cases, not those anticipated in the abstract.¹⁵⁷ Successful claims would be rare; forum selection bylaws are likely enforceable, even in fiduciary duties contexts.¹⁵⁸ However, a "fiduciary out," while a useful tool for corporate defendants to concede to jurisdiction, does not provide an articulable method for adjudicating the enforceability of forum selection bylaws. It places discretion in the hands of corporate defendants, but leaves both stockholders and non-Delaware courts without a predictable decision-making framework.¹⁵⁹ The following solution relies on accepted authority arguments and builds them into a step-by-step method of adjudicating fiduciary duties in derivative actions.

III. WHERE WILL THEY GO? A GUIDE FOR DETERMINING THE ENFORCEABILITY OF FORUM SELECTION BYLAWS IN COURTS OUTSIDE OF DELAWARE

This Note proposes a prescriptive framework situated within DGCL law. It aims at aiding foreign jurisdictions in deciding the enforceability of forum selection bylaws in fiduciary duties derivative suits. The solution provides a step-by-step guide. First, in terms of pure power, corporate boards of directors have the authority under the DGCL and other states' laws to adopt forum selection bylaws.¹⁶⁰ *Boilermakers* confirmed this proposition.¹⁶¹ Second, this authority creates a rebuttable presumption of enforceability of the clauses, buttressed by the

154. *Id.* at 402.

155. *Id.* (adding that the existence of a choice of forum provision alone is neither sufficient to prove self-interest, nor a breach of the duty of loyalty).

156. *Id.* at 403.

157. *Id.*

158. *Id.*

159. *See infra* Part III.

160. DEL. CODE ANN. tit. 8, § 109(a) (West 2013).

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

business judgment rule.¹⁶² Finally, in order to rebut this presumption, stockholder-plaintiffs must establish a violation of a fiduciary duty, specifically the duty of care and/or the duty of loyalty.¹⁶³ Specific examples of fiduciary duties violations, dependent on timing, inform this section. The solution develops each of these steps and fits the framework into the existing DGCL law taken from other contexts that engage in a fiduciary duties analysis.¹⁶⁴ The novelty of this approach lies in its mediation of defendants' genuine multi-jurisdictional concerns and plaintiffs' legitimate fiduciary claims, an approach that critics have failed to fully address.¹⁶⁵

A. STEP 1: THE AUTHORITY OF THE BOARD

Directors' authority to adopt forum selection bylaws has been established by *Boilermakers*, and it serves as the first step of the decision-making framework for jurisdictions outside of Delaware.¹⁶⁶ As a matter of corporate law, Delaware boards of directors have the power to adopt, amend, or repeal bylaws if they are so authorized by the certificate of incorporation.¹⁶⁷ In order to secure this authority, incorporators may simply adopt a charter provision prior to the issuance of shares that allows the board to adopt bylaws.¹⁶⁸ Section 109(a) must be read in conjunction with section 141(a) of the DGCL which mandates that the, "business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors."¹⁶⁹ Delaware courts recognize the boards possess this "large reservoir of authority."¹⁷⁰ Directors can adopt bylaws with a simple majority vote of the quorum present at a meeting.¹⁷¹ As an application of the board's power, fo-

162. See *supra* Part I(A)(1).

163. See *supra* Part I(A)(1).

164. *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989).

165. See *supra* Parts II(A), (B).

166. *Boilermakers*, 72 A.3d at 954, 963.

167. DEL. CODE ANN. tit. 8, § 109(a) (West 2013) ("Notwithstanding the foregoing, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors . . .").

168. *Id.*

169. *Id.* § 141(a); see also *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) ("A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.").

170. *Unocal Corp v. Mesa Petroleum Co.*, 493 A.2d 946, 953 (Del. 1985).

171. Tit. 8, § 141(b).

rum selection clauses as Vice Chancellor Laster notes, “provide an efficient and value-promoting locus for dispute resolution.”¹⁷²

Directors’ authority to enact forum selection bylaws is consistent with contract law, a point that follows from their authority and that *Boilermakers* confirms.¹⁷³ The board possesses a broad mandate under section 109(b) of the DGCL to promulgate bylaws. Generally, Delaware corporate bylaws regulate procedural and corporate governance matters.¹⁷⁴ Delaware courts employ a “context and purpose” test to determine the procedural nature of a bylaw.¹⁷⁵ Forum selection clauses adopted via bylaws, similarly to other procedural bylaws, arguably fit within this domain because of their predominantly procedural nature.¹⁷⁶ However directors’ authority to adopt forum selection bylaws does not foreclose stockholders from successfully challenging and removing the clauses through internal corporate processes.

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

173. See Grundfest & Savelle, *supra* note 5, at 381. *Contra* Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. LAW REV. 595, 604 (1997) (“In short, the fiduciary relationship and its obligations serve functions not addressed by ‘mere’ contract in a world that puts a premium on individual autonomy, let alone in a cooperating world that takes a broader view of the psychological and social needs and functions of human beings.”). In the corporate context, courts impute consent to parties absent “[rejection of] any or all of those rules, which they are presumed to be free to do.” *Id.* at 623. Unilateral adoption of bylaws by the board is an example of imputed consent because assent is assumed absent an explicit agreement otherwise. See *id.* Imputed consent does not mean that stockholders actually consent or that their agreement becomes part of a “contractual” agreement. Instead, it remains within the corporate context. See *id.* at 623–24.

174. See McDonnell, *supra* note 42, at 217, 221; see also *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 235 (Del. 2008); *Gow v. Consol. Coppermines Corp.*, 165 A. 136, 140 (Del. Ch. 1933) (“[A]s the charter is an instrument in which the broad and general aspects of the corporate entity’s existence and nature are defined, so the by-laws are generally regarded as the proper place for the self-imposed rules and regulations deemed expedient for its convenient functioning to be laid down.”).

175. Grundfest & Savelle, *supra* note 5, at 373 (citing *AFSCME Emps. Pension Plan*, 953 A.2d at 236–37).

176. See *id.* at 374–75. For example, several procedural-themed bylaws exist in the DGCL, including *inter alia* § 141(b) which authorizes bylaws that fix the number of directors on the board, quorum requirements, and votes needed for board actions; § 211(a) and (b) which establish the date and location for the annual stockholder meeting; § 211(d) outlines stockholder special meeting requirements; § 216 establishes quorum and voting requirements for stockholders; and § 222 which promulgates notice requirements for stockholder meetings. Tit. 8, §§ 141(b), 211(a)–(b), (d), 216.

Stockholders have a reciprocal, statutory right to use direct or indirect means to remove director-enacted bylaws, without resorting to derivative litigation.¹⁷⁷ First, stockholders can directly override the board's authority to adopt bylaw provisions: "[t]he fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend, or repeal bylaws."¹⁷⁸ Second, stockholders can indirectly impose their preferences regarding governance issues through the director-election process. For example, if the stockholders do not like the actions taken by the board, they can elect new directors at the next annual stockholder meeting.¹⁷⁹ Moreover, at any time, even between annual meetings, "[a]ny director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors."¹⁸⁰ Next, a non-Delaware court would apply a rebuttable presumption of enforceability of the clauses based on directors' authority that is buttressed by the business judgment rule.¹⁸¹

B. STEPS 2 & 3: A REBUTTABLE PRESUMPTION OF ENFORCEABILITY AND HOW TO (POSSIBLY) OVERCOME IT.

Directors' authority to enact forum selection clauses via bylaws creates a presumption of their enforceability *à la* business judgment rule.¹⁸² The business judgment rule forms this starting point for the next step. It provides that directors acted pursuant to their fiduciary duties, which means that they acted on

177. Delaware corporate stockholders have several options that do not involve derivative litigation. First, they could simply repeal or amend the director-enacted bylaw by a simple majority vote (unless the bylaws require a higher vote). *See* *Rogers v. Hill*, 289 U.S. 582, 588–89 (1933) (explaining that, as an incident of stockholders' ownership and voting power of their shares, they have a plenary, statutory right to repeal or amend directors' bylaws). Second, stockholders could except forum selection clauses from the board's power to enact bylaws. *See* tit. 8, § 141(a). Third, stockholders may take indirect action by voting or threatening to vote out directors who adopted the bylaw with the forum selection clause. *See* tit. 8, § 141(k).

178. Tit. 8, § 109(a).

179. Tit. 8, § 211(b) ("[A]n annual meeting of stockholders shall be held for the election of directors . . .").

180. Tit. 8, § 141(k).

181. *See supra* Part I(A)(1).

182. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 367 (Del. 1993) (explaining that the business judgment rule is an outgrowth from the codified delegation of management powers in § 141(a) of the DGCL).

an informed basis, in good faith, and in honest belief the actions they took were in the best interests of the corporation.¹⁸³ The business judgment rule serves as formidable protection for corporate directors and officers. In order for stockholder-plaintiffs to rebut the presumption of enforceability in the context of forum selection clauses, they may introduce evidence of directors' breaches of the duty of care or the duty of loyalty.¹⁸⁴

If stockholder-plaintiffs are successful and rebut the presumption of enforceability, courts should proceed to the third step and review the transaction under an entire fairness standard.¹⁸⁵ This necessarily involves a case-by-case inquiry.¹⁸⁶ In order to flesh out the second and third steps, which are necessarily intertwined, the solution walks through circumstances that may feasibly arise or have arisen in the duty of care and duty of loyalty contexts. Unlike in *Boilermakers*, this exercise does not aim to outline a "parade of horrors" or engage with hypothetical, law school-esque scenarios.¹⁸⁷ Instead, the purpose of ap-

183. *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1988) ("As a rule of evidence, [the business judgment rule] creates 'a presumption that in making a business decision, the directors of a corporation acted on an informed basis [i.e., with due care], in good faith and in the honest belief that the action taken was in the best interest of the company.' The presumption initially attaches to a director-approved transaction within a board's conferred or apparent authority in the absence of any evidence of 'fraud, bad faith, or self-dealing in the usual sense of personal profit or betterment.'" (second alteration in original) (citations omitted)).

184. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (explaining that the plaintiff has a burden of proof to rebut this presumption by introducing evidence of self-dealing or lack of due care), *overruled on other grounds by Gantler v. Stevens*, 965 A.2d 695 (2009); *see supra* Part I(A).

185. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362-63 (Del. 1993), *modified on reargument*, 636 A.2d 956 (Del. 1994); *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993).

186. *See, e.g., Brown v. Slenker*, 220 F.3d 411, 424 (5th Cir. 2000) ("The existence of a fiduciary duty, and the breach thereof, are both questions of fact."). This approach disavows a bright line rule that advocates for or against the enforceability of forum selection clauses. *Cf. Grundfest & Savelle, supra* note 5, at 402 (rejecting a bright-line rule, but articulating a different fiduciary duties analysis).

187. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 958 (Del. Ch. 2013). *Compare Grundfest & Savelle, supra* note 5, at 364 ("Courts applying Delaware law to adjudicate the validity of an ICFS provision as adopted therefore need not speculate as to every conceivable circumstance that might later arise in connection with a future effort to enforce that provision under conditions that are unknown and unknowable as of the date of the provision's adoption."), *with Stroud v. Grace*, 606 A.2d 75, 96 (Del. 1992) ("There was no basis to invoke some hypothetical risk of harm rather than an examination of the board's proven, and entirely proper, conduct."). It is appropriate to consider various fact scenarios for the purpose of generating a pre-

plying this framework in possible situations is that they will likely arise in “as-applied” circumstances in future fiduciary duties derivative litigation. Therefore, the duty of care will first be analyzed, followed by the duty of loyalty.

1. The Duty of Care

Plaintiffs may show a violation of the duty of care sufficient to pass step two by demonstrating that directors did not engage in a process of informed decision-making.¹⁸⁸ This analysis requires consideration of more than whether “Delaware courts will fail to hold directors properly responsible for their actions.”¹⁸⁹ Directors must reach their decision to adopt a bylaw with a forum selection clause through “informed, reasonable deliberation.”¹⁹⁰ Fortunately for directors, the travails of multi-jurisdictional litigation and the phenomenon of the lead plaintiff race are well-documented and easily serve as a basis for rational decision.¹⁹¹ In addition, the fiduciaries’ conduct is only actionable if the directors are grossly negligent.¹⁹² Plaintiffs’ assertions that directors fail to consider the effect of forum selection clauses on stockholders likely misses this mark sufficient to rebut the presumption of enforceability à la business judgment rule.¹⁹³ If directors truly were irrational, for example, identifying Delaware as an exclusive forum for a Minnesota corporation, they may come closer to rebutting the presumption of enforceability. Instead, stockholders may be more successful

scriptive decisionmaking framework. In an actual case, the court is bound by the facts, not by hypothetical inquiries. These two situations are distinct, and prescriptive/normative analysis can inform and construct the decisionmaking process.

188. *Van Gorkom*, 488 A.2d at 872. This paragraph assumes that the corporation does not have an exculpation provision described in Delaware law. DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2013).

189. *Contra Grundfest & Savelle*, *supra* note 5, at 402.

190. *Van Gorkom*, 488 A.2d at 872.

191. *See supra* Part I(B). *Contra* Revised Verified Supplement to the Complaint at ¶14, *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (2013) (No. 7220-CS) (“[T]he only duplicative litigation Chevron and its Board have experienced resulted from the *Exclusive Forum Bylaw* whose purported purpose was to avoid duplicative litigation.” (emphasis in original)).

192. *See In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693, 750 (Del. Ch. 2005) (adding that duty of care violations are rarely found).

193. *See* Verified Complaint at ¶ 95, *Neighbors v. Air Prods. & Chems., Inc.*, No. 7240-CS, 2012 WL 467520 (Del. Ch. Feb. 13, 2012) (arguing *inter alia*, that adoption of a form bylaw evinces directors’ lack of consideration of the specific terms and effects of the bylaw at issue).

in identifying a breach of the duty of loyalty in order to proceed to the third step that triggers the “entire fairness” standard.

2. The Duty of Loyalty

A successful rebuttal of the presumption of enforceability sufficient to proceed to the third step may depend on the timing of the duty of loyalty claim. The timing of duty of loyalty challenges fit into three groups: pre-planning before a suit is filed, after alleged wrongdoing, and in the midst of ongoing litigation. Similarly to the duty of care context, stockholder-plaintiffs face a distinct uphill battle in rebutting the presumption of enforceability sufficient to have a court determine the “entire fairness” of the transaction.

The first scenario is an extension of anti-takeover and poison pill jurisprudence, in which courts allow corporations to keep anti-takeover methods on the shelf for potential, future use.¹⁹⁴ As in that context, it is unlikely that courts would find self-dealing if directors adopted a clause as a form of pre-planning for possible, future derivative litigation.¹⁹⁵

In the second scenario, a board’s adoption of a clause after alleged wrongdoing provides a clearer self-dealing scenario; *Galaviz v. Berg* can be reconciled in this way.¹⁹⁶ In the *Galaviz* scenario, the board can proffer few alternative reasons for their actions other than their self-interest in escaping liability.¹⁹⁷ In so doing, they effectively place their self-interest over the best interests of the corporation and its stockholders. Although confining litigation to Delaware does not assure directors’ success,

194. See Paul H. Edelman & Randall S. Thomas, *Selectica Resets the Trigger on the Poison Pill: Where Should the Delaware Courts Go Next?*, 87 IND. L. J. 1087, 1088–89 (2012) (“Rights plans, or as they are known more pejoratively ‘poison pills,’ enable a target board to ‘poison’ a takeover attempt by making it prohibitively expensive for a bidder to acquire more than a certain percentage of the target company’s stock . . . [Delaware courts generally] have approved traditional rights plans as useful bargaining devices for well-intentioned boards of directors.”).

195. See Grundfest & Savelle, *supra* note 5, at 366 (analogizing forum selection clauses to poison pills as a pre-planning tool for hostile takeovers).

196. See, e.g., *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 11712 (N.D. Cal. 2011). The holding of the *Galaviz* case can be reconciled with this prescriptive framework because, as a matter of corporate law, it implicates a fact scenario that involves self-dealing. *Contra* Grundfest & Savelle, *supra* note 5, at 407 (arguing that the *Galaviz* court ignored controlling precedent when it relied on a vested rights theory to find the forum selection clause unenforceable). A self-dealing supersedes considerations of whether the plaintiffs’ claims have vested.

197. See, e.g., *Galaviz*, 763 F. Supp. 2d at 1171.

it certainly increases their odds.¹⁹⁸ Delaware courts confer benefits on directors, strategic advantages that stockholders do not necessarily share.¹⁹⁹

Finally, directors could also adopt a clause in the midst of pending litigation in a foreign court. Again, stockholders could implicate directors' self-dealing incentives in adopting the clause.²⁰⁰ This scenario provides a direct affront to contract law, although this may be difficult to establish after *Boilermakers* upheld the contractual validity of forum selection in the corporate context.²⁰¹ While the enforceability of forum selection clauses in contract law is well-settled, contract law likely does not allow one party to unilaterally add a forum selection clause after litigation has begun.²⁰² Parties must instead resort to having cases dismissed, transferred, or stayed.²⁰³ Though most cases will likely be stalled at the second step, rebutting the presumption of enforceability of forum selection clauses, the possibility of reaching the "entire fairness" standard provides a roadmap for courts to follow in these cases. Indeed, it provides the best alternative to existing counterarguments.

C. ALTERNATIVES ARE INEFFECTIVE

Yet alternatives exist. Some advocate an outright ban on forum selection bylaws in the corporate context, or a slightly more mediated solution as long as directors engage in good governance.²⁰⁴ Opponents cannot turn a blind eye to the very real inconvenience and waste of resources that is caused by unconstrained multi-jurisdictional litigation.²⁰⁵ In most contexts,

198. See *supra* Part I(B).

199. See *supra* Part I(B).

200. This argument is distinct from whether stockholders have perfected their right to sue in a foreign forum. *But c.f.* Grundfest & Savelle, *supra* note 5, at 377 (discussing how stockholders have typically failed to perfect their right to sue in a foreign jurisdiction).

201. See *Galaviz*, 763 F. Supp. at 1174 ("To whatever degree bylaws may generally be contractual in nature, however, Oracle here seeks to rely on principles of *corporate* law with respect to how its bylaws could be amended. Oracle has not pointed to any commercial contract case upholding a venue provision that was inserted by a purported unilateral amendment to existing contract terms." (emphasis in original)). *Contra* *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 955 (Del. Ch. 2013).

202. See *supra* Part I(A)(4).

203. See *id.* Whether a court dismisses, transfers, or stays a case depends on the court and/or the state.

204. See *supra* Part II(A)(1).

205. See *supra* Part I(B).

forum selection clauses provide a useful solution to the travails of multi-jurisdictional litigation. A rebuttable presumption of enforceability provides plaintiffs with an avenue in which to bring legitimate fiduciary duties claims, while weeding out strike suits.

Unconditional enforcement of forum selection bylaws faces similar problems, but strikes a different, improper balance. Stockholders with possible fiduciary duties' arguments could be locked out of their preferred venues, in a full concession to multi-jurisdictional problems. Grundfest's "fiduciary out" solution, that allows directors to waive the forum selection bylaw, fits with this Note's proposed solution. Together, they establish a compromise: directors monitor their fiduciary duties and stockholders may rebut the presumption of directors' authority. If directors concede to a venue or stockholders are successful, litigation proceeds; if not, the case continues in Delaware, which is not a bad alternative.

Finally, doing nothing is not an option. This hotly-debated and increasingly-litigated topic demands a solution. This Note provides a fiduciary duties-specific solution for courts outside of Delaware to when they inevitably encounter these cases.

CONCLUSION

In re Revlon, Galaviz, and Boilermakers began the discussion about the enforceability of forum selection bylaws, but significant questions remain. It is unclear how non-Delaware courts will interpret this progression of cases, especially when plaintiffs raise breach of fiduciary duties claims about directors' uses of the forum selection bylaws. This Note proposes and develops a structure for the resolution of these disputes. Forum selection bylaws should be presumptively enforceable because of directors' authority to adopt bylaws. Plaintiffs may challenge this rebuttable presumption by showing that directors breached their duties of care and/or loyalty. If they are successful, directors must demonstrate the "entire fairness" of the forum selection bylaw to stockholders. At all times, directors could waive the forum selection bylaws if their fiduciary duties so require. In this way, courts mediate a compromise between corporate defendants' and stockholder-plaintiffs' competing interests and in effect, organize this section of intracorporate litigation within existing DGCL precedent. For non-Delaware courts, today may not be the day, but when it is, this Note will help them get on their way.