No. 08-5842-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUCIAN BEBCHUK

Appellant,

-against-

ELECTRONIC ARTS, INCORPORATED

Appellee.

On Appeal from an Order of the
United States District Court for the Southern District of New York

REPLY OF APPELLANT

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PRELIMINARY STATEMENT

Electronic Arts ("EA" or the "Company") essentially concedes that the District Court's holding was the product of clear legal error.[1] The District Court held that Rule 14a-8 prohibits a company from adopting bylaws or certificate amendments that restrict a board of directors from excluding shareholder proposals from a company's proxy statement. That holding is inconsistent with this Court's acknowledgement that corporate bylaws requiring a company to include specific material in its proxy statement are "certainly allowed" under the federal proxy rules, even such material otherwise could be excluded under the proxy rules. *American Federation of State, County & Municipal Employees v. American Int'l Group, Inc.*, 462 F.3d 121, 130 n.9 (2d Cir. 2006) ("*AFSCME*").

Although the U.S. Chamber of Commerce clings tenaciously to the District Court's flawed analysis, EA apparently recognizes this inconsistency and formulates an entirely different rationale for why Professor Bebchuk's Proposal[2] should be excludable under Rule 14a-8. But both EA and the Chamber take issue only with the simple point that the Proposed Amendment would set restrictions on how the Company's *board of directors* exercises the limited discretion that Rule

[1] The Brief of Appellee will be cited as "App. Br."

[2] Capitalized terms herein shall have the same meeting as set forth in the Brief of Appellant ("Bebchuk Br.").

14a-8 grants to the *Company itself.* Their arguments, however, are logically flawed, depend on a wholesale rejection of the applicable rules of statutory construction, and evidence a fundamental misunderstanding of established caselaw both interpreting the proxy rules and regarding the internal governance of corporations.

First, EA's argument that the Proposal is contrary to the proxy rules rests on a patently false premise.[3] EA argues that the Proposed Amendment would "opt out of Rule 14a-8"[4] by "changing the proxy rules' application to EA."[5] This is wrong. The Proposed Amendment would leave Rule 14a-8 intact, and its application to EA would remain the same. As explained by the 60 preeminent corporate and securities law professors, from thirty-eight law schools throughout the country, who submitted an amicus brief supporting Professor Bebchuk's position, the Proposed Amendment "would govern EA's actions within the zone of freedom left to it by Rule 14a-8 to include or exclude certain proposals."[6] The *only* thing that would change would be the ability of *EA's directors*, under certain circumstances, to cause the Company to exclude proposals that the Company itself is permitted to

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[3] App. Br. at 24-36.

[4] App. Br. at 1.

[5] App. Br. at 2.

[6] Brief of Corporate and Securities Law Professors as *Amici Curiae* Supporting Appellant ("Law Professors' Br.") at 11.

publish. The Proposed Amendment would do nothing more than establish *state law guidelines* for how EA's directors would exercise the managerial authority granted to them under *state law*. The fact that a shareholder is proposing this amendment does not render the Proposal itself inconsistent with Rule 14a-8 itself, and EA offers no legitimate argument to the contrary.

Throughout its brief, EA concedes that the Proposed Amendment could be adopted either by EA's Board or by EA's shareholders through an independent proxy solicitation.[7] ***Thus, EA concedes that the Proposed Amendment is entirely "lawful" under the proxy rules***.[8] If the Proposed Amendment is consistent with and does not violate Rule 14a-8, the Proposal that advocates the amendment, by definition, cannot be considered "contrary to" with Rule 14a-8 as a matter of law. EA asks the Court to invent a category of arrangements that are "lawful but contrary to the proxy rules," a concept for which EA provides no precedent as it completely invented for this case. For its part, the U.S. Chamber rejects EA's paradoxical "lawful but contrary" theory and instead urges affirmance based on the argument that *any* restriction on "director" discretion under Rule 14a-8 is unlawful, regardless of how it is adopted. But the Chamber's argument, like the District Court below, ignores the fact that Rule 14a-8 itself does not grant any discretion to

[7] *See* App. Br. at 4, 21, 37-39.

"directors" at all. Beyond ignoring the legal distinction between corporate boards and the companies they are charged with representing, the Chamber offers nothing to support its cause.

The fact that the SEC considered proposed amendments to Rule 14a-8[9] is irrelevant to the interpretation of the rules in their current form.[10] The proposed rule changes would have only established new federal requirements. Those proposed amendments do not impact how *existing state law* governs the limited discretion provided to companies in Rule 14a-8.

Second, EA argues that the Proposal may be excluded under subsection (i)(8) because it relates to a procedure for the nomination or election of directors of EA and generally under the other exemptions listed in the Rule.[11] The Proposed Amendment does not relate *at all* to director elections or election procedures, or any of the other grounds for exclusion enumerated under subsection (i) of the Rule. The Proposed Amendment would establish a procedure for enacting *bylaws*. The fact that the Proposed Amendment, if implemented, might someday increase the likelihood that the Company may publish a proposal introduced by a shareholder to

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[8] App. Br. at 21.

[9] App. Br. at 31-34.

[10] *AFSCME,* 462 F.3d at 129 n.8.

[11] App. Br. at 39-45.

establish an election-related procedure does not mean that the Proposal itself relates to elections or election procedures in any way. Indeed, accepting EA's argument[12] would permit the exclusion of myriad shareholder proposals on different subjects that the SEC routinely requires corporations to publish – including majority voting, declassification of boards, director qualifications, etc. – merely because such proposals might increase the likelihood that the Company may permit the introduction of a election-related shareholder proposal. Because the plain text of Rule 14a-8(i) does not allow exclusion of a shareholder proposal that establishes a procedure for adopting bylaws or certificate provisions, the Proposal may not be excluded under the plain text of the Rule.[13]

Unable to reconcile its argument with the actual text of either the Proposal or Rule 14a-8 itself, EA argues that the Proposal is excludable under subsection (i)(8) because Professor Bebchuk's views in favor of election reform raise suspicion that he is "set about to undermine" Rule 14a-8.[14] Not only is EA's argument irrelevant, but it is factually incorrect. The Proposed Amendment is aimed not at increasing shareholders' ability to replace directors, but at facilitating their ability to amend bylaws. Moreover, Professor Bebchuk's belief regarding the permissibility of the

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[12] App. Br. at 13.

[13] *See U.S. v. Gayle*, 342 F.3d 89, 92 (2d Cir. 2003) ("Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well.").

proposal under Rule 14a-8 is shared by the 60 other professors who have sharply divergent views on corporate governance policies. As their brief explains "*Amici* do not generally hold the same views as to whether EA and its shareholders would benefit from the passage of the proposal submitted by [Prof. Bebchuk] to [EA]. *Amici* also differ on many issues concerning corporate governance and corporate law policy. *Amici* all share, however, the view that EA may not exclude the Proposal from its proxy materials and deny EA's shareholders the opportunity to vote on it."[15] The fact that Professor Bebchuk may personally support reforming corporate elections, therefore, is beside the point.

Third, the Proposal is not vague or ambiguous. EA's argument that the Proposal is vague depends on EA's mistaken assertion that the Proposal would set up an "alternative scheme to Rule 14a-8."[16] But EA also candidly concedes that nothing on the face of the Proposal "supplant[s] [the] framework [of Rule 14a-8]."[17] There is simply nothing ambiguous about how the Proposal would interact with Rule 14a-8. If a shareholder submits a proposal that must be included under Rule 14a-8, then the Company must include the proposal in its proxy statement. If

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[14] App. Br. at 11.

[15] Law Professors' Br. at 2.

[16] App. Br. at 52.

[17] App. Br. at 52.

a shareholder submits a proposal that may be excluded under Rule 14a-8, the Company must comply with all the procedural requirements of Rule 14a-8 if it intends to exclude the Proposal. Thus, the Proposed Amendment would not alter how Rule 14a-8 operates. It only establishes an additional factor that EA's board must consider in determining whether it has the managerial authority under state law to seek to prevent shareholders from considering certain kinds of proposals, an arrangement which EA concedes is entirely permissible under Rule 14a-8.[18]

ARGUMENT

I. EA CONCEDES THAT THE DECISION OF THE COURT BELOW WAS THE PRODUCT OF A CLEAR ERROR OF LAW

EA appears to agree with Professor Bebchuk, and the 60 other law professors, that the District Court's holding was the product of clear legal error. The District Court held that the Proposal is contrary to Rule 14a-8 because the rule somehow gives the "board of directors" of corporations discretion to exclude certain shareholder proposals and "the purpose of [the] proposal is to eliminate such discretion on the part of the directors."[19] Thus, according to the District Court, any bylaw or certificate provision that limits the discretion of a board to exclude shareholder proposals is contrary to the proxy rules.[20] As explained in

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[18] *See* App. Br. at 4, 21, 37-39.

[19] A-1096.

[20] A-1094-96.

Professor Bebchuk's opening brief and the law professors' supporting brief, the District Court erred by conflating the discretion provided to a "company"[21] under Rule 14a-8 with the managerial authority that is granted to "corporate boards" under *state law*. [22] The District Court failed to recognize that the managerial discretion of corporate boards, being a creation of state law, can be limited and restricted by state law as well,[23] and that such state law provisions can be perfectly consistent with the scheme contemplated by Rule 14a-8.[24] In its brief, EA concedes this point, admitting that (1) "Bebchuk is free to present his Proposal to EA shareholders in his own ... proxy materials"[25] and (2) "EA voluntarily may choose to publish his Proposal."[26]

EA's concession has important implications. If EA's shareholders could adopt the Proposed Amendment through an independent solicitation, and EA's

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[21] *See* Rule 14a-8(i) ("If I have complied with the procedural requirements, on what other bases *may a company* rely to exclude my proposal?" (Emphasis supplied.))

[22] *See Burks v. Lasker*, 441 U.S. 471, 478 (1979) ("[I]t is state law which is the font of corporate directors' powers.").

[23] A-1094-96.

[24] *See Santa Fe Indus. Inc. v. Green*, 430 U.S. 462, 479 (1977) ("[E]xcept where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.").

[25] App. Br. at 4 (emphasis omitted).

[26] App. Br. at 39.

board could voluntarily implement the Proposed Amendment on its own,[27] this necessarily means that the Proposed Amendment can (and would) coexist with Rule 14a-8 without violating the rule or somehow changing the rule's application to EA.[28]

EA's concession also is in direct conflict with the arguments advanced by the Chamber. The Chamber spends the majority of its brief arguing about the supposed "careful balance" achieved by the SEC in formulating Rule 14a-8 – ignoring entirely the fact that *not once* in Rule 14a-8 did the SEC grant *any*

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[27] Of course, to the extent that EA's board determined that it would be appropriate to implement the Proposed Amendment through a change to the Company's certificate of incorporation, shareholder approval would be necessary. *See* 8 Del. C. § 242(b); *AGR Halifax Fund, Inc. v. Fiscina*, 743 A.2d 1188, 1192 (Del. Ch. 1999) ("§ 242(b) prescribes a two-step process that must be followed in precise sequence to amend a Delaware corporation's charter. The first requires the board of directors to adopt a resolution proposing the amendment, declaring its advisability, and calling for a shareholder vote at a special or annual shareholder meeting. The second step requires that the proposed amendment be considered and voted upon at a special meeting (or at the next annual meeting) of stockholders.").

[28] A recently adopted Delaware law confirms that state law may empower shareholders to adopt bylaws that require a company to include material in its proxy statement even where Rule 14a-8 allows exclusion. The newly enacted 8 Del. C. § 112 states:

> The bylaws may provide that if the corporation solicits proxies with respect to an election of directors, it may be required, to the extent and subject to such procedures or conditions as may be provided in the bylaws, to include in its proxy solicitation materials (including any form of proxy it distributes), in addition to individuals nominated by the board of directors, one or more individuals nominated by a stockholder.

discretion to exclude shareholder proposals to "corporate directors."[29] The Chamber then posits, *ipse dixit*, that "nothing in state law requires defendant to surrender responsibility over company proxy materials to shareholder proponents."[30] This assertion is irrelevant because the Proposed Amendment would not require the "defendant" – *i.e.*, Electronic Arts – to "surrender" anything. The only restrictions that would be established through the Proposed Amendment would be on the managerial discretion granted to EA's *board of directors* under state law. And in this regard, the Chamber's argument, like the District Court's holding below, is wrong because it ignores the indisputable point that the directors of a corporation are not, in fact, united in identity with the company itself. Distinct from whatever rights are granted to a corporation under the federal securities laws, Delaware law is clear that the managerial discretion of corporate boards can in fact be substantially restricted, or eliminated entirely, through precisely the mechanisms advocated in the Proposal – an amendment to the Company's

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[29] *See* Bebchuk Br. at 25 (pointing out that in Rule 14a-8 the SEC granted certain discretion to the "company," and that when it intended to say "board of directors," it said so).

[30] Chamber Br. at 21 (capitalization changed).

certificate of incorporation[31] or to the very bylaw that grants EA's directors their managerial authority in the first place.[32]

II. THE PROPOSAL MAY NOT BE EXCLUDED UNDER RULE 14a-8(i)(3) AS INCONSISTENT WITH THE PROXY RULES

Abandoning any effort to defend the actual holding of the District Court, EA instead makes three arguments about how the Proposal is somehow contrary to the proxy rules. First, EA argues that the Proposal is contrary to Rule 14a-8 because it would establish some sort of "alternative process" that would cause EA to "opt out" of Rule 14a-8.[33] Second, EA argues that the fact that the SEC declined in the past to enact certain proposed amendments to Rule 14a-8 demonstrates that the Proposal is inconsistent with Rule 14a-8.[34] Third, EA argues that the Proposal is inconsistent with Rule 14a-8 because "nothing in either the Delaware code or EA's certificate of incorporation (or bylaws) ... delegates to anyone other than the Board the power under Rule 14a-8 to determine which shareholder proposals to include in EA's proxy."[35] EA's arguments are without merit.

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[31] 8 Del. C. § 141(a).

[32] *See* Amended and Restated Bylaws of Electronic Arts Inc. ("Section 2.10: Powers. The Board of Directors may, except as otherwise required by law or the Certificate of Incorporation, exercise all such powers and do all such acts and things as may be exercised or done by the Corporation.") (A-1025).

[33] App. Br. at 25-29.

[34] App. Br. at 30-34.

[35] App. Br. at 36.

A. THE PROPOSAL IS NOT CONTRARY TO RULE 14a-8 AND THUS MAY NOT BE EXCLUDED UNDER SUBSECTION (i)(3) OF THE RULE

EA contends that the Proposal is "inconsistent" with the proxy rules and may be excluded under Rule 14a-8(i)(3)[36] based on nothing more than the fact that the Proposed Amendment would preclude the Board from causing EA to exclude shareholder proposals that Rule 14a-8 gives the Company the discretion to exclude.[37] This, EA suggests, makes the Proposal "inconsistent with" Rule 14a-8 and excludable under subsection (i)(3) of the Rule because the Proposed Amendment would cause EA to "opt out of Rule 14a-8 entirely."[38]

As an initial matter, EA's "inconsistent with" gloss appears nowhere in Rule 14a-8(i)(3). Rather, subsection (i)(3) permits a company to exclude a proposal "[i]f the proposal or supporting statement is ***contrary to*** any of the Commission's proxy rules."[39] EA argues that "the term 'contrary to' the proxy rules does not equate to 'unlawful,' as Bebchuk argues. The term 'contrary to' in this case means 'inconsistent with' – a proposal can be both lawful and contrary to the proxy rules, as is the case with Bebchuk's Proposal."[40] EA is just plain wrong. The SEC

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[36] App. Br. at 25.

[37] App. Br. at 26.

[38] *See* App. Br. at 5.

[39] 17 C.F.R. § 240.14a-8(i)(3) (emphasis supplied).

[40] App. Br. at 21.

explained that subsection (i)(3) was designed to permit companies to exclude shareholder proposals that were "***prohibited from inclusion in proxy soliciting materials***" or "***that would, if implemented, be violative of a federal law of the United States***."[41] In other words, if a shareholder proposal is legal and would not cause the corporation to violate any law or SEC rule, the proposal cannot be deemed "contrary to" the proxy rules within the meaning of Rule 14a-8(i)(3).[42] EA's invented "lawful but contrary to the proxy rules" rationale has absolutely no support in law and should be rejected.

EA recognizes that companies can adopt bylaws and certificate amendments that require inclusion of shareholder proposals that may be excluded under Rule 14a-8.[43] EA offers absolutely no rationale why this scheme is somehow rendered "inconsistent" if a shareholder raises the proposal under the Rule 14a-8 process.[44]

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[41] Proposed Amendments to Rule 14a-8, Exchange Act Release Nos. 12598, 19602, 34-12598, 35-19602, IC-9343, 9 S.E.C. Docket 1030, 1976 WL 160410 (July 7, 1976) ("Release No. 12598") (emphasis added) (A-570) (emphasis supplied).

[42] *Id.*

[43] *See* App. Br. at 37 (citing a bylaw of Comverse Tech., Inc. that requires the company to place certain shareholder nominated directors on its proxy statement, despite the fact that it may exclude those names under Rule 14a-8).

[44] EA argues that in the Proposal's Supporting Statement, Professor Bebchuk "admits that the Proposal is contrary to the proxy rules." App. Br. at 27. Professor Bebchuk "admits" no such thing. The supporting statement merely points out that the Proposed Amendment would require the Company to include shareholder proposals that the Company otherwise may be permitted to exclude under Rule *(Cont'd)*

EA's concession that the proposal is not "unlawful and violative of the proxy rules,"[45] concedes that the Proposal is not excludable under Rule 14a-8(i)(3).

EA places heavy reliance on the informal opinion of the SEC's Division of Corporation Finance (the "Staff") on a no-action letter issued to State Street Corporation ("State Street").[46] The proposal in *State Street* is distinguishable from the Proposal because the *State Street* proposal would have required the company to publish even proposals that violated proxy rules.[47] For example, the *State Street* proposal could have required the company to include in its proxy materials proposals that contain false and misleading statements in violation of Rule 14a-9. On the other hand, a Qualified Proposal under the Proposed Amendment must comply with all applicable law, including the proxy rules.[48] Therefore, unlike the *State Street* proposal, the Proposed Amendment would never require the Company to violate the securities laws.

14a-8. As discussed herein, this does not make the Proposal contrary to the proxy rules.

[45] App. Br. at 38.

[46] *State Street Corp.*, SEC No-Action Letter, 2004 WL 257703 (Feb. 3, 2004) (A-588).

[47] The proposal at issue in *State Street* stated that "Every proposed by-law amendment that is timely submitted by one or more stockholders shall be included, verbatim, in the corporation's proxy statement" 2004 WL 257703 at *2 n.1.

[48] A Qualified Proposal must be "valid under applicable law." (A-546).

In any event, a "no-action letter does not bind the courts"[49] and "[e]ven when district courts have ruled in accord with no-action letters, they almost always have analyzed the issues independently of the letters."[50] Thus, where the Staff's opinion in a no-action letter is not consistent with the actual language of the applicable rule,[51] this Court has not hesitated to reject even dozens of no-action letters issued over the course of decades.[52] Subsection (i)(3) permits only the exclusion of proposals that are "contrary to" the proxy rules, which as the SEC has explained means proposals that would be "prohibited by" or "violative" of the securities laws. Thus, to the extent the Staff even addressed the issue in *State Street*,[53] a Staff opinion that a proposal recommending the adoption of a bylaw or certificate provision that is perfectly legal and could exist coextensively with Rule

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[49] *New York City Employees' Retirement Sys. v. SEC*, 45 F.3d 7, 13 (2d Cir. 1994) ("*NYCERS*"); *see also Amalgamated Clothing and Textile Workers Union v. SEC*, 15 F.3d 254, 257 (2d Cir. 1994) ("Although courts may find SEC positions on enforcement as articulated in no-action letters persuasive in the circumstances, such positions are not binding on the district courts.").

[50] *NYCERS*, 45 F.3d at 13.

[51] *Peralta-Taveras v. Attorney General***,** 488 F.3d 580, 584 (2d. Cir. 2007) ("[O]ur inquiry begins with the plain language of the statute and where the statutory language provides a clear answer, it ends there as well.").

[52] *See AFSCME*, 462 F.3d at 128 n.7 (disagreeing with the position the Division had taken in no-action letters "consistently" since 1998).

[53] As usual, the Staff stated only: "There appears to be some basis for your view that State Street may exclude the proposal under rule 14a-8(i)(3), as contrary to the Commission's proxy rules." *State Street*, 2004 WL 257703 at *1.

14a-8 nevertheless can be excluded under subsection (i)(3) of the Rule, would not be consistent with the actual language of (i)(3) and should not be adopted by this Court.

Finally, EA suggests that the Proposed Amendment would "frustrate[] the policy that Congress sought to implement."[54] But in enacting Section 14(a) of the Exchange Act, "[i]t was the intent of Congress to require fair opportunity for the operation of corporate suffrage. The control of great corporations by a very few persons was [the] abuse at which Congress struck in enacting Section 14(a)."[55] EA provides no explanation as to how the Proposed Amendment, which would merely expand the breadth of proposals that may be considered by EA's shareholders, would "frustrate" Congressional intent to promote shareholder suffrage. Indeed, because Rule 14a-8 does not "expressly require[]" that the directors of corporations have the unfettered ability to exercise their business judgment with respect to the exclusion of shareholder proposals, the clear federal policy is to leave that matter to state law.[56]

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[54] App Br. at 25 (citing *William J. Lang Clearing, Inc. v. Adm., Wage and Hour Div.*, 520 F. Supp. 2d 870, 877 (E.D. Mich. 2007)).

[55] *SEC v. Transamerica Corp*, 163 F.2d 511, 518 (3d Cir. 1947).

[56] *See Santa Fe Indus.*, 430 F.2d at 479.

B. THAT THE SEC HAS DECLINED TO IMPLEMENT VARIOUS AMENDMENTS TO RULE 14a-8 DOES NOT SUPPORT EA'S ARGUMENT THAT THE PROPOSAL IS "CONTRARY TO" THE RULE.

Unable to articulate a reason to justify excluding the Proposal under the actual language of Rule 14a-8, EA argues that the fact that the SEC has declined to implement certain amendments to Rule 14a-8 that were in some respects similar to the Proposal advocated by Prof. Bebcuk supports its position that the Proposal is somehow contrary to the Rule and may be excluded.[57] In *AFSCME*, this Court held that it was irrelevant that a proposal "improperly conflicts" with "a proposed [unadopted] SEC rule." 462 F.3d at 130 n.8. Similarly, the proposed rule changes cited by EA are irrelevant to the present dispute of whether the Proposal may be excluded under Rule 14a-8(i)(3).

Under one proposed change, the SEC considered allowing companies to follow a federally specified process for altering the minimum disclosure requirements for shareholder proposals.[58] In another, the SEC considered requiring inclusion of any proposals that were proper under state law and did not involve the

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[57] App. Br. at 30-34.

[58] *See* Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release Nos. 22666, 35-22666, 34-19135, IC-12734, 26 S.E.C. Docket 494, 1982 WL 600869 (Oct. 14, 1982) ("Exchange Act Release 34-19135") (A-627).

election of directors.[59] A third SEC Release cited by EA states that the SEC "considered" but declined to implement a "fundamentally different approach" to regulating the shareholder proposal process.[60]

EA's only argument that these proposed amendments are at all relevant here is premised on its assertion that Professor "Bebchuk's proposal would ... install[] an alternative opt-out scheme similar to those the SEC specifically rejected."[61] But as detailed above, the Proposal does not propose an alternative scheme to Rule 14a-8, but only suggests a procedure for adopting bylaws wholly consistent with Rule 14a-8.[62] Therefore, the fact that the SEC has declined to implement an "alternative" regime is beside the point.[63]

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[59] *Id.*

[60] *See* App. Br. at 31 (citing Amendments To Rules On Shareholder Proposals, Exchange Act Release Nos. 39093, 22828, 34-39093, 26 IC-22828, 65 S.E.C. Docket 986, 1997 WL 578696 (Sept. 18, 1997) ("Exchange Act Release 34-39093")) (A-678).

[61] App. Br. at 31.

[62] *See supra* at 6-7, 11-13.

[63] Defendant also objects to Professor Bebchuk stating that "Rule 14a-8 provides only the 'minimum requirements for the publication of shareholder proposals.'" See App. Br. at 33-4 ("Tellingly, the 'minimum requirement' cases Bebchuk cites contain no discussion of Rule 14a-8 at all."). But EA does not dispute the fact that Rule 14a-8 requires only the inclusion of shareholder proposals and does not require the exclusion of any proposal. *See* App. Br. at 1. EA only complains that Professor Bebchuk, in his brief, did not cite any cases holding that Rule 14a-8 establishes only minimum requirements. *See* App. Br. at 34-36. EA is wrong. Bebchuk Br. at 33-34; *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, *(Cont'd)*

C. EA's Argument That Any Attempt To Limit The Directors' Abilities To Exercise Discretion On Behalf Of The Company Through A Proposal Introduced Under Rule 14a-8 Is Contrary To The Rule Itself Is Without Merit.

EA argues that Professor Bebchuk and the 60 law professors who submitted the *amici* brief, despite their academic heft, misunderstand the relationship between state law and the federal securities laws in suggesting that a certificate or bylaw provision may divest directors of authority to exercise discretion granted to the "company" under Rule 14a-8. EA states: "[Rule 14a-8 gives] discretion to 'the company' to determine whether to exclude certain proposals. And where 'the company' properly exercises that discretion, a shareholder cannot compel 'the company' to include that proposal."[64] At least in this narrow regard, EA is correct. But that's not the relevant inquiry. The relevant inquiry is whether and how "'the company' [may] properly exercise[] that discretion." And here EA takes its argument one step further, arguing that a proposal that would restrict the ability of EA's directors to exercise the discretion granted to the "company" under Rule 14a-8 is contrary to the Rule because "nothing in either the Delaware code or EA's certificate of incorporation (or bylaws) ... delegates to anyone other than the Board

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406 (1972), holding that a company could "continue to include [a] proposal" in its proxy materials despite the fact that "the proposal might properly be omitted" under Rule 14a-8.

[64] App. Br. at 35.

the power under Rule 14a-8 to determine which shareholder proposals to include in EA's proxy."[65]

EA's argument puts the proverbial cart before the horse. The fact that EA's current certificate and bylaws do not presently restrict EA's directors' abilities to exercise their business judgment in determining whether to cause the Company to exercise *its* discretion to exclude certain shareholder proposals does *not* mean that Rule 14a-8 itself precludes the introduction of a proposal that, if adopted, would implement such restrictions. Rather, the question is whether one of the thirteen specifically enumerated grounds listed in subsection (i) of the Rule applies to permit the exclusion of the proposal here. As discussed above, provided that the proposal is lawful and does not run afoul of the securities laws, it cannot be excluded as "contrary to" the proxy rules under subsection (i)(3) of the Rule.[66] So the remaining question is whether any of the remaining twelve exceptions would justify the exclusion of the Proposal. As discussed in the following section (*infra*, Sec. III), they do not. But it is circular for EA to argue that the Company may exclude Professor Bebchuk's Proposal because the Company does not already have in place a provision similar to the Proposed Amendment, particularly where it also admits that the Proposed Amendment could operate consistently with Rule 14a-8.

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[65] App. Br. at 36.

EA's argument also ignores that the managerial authority of its board of directors may be eliminated through an amendment to the Company's certificate of incorporation,[67] and that bylaws may "pervasively and strictly regulate the process by which boards act."[68] Therefore, when Rule 14a-8 gives discretion to the "company" to exclude shareholder proposals, a bylaw or certificate of amendment can divest directors of authority to exercise that discretion on behalf of the company.

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[66] *See* Release No. 12598.

[67] 8 Del. C. § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, *except as may be otherwise provided in this chapter or in its certificate of incorporation*.") (emphasis added)).

[68] *Hollinger Intern., Inc. v. Black*, 844 A.2d 1022, 1080 n.136 (Del. Ch. 2004), *aff'd* 872 A.2d 559 (Del. 2005). The Chamber argues that "Plaintiff fails to identify a single Delaware case that holds, or even suggests, that bylaw amendments which place a broad restriction on directors' and managers' control of the company proxy are valid *per se*." Chamber. Br. at 24-25. The Chamber is mistaken. Bylaws that establish a procedure regarding the consideration and adoption of corporate bylaws are permissible under Delaware law. *See CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 235 (Del. 2008) ("[P]urely procedural bylaws do not improperly encroach upon the board's managerial authority under Section 141(a)."). But the argument is irrelevant because the Proposal also advocates an amendment to EA's certificate of incorporation. There is no question that the certificate may contain a "limitation on the board's authority." *Quickturn Design Systems, Inc. v. Shapiro, 721* A.2d 1281, 1291 (Del. 1998). And EA waived this argument by not raising it in the District Court or in its brief here. *See Boimah v. Cumberland Farms, Inc.*, 239 Fed. Appx. 632, 633 (2d. Cir. 2007) ("[F]ailure to raise the claims in the district court waives them on appeal.").

EA also argues that Professor Bebchuk is attempting to "broaden the *federal* proxy-access right that the SEC has fashioned in Rule 14a-8."[69] EA is wrong here too. The Proposed Amendment would not "broaden" anything. It would just define how the Company would exercise its discretion under the *existing* rule.

III. THE PROPOSAL IS NOT EXCLUDABLE UNDER RULE 14a-8(i)(8) OR ANY OTHER PROVISION OF RULE 14a-8

In arguing that the Proposal may be excluded under Rule 14a-8(i)(4)-(5) and 14a-8i(8)-(13), EA advocates a novel cannon of statutory construction: "It does not matter . . . that the Proposal does not on its face expressly relate to any [provisions of Rule 14a-8]."[70] This argument is absurd. "In interpreting an administrative regulation, as in interpreting a statute," this Court has explained, "we must begin by examining the language of the provision at issue."[71]

It is unsurprising that EA must disclaim any attempt to interpret the plain language of the Rule. The Proposal has absolutely nothing to do with (i) a personal grievance ((i)(4)); (ii) *de minimis* operations of the company ((i)(5)); (iii) a matter directly conflicting with a proposal submitted by EA ((i)(9)); (iv) a policy that EA has substantially implemented ((i)(10)); (v) a matter duplicating a previously submitted shareholder proposal to be included in EA's proxy statement

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[69] App. Br. at 36-39.

[70] App. Br. at 46.

((i)(11)); (vi) a previously submitted shareholder proposal that failed to gain a significant number of shareholder votes ((i)(12)); and (vii) the payment of dividends ((i)(13)). By their plain language, these provisions have nothing to do with proposals that advocate procedures for adopting bylaws. And EA does not even try to explain how the Proposal can be excluded under the language of any of these provisions.

In an effort to justify the Proposal's exclusion under the "election exclusion" of subsection (i)(8), EA cites recent amendments that permit the exclusion not only of proposals that relate to "an election," but also those that establish a procedure for nominating or electing directors.[72] But even this amendment does not apply to proposals simply advocating a procedure to amend corporate bylaws.[73]

EA selectively quotes an SEC release to argue that *any* proposal is excludable under subsection (i)(8) if it would make it even "slightly more likely" that a shareholder-nominated director would be placed on a company's proxy

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[71] *AFSCME*, 462 F.3d at 125.

[72] Shareholder Proposals Relating to the Election of Directors, Exchange Act Release Nos. 56914, 34-56914, IC-28075, 92 S.E.C. Docket 256, 2007 WL 4442610 (Dec. 6, 2007) ("Release No. 34-56914") (A-49).

[73] Rule 14a-8(i)(8) states: "If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal? ... Relates to election: If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election."

statement in "subsequent years."[74] In reality, the SEC release confirms the plain language of Rule 14a-8(i)(8) and states that it allows exclusion of proposals that "set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings."[75] The Proposal does not set up a process to nominate directors in this year or any subsequent year.

EA's argument that any proposal is excludable under (i)(8) if it makes a contested election "slightly more likely" leads to absurd results.[76] As the law professors' brief points out, EA's interpretation would allow for exclusion of almost all corporate governance measures that make directors more responsive to shareholders, including proposals to de-stagger the board, adopt majority voting, reimburse the expenses of shareholders initiating change in the company's by-laws, or require a super-majority of directors to approve the exclusion of certain types of shareholder proposals.[77] By increasing director accountability to shareholders, these proposals all make it more likely that a shareholder-nominated director will be placed on the Company's proxy statement. In its brief, EA did not

[74] App. Br. at 22.

[75] Release No. 34-56914 (A-53).

[76] App. Br. at 42.

[77] Law Professors' Br. at 20.

attempt to articulate a limiting principle to its "slightly more likely" argument that would allow for exclusion of the Proposal, but require inclusion of these corporate governance measures, which are clearly *not* excludable under Rule 14a-8(i)(8).[78]

Recognizing the weakness of its argument, EA resorts to attacking Professor Bebchuk personally.[79] EA purports to divine, based on Professor Bebchuk's views in favor of election reform, that he has "set about to undermine" Rule 14a-8.[80] However, although Professor Bebchuk has written about reforming corporate elections, he also has written extensively about the value of increasing shareholder involvement in the adoption of governance arrangements.[81] The Proposal here focuses not on election reform but on facilitating shareholder bylaws. Notably, EA does not question the motives of the 60 law professors from thirty-eight different schools who "differ on many issues concerning corporate governance and

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[78] Release No. 34-56914 at n.56. (noting that the new amendments to Rule 14a-8(i)(8) were not meant to allow exclusion of, *inter alia*, (1) "qualifications of directors or board structure (as long as the proposal will not remove current directors or disqualify current nominees);" (2) "voting procedures (such as majority or plurality voting standards or cumulative voting);" (3) "nominating procedures (other than those that would result in the inclusion of a shareholder nominee in company proxy materials);" and (4) "reimbursement of shareholder expenses in contested elections.") (A-64).

[79] App. Br. at 5, 11.

[80] App. Br. at 13.

[81] *See*, Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1784-1813 (2006); Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 833-914 (2005).

corporate law policy,"[82] but nonetheless all agree that the Proposal "does not relate to a procedure for director nomination or election."[83]

EA's hypothetical scenarios involving shareholders submitting proposals requiring EA to refund the purchase price of certain products or to declare specific dividends[84] are irrelevant. Such bylaws would not constitute Qualified Proposals because they would be illegal under state law.[85]

In any case, to the extent that the Board disagrees with Professor Bebchuk regarding the merits of the Proposal, the directors' proper recourse is not to exclude the Proposal, but to inform shareholders why they think the Proposal is a bad idea.[86]

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[82] Law Professors' Brief at 2.

[83] Law Professors' Brief at 20.

[84] App. Br. at 47-48.

[85] *See CA*, 953 A.2d at, 240 (holding that bylaws must "reserve to ... directors their full power to exercise their fiduciary duty to [expend corporate funds].").

[86] Rule 14a-8(m)(1).

IV. THE PROPOSAL IS NOT VAGUE OR AMBIGUOUS

EA argues that the Proposed Amendment is vague because it is unclear whether the Proposal "supplant[s]" Rule 14a-8.[87] Nothing in the Proposal, however, alters Rule 14a-8 at all. Indeed, EA concedes this, acknowledging that the Proposal "nowhere explicitly states that it is supplanting [the] framework [of Rule 14a-8]."[88]

Nonetheless, EA argues that the Proposed Amendment is ambiguous because it does not state whether a shareholder is required to comply with the procedural and eligibility requirements set forth in the Rule, or whether a shareholder would be permitted to cure any such defects under the procedures outlined in Rule 14a-8. EA's argument is misplaced. The Proposed Amendment does not eliminate the procedural aspects of the Rule. Rather, the Proposed Amendment would only impose additional requirements that may restrict the Board's ability to cause the Company to seek to exclude a Qualified Proposal. Far from raising the many questions suggested by EA in the complex diagram presented at page 54 of its brief, the relevant analysis presented by the Proposed Amendment is really quite simple:

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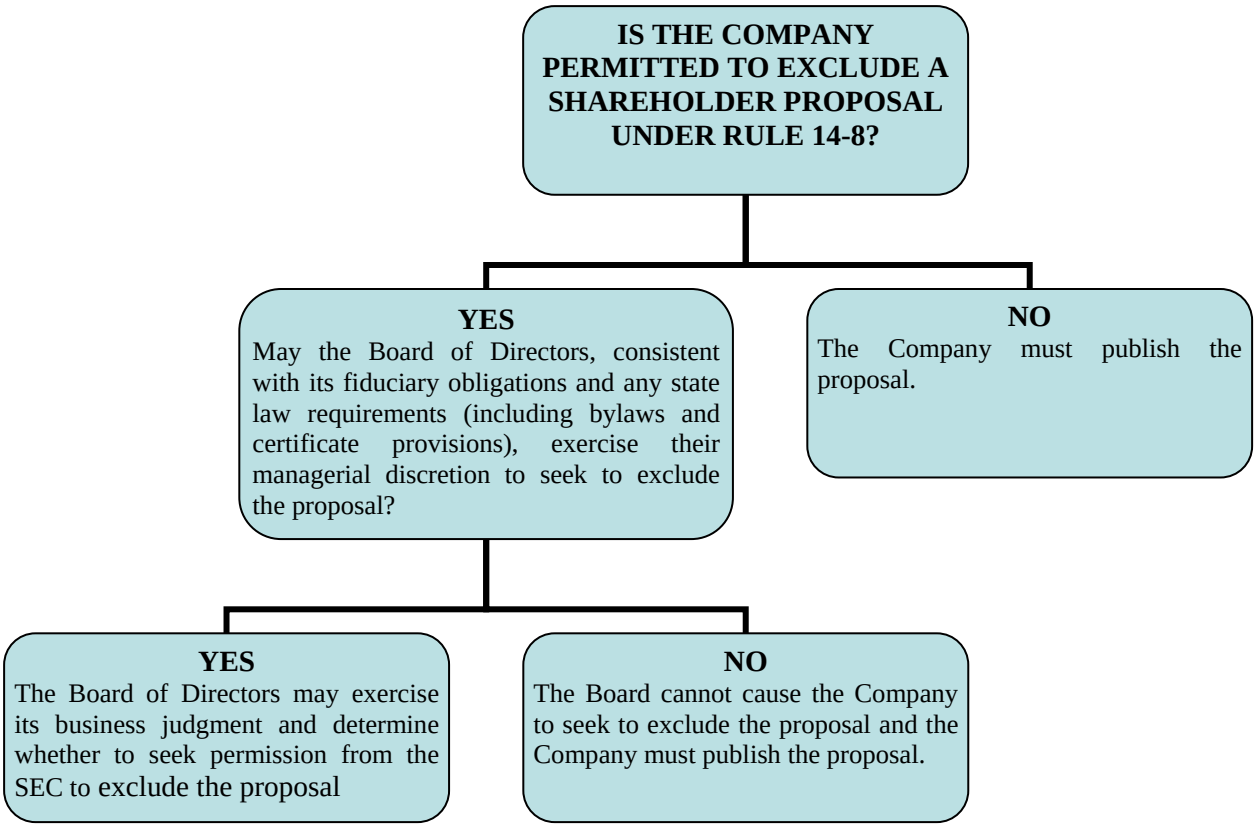
[87] App. Br. at 51-55.

[88] App. Br. at 52.



If the Proposed Amendment were enacted and EA intended to exclude a shareholder proposal submitted to the Company pursuant to Rule 14a-8, it must notify the SEC 80 days before filing its definitive proxy statement and form of proxy pursuant to Rule 14a-8(j)(1). Further, if the Company intended to exclude such a shareholder proposal that had procedural or eligibility defects, it would still have to give the shareholder an opportunity to cure the defect pursuant to Rule 14a-8(f). Only if the Company is permitted under Rule 14a-8 to exclude a proposal is consideration of a provision such as the Proposed Amendment even necessary.

If a shareholder disagrees with the Company's determination that the Proposal is excludable under Rule 14a-8, it may respond to the company's no action letter to the Staff or bring suit in federal court.[89] If, however, a shareholder disagrees that its proposal is excludable under the Proposed Amendment, it may bring state law claims to require inclusion.[90] EA cannot point to any provision in the Proposal that creates ambiguity concerning this relationship.

Indeed, state laws frequently place such requirements on corporations without creating any confusion whatsoever. For example, the laws of Delaware, North Dakota, and Bermuda (which applies to many corporations subject to the securities laws and Rule 14a-8 in particular), either impose affirmative requirements on corporations to publish certain types of shareholder proposals, or

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[89] *See, e.g., Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 424 (D.C. Cir. 1992) ("The Commission has consistently regarded the court, and not the agency, as the formal and binding adjudicator of Rule 14a-8's implementation of section 14(a)); *The New York City Employees Ret. Sys. v. Am. Brands, Inc.*, 634 F. Supp. 1382, 1386 (S.D.N.Y. 1986) ("[W]e conclude that [Plaintiff] can seek an interpretation of Rule 14a-8 as applied to its particular proposal in this court.").

[90] *See, e.g., Openwave Sys. Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 240 (Del. Ch. 2007) (resolving dispute between a shareholder and board seeking interpretation of a company bylaw). The Chamber's statement that "Delaware courts do not rule on the validity of proposed bylaws before enactment" is irrelevant. Chamber Br. at 25. If the Proposed Amendment were enacted, a dispute regarding the application of the Proposed Amendment to a Qualified Proposal would present a live controversy – the application of the Proposed Amendment itself.

explicitly permit corporate bylaws that would do so.[91] In light of these laws, which clearly do not supplant Rule 14a-8, there is no reason for shareholders to believe that the Proposed Amendment would alter the operation of Rule 14a-8 merely because it would require the inclusion of Qualified Proposals in the Company's proxy statement.

[91] *See* 8 Del. C. § 112 (expressly authorizing proxy access bylaws); N.D. Cent. Code § 10-19.1-19 (requiring company to place proposals to amend a certificate of incorporation submitted by 5 % holders of stock in the notice for a shareholder meeting); The Bermuda Companies Act of 1981 § 79 (requiring publication of "any resolution which may properly be moved and is intended to be moved" at an annual meeting).

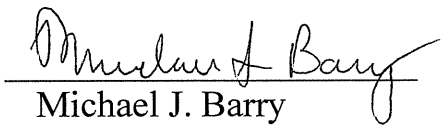
CONCLUSION

The Judgment of the District Court should be reversed.

Dated: April 27, 2009
New York, New York

Respectfully submitted,

GRANT & EISENHOFER P.A.

By 
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Dated: April 27, 2009

Michael J. Barry

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Lucian Bebchuck *Appellant,*	)	08-5842-cv
-against-	)	
Electronic Arts, Incorporated *Appellee*	)	

CERTIFICATE OF SERVICE

I, Michael J. Barry, do hereby certify that, on April 27, 2009, I caused a true and correct copy of the Reply Brief of Appellant to be served by overnight mail on:

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Dated: April 27, 2009

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