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

BRIEF OF APPELLANT

Jay W. Eisenhofer (98-587)
Ananda Chaudhuri
GRANT & EISENHOFER, P.A.
485 Lexington Avenue, 29th Floor
New York, NY 10017
Telephone: 646-722-8500
Fax: 646-722-8501

Michael J. Barry (05-176558)
GRANT & EISENHOFER, P.A.
1201 N. Market Street
Wilmington, DE 19801
Tel: 302-622-7000
Fax 302-622-7100

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PRELIMINARY STATEMENT

Plaintiff-Appellant Professor Lucian Bebchuk ("Prof. Bebchuk" or "Plaintiff") appeals from a final judgment (SPA-51)[1] entered pursuant to a decision by the United States District Court for the Southern District of New York (Hellerstein, J) dismissing all of Plaintiff's claims under Fed. R. Civ. P. 12(b).[2]

JURISDICTIONAL STATEMENT

The court below had subject matter jurisdiction pursuant to the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78aa and 28 U.S.C. § 1331.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. Final judgment was entered in the court below on November 20, 2008. (SPA-51). Plaintiff filed a timely notice of appeal on November 26, 2008. (A-1105).[3]

The appeal is from a final judgment that disposes of all Plaintiff's claims in this action against the sole defendant, Electronic Arts, Inc ("EA," or "the Company").

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[1] The Special Appendix will be cited as "SPA__."
[2] *See* Transcript of Hearing, November 12, 2008 ("Transcript") (A 1048-1096).
[3] The Joint Appendix will be cited as "A__."

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Does SEC Rule 14a-8, 17 C.F.R. § 240.14a-8, which grants to corporations the right, under certain circumstances, to exclude shareholder proposals from the company's proxy statement, prohibit the corporation from adopting a provision in the company's certificate of incorporation or bylaws, legal under state law, that provides guidelines by which the company's board of directors may act under state law to exercise the discretion granted to the "company" under Rule 14a-8?

STATEMENT OF THE CASE

A. The Nature of the Case

Prof. Bebchuk brought this action, pursuant to Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a), against EA to compel EA to include in its proxy statement a shareholder proposal Prof. Bebchuk had submitted to the Company under SEC Rule 14a-8, 17 C.F.R. § 240.14a-8 ("Rule 14a-8"). Under Rule 14a-8, if a shareholder meets certain procedural and eligibility requirements in submitting a proposal, the corporation *must* publish the proposal in the corporation's proxy statement, subject to thirteen enumerated exclusions. Under those exclusions, the corporation *may*, in its discretion, elect to exclude the proposal. *See* 17 C.F.R. § 240.14a-8.[4] Prof. Bebchuk complied with the procedural and eligibility requirements for submitting shareholder proposals under Rule 14a-8. EA does not argue otherwise. The only question is whether EA was "permitted" to exclude the proposal under one of Rule14a-8's thirteen exceptions.

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[4] Rule 14a-8 begins as follows: "This section addresses when a ***company must*** *include a shareholder's proposal* in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. *Under a few specific circumstances, the* ***company*** *is* ***permitted*** *to exclude your proposal*, but only after submitting its reasons to the Commission." 17 C.F.R. § 240.14a-8 (emphasis supplied.)

As explained more fully below, Prof. Bebchuk's proposal (the "Proposal") advocated amending EA's certificate of incorporation or bylaws to establish guidelines by which EA's Board of Directors would be authorized, pursuant to the managerial authority granted to the board under applicable state law, to exercise the limited discretion given to the "company" under Rule 14a-8. (A-877).

EA sought permission to exclude Prof. Bebchuk's proposal. EA requested a "no-action" letter from the Division of Corporation Finance (the "Division") of the Securities and Exchange Commission ("SEC" or the "Commission") arguing that Prof. Bebchuk's proposal could be excluded under several exceptions enumerated in Rule 14a-8. (A-855 – A-974). While EA's request was pending, Prof. Bebchuk sought a declaratory judgment from the District Court that the various exclusionary grounds EA asserted did not, as a matter of law, provide any legitimate bases to exclude the Proposal from the Company's proxy materials. (A-8).

After argument, the District Court granted EA's motion to dismiss. (SPA-45). Specifically, the District Court held that the certificate amendment or bylaw advocated by the Proposal, if implemented, would have been inconsistent with Rule 14a-8 itself and, as such, the Proposal could be excluded. According to the District Court, because the proposed certificate or bylaw provision would restrict the ability of the Company's *directors* to exercise unfettered business judgment in determining when the *Company itself* would exercise the discretion provided to a

"company" under Rule 14a-8, the proposed provision would be unlawful. The District Court held, as a matter of law, that the discretion afforded to a "company" under Rule 14a-8 necessarily required that such discretion be exercised by a corporation's *directors*, free of any restrictions that state law otherwise may impose on a director's managerial authority. (SPA-44 – SPA-49).

B. The Course of Proceedings and Disposition Below

Plaintiff commenced this litigation by filing the Complaint on April 18, 2008. (A-8). On May 30, 2008, Defendant moved to dismiss the Complaint. (A-21). On November 11, 2008, the court below dismissed the Complaint. (SPA-51). On November 26, 2008 Plaintiff filed the Notice of Appeal. (A-1105).

STATEMENT OF FACTS

Professor Bebchuk is the William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance and Director of the Program on Corporate Governance at Harvard Law School. ¶8[5] (A-9). EA is a Delaware corporation with its principal place of business in Redwood City, California. ¶9 (A-9).

On February 20, 2008, Prof. Bebchuk submitted the Proposal to EA for inclusion in the Company's 2008 proxy materials. ¶15 (A-5).

[5] The Complaint will be cited as ¶__.

A. Regulatory Background

Known as the "town meeting rule,"[6] Rule 14a-8 "facilitate[s] ... communication among shareholders and between shareholders and management"[7] by providing an inexpensive means by which shareholders of a publicly traded corporation can voice ideas and propose matters to be considered at a company's annual meeting. Absent Rule 14a-8, shareholders wishing to submit a shareholder proposal to be voted on at an annual meeting would have to fund an expensive solicitation process. Rule 14a-8 eliminates the need for such an investment by generally requiring a corporation to publish proposals submitted by shareholders who have maintained a minimum level of stockholdings for at least a year, provided that such proposals do not exceed 500 words. Rule 14a-8 provides shareholders an economically realistic way to introduce proposals on subjects of great concern to shareholders but that may not warrant the substantial costs of an independent proxy solicitation.[8]

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[6] *Am. Fed. of State, County & Municipal Employees v. Am. Intern. Group, Inc.*, 462 F.3d 121, 125 (2nd Cir. 2006) ("*AFSCME*" or "*AFSCME v. AIG*").

[7] *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877 (S.D.N.Y. 1993), *aff'd* 54 F.3d 69 (2d Cir. 1995).

[8] *See JANA Master Fund Ltd. v. CNET Network, Inc.*, 954 A.2d 335, 341-42 (Del. Ch. 2008), *aff'd* 947 A2d 1120 (Del. 2008) ("Permitting a shareholder access to the company's proxy greatly reduces the cost that would otherwise be associated with a proxy fight.… More importantly, the solicitation process is extraordinarily expensive.").

Rule 14a-8 specifies when "a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy." 17 C.F.R. § 240.14a-8. If a shareholder complies with certain procedural and eligibility requirements, the company *must* include the shareholder's proposal in the company's proxy materials. This inclusionary mandate is subject only to thirteen enumerated exceptions under which the company is "permitted" – not "required" – to exclude the proposal. *See* 17 C.F.R. § 240.14a-8(i)(1)-(13).

Two points about these exclusions are significant here:

First, the exclusions in Rule 14a-8(i)(1)–(13) are purely discretionary. They do not *require* a company to exclude any proposal. They simply *permit* a company to exclude certain proposals under certain circumstances. Rule 14a-8(i) states, in "Plain English" format: "If I have complied with the procedural requirements, on what other bases *may* a company rely to exclude my proposal?" (Emphasis supplied.) The Rule then lists the thirteen exceptions.

Second, Rule 14a-8 provides some discretion expressly and only to a "company" to exclude proposals that fall within one of the thirteen enumerated exclusions. *But the Rule is entirely silent on* ***how*** *the "company" may exercise this discretion.* The Rule simply provides that if the "company" intends to exercise this limited discretion to exclude a particular proposal, the "company" must follow certain procedures in providing notice to the Commission and the shareholder

proponent of the "company's" intention to do so. *See* 17 C.F.R. § 240.14a-8 ("Under a few specific circumstances, the ***company*** is ***permitted*** to exclude your proposal, but only after submitting its reasons to the Commission.") (Emphasis supplied).

Specifically, a "company" wishing to exclude a proposal must notify the Commission and the shareholder proponent of its reasons for excluding the proposal 80 days before the company issues its proxy statement. 17 C.F.R. § 240.14a-8(j)(1). This notification is "intended to alert the shareholder proponent of management's likely course of action so that the shareholder can pursue any remedy believed available in a federal court."[9] Notification also enables the Division to issue an "informal" No-Action Letter that "indicate[s] either that there appears to be some basis for the company's view that it may exclude the proposal or that [the Staff is] unable to concur in the company's view that it may exclude

[9] Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, Exchange Act Release Nos. 19603, 12599, 34-12599, 35-19603 and 1C-9344, 9 S.E.C. Docket 1040, 1976 WL 160411 (July 7, 1976) ("SEC Release No. 19603").

the proposal."[10] These No-Action letters are not binding on the company, the proponent or the Commission itself.[11]

B. Summary of the Proposal

Prof. Bebchuk's Proposal requested that the directors of EA take the necessary steps to submit for shareholder approval a proposed amendment to the Company's certificate of incorporation or bylaws. This proposed amendment (the "Requested Amendment") provides that EA will exercise the discretion provided to the "company" under Rule 14a-8 "to the extent permitted by law" and that, in certain circumstances, the Company would not exclude certain kinds of shareholder proposals for which the Rule does permit exclusion.

Specifically, the Requested Amendment would require the Company, ***to the extent permitted by law,*** to bring qualified proposals advocating an amendment to the Company's bylaws to a stockholder vote, to include them in the Company's notice of the annual shareholders' meeting, and to allow a vote on such proposals on the Company's proxy card. The Requested Amendment would impose substantial requirements for a proposal to be qualified. Qualified proposals must

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[10] A-611; Staff Legal Bulletin No. 14, Shareholder Proposals, *available at* http://www.sec.gov/interps/legal/cfslb14.htm (July 13, 2001) ("Staff Legal Bulletin No. 14.").

[11] SEC Release No. 19603 ("[T]he Commission and its staff do not purport in any way to issue 'rulings' or 'decisions' on shareholder proposals management *(Cont'd)*

be supported by significant shareholders (owning at least 5% of the Company's stock), cannot be illegal, and cannot relate to the company's ordinary business. The Proposal stated as follows:

> RESOLVED that stockholders of Electronic Arts, Incorporated recommend that the Board of Directors, to the extent consistent with its fiduciary duties, submit to a stockholder vote an amendment to the Corporation's Certificate of Incorporation or the Corporation's Bylaws that states that the Corporation (1) shall, to the extent permitted by law, submit to a vote of the stockholders at an annual meeting any Qualified Proposal to amend the Corporation's Bylaws; (2) shall, to the extent permitted by law, include any such Qualified Proposal in the Corporation's notice of an annual meeting of the stockholders delivered to stockholders; and (3) shall, to the extent permitted by law, allow stockholders to vote with respect to any such Qualified Proposal on the Corporation's proxy card for an annual meeting of stockholders. "Qualified Proposals" refer in this resolution to proposals satisfying the following requirements:
>
> (a) The proposal was submitted to the Corporation no later than 120 days following the Corporation's preceding annual meeting by one or more stockholders (the "Initiator(s)") that (i) singly or together beneficially owned at the time of submission no less than 5% of the Corporation's outstanding common shares, (ii) represented in writing an intention to hold such shares through the date of the Corporation's annual meeting, and (iii) each beneficially owned continuously for at least one year prior to the submission common shares of the Corporation worth at least $2,000.00;
>
> (b) If adopted, the proposal would effect only an amendment to the Corporation's Bylaws, and would be valid under applicable law;

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indicates it intends to omit . . . [T]he informal advice and suggestions emanating from the staff in this area are not binding on either managements or proponents.").

(c) The proposal is a proper action for stockholders under state law and does not deal with a matter relating to the Corporation's ordinary business operations;

(d) The proposal does not exceed 500 words; and

(e) The Initiator(s) furnished the Corporation within 21 days of the Corporation's request any information that was reasonably requested by the Corporation for determining eligibility of the Initiator(s) to submit a Qualified Proposal or to enable the Corporation to comply with applicable law.

(A-877).

Prof. Bebchuk's Proposal also included a supporting statement urging the adoption of the Requested Amendment:

> Statement of Professor Lucian Bebchuk: In my view, when stockholders representing more than 5% of the Corporation's common shares wish to have a vote on a Bylaw amendment proposal satisfying the conditions of a Qualified Proposal, it would be desirable to facilitate such a vote. Current and future SEC rules may in some cases allow companies – but do not currently require them – not to place proposals for Bylaw amendments initiated by stockholders in the Corporation's notice of an annual meeting and proxy card for the meeting. Even stockholders who believe that no changes in the Corporation's Bylaws are currently worth adopting should consider voting for my proposal to express support for facilitating stockholders' ability to decide for themselves whether to adopt Bylaw amendments initiated by stockholders. Note that, if the Board of Directors were to submit the proposed change in the Certificate of Incorporation or Bylaws to a stockholder vote, the change would occur only if the stockholders approve it.
>
> I urge you to vote for this proposal.

(A-877).

By its terms, neither Prof. Bebchuk's Proposal nor the Requested Amendment it advocated would have caused EA to violate any federal law or regulation, including Rule 14a-8. The Requested Amendment would not eliminate the discretion provided to a "company" under the Rule. Rather, if implemented, the Requested Amendment itself would constitute an exercise of that discretion. Indeed, the Company would remain free to adopt further amendments to its certificate of incorporation or bylaws in the event the Company elected to change its mind. The Requested Amendment would, however, impose some limitation on the ability of EA's board of directors to exercise some managerial discretion that the board otherwise may have under *state law* by providing guidelines under which the Company itself would exercise – or decline to exercise – the discretion provided to a "company" under Rule 14a-8 concerning including certain kinds of shareholder proposals on EA's proxy statement.

C. EA Refuses To Place The Proposal In Its Proxy Materials

On March 26, 2008, pursuant to Rule 14a-8(j), EA sent a letter to the Division stating EA's intent to exclude the Proposal from its proxy statement under the substantive requirements of Rule 14a-8(i) and requesting "No-Action Relief." (A-855 – A-974). EA argued that the Proposal could be excluded under subsection (i)(3) as inconsistent with the SEC's proxy rules, under subsection (i)(8) as relating to an election to the Company's board of directors, under subsection (i)(3) as

"vague and misleading" and thus contrary to Rule 14a-9, and under subsection (i)(7) as relating to the Company's "ordinary business." (A-855 – A-974).

On April 18, 2008, Professor Bebchuk commenced this action seeking a declaratory judgment that none of the exclusions enumerated under Rule 14a-8(i) applied to permit the omission of the Proposal from EA's proxy materials. (A-8 – A-28).

On May 23, 2008, the Division stated that it would not issue a No-Action letter pursuant to EA's request, consistent with the Division's long-standing policy of not issuing informal opinion letters when the underlying dispute is the subject of litigation. (A-855).

D. The Lower Court's Decision

The District Court held that the Proposal was contrary to Rule 14a-8 itself and thus could be excluded under Rule 14a-8(i)(3). (SPA-44 – SPA-49). The District Court reasoned that because Rule 14a-8 gave the "company" the ability to exclude certain shareholder proposals from its proxy materials, this necessarily meant that the Rule vested in EA's *Board of Directors* the unfettered ability to exercise the "company's" discretion to do so:

> [I]t is clear, by "the company" that the SEC understand[s] the company to be those who act for the company and are entrusted and have the responsibility to act for the company. And that is a small, relatively small group of people, like the board of directors, who have management discretion to run the business and affairs of the company And it is they that must have this discretion.

(SPA-47).

On this rationale, the District Court held that the Recommended Amendment was contrary to Rule 14a-8 because, if enacted, the Recommended Amendment would impermissibly prohibit *directors* from excluding certain proposals from EA's proxy materials:

> [T]he inevitable effect of this proposal is to do away with the careful limitation on the part of 14a-8, to eliminate the discretion of the company, because there will be nobody to exercise it, and to have all of these question as a matter of law, federal law, to the shareholders.

(SPA-49).

Having determined that Prof. Bebchuk's Proposal could be excluded as being contrary to Rule 14a-8 itself, the District Court granted EA's motion to dismiss. (SPA-45). The District Court did not address EA's arguments that the Proposal could be excluded under the "election exclusion" of subsection (i)(8) or because the Proposal was impermissibly "vague and misleading" and thus excludable under subsection (i)(3) as contrary to Rule 14a-9.[12]

This appeal followed.

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[12] During the proceedings below, EA waived its previous argument that the Proposal could be excluded as relating to the Company's "ordinary business" under subsection (i)(7) of the Rule made before the Staff in its no-action letter by not raising it in the motion to dismiss. (A-867–A-868). *See Lyn v. Incorp. Village of Hempstead*, No. 07-37887-cv, 2009 WL 76517, at *3 (2d. Cir. Jan. 13, 2009) ("[Plaintiff] raises two arguments on appeal which were not made before the district court. . . . Because these arguments are raised for the first time on appeal, we will not consider them.").

SUMMARY OF THE ARGUMENT

The District Court's decision is the product of a clear error of law. The District Court failed to construe Rule 14a-8 in accordance with its plain and unambiguous terms. Rule 14a-8 states that a "*company* is permitted to exclude" proposals submitted by shareholders who do not meet the Rule's eligibility or procedural requirements, and that a "*company*" nonetheless may exclude proposals submitted by a shareholder who satisfies these requirements if one of thirteen permissive exclusions apply. Rule 14a-8 does not state *how* the "company" is to exercise this discretion, or *who* within the "company" is required to exercise that discretion.

Delaware law, not Rule 14a-8, provides the ground-rules for EA's corporate decision-making. Delaware law provides that directors shall manage the affairs of the corporation. Delaware law, however, also provides that a corporation can opt out of this default rule by amending its certificate of incorporation to limit the directors' managerial discretion and to provide that managerial decisions may be made by someone *other* than the board of directors.[13] In addition, Delaware law provides that bylaws too can place substantive limitations on the discretionary

[13] 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.)

authority of corporate boards.[14] Thus, an amendment to EA's certificate of incorporation or bylaws that would provide guidelines by which the Company's board of directors would be authorized to exercise the discretion provided to the "*company*" under Rule 14a-8 is perfectly consistent both with Delaware law and with the text and thrust Rule 14a-8 itself.

The District Court, however, completely ignored this key point. Instead, the District Court misconstrued Rule 14a-8 as providing a *substantive federal requirement* that, in all cases, the limited discretion provided to a "*company*" under Rule 14a-8 must be exercisable – without any restriction whatsoever – by a company's "*board of directors.*" Yet Rule 14a-8, by its plain terms, imposes no such requirement. Where in Rule 14a-8 the SEC intended to reference a company's "board of directors" or "analogous governing body," it did so.[15] If the SEC had intended that the limited discretion provided to a "company" with respect to omitting certain shareholder proposals must be exercised, without limitation, by

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[14] 8 Del C. § 109.

[15] Rule 14a-8(i)(a) ("Question 1: What is a proposal? A shareholder proposal is your recommendation or requirement that the *company and/or its board of directors* take action, which you intend to present at a meeting of the company's shareholders. …" Emphasis supplied); Rule 14a-8(i) ("Question 9: If I have complied with the procedural requirements, on what other bases may a *company* rely to exclude my proposal? … (8) 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." Emphasis supplied.)

a company's "board of directors," the SEC would have said that. It did not. Thus, the District Court's decision marked a clear deviation from the text of Rule 14a-8 and purported to impose a substantive federal requirement that appears nowhere in the text of the Rule. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." (internal citations and quotations omitted)).

Nor is the Requested Amendment inconsistent with the scheme contemplated by Rule 14a-8. Rule 14a-8 does not require a company to exclude any shareholder proposal. Indeed, courts addressing Rule 14a-8 (including controlling authority from this Court[16]) uniformly have acknowledged that corporations can choose to publish a shareholder proposal even if it would be permitted to exclude the proposal under one of the thirteen exceptions listed in the Rule. EA itself specifically conceded this point before the District Court. Under Rule 14a-8, it is a matter of discretion for the "company" itself. A provision in a corporation's certificate of incorporation or bylaws, such as the Requested

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[16] *See AFSCME*, 462 F.3d at 130 n.9 (holding that bylaws that require inclusion of shareholder proposals that a company may exclude under Rule 14a-8 are "*certainly* allowed . . . under the federal securities laws…. (emphasis added)).

Amendment, that would provide guidelines for when and how the "company" would make the determination of when to seek to exclude a particular shareholder proposal, therefore, *is simply a means by which the corporation would be exercising the very discretion provided to the "company" under text of the Rule*. Because it is undisputed that a company can, consistent with Rule 14a-8, determine to publish a shareholder proposal that otherwise it could choose to exclude, a certificate or bylaw provision providing that the company will exercise this discretion to allow for the inclusion of shareholder proposals "to the fullest extent permitted by law" is perfectly consistent with the scheme contemplated by Rule 14a-8.

The District Court's decision also clearly contradicts well-established federal policy *limiting* the intrusion of mandatory federal requirements into the inner workings of corporations. Over 30 years ago, the U.S. Supreme Court held that "*except where federal law* ***expressly requires*** *certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation*."[17] The District Court acknowledged this principle of construction,[18] but plainly failed to apply it. Nothing in either the Exchange Act or Rule 14a-8 itself "expressly requires" a board of directors to have unfettered

[17] *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462, 479 (1977) (emphasis supplied).

discretion relating to shareholder proposals. Yet the District Court's interpretation of Rule 14a-8 purports to impose just such an affirmative federal requirement. The District Court's holding that Prof. Bebchuk's Proposal is inconsistent with Rule 14a-8 merely because it proposed a certificate or bylaw provision that would restrict the ability of EA's board of directors to exercise unfettered discretion in determining when the "company" will seek to exclude shareholder proposals, therefore, is directly contrary to controlling Supreme Court precedent.

Finally, and although never reached by the District Court, Prof. Bebchuk's Proposal was not excludable under the other grounds EA cited in its "no-action" request. Rule 14a-8(i)(8) permits a corporation to exclude a proposal that "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." 17 C.F.R. § 240.14a-8(i)(8). Nothing in Prof. Bebchuk's Proposal relates to director elections or any procedure for director elections. The Proposal relates exclusively to how EA will exercise the limited discretion provided to the "company" under Rule 14a-8 concerning shareholder proposals – not director elections. The Proposal also could not be excluded under Rule 14a-8(i)(3) as contrary to SEC Rule 14a-9 either. SEC Rule 14a-9 prohibits the publication of materially false

[18] (A-1095); ("[The proxy rules do] not involve themselves in areas that are matters of state law to govern").

and misleading statements in proxy materials. 17 C.F.R. § 240.14a-9. Subsection (i)(3) of Rule 14a-8 permits the exclusion of a proposal that is so "vague and misleading" that shareholders reasonably cannot be expected to understand what they are being requested to consider, such that the proposal itself would be considered "materially false and misleading." *See* 17 C.F.R. § 240.14a-8(i)(3). However, nothing is impermissibly vague or misleading about Prof. Bebchuk's Proposal or the Recommended Amendment. The Proposal simply recommends the adoption of an amendment to the Company's certificate of incorporation or bylaws. The parameters of the Requested Amendment are clearly set forth in the Proposal itself.

STANDARD OF REVIEW

This Court reviews the granting of a motion to dismiss on the pleadings *de novo*. *See Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2d Cir. 2005) ("We apply a de novo standard of review to the grant of a motion to dismiss on the pleadings, accepting as true the complaint's factual allegations and drawing all inferences in the plaintiff's favor.").

ARGUMENT

SEC Rule 14a-8, 17 C.F.R. § 240.14a-8, gives shareholders "[a]ccess to management proxy solicitations to sound out management views and to communicate with other shareholders on matters of major import. ..."

Amalgamated, 821 F. Supp. at 882 (S.D.N.Y. 1993) (quoting *Roosevelt v. E.I. DuPont de Nemours & Co.*, 958 F.2d 416, 421 (D.C. Cir. 1992)). *See also Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554, 561 (D.D.C. 1985). A company must include in its proxy statement any proposal submitted by a shareholder who satisfies the eligibility and procedural requirements of Rule 14a-8 *unless* the company can prove that the proposal falls within one of thirteen enumerated exceptions in Rule 14a-8(i). 17 C.F.R. § 240.14a-8(i)(1)-(13); *Amalgamated*, 821 F. Supp. at 882 (company bears burden of demonstrating that shareholder's proposal can be excluded); Adoption of Amendments to Proxy Rules, SEC Exchange Act Release Nos. 4979, 34-4979, 1954 WL 5772 (Jan. 6, 1954) (company bears burden of showing proposal is not proper for inclusion in the company's proxy materials).

Here, the District Court held that Prof. Bebchuk's Proposal was excludable under Rule 14a-8(i)(3) as being inconsistent with the Rule itself. (SPA44 – SPA-49). This decision, however, stems from a fundamental misapplication of relevant principles of statutory construction, and a plain disregard of decades of controlling precedent limiting the intrusion of federal law into the internal decision-making processes of American corporations.

I. THE PROPOSAL IS ENTIRELY CONSISTENT WITH THE PROXY RULES AND MAY NOT BE EXCLUDED FROM EA'S PROXY STATEMENT UNDER 14a-8(i)(3)

Rule 14a-8(i)(3) states that a company is permitted to exclude a shareholder proposal from its proxy materials "[i]f the proposal or supporting statement is contrary to any of the Commission's proxy rules." The District Court held that that the Proposal may be excluded from the Company's proxy materials because it is contrary to Rule 14a-8 itself. (SPA-44 – A-49). The District Court was wrong.

A. Rule 14a-8 Does Not Require A Company's Board Of Directors To Have Completely Unfettered Authority To Exercise The Limited Discretion Provided To A "Company" Under The Text Of The Rule.

"In interpreting an administrative regulation, as in interpreting a statute, [the Court] must begin by examining the language of the provision at issue." *AFSCME,* 462 F.3d 121, 125 (2d Cir. 2006), quoting *Resnik v. Swartz*, 303 F.3d 147, 151-52 (2d Cir. 2002). The Court "first look[s] to the statute's plain meaning; if the language is unambiguous, we will not look farther." *Estate of Pew v. Cardarelli*, 527 F.3d 25, 30 (2nd Cir. 2008). *See also Virgilio v. City of New York*, 407 F.3d 105, 112 (2nd Cir. 2005) ("When interpreting a statute, the 'first step ... is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'") (internal citation omitted).

Rule 14a-8 vests in the "company" only – not the "directors" – the discretion to exclude some shareholder proposals in some circumstances. For example, Rule 14a-8(f) provides that if a shareholder fails to satisfy the procedural and eligibility requirements, "[t]he *company* may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it."[19] Similarly, Rule 14a-8(h) explains that if a shareholder fails to appear at a meeting in person or through a representative to present a submitted proposal, "the *company* will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years." 17 C.F.R. § 240.14a-8(h)(3) (emphasis supplied).

Particularly important here, Rule 14a-8(i) gives the "company" the limited discretion to exclude proposals on certain substantive grounds. Before listing the thirteen specific grounds, Rule 14a-8(i) provides: "If I have complied with the

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[19] Rule 14a-8(f) states as follows:

> "What if I fail to follow one of the eligibility or procedural requirements?
>
> (1) The *company* may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. …
>
> (2) If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the *company* will be permitted to exclude all of your proposals from its proxy materials for any meeting held in the following two calendar years."

17 C.F.R. § 240.14a-8(f) (emphasis supplied).

procedural requirements, on what other bases may a *company* rely to exclude my proposal?" 17 C.F.R. § 240.14a-8(i) (emphasis supplied). And subsection (j) of the Rule establishes the procedures that "the *company* must follow if it intends to exclude [a] proposal."[20]

Rule 14a-8 is *entirely silent* on *how* the "company" is to exercise this discretion, or *who* within the "company" is required to make these decisions. Ignoring this point, and inventing a novel rule of interpretive convenience contrary to establish canons, the District Court re-wrote Rule 14a-8 to provide a specific delegation of discretionary authority not to a "company" itself, but to its *board of*

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[20] Rule 14a-8(j) states as follows:

> (j) Question 10: What procedures must the company follow if it intends to exclude my proposal?
>
> (1) If the *company* intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The *company* must simultaneously provide you with a copy of its submission. The Commission staff may permit the *company* to make its submission later than 80 days before the *company* files its definitive proxy statement and form of proxy, if the *company* demonstrates good cause for missing the deadline.
>
> (2) The *company* must file six paper copies of the following:
>
> (i) The proposal;
>
> (ii) An explanation of why the *company* believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule; and
>
> (iii) A supporting opinion of counsel when such reasons are based on matters of state or foreign law.

17 C.F.R. § 240.14a-8(j) (emphasis supplied).

directors. The District Court stated: "[T]he SEC understand[s] the company to be those who act for the company and are entrusted and have the responsibility to act for the company. And that is a small, relatively small group of people, like the board of directors." (SPA-47).

Two fundamental problems pervade the District Court's analysis and render its decision legally erroneous.

First, the District Court's hypothesis as to what the SEC "understands" is simply unsupported conjecture. The SEC did not file an amicus brief below. Furthermore, within Rule 14a-8 itself, when the SEC intended to refer specifically to a corporation's board of directors, it did so. Subsection (a) of the Rule, for example, specifically distinguishes between actions by a "company" and those by a "board of directors": a "shareholder proposal is your recommendation or requirement that the *company and/or its board of directors* take action, which you intend to present at a meeting of the company's shareholders." 17 C.F.R. § 240.14a-8(a). Rule 14a-8 itself thus expressly recognizes that a shareholder proposal can recommend or require action by a "company," its "board of directors," or both. *Id.* Had the SEC intended that "company" includes "board of directors," the SEC would not have distinguished between actions by a "company" and those of a "board of directors" at the beginning of the Rule. And had the SEC intended to grant an ironclad exclusive delegation of specific discretion to "boards

of directors," or to require that, in all circumstances, corporate boards must retain the unencumbered ability to exercise the discretion specifically granted to a "company," the SEC would have said so.[21] The SEC's lack of any specific delegation of responsibility, therefore, does not comport with the District Court's hypothesis that the specific term "company" in Rule 14a-8 is somehow interchangeable with the equally specific, and very different, term "board of directors" used elsewhere in the Rule.[22]

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[21] *See also* 17 C.F.R. § 240.14a-8(i)(1) ("Note to paragraph (i)(1): … In our experience, most proposals that are cast as recommendations or requests that the *board of directors* take specified action are proper under state law") (emphasis supplied); 17 C.F.R. § 240.14a-8(i)(8) ("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") (emphasis supplied).

[22] Since the adoption of Rule 14a-8, the Commission has considered various proposed changes to the Rule. These include proposed revisions that would have either provided federal guidelines for how corporations could raise the minimum requirements set forth in the Rule, or would have required corporations to publish any proposals that would have been legal. The SEC's consideration of such possible amendments to Rule 14a-8, however, is irrelevant. As this Court observed in *AFSCME*, the failure to adopt a change to the existing rules that would have addressed the subject matter of a particular proposal does not mean that such a proposal can be excluded under the actual terms of the rule. *See AFSCME*, 462 F.3d at 130 n.8 (rejecting defendant's "'improperly conflicts' with a *proposed* SEC rule" argument) (emphasis added). Because Rule 14a-8 does not provide how a "company" is required to exercise the limited discretion provided under the rule, it cannot be said that a bylaw through which the Company would exercise that discretion is necessarily prohibited by the Rule. Moreover, a certificate provision or bylaw through which a Company would exercise its discretion "to the extent permitted by law" to publish certain kinds of proposals is a far cry from imposing

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Second, and more importantly, the District Court ignored that state, not federal, law establishes how a "company" makes decisions. EA is a Delaware corporation, ¶9 (A-9), so Delaware law governs EA's internal operations. *See, e.g.*, *AFSCME*, 462 F.3d at 125 ("Delaware corporate law, which governs AIG's internal affairs, provides that shareholders have the power to amend bylaws by majority vote."); *Krafsur v. Spira Footwear, Inc.*, No. EP-07-CA-401-DB, 2008 WL 821576, at *3 (W.D. Tex. Mar. 27, 2008) ("[T]he Court finds that, as the instant case concerns a corporation's bylaws and falls within the 'internal affairs doctrine,' the substantive laws of Delaware govern the instant case. ..."). EA's Board of Directors has the authority to exercise the discretion provided to the Company under Rule 14a-8 only because Delaware state law and EA's own bylaws provide for such authority. *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281, 1292 (Del. 1998) ("Section 141(a) ... confers upon any newly elected board of directors *full* power to manage and direct the business and affairs

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additional federal obligations as to what a corporation "must" publish without any such discretion.

The Division's "no-action" letter in *State Street Corp.*, SEC No-Action Letter, 2004 WL 257703, at *2 (Feb. 3, 2004), is irrelevant for the same reason. The very different shareholder proposal at issue there would have required a company to publish "every" shareholder proposal submitted, regardless of content, and regardless of the law. The proposal in that case, if adopted, could have required the company to violate the law - for example, by publishing a proposal with materially false and misleading statements. In contrast, Prof. Bebchuk's

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of a Delaware corporation. (emphasis in original)); *Conrad v. Blank*, 940 A.2d 28, 36 (Del. Ch. 2007) ("Section 141(a) of the Delaware General Corporation Law grants the board of directors broad power to manage the business and affairs of the corporation."); *see also* 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).

But under Delaware law, the ability of corporate boards to exercise discretion on behalf of the company *can be restricted* through amendments to the company's certificate of incorporation or through bylaws – *i.e.*, the specific mechanisms advocated through Prof. Bebchuk's Proposal.

Section 141(a) of the Delaware General Corporation Law (the "DGCL") provides that "the business and affairs of every corporation ... 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*." 8 Del. C. § 141(a) (emphasis supplied). EA's Certificate of Incorporation is presently silent on the scope of the Board's authority. Section 2.10 of the Company's bylaws, however, provides that "[t]he Board of Directors may, *except as otherwise required by law or the*

Proposal only would require the Company to take action the Company already is legally permitted to do.

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) (emphasis supplied).

It is thus only through Section 141(a) of the DGCL and Section 2.10 of the Company's existing bylaws – the "rules by which [EA's] board conducts its business"[23] – that EA's directors currently have any ability to exercise the discretion provided to the "company" under Rule 14a-8 at all. And to the extent the directors' discretionary authority can be established under state law, it can be limited under state law as well.

Section 141(a) of the DGCL and Section 2.10 of EA's own bylaws, quoted above, specifically provide that an amendment to the Company's certificate of incorporation can restrict any managerial authority that otherwise may be vested in the corporate board. 8 Del. C. § 141(a). Indeed, in *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998) the Delaware Supreme Court held that a company's certificate of incorporation may contain a "limitation on the board's authority" to act on behalf of the company. *Id*. at 1291.

[23] Under Delaware law, the bylaws of a corporation "[t]raditionally … have been the corporate instrument used to set forth the rules by which the corporate board conducts its business." *Hollinger Intern. v. Black*, 844 A.2d 1022, 1078 (Del. Ch. 2005), *aff'd*, 872 A.2d 559 (Del. 2005).

Similarly, corporate bylaws can substantively limit directors' managerial authority. *See* 8 Del C. § 109(b) ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, *relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees*" (emphasis supplied)). The Delaware Supreme Court recently observed that "[b]ylaws, by their very nature, set down rules and procedures that bind a corporation's board and its shareholders. In that sense, most, if not all, bylaws could be said to limit the otherwise unlimited discretionary power of the board." *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 234 (Del. Supr., 2008). *See also Hollinger*, 844 A.2d at 1080 ("[B]ylaws may pervasively and strictly regulate the process by which boards act.").

In granting EA's motion to dismiss, the District Court did not even acknowledge the relevance, let alone the controlling importance, of Delaware law or EA's own certificate of incorporation or bylaws. This constitutes a clear error of law. Delaware law, and EA's own bylaws, specifically provide that the managerial authority of corporate boards can be constrained through certificate or bylaw provisions. Accordingly, the Requested Amendment advocated in the Proposal is plainly consistent with Delaware law and with the delegation of discretion to a "company" under Rule 14a-8. *See JANA Master Fund, Ltd.*, 954

A.2d at 342 n.36 ("[Under Rule 14a-8] management could refuse a shareholder proposal ... that relates to an election. *However, the Rule does not require management to exclude such proposals, and to the extent the bylaws provide for such proposals, management may include them*.") (Emphasis supplied).

B. The Requested Amendment Is Not Inconsistent With Rule 14a-8

The Recommended Amendment in Prof. Bebchuk's Proposal is consistent with Rule 14a-8 because the Amendment is a means by which EA would exercise the limited discretion provided to a "company" under the Rule. The Requested Amendment, if implemented, is not contrary to the scheme contemplated by the Rule and would not violate the law in any way. If adopted, the Requested Amendment merely would provide that the Company would publish in its proxy statements certain qualified proposals "to the extent permitted by law." (A-77). Rule 14a-8 clearly permits corporations to publish proposals that they otherwise may have the discretion to exclude under one of the thirteen exceptions listed in subsection (i) of the Rule. It ineluctably follows that a certificate or bylaw provision through which a corporation would elect to exercise this discretion in favor of publishing proposals does not violate the Rule itself or any other provision of law.

A shareholder proposal is not "contrary" to the proxy rules and thus excludable under Rule 14a-8(i)(3) unless, unlike Professor Bebchuk's, the proposal

is prohibited by the rules or would expressly violate such rules. In adopting Rule 14a-8(i)(3), the SEC explained:

> The Commission is aware that on many occasions in the past proponents have submitted proposals and/or supporting statements that *contravene* one or more of its proxy rules and regulations. Most often, this situation has occurred when proponents have submitted items that contain false or misleading statements. Statements of that nature are *prohibited* from inclusion in proxy soliciting materials by Rule 14a-9 of the proxy rules. Other rules that occasionally have been *violated* are Rule 14a-4 concerning the form of an issuer's proxy card, and Rule 14a-11 relating to contests for the election of directors.
>
> In light of the foregoing, the Commission proposes to add a new subparagraph (c)(3) to Rule 14a-8 expressly providing that a proposal or supporting statement may not be *contrary* to any of the Commission's proxy rules and regulations, including Rule 14a-9. This provision, if adopted, would simply formalize a ground for omission that the Commission believes is inherent in the existing rule.

(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).

Reflecting room for proposals like Professor Bebchuk's, Rule 14a-8 provides only the *minimum* requirements for the publication of shareholder proposals.[24] Rule 14a-8 speaks to which shareholder proposals a company *must*

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[24] *Compare See, e.g., Maldonado v. Flynn*, 597 F.2d 789, 796 n.9 (2d Cir. 1979) ("Schedule 14A sets minimum disclosure standards."); *Zell v. Intercapital Income Sec., Inc*., 675 F.2d 1041, 1044 (9th Cir. 1982) (same); *Bertoglio v. Texas Int'l Co*., 488 F. Supp. 630, 647 (D. Del. 1980) ("Schedule 14A sets only minimum disclosure standards"); *Cohen v. Ayers*, 449 F. Supp. 298, 317 (N.D. Ill 1978) *(Cont'd)*

include in its proxy statement and, as discussed above, provides the "company" with discretion concerning the specified excludable proposals. Rule 14a-8's plain language states that a Company *may* exclude shareholder proposals that do not meet certain procedural or substantive requirements. Rule 14a-8 does *not* mandate exclusion of any proposal. *See* Rule 14a-8(f) ("What if I fail to follow one of the eligibility or procedural requirements? ... The company *may* exclude your proposal, but only after it has notified you of the problem ..." (emphasis added)); 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 added)). In other words, Rule 14a-8 neither forbids a corporation from voluntarily exceeding the minimum requirements established by the Rule nor forbids a corporation from publishing a shareholder proposal that it otherwise would be permitted to exclude under the terms of the Rule.

The United States Supreme Court recognized this precise point over thirty years ago in *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972). There, a company included a shareholder proposal in its proxy statement despite the fact that its belief that "the proposal might properly be omitted" under Rule 14a-8. *Id*. at 406. The proposal's proponent however, continued to litigate against

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("The items enumerated in Schedule 14A establish a minimum level of disclosure, but Rule 14a-9 does not indicate that they are exclusive or exhaustive.").

the SEC, seeking to overturn the Commission's decision that the Proposal was excludable. The Court held that the issue of whether the proposal was excludable was moot because the company would likely "continue to include the proposal when it again becomes eligible for inclusion." *Id*. Similarly, in *AFSCME v. AIG* this Court recognized that "[e]ven if [a shareholder proposal] were excludable under Rule 14a-8(i)(8) a company could nevertheless decide to include the proposal in its proxy statement." *AFSCME*, 462 F.3d at 130 n.9. Indeed, before the District Court, EA conceded that the exclusionary provisions of Rule 14a-8(i) are purely discretionary, and that a company is free to publish a proposal that it otherwise may be permitted to exclude. (SPA-46).[25] Indisputably, a company may

[25] The following exchange occurred at the argument:

> [The Court:] Section 14a-8, mostly in question and answer form, provides [a] certain number of enumerated exceptions to the company['s] duty to submit proposals initiated or suggested by shareholders [to be included in the company's proxy material] . . . *If [the proposal falls in] one of the exclusions, the company has discretion whether or not to submit them*. Am I right about that, gentlemen.
> Mr. Barry [for Professor Bebchuk]: Your Honor, that's correct.
> Mr. Rosenberg [for EA]: Yes, your Honor

(SPA-46) (emphasis supplied).

decide to include a shareholder proposal in its proxy materials even where the proposal is otherwise excludable under Rule 14a-8. [26]

The only question, therefore, is whether certificate or bylaw provisions that would govern how a corporation exercises its discretion in this regard, adopted and valid under state law, would "violate" Rule 14a-8 itself. The answer is "No."

In *AFSCME v. AIG*, this Court held that under the version of Rule 14a-8(i)(8) (the so-called "election exclusion") then in effect, a company could not exclude a proposal advocating the adoption of a bylaw that would have required the company to list on the company's proxy card the names of shareholder-nominated candidates for election as directors (so-called "proxy access" proposals). In so holding, this Court recognized that *even if* such a proposal could have been excluded under the "election exclusion," this did *not* mean that the proposed bylaw advocated was illegal or contrary to the federal securities laws. To the contrary, the Court of Appeals observed:

> The question, however, is not really whether proposals like AFSCME's are allowed -- they are certainly allowed, at least under

[26] Of course, even if a corporation might permissibly exclude a proposal under Rule 14a-8, it cannot do so if the exclusion would render the proxy statement false and misleading. *See New York City Employees' Retirement System v. Am. Brands, Inc.*, 634 F. Supp. 1382, 1386 (S.D.N.Y. 1986) ("Since a shareholder may present a proposal at the annual meeting regardless of whether the proposal is included in a proxy solicitation, the corporate circulation of proxy materials which fail to make reference to a shareholder's intention to present a proper proposal at the annual meeting renders the solicitation inherently misleading.").

> the federal securities laws -- the question is whether corporations can exclude such proposals if they wish to do so. Even if proxy access bylaw proposals were excludable under Rule 14a-8(i)(8), a company could nevertheless decide to include the proposal in its proxy statement; if the proposal were subsequently adopted by the requisite number of shareholder votes, then, subject to the specifics of the adopted proxy access bylaw, shareholders would be able to wage election contests without conducting a separate proxy solicitation and without providing the disclosures required by the rules governing such solicitations.

AFSCME, 462 F.3d at 130 n.9. Crucially, this Court recognized that state law based provisions – in particular, a bylaw – that would require a corporation to publish a proposal that the company otherwise may be permitted to exclude "are certainly allowed, at least under the federal securities laws." *Id.*

The Court's recognition of this point in the *AFSCME* decision was not novel. In the wake of *AFSCME*, the SEC contemplated amendments to the "election exclusion" of Rule 14a-8(i)(8), ultimately adopting a rule designed to permit companies to exclude so-called "proxy access" proposals. The Commission itself acknowledged that "***most state corporation laws provide that a corporation's charter or bylaws can specify the types of proposals that are permitted to be brought before the shareholders for a vote at an annual or special meeting***. Rule 14a-8(i)(1) supports these determinations by providing that a proposal that is not a proper subject for action by shareholders under the laws of the jurisdiction of the corporation may be excluded from the corporation's proxy materials." 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) ("Exchange Act Release 34-56914") (emphasis supplied) (A-59). Thus, the SEC itself has acknowledged that the Recommended Amendment contemplated in the Proposal is perfectly consistent with Rule 14a-8.[27]

Indeed, before the District Court, EA itself conceded the legality of the Requested Amendment, admitting that a corporation could adopt a certificate or bylaw provision such as the Requested Amendment without running afoul of Rule 14a-8. Recognizing that a certificate of incorporation or bylaw provision requiring the inclusion of shareholder proposals that a company has discretion to exclude under Rule 14a-8 are "certainly allowed ... under the federal securities laws,"[28]

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[27] Rule 14a-8's lack of any bar to state law arrangements that impose obligations concerning shareholder proposals whose inclusion is not required by Rule 14a-8 is demonstrated by those jurisdictions whose laws specifically require a company to include proposals whose inclusion may not be required under Rule 14a-8. For example, North Dakota law requires corporations to include in their notice for the annual meeting any proposals to amend the company's certificate that is submitted by shareholders holding at least 5% of the company's outstanding stock. *See* N.D. Cent. Code § 10-19.1-19. Similarly, some "issuers" subject to the proxy rules are incorporated in Bermuda and subject to The Bermuda Companies Act, which requires publishing notice of "any resolution that may properly be moved and is intended to be moved" at an annual meeting. The Bermuda Companies Act of 1981 § 79. *See AmerInst Ins. Group, Ltd*. SEC No-Action Ltr., 2006 WL 1006450 (April 14, 2006) (companies incorporated under Bermuda law that are listed on a U.S. securities market are subject to Rule 14a-8). Similarly, at least one company, Comverse Technology, Inc., recently adopted a bylaw, excludable under Rule 14a-8(i)(8), that requires the company to place in its proxy the names of shareholder-nominated directors. (A-1035).

[28] *See AFSCME*, 462 F.3d at 130 n.9

EA's counsel stated that the Company – and indeed, EA's shareholders themselves – *could* adopt the Requested Amendment. EA argued only that EA's shareholders would have to launch an independent solicitation to do so:

> Mr. Rosenberg [for EA]: And if the shareholders decide, through a proxy solicitation, that a shareholder does, at its own expense to the other shareholders, if they decide, through that process, that they want to amend the bylaws to opt out of the 14a-8 process, they could do that as well.

(SPA-13); *see also* EA's Reply Memorandum of Law In Further Support Of Its Motion To Dismiss (filed Oct. 13, 2008) at 11 ("***EA's shareholders would still be free to adopt alternative-access regimes through direct votes at shareholder meetings or by soliciting proxies through their own separate proxy materials***." (Emphasis supplied.)). Having conceded the legality of the Requested Amendment, EA's entire argument hinged on its proposition that, although the Requested Amendment is perfectly lawful and could be implemented by the Company, Prof. Bebchuk nonetheless cannot introduce the proposal through the 14a-8 process because the Requested Amendment would be "inconsistent" with the Rule. (SPA-13 – SPA-15). But EA's argument in this regard was entirely circular. If the Requested Amendment indeed was "inconsistent" with Rule 14a-8, then the implementation of the Requested Amendment, by definition, would be unlawful and violative of the proxy rules. 15 U.S.C. § 78n ("It shall be unlawful for any person … in contravention of such rules and regulations as the Commission may

prescribe … to solicit … any proxy or sent or authorization in respect of any security … registered pursuant to section 78l of this title."); *see SEC v. Transamerica, Corp.*, 163 F.2d 511, 518 (3rd Cir. 1947) (bylaw that would "serve to circumvent the intent of Congress in enacting the Securities Exchange Act of 1934" was unenforceable). So EA's concession that the Requested Amendment is perfectly lawful essentially conceded the case. Either the Requested Amendment is legal, or it is not. And if it is legal, by definition it would not be in "contravention" of the SEC's proxy rules. Because the Requested Amendment is lawful – and in other words does not frustrate the purposes of the Exchange Act and may interact perfectly consistently with the overall scheme contemplated by Rule 14a-8 – the Requested Amendment may not be excluded under subsection (i)(3) of the Rule.

The District Court apparently appreciated the circularity of EA's argument in this regard,[29] and thus in its decision essentially rejected the agreement between the parties on this point. In granting EA's motion to dismiss, the District Court

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[29] In response to EA's argument, the District Court stated as follows:

> THE COURT: I follow you, and my agree with your point. But I'm puzzled by the difference you draw between how that comes about. You say that if it came about in a proxy contest where the shareholder concerned initiates and pays for the proxy, it's okay. But if done by management, it's not okay.

(SPA-15).

incorrectly opined that a certificate or bylaw provision that would restrict a corporate board's discretionary authority, in effect, "eliminated" the discretion otherwise available to the "company" itself and thus contravened the "careful limitation" established by the Rule:

> The purpose of this proposal is to eliminate such discretion on the part of directors. They will retain the discretion, in the first place, to heed the voice of the shareholders, because the proposal, in and of itself, is innocuous, or apparently so in relationship to the 13 exclusions. But once the recommendation is made, if it's made, the inevitable effect of the proposal is to do away with the careful limitation on the part of 14a-8, to eliminate the discretion of the company, because there will be nobody to exercise it, and to have all of these questions submitted as a matter of law, federal law, to the shareholders.
>
> That contradicts 14a-8 and, therefore, I grant the motion and dismiss the complaint.

(SPA-49).

The fundamental error in the District Court's analysis lies not only in its improper conflation of the discretion provided to a "company" under Rule 14a-8 with the managerial authority of corporate boards that is determined (and may be restricted) under state law, but in its conclusion that the Recommended Amendment, if adopted, would "eliminate" the Company's discretion under the Rule. Yes, if the Recommended Amendment were adopted, it *would* restrict the discretion of EA's board of directors. But that limitation is perfectly appropriate under state law. *See supra* Sec. I. Further, the Recommended Amendment *would not restrict the Company's discretion at all.* Rather, the adoption of an amendment

to the Company's certificate of incorporation or bylaws *would constitute an exercise of that discretion*. If the Company later changed its mind – and sought to exercise this discretion again – the Company could amend or repeal any such provision.[30] The District Court's suggestion, therefore, that the Recommended Amendment would be contrary to Rule 14a-8 because, if adopted, "there would be nobody to exercise [the discretion provided under the Rule]" is simply incorrect. The adoption of the Recommended Amendment itself would constitute the Company's exercise of that very discretion.

Prof. Bebchuk's Proposal advocates the adoption of a certificate or bylaw provision that would constitute a permissible way for EA to regulate how it – the Company itself – exercises the limited discretion provided to a "company" under Rule 14a-8. As this Court held in *AFSCME*, Rule 14a-8 nowhere precludes a company from adopting a bylaw or certificate provision to regulate the manner in which it decides to include or exclude shareholder proposals. In no way "contrary"

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[30] Delaware General Corporations law provides that shareholders and directors have the power to amend the bylaws. *See* 8 Del. C. 109(a) ("[T]he power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote . . . provided, however, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors…"). Additionally, EA's certificate of incorporation can be amended if "the board of directors . . . adopt a resolution setting forth the amendment proposed, declaring its advisability" and shareholders representing "a majority of the outstanding stock entitled to vote thereon…" vote in favor of the Amendment. 8 Del. C. § 242(b)(1).

to Rule 14a-8 itself, the Recommended Amendment may not be excluded under Rule 14a-8(i)(3).

C. The Court Below Erroneously Extended The Proxy Rules To Regulate The Internal Affairs Of EA

The District Court's interpretation of Rule 14a-8 is also flatly at odds with decades of controlling precedent establishing that state law, not federal law, governs the internal affairs of corporations and, in particular, how corporate decisions are made.

Over thirty years ago, the Supreme Court in *Santa Fe* rejected an attempt to federalize state law issues of corporate governance. Quoting the Court's earlier decision in *Cort v. Ash*, 422 U.S. 66 (1975), the Court observed: "Corporations are creatures of 'state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly requires* certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.'" 430 U.S. at 479 (emphasis supplied). Nothing in Rule 14a-8 "expressly requires" a company's *board of directors* to determine when a "company" will determine whether to seek permission to exclude a shareholder proposal from the company's proxy statement. The District Court clearly erred in adopting an interpretation of Rule 14a-8 that expands the scope of the Rule to impose a *substantive federal requirement* that all decisions

affecting shareholder proposals must fall within the exclusive province of a corporate board of directors.

Section 14 of the Exchange Act and Rule 14a-8 regulate disclosure and do not generally regulate how companies organize their internal affairs. More than 40 years ago in *J. I. Case Co. v. Borak*, 377 U.S. 426 (U.S. 1964), the Supreme Court observed:

> The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that "(f)air corporate suffrage is an important right that should attach to every equity security bought on a public exchange."

Id. at 431 (quoting H.R.Rep. No. 1383, 73d Cong., 2d Sess., 13). Courts addressing Rule 14a-8 have recognized that it is designed to promote shareholders' communications and shareholders' ability to control important corporate decisions. In *Medical Committee for Human Rights v. Securities and Exchange Commission*, 432 F.2d 659, 680-81 (D.C. Cir. 1970), *vacated as moot* 404 U.S. 403 (1972), for example, the court recognized that the "overriding purpose [of Rule 14(a)] is to assure to corporate shareholders the ability to exercise their right – some would say their duty – to control the important decisions which affect them in their capacity as stockholders and owners of the corporation." As the court explained, Rule 14a-8 was adopted to further this goal by ensuring that shareholders were fully apprised of matters that would be considered at a company's annual meeting:

> Early exercises of the rule-making power were directed primarily toward the achievement of full and fair corporate disclosure regarding management proxy materials; the rationale underlying this development was the Commission's belief that the corporate practice of circulating proxy materials which failed to make reference to the fact that a shareholder intended to present a proposal at the annual meeting rendered the solicitation inherently misleading…. From this position, it was only a short step to a formal rule requiring management to include in its proxy statement any shareholder proposal which was 'a proper subject for action by the security holders'

Id. at 677 (internal citations omitted)).[31] Rather than purporting to impose federalized substantive restrictions on the internal governance of a corporation, the SEC adopted Rule 14a-8 to insure that shareholders had "[a]ccess to management proxy solicitations to sound out management views and to communicate with other shareholders on matters of major import . . ." *Roosevelt,* 958 F.2d at 421. *See also Amalgamated,* 821 F. Supp. at 882; *Lovenheim,* 618 F. Supp. at 561.[32]

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[31] *See also Am. Brands, Inc.*, 634 F. Supp. at 1386 (S.D.N.Y. 1986) ("Since a shareholder may present a proposal at the annual meeting regardless of whether the proposal is included in a proxy solicitation, the corporate circulation of proxy materials which fail to make reference to a shareholder's intention to present a proper proposal at the annual meeting renders the solicitation inherently misleading.").

[32] Section 14a-8 was intended to give "true vitality" to corporate democracy, and to permit shareholders to "communicate with each other":

> Congress, however, did not narrowly train section 14(a) on the interest of stockholders in receiving information necessary to the intelligent exercise of their approval rights under state law. Beyond that limited frame, section 14(a) shelters use of the proxy solicitation process as a means by which stockholders may become informed about

(Cont'd)

Rule 14a-8, quite simply, was neither intended nor designed to place substantive requirements on how corporations exercise the limited discretion provided to a "company" with respect to shareholder proposals under the Rule. It was clear error, therefore, for the District Court to *interpret* the Rule as if it did. Decades of federal court precedent construing rules promulgated by the SEC under the Exchange Act reflect the presumption that such rules *do not* interfere with the internal governance of corporations. In *Santa Fe*, for example, the Court held: "Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations . . . particularly where established state policies of corporate regulation would be overridden." 430 U.S. at 479. In that case, the Court held that the SEC did not intend for Rule 10b-5 to create a

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> management policies and may communicate with each other. Referring to the House Report cited in support of the *Borak* cause of action, this court once commented: "*It is obvious to the point of banality … that Congress intended by its enactment of section 14 … to give true vitality to the concept of corporate democracy*." *Medical Comm*., 432 F.2d at 676. The Senate Report similarly indicates this broader purpose: "In order that the stockholder may have adequate knowledge as to the manner in which his interests are being served, *it is essential that he be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders' meetings*." S. Rep. No. 792, 73d Cong., 2d Sess. 12 (1934), *See also Business Roundtable v. SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990) (quoting Senate Report).

Roosevelt, 958 F.2d at 421-2 (emphasis added).

cause of action for breaches of fiduciary duty, which is regulated by state law, absent a false statement or omission. *See id*. at 476 ("Cases do not support the proposition ... that breach of fiduciary duty by majority stockholders, without any deception, misrepresentation, or nondisclosure, violates the statute and the Rule.").

Four years later, in *Burks v. Lasker*, 441 U.S. 471 (1979), the Supreme Court expressly recognized that the scope of directors' managerial authority is established by *state law.* "Corporations are creatures of state law," the Court observed (quoting *Santa Fe*), "***and it is state law which is the font of corporate directors' powers***." 441 U.S. at 477 (emphasis supplied). Applying this rule, the Court held that state law would govern questions regarding directors' authority to terminate a derivative action unless that law "would be inconsistent with the federal policy underlying the cause of action." *Id*. at 479, quoting *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1975). *See also RCM Securities Fund, Inc. v. Stanton*, 928 F.2d 1318, 1326 (2d Cir 1991) ("Judicial review of a corporate decision to bring, not to bring, or to terminate a lawsuit is in turn governed by the business judgment rule, as determined by the law of the state of incorporation. The law of that state applies even where federal claims are involved.").

The decision to exercise discretion on behalf of the "company" to seek to exclude a particular shareholder proposal is a business decision, just like the

decision to act on behalf of a corporation to terminate a derivative case. As such, the directors' ability to exercise managerial discretion in this regard is determined under *state law* unless its application would be directly contrary to the federal policies involved. *See Burks*, 441 U.S. at 487. In *Gelles v. TDA Indus., Inc.*, 44 F.3d 102 (2d Cir. 1994), however, this Court specifically rejected the notion that the federal securities laws were intended to provide substantive rules regarding a director's fiduciary duties in exercising business judgment in connection with corporate acts. In that case, a shareholder who allegedly was duped into supporting a going-private transaction based on a promise of future employment brought a securities claim alleging that the directors' false promises provided the basis for a cause of action under SEC Rule 10b-5. The Court rejected this claim, declining to extend the scope of the federal securities laws into matters relating to the business judgment of corporate directors. This Court held: "We see no policy reason to extend federal jurisdiction under the securities laws, which principally implement a disclosure regime, to an area of law so clearly governed by, and traditionally the province of, state law." *Id.* at 106. *See also Burks*, 441 U.S. at 478 ("Congress has never indicated that the entire corpus of state corporation law is to be replaced…."). No "federal policy" exists that does or could justify interpreting Rule 14a-8 as imposing a *substantive federal requirement* regarding the scope of a corporate board's managerial discretion under the Rule.

Beyond this strong presumption against *interpreting* SEC rules to impose requirements on state law governance issues, courts have rejected attempts by the SEC to affirmatively inject itself, through its rulemaking authority, into the internal affairs of corporations. In *The Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990), for example, the court held that the SEC lacked any statutory authority to adopt a rule "barring national securities exchanges . . . from listing stock of a corporation" in instances where the corporation takes action "restricting or disparately reducing the per share voting rights of [existing common stockholder]." *Id.* at 407. The SEC argued the rule was authorized under Section 19(c) of the Exchange Act, which gives the SEC power to adopt rules regulating exchanges where such rules are "necessary or appropriate . . . in furtherance of the purposes of [the Exchange Act]." *Id*. at 408-9. The SEC argued that the rule furthered the purpose of Section 14 of the Exchange Act by "ensuring[ing] fair shareholder suffrage." *Id.* at 410 (internal quotations omitted).

The court, however, rejected this argument. Holding that Section 14 of the Exchange Act was primarily concerned with disclosure and was not meant to "interfere with the management of the affairs of an issuer" (*id*. at 411 (quotations omitted)) the court held:

> Proxy solicitations are, after all, only *communications* with potential absentee voters. The goal of federal proxy regulation was to improve those communications and thereby to enable proxy voters to control

> the corporation as effectively as they might have by attending a shareholder meeting.

Id. at 410. (emphasis in original). Thus, the court held that the SEC rule did not further the purpose of the Exchange Act as it had little to do with disclosure: "We find that the Exchange Act cannot be understood to include regulation of an issue that is so far beyond matters of disclosure (such as are regulated under § 14 of the Act), ... and that is concededly a part of corporate governance traditionally left to the states." *Id.* at 408.

Here, the District Court interpreted of Rule 14a-8 to impose a substantive federal requirement on a matter directly relating to the internal governance of EA – *i.e.*, the discretionary authority of the Company's board of directors. But whether, and to what extent, a corporate board is authorized to act on behalf of a corporation is perhaps the most fundamental "part of corporate governance" that traditionally has been determined under state law. *Burks*, 441 U.S. at 478 ("[I]t is state law which is the font of corporate directors' powers.").

Consider the implications of the District Court's decision. If the District Court is correct and Rule 14a-8 does provide a substantive federal requirement that precludes state law provisions that may place limitations on the ability of corporate directors to exercise discretion on behalf of a "company" under the Rule, such a prohibition would have far-reaching implications. For example, does this substantive federal requirement impose any voting requirement on corporate

boards? Must the board act by majority vote? If provisions adopted under state law cannot interfere with this supposed federal delegation to corporate boards, a certificate or bylaw provision that required director action by unanimous or supermajority vote would be just as offensive to such a federal rule as would the kind of restriction contemplated in the Requested Amendment. In both cases, state law would limit the ability of corporate boards to exercise their business judgment with respect to decisions impacting the inclusion of shareholder proposals in corporate proxy materials. Thus, under the District Court's analysis, even a requirement that corporate boards act by supermajority vote on decisions relating to shareholder proposals would be invalid as somehow inconsistent with Rule 14a-8. Yet this cannot be the case. *Cf. The Business Roundtable*, 905 F.2d at 408 (invalidating SEC rule regulating shareholder voting requirements). Although it may be possible to draw a line that distinguishes between a state law provision that would impose a director voting requirement and one that itself would constitute the exercise of discretion on behalf of a corporation under Rule 14a-8 (and EA no doubt will try), the relevant inquiry is not necessarily where that line ought to be drawn, but whether either Rule 14a-8 or, more importantly the Exchange Act itself imposes a mandatory federal policy that would justify drawing that line anywhere at all. Quite simply, federal law is not intended, and Rule 14a-8 itself is not designed, to inject the federal government into matters involving how corporations

act and whether and to what extent corporate boards are authorized to exercise their business judgment on behalf of a corporation.

Rule 14a-8 does not "expressly require" corporate boards to exercise the discretion provided to a "company" under the Rule with respect to shareholder proposals. The District Court erred in imposing such a requirement. Further, because the scope of discretionary authority of corporate boards is a central issue of corporate governance traditionally resolved under state law, the District Court erred in applying Rule 14a-8 in a manner that could not be justified as within the SEC's rulemaking authority pursuant to Section 14 of the Exchange Act.

II. THE PROPOSAL MAY NOT BE EXCLUDED FOR THE OTHER REASONS ADVANCED BY EA

A. The Proposal May Not Be Excluded Under Rule14a-8(i)(8) Because It Does Not Relate To An Election Of Directors Or Any Procedure For Such Elections

The Proposal, on its face, does not relate to an election or an election procedure. Rule 14a-8(i)(8) allows a company to exclude a shareholder proposal "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." 17 C.F.R. § 240.14a-8(i)(8). In explaining the scope of Rule 14a-8(i)(8), the SEC has stated:

> Rule 14a-8(i)(8) permits exclusion of a proposal that would result in an immediate election contest (*e.g.*, by making or opposing a director nomination for a particular meeting) or would 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.

SEC Release No. 34-56914 (A-53). Indisputably, the Proposal would neither result in an immediate election contest nor establish a process for shareholders to conduct future election contests. Rather, the Proposed Amendment creates a procedure to enable shareholders to vote on certain shareholder-submitted bylaw proposals. The plain and unambiguous language of Rule 14a-8(i)(8) does not permit EA to exclude the Proposal.

Recent amendments to Rule 14a-8(i)(8) did not expand the scope of the rule to allow companies to exclude shareholder proposals that, on their face, have nothing to do with director elections or nominations. In 2007, the SEC amended Rule 14a-8(i)(8) in response to this Court's decision in *AFSCME*. Before the 2007 amendment, Rule 14a-8(i)(8) only excluded proposals that "relate[d] to an election for membership on the company's board of directors or analogous governing body." Interpreting the scope of that language, this Court held that "a shareholder proposal that seeks to amend the corporate bylaws to establish a procedure by which shareholder-nominated candidates may be included on the corporate ballot ... cannot be excluded from corporate proxy materials under [Rule 14a-8(i)(8)]." *AFSCME*, 462 F.3d at 123. In response to that decision, the SEC amended Rule 14a-8(i)(8) to enable companies to exclude not only proposals that relate to an

election or nomination of directors, but also proposals that contain "a procedure for such nomination or election." 17 C.F.R. § 240.14a-8(i)(8). In adopting this amendment, however, the SEC explained:

> We are acting today to state clearly that the phrase "relates to an election" in the election exclusion cannot be read so narrowly as to refer only to a proposal that relates to the current election, or a particular election, but rather must be read to refer to a proposal that "relates to an election" in subsequent years as well.

(A-53); Exchange Act Release No. 34-56914 at II. However, in clarifying Rule 14a-8(i)(8), the SEC did not rewrite the rule to exclude any shareholder proposal that may make a contested election on the Company's proxy slightly more likely. Rather, the SEC merely enabled companies to exclude shareholder proposals that contained a "procedure for such nomination or election" of directors. The Proposal plainly contains no such procedure and thus may not be excluded under Rule 14a-8(i)(8).

B. The Proposal Is Neither Vague Nor Misleading And Therefore Cannot Be Excluded Under Rule 14a-8(i)(3) As Being In Violation Of Rule 14a-9

The Proposal is not excludable under Rule 14a-8(i)(3) as vague and misleading. Rule 14a-8(i)(3) allows companies to exclude a proposal if it "is contrary to any of the Commission's proxy rules, including § 240.14a-9, which prohibits materially false or misleading statements in proxy soliciting materials."

The Staff of the SEC's Division of Corporation Finance has explained that proposals can be excluded under this provision for vagueness only if

> the resolution contained in the proposal is so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires[.]

A-838; Staff Legal Bulletin 14B.

The Proposal, however, is not at all vague. It recommends that directors submit to a shareholder vote a certificate of incorporation or bylaw amendment that clearly defines a set of proposals that, to the extent allowed by law, must be (1) included in the Company's proxy statement, (2) included in the Company's notice of annual meeting and (3) brought to a shareholder vote at the Company's annual meeting. The Proposal also describes the general parameters of the kinds of proposals the Company would elect to publish in the future, indicating that such proposals would need to be supported by shareholders holding at least 5% of the Company's stock, be submitted to the Company in accordance with the deadlines established by the federal securities laws, and recommend the adoption of a bylaw. Additionally, the supporting statement explains the Proposal's relationship with Rule 14a-8:

> Current and future SEC rules may in some cases allow companies – but do not currently require them – not to place proposals for Bylaw amendments initiated by stockholders in the Corporation's notice of an annual meeting and proxy card for the meeting. Even stockholders

> who believe that no changes in the Corporation's Bylaws are currently worth adopting should consider voting for my proposal to express support for facilitating stockholders' ability to decide for themselves whether to adopt Bylaw amendments initiated by stockholders.

Therefore, the Proposal is not "so inherently vague or indefinite" that the Company is permitted to exclude it. It is a precise and clear request to EA's board to consider adopting the Requested Amendment.

CONCLUSION

For the reasons set forth above, the Judgment of the District Court should be reversed.

Dated: February 13, 2009
New York, New York

Respectfully submitted,

GRANT & EISENHOFER P.A.

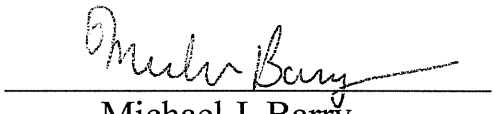
By _____
Jay W. Eisenhofer (98-587)
Michael J. Barry (05-176558)
Ananda Chaudhuri
485 Lexington Avenue
New York, New York 10017
(646) 722-8500

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (New Times Roman) of 14 points, and contains 13,301 words (excluding, as permitted by Fed. R. App. P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

Dated: February 13, 2009



Michael J. Barry

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 February 13, 2009, I caused a true and correct copy of the Brief of Appellant to be served by overnight mail postage pre-paid on the following:

Brendan J. Dowd
O'Melveny & Myers LLP
7 Times Square
New York, NY 10036

Dated: February 13, 2009

Michael J. Barry (05-176558)