UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LUCIAN BEBCHUK, Plaintiff, -against- ELECTRONIC ARTS, INCORPORATED, Defendant.	CV 08-3716 (AKH) Electronically Filed

EA'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiff does not dispute that Rule 14a-8 does not require EA to include in its corporate proxy materials any shareholder proposal that is contrary to the proxy rules. Nor does he dispute that his Proposal would ultimately require EA to include shareholder proposals that are contrary to Rule 14a-8, including shareholder proposals relating to director nominees. He even admits that the Proposal would "*increase* [EA's] obligation to publish shareholder proposals in certain circumstances." His Proposal is therefore contrary to Rule 14a-8, and Rule 14a-8 does not compel EA to include it.

Rule 14a-8 is a comprehensive regulatory scheme governing what shareholder proposals an issuer *must* include in its proxy and what proposals it *cannot* be required to include. It reflects the SEC's careful balancing of conflicting interests: shareholders' interest in access to an issuer's proxy materials and issuers' interest in avoiding the expense that shareholder proposals impose. As part of that balancing process, the SEC has repeatedly rejected Rule 14a-8 amendments that would have required companies to include in their proxy materials proposals to "opt out" of the rule's proxy-access framework. The SEC has reasoned that Rule 14a-8 strikes a fair balance and maintains uniformity and consistency in the proxy access process, thereby minimizing the burden on issuers, shareholders and the SEC alike. Any manipulation of the SEC's federal proxy rules to force issuers to include a proposal that advances *any* issuer-specific proxy-access scheme would be contrary to the balance and consistency for which the SEC has steadfastly strived under Rule 14a-8.

But Plaintiff contends that Rule 14a-8 is merely a "floor" for shareholder proxy access, and that shareholders can compel issuers to include a proposal advancing any alternative proxy-access mechanism if it is not more restrictive than Rule 14a-8. This argument misses the point,

which is all about whether Rule 14a-8 compels access to the issuer's proxy materials. Shareholders can use their own proxy materials to solicit votes in favor of a proxy-access scheme that provides greater access. Or they can vote directly at the shareholders' meeting for such a scheme. But they cannot use the federal proxy rules to force EA to help them achieve that goal. Understood in this light, Plaintiff's (and their *amici's*) state law rights argument also falls away: as long as shareholders do not resort to compelled use of the company's proxy materials under the federal proxy rules, they are free to amend their company's bylaws to provide an alternative proxy access framework.

Plaintiff also fails in his other arguments and attempts to depict the Proposal as consistent with Rule 14a-8:

- Plaintiff's "preemption" argument is a red herring. EA does not argue that Rule 14a-8 preempts state law; it merely argues that Plaintiff's Proposal is contrary to the rule because it is inconsistent with it. While this is analogous to "field preemption," EA has not argued that Rule 14a-8 provides the exclusive means for shareholders to have their proposals voted on. Shareholders can mount their own proxy-solicitation campaigns or seek a direct vote at a shareholder meeting.

- Plaintiff points to Bermuda and North Dakota statutes as enacting local proxy-access requirements similar to those the Proposal seeks to impose. But those statutes govern access to the "notice of shareholder meeting," which is not a proxy-solicitation device. In contrast to notices of shareholder meetings, the solicitation of proxies is extensively regulated under the *federal* power that Congress delegated to the SEC in Section 14 of the Exchange Act. And in any event, the North Dakota statute contains a savings clause that requires it to be construed to comply with federal regulations.

- Plaintiff cites Comverse Technologies, Inc., which amended its bylaws to permit shareholder access to the corporate proxy materials to nominate directors. But Comverse's board *voluntarily* adopted that amendment. Rule 14a-8 did not force Comverse to include it in the company's proxy statement. The Comverse example is thus similarly beside the point.

- Plaintiff cites court opinions holding that SEC Schedule 14A provides a "floor" for proxy disclosure requirements. From that, Plaintiff argues that Rule 14a-8 provides merely a baseline for shareholder access to EA's proxy. But Schedule 14A is not the same as Rule 14a-8. Schedule 14A provides specific line-item requirements that *anyone* soliciting proxies must disclose, and is supplemented by

> Rule 14a-9, which may also compel the soliciting party to disclose more information to make the Schedule 14A disclosures not false or misleading. By contrast, Rule 14a-8 sets forth the exclusive federal requirements under which an *issuer* must include a shareholder proposal in its proxy materials. No other federal requirement compels an issuer to include a proposal in its proxy materials. The Schedule 14A case law, therefore, provides no support for Plaintiff's "floor" argument.

Another reason that Rule 14a-8 does not require EA to include the Proposal in its proxy materials is that it could require EA to include future proposals relating to shareholder director nominees that would otherwise be excludable under Rule 14a-8(i)(8). As shown in EA's opening brief, the Proposal would be the first step in a process to place shareholder director nominees on EA's proxy materials. In amending Rule 14a-8(i)(8) in 2007, the SEC clarified its intent to permit issuers to exclude from their proxy statements proposals that relate "to procedures that would result in a contested election either in the year in which the proposal is submitted or in *any subsequent year*." Thus, the SEC itself has put the lie to Plaintiff's argument that the Rule applies only to proposals that, on their face, concern a contested director election. Plaintiff is therefore reduced to nit-picking. He argues that it would take four years, not three (as EA argued), for Plaintiff to circumvent Rule 14a-8(i)(8). But that is a distinction without a difference, because what is at issue is the Proposal's purpose and effect. If EA's shareholders were to approve the Proposal, it would initiate a process that would result in contested elections (*i.e.*, the inclusion of shareholder nominees in EA's proxy materials) in subsequent years, contrary to Rule 14a-8(i)(8).

Plaintiff's related argument—that the Proposal is "precatory" and therefore must be included—elevates form over substance. Rule 14a-8 makes no distinction between precatory and mandatory proposals. And a successful precatory proposal would compel some board action, as proxy advisors would urge institutional shareholders to oust EA's board if it failed to

follow the shareholders' wishes. Courts have recognized the overwhelming power that precatory shareholder proposals wield.

Rule 14a-8 also does not require EA to include Plaintiff's Proposal for the separate and independent reason that it is vague and confusing. Plaintiff's attempt to explain the Proposal merely confirms its vagueness. In one sentence, he asserts that the Proposal would not affect Rule 14a-8's procedures at all. In another, he explains that it *would* affect Rule 14a-8's procedures, but only if EA actually tried to exclude a shareholder proposal. This "clarification" only confirms that that the Proposal is vague and confusing.

In fact, Plaintiff's Proposal is so broad and open-ended that it falls within virtually each of Rule 14-8(i)'s exclusionary categories and each of those categories provides a separate and independent basis for the conclusion that Rule 14a-8 does not require EA to include the Proposal in its proxy materials.

ARGUMENT

I. EA CANNOT BE FORCED TO INCLUDE THE PROPOSAL IN ITS PROXY MATERIALS BECAUSE IT IS CONTRARY TO THE PROXY RULES.

A. Rule 14a-8's History Demonstrates That Issuers Cannot Be Compelled to Include Any Shareholder Proposal Seeking To "Opt Out" of Its Requirements.

Rule 14a-8 specifies the proposals that EA is not required to include in its proxy materials. Under Rule 14a-8(i)(3), EA is not required to include the Proposal because it would require EA to include future proposals that Rule 14a-8 would otherwise allow it to exclude. The SEC has repeatedly rejected the creation of federal alternative proxy-access frameworks, including a federal requirement that companies include shareholder proposals seeking to create alternative proxy-access frameworks. Instead, it has prescribed a uniform framework for all registered issuers that balances individual shareholder-proponents' and issuers' respective

interests. Because the Proposal would upset the SEC's interest-balancing, it is contrary to Rule 14a-8. It follows that Rule 14a-8 does not require EA to include the Proposal in its proxy materials.

Rule 14a-8 is part of a comprehensive scheme regulating proxy solicitations.[1] The SEC periodically considers amendments to Rule 14a-8, re-examining whether proposed amendments "fairly balance participants' sometimes conflicting concerns."[2] Following thorough reviews, the SEC has repeatedly rejected any changes to Rule 14a-8 that would require companies to include shareholder proposals that would create alternative schemes. In rejecting proposed changes to the proxy-access rules, the SEC has explained that "the basic framework of current Rule 14a-8 provides a fair and efficient mechanism for the security holder process, and ... should serve the interests of shareholders and issuers well,"[3] and reflects the SEC's effort to provide "the most fair, predictable, and efficient system possible."[4]

Plaintiff contends that the SEC's rejection of alternative shareholder-access frameworks "does *not* provide any basis to hold that [the Requested] Amendment ... is necessarily precluded under the existing Rule."[5] But he ignores the reasons the SEC provided for rejecting the alternative federal frameworks. In 1983, it rejected a federal shareholder right to establish

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[1] Br. for the Chamber of Commerce of the U.S.A. as *Amicus Curiae* Supporting Defendant ("Chamber of Commerce Br."), at 4–8.

[2] Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-39093, Fed. Sec. L. Rep. (CCH) ¶ 85,961, at 2 (Sept. 18, 1997) (the "1997 Amendments"). (May 30, 2008 Declaration of Brendan J. Dowd ("Dowd Decl."), Ex. N.)

[3] Amendments to Rule 14a-8, Exchange Act Release No. 34-20091, Fed. Sec. L. Rep. (CCH) ¶ 83,417, at 2–3 (Aug. 16, 1983) (the "1983 Release"). (Dowd Decl., Ex. M.)

[4] Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, Fed. Sec. L. Rep. (CCH) ¶ 86,018, at 2 (May 21, 1998) (the "1998 Amendments"). (Dowd Decl., Ex. O.)

[5] Pl.'s Br. at 23 (citing *Am. Fed'n of State County and Mun. Employees, Employees Pension Plan v. American Int'l Group, Inc.*, 462 F.3d 121, 130 n.8 (2d Cir. 2006) ("*AIG*"). *AIG* provides no support for Plaintiff. In footnote 8, the court responded to *AIG*'s argument that the court's narrow interpretation of Rule 14a-8(i)(8) conflicted with a rule that the SEC had proposed—but not yet adopted. That, of course, is far different from imposing a scheme that the SEC had specifically considered and rejected.

issuer-specific frameworks because, as commentators noted, "there would be no uniformity or consistency in determining the inclusion of security holder proposals" and "the effect of the fifty state judicial systems administering the process" would "exacerbat[e] the problem."[6] And in 1998, the SEC rejected alternative federal shareholder-access frameworks that, among other things, would have "reduce[d] the Commission's and its staff's role in the process and ... provide[d] shareholders and companies with a greater opportunity to decide for themselves which proposals are sufficiently important and relevant to a company's business to justify inclusion in its proxy materials."[7] Contrary to Plaintiff's assertion that the Proposal's "company specific rule" is "complimentary [*sic*] to the federal regime,"[8] the Proposal attempts to *use* the federal regime (rather than merely complementing the federal regime) to require EA to include his Proposal in EA's proxy materials. Moreover, the Proposal is at odds with the SEC's history of rejecting a federal obligation for companies to include shareholder proposals that seek to establish issuer-specific proxy rules.

B. The Proposal Is Inconsistent with Rule 14a-8.

Rule 14a-8 is not a "floor," as Plaintiff contends, nor is it a ceiling. Rather, it is a comprehensive structure that defines the contours of issuer obligations to include shareholder proposals in the corporate proxy materials.[9] If shareholders meet certain eligibility and procedural requirements, issuers must include their proposals in the corporation's proxy materials unless they fall within one of the thirteen exclusionary categories.[10] Rule 14a-8

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6 1983 Release at 2.

7 1998 Amendment at 2.

8 Pl.'s Br. 22.

9 17 C.F.R. 240.14a-8 ("This section addresses when a company must include a shareholder's proposal in its proxy statement.").

10 Compl. ¶¶ 11–13.

requires issuers to include no more and no less. As one state court judge explained, Rule 14a-8 is a "compromise" that "opens the doors to management's proxy materials, [but] management retains significant power as gatekeeper."[11]

Using Rule 14a-8 to force a change in the issuer's "gatekeeper" role would impermissibly alter the SEC's carefully designed structure. In an analogous case, the New York Court of Appeals held that state law claims purporting to require broker-dealers to disclose more detail about order flow payments than the SEC required "would directly conflict with SEC regulations limiting the disclosure requirements."[12] The court noted that the SEC had passed the original rule, amended it, and regularly evaluated its effectiveness "based on an interest-weighing, cost/benefit analysis."[13] Though many commentators questioned the adequacy of existing disclosure requirements, the SEC "rejected proposals for more exacting disclosure."[14] The court therefore held that requiring greater disclosure under state laws "would inevitably defeat the purpose of enabling the SEC to develop and police that 'coherent regulatory structure' for a national market system."[15]

Here, the SEC has similarly decided how much access to the corporate proxy materials issuers must provide to shareholders. But Plaintiff is trying to manipulate the SEC's proxy rules to require an issuer to include in its proxy materials a shareholder proposal that would set in motion a process that would ultimately require that issuer to include shareholder proposals that Rule 14a-8 does not mandate. That manipulation would "upset the policy-based delicate balance

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11 *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, No. 3447-CC, 2008 Del. Ch. Lexis 35, at *17–18 (Del. Ch. March 13, 2008), *aff'd*, 947 A.2d 1120 (Del. 2008).

12 *Guice v. Charles Schwab & Co.*, 674 N.E.2d 282, 289, 89 N.Y.2d 31, 45 (1996).

13 674 N.E.2d at 289.; 89 N.Y.2d at 46.

14 674 N.E.2d at 290; 89 N.Y.2d at 47.

15 674 N.E.2d at 290; 89 N.Y.2d at 46.

Congress directed the SEC to achieve in the regulatory regime."[16] Thus, the Proposal—which would result in requiring EA to include numerous shareholder proposals that Rule 14a-8 does not require—is "contrary to ... the proxy rules," *i.e.*, Rule 14a-8.

Plaintiff nevertheless defends his Proposal by arguing that it would not be "impossible" for EA to comply both with the Proposal's alternative proxy-access rules and the SEC's rules. But that is beside the point, because the issue is whether the Proposal would alter the SEC's carefully crafted balance, which Plaintiff concedes it would. Indeed, he acknowledges that if the Proposal and Requested Amendment were adopted, they would "*increase* [EA's] obligation to publish shareholder proposals in certain circumstances."[17] That acknowledgment ends the discussion and requires the Complaint's dismissal.

Plaintiff argues that Rule 14a-8(i)(3) is inapposite here because that exclusion only concerns proposals that violate other proxy rules, such as Rule 14a-9 or Rule 14a-11.[18] But Plaintiff construes Rule 14a-8(i)(3) too narrowly. *State Street* establishes that issuers are not required to include proposals that create alternative shareholder-access frameworks because those proposals are contrary to the proxy rules.[19]

And there is no meaningful difference between Plaintiff's Proposal and *State Street*'s. Just like Plaintiff's Proposal, the proposed *State Street* bylaw amendment would have required

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16 674 N.E.2d at 291; 89 N.Y.2d at 49; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 878–883 (2000) (holding state law rules mandating inclusion of air bags conflicted with federal regulation providing car manufacturers with discretion to implement different passive restraints); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 & 152 (1989) (explaining that "state regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress in our patent laws," which have always "embodied a careful balance" of interests).

17 Pl.'s Br. at 10.

18 Pl.'s Br. at 21.

19 *See* State Street Corporation, SEC No-Action Letter, CCH Securities Internet Library (Feb. 3, 2004) ("State Street No-Action Ltr."). (Dowd Decl., Ex. J.)

State Street to submit for a shareholder vote and include in its proxy statement a broad range of future shareholder bylaw-amendment proposals that Rule 14a-8 would not require the company to include. State Street argued that Rule 14a-8 did not require it to include the proposal because it would "impose new obligations on [the company's] proxy statement and form of proxy that Regulation 14A does not require."[20] The SEC concurred that State Street "may exclude the proposal under [R]ule 14a-8(i)(3), as contrary to the Commission's proxy rules."[21] Plaintiff's proposed bylaw amendment has the same intent and potential effect, and thus, it too is "contrary to the Commission's proxy rules."

Plaintiff dismisses *State Street* as resting on a conclusion that the proposal there could have theoretically led to including proposals that contain misleading statements. But State Street never made that argument. Rather, its Rule 14a-8(i)(3) argument for exclusion was that the proposal was "inconsistent with the regime that the [SEC] has established for stockholder access to the corporate machinery consistent with Rule 14a-8."[22] The SEC does not base no-action decisions on arguments the issuer does not make.[23] Thus, the SEC's *State Street* decision must be deemed to rest entirely on its conclusion that the proposed alternative *framework* was contrary to the proxy rules.

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20 *Id.* at 3–4.

21 *Id.* at 15.

22 *Id.* at 3–4. State Street argued other bases for exclusion (*e.g.*, that the proposal was really two proposals, not one), but the SEC ruled only on the Rule 14a-8(i)(3) ground.

23 Staff Legal Bulletin No. 14, Fed. Sec. L. Rep. (CCH) ¶ 60,014, at 5 (July 13, 2001) (Dowd Decl., Ex. K.) ("What factors do we consider in determining whether to concur in a company's view regarding exclusion of a proposal from the proxy statement? … [W]e will not consider any basis for exclusion that is not advanced by the company.").

C. Schedule 14A Has No Bearing on Rule 14a-8.

Equally flawed is Plaintiff's reliance on cases concerning Schedule 14A to argue that Rule 14a-8 is a "floor," not a ceiling. Schedule 14A sets forth the SEC's specific line-item requirements for the disclosure that a person must include in any materials that are used to solicit a proxy.[24] As the cases Plaintiff cites explain,[25] Rule 14a-9 prohibits the party soliciting proxies from including in its proxy materials "any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." Accordingly, Rule 14a-9 may establish a separate requirement to include additional information that Schedule 14A may not specifically identify.

Conversely, the federal proxy rules do not establish a separate, general requirement regarding shareholder proposals. Instead, Rule 14a-8 creates the *only* federal requirements for a company to include a shareholder proposal in its proxy materials. If the requirement is not found in Rule 14a-8, then no federal requirement to include that proposal exists. Further, the cases Plaintiff cites contain no discussion of Rule 14a-8.[26] They therefore provide no support for his argument that Rule 14a-8 is merely a "floor" or that Rule 14a-8 requires EA to include his Proposal in its proxy materials.

D. Plaintiff's State Law-Based Arguments Are Meritless.

Plaintiff also makes two meritless arguments based on state law. Plaintiff's first argument seeks to distinguish between (i) the discretion Rule 14a-8 grants to the "company" to

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[24] 17 C.F.R. § 240.14a-101 (requiring, among other things, disclosure of who is funding the solicitation, if not the issuer).

[25] *See, e.g., Maldonado v. Flynn*, 597 F.2d 789 (2d Cir. 1979); *Zell v. Intercapital Income Sec., Inc.*, 675 F.2d 1041 (9th Cir. 1982).

[26] *Id.*

exclude certain proposals, and (ii) the state law mandate that "corporate boards" manage a corporation's day-to-day affairs. Plaintiff argues that under state law, a corporation's shareholders have the power, through bylaw amendments, to determine how the corporation exercises the discretion afforded it under Rule 14a-8. Thus, Plaintiff argues, EA's interpretation would unjustly prohibit shareholders from determining how an issuer's board of directors could exercise their Rule 14a-8 discretion.[27]

Plaintiff is wrong. Under Rule 14a-8, shareholders would *not* be forever barred from adopting a bylaw that prescribes an alternative corporate proxy-access scheme. Rather, Rule 14a-8 prevents shareholders only from using that rule to force EA to include such a bylaw amendment in its proxy materials. 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.[28] Thus, EA's construction of Rule 14a-8 is fully compatible with state law authority to regulate corporations' internal affairs.

Plaintiff's second state law argument fares no better. Plaintiff contends that Rule 14a-8 cannot "preempt" state law because state law still provides important guidance on how directors exercise their discretion under Rule 14a-8.[29] But EA is *not* arguing that Rule 14a-8 preempts state law. EA's argument is based on statutory construction, not preemption. A *shareholder proposal* under Rule 14a-8 that advances an alternative regime—as opposed to a statute, board

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27 Pl.'s Br. at 11–14.

28 Plaintiff again conflates state and federal law when he argues that the SEC's 2007 Release acknowledged that the Proposal and Recommended Amendment would be consistent with Rule 14a-8. (Pl.'s Br. at 22.) The passage Plaintiff quoted in support—"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"— says nothing about those proposals that companies are *required* to include on their proxy materials. The SEC was simply noting that if a shareholder proposal concerns a matter that state law deems inappropriate for shareholder vote, Rule 14a-8(i)(1) does not require the issuer to include it.

29 *See* Pl.'s Br. at 16–21.

resolution, or direct shareholder vote advancing an alternative regime—is "contrary to" Rule 14a-8's comprehensive federal regulatory scheme. That is precisely why Rule 14a-8 does not require EA to include the Proposal in its proxy materials.[30]

Thus, the North Dakota and Bermuda statutes on which Plaintiff relies do not undermine EA's argument. Those are local statutes; they do not amend the federal proxy rules to create a federal shareholder right to access the corporate proxy materials. Indeed, each statute requires the corporation to include the relevant proposals in the state law-required *meeting notice* to shareholders,[31] not the federally mandated corporate proxy materials.[32] Even so, the North Dakota statute has a savings clause explicitly barring its application to registered issuers in any manner that conflicts with federal law.[33]

Comverse Technology's recent bylaw amendment[34] similarly provides Plaintiff no support. The amendment, among other things, gives any shareholder owning 5% or more of the company's stock for two consecutive years the right to include the name of one board nominee on Comverse's proxy materials. But as Plaintiff concedes, Comverse's *board* voluntarily adopted the bylaw; Rule 14a-8 did not require Comverse to include the bylaw amendment as a proposal in its corporate proxy materials. Thus, while the proxy-access regime that Comverse adopted may create a state law obligation to include proposals beyond those required by Rule

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30 EA Opening Br. at 11.

31 N.D. Bus. Corp. Act § 10-19.1-19(3); the Bermuda Companies Act of 1981 §§ 79, 80.

32 The SEC defines "proxy materials" as "the statement required by § 240.14a-3(a)," which includes Schedule 14A. 17 C.F.R. § 240.14a-1. The meeting notice, by contrast, is a separate requirement mandated by state law. *See, e.g.*, 8 Del. C. § 222; N.D. Bus. Corp. Act § 10-19.1-73; *see also State of Wisconsin Investment Board v. Peerless Sys. Corp.*, Civ. No. 17637, 2000 Del. Ch. LEXIS 170, at *5 (Del. Ch. Dec. 4, 2000) (explaining that the proxy materials and notice of annual meeting are distinct).

33 N.D. Bus. Corp. Act § 10-19.1-19(2) ("[I]f a corporation is registered or reporting under the federal securities laws, the provisions of this sentence do not apply to the extent that these provisions are in conflict with the federal securities laws or rules adopted under those laws.").

34 Pl.'s Br. at 20.

14a-8, it is inapposite because it was adopted without the company being compelled to include a proposal for that regime in its proxy materials.

II. EA IS NOT REQUIRED TO INCLUDE THE PROPOSAL BECAUSE IT IS CONTRARY TO RULE 14A-8(i)'S SPECIFIC REQUIREMENTS.

The Proposal is also contrary to Rule 14a-8(i)'s exclusionary categories because it would compel EA to include proposals that relate to specific subject matters it cannot be forced to include under Rule 14a-8.

A. EA Is Not Required to Include the Proposal Because, as Plaintiff Concedes, It Relates to a Procedure for Contesting Director Elections in *Subsequent* Years.

As described in EA's opening brief, the Proposal is at loggerheads with Rule 14a-8(i)(8), which permits EA to exclude proposals relating "to a nomination or an election for membership on the company's board of directors ... or a procedure for such nomination or election." Plaintiff concedes that the Proposal relates to a procedure for nominating directors.[35] That concession requires that the Complaint be dismissed. It does not matter whether it would take four years or three years for the shareholders to subvert Rule 14a-8(i)(8).[36] Either way, the Proposal would ultimately require EA to include in its proxy materials proposals that would result in contested director elections. As the SEC has explained, the 2007 amendment was designed to allow an issuer to exclude any proposal that "relates to procedures that would result in a contested election either in the year in which the proposal is submitted or in *any subsequent year*."[37] The SEC does not limit the analysis to any two- or three-year horizon. For the same

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35 Pl.'s Br. at 25.

36 Pl.'s Br. at 25–26.

37 Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 34-56914, Fed. Sec. L. Rep. (CCH) ¶ 88,023 at 6 (Dec. 6, 2007) (the "2007 Final Release") (emphasis added). (Dowd Decl., Ex. C.)

reason, Plaintiff's argument that the Proposal does not, on its face, relate to a procedure for nominating directors is meritless. The SEC warned that "if one looked only to what a proposal accomplished in the current year, and not to its effect *in subsequent years*, the purpose of the exclusion could be evaded easily."[38]

Similarly off the mark is Plaintiff's argument that a "daisy chain" of events would be required before shareholders could force EA to include shareholders' director nominees in its proxy materials. Rule 14a-8(i)(8) "does not focus on whether the proposal would make election contests more likely, but whether the resulting contests would be governed by the Commission's proxy rules for contested elections."[39] Plaintiff quotes this passage but misleadingly omits "for contested elections." He argues that the Proposal contains adequate safeguards against circumventing the SEC's director election rules by requiring (i) that any Qualified Proposal must be "valid under applicable law" and (ii) that the directors place such a proposal in EA's proxy materials only "to the extent permitted by law."[40] But as the SEC elaborated, "were the election exclusion not available for proposals that would establish a process for the election of directors that circumvents the proxy disclosure rules, it would be possible for a person to wage an election contest without providing the disclosures required by the Commission's present rules governing such contests."[41] Here, the Proposal would ultimately require EA to include future shareholder nominees for election to the board in its proxy materials. Accordingly, this Proposal falls into Rule 14a-8(i)(8)'s exclusionary category, and Rule 14a-8 does not require EA to include it.

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38 2007 Final Release at 5 (emphasis added); *see also id.* at 3 (concluding that proposals "that *may* result in a contested election ... fall within the election exclusion" (emphasis added)).

39 *Id.* at 5.

40 Pl.'s Br. at 27 n.15.

41 2007 Final Release at 2; *see also id.* at 2–3, 7–8 (explaining that several SEC rules govern contested board nominations, including Rule 14a-3, which (among other things) requires the party soliciting proxies to file a Schedule 14A, Rule 14a-9, and Rule 14a-12).

B. The Proposal's Precatory Nature Does Not Require EA to Include It.

Plaintiff's "daisy chain" argument also rests, in part, on the flawed assertion that even if EA's shareholders approve the Proposal, EA's board might choose not to submit the Requested Amendment to a shareholder vote.[42] But under Rule 14a-8(i), an issuer cannot be forced to include certain proposals regardless of whether they are mandatory or precatory. As Rule 14a-8(a) provides, a "proposal" includes "your *recommendation or* requirement that the company and/or its board of directors take action."[43] Thus, Rule 14a-8 cannot require an issuer to include even a precatory "recommendation" if it falls within an excluded category.

Further, it makes no sense to assume that a proposal will fail to achieve its goal when considering whether it falls within one of Rule 14a-8(i)'s exclusionary categories. As the Delaware Supreme Court recently observed, when considering the application of the Rule 14a-8(i)(2) exclusion to the validity of a shareholder proposal that would amend a bylaw, "we must necessarily consider any possible circumstance under which a board of directors might be required to act."[44] If it were otherwise, shareholders could circumvent Rule 14a-8(i)'s exclusions by presenting multiple-step precatory proposals. A proposal's subject matter is the sole criterion for whether it falls into a Rule 14a-8(i) exclusionary categories.

Plaintiff's "precatory" argument also distorts the practical realities. The board would have little choice but to submit the Requested Amendment to a shareholder vote if EA's shareholders approved the Proposal. Should it refuse, the various proxy advisors, such as ISS, would recommend that institutional shareholders vote against or withhold their proxy from the

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42 Pl.'s Br. at 25.

43 17 C.F.R. 240.14a-8(a) (emphasis added).

44 *CA Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 238 (Del. 2008) (*en banc*) (addressing the validity of a shareholder proposal under state law on certified questions from the SEC).

issuer's board nominees.[45] As Delaware Vice Chancellor Leo Strine recently observed in a debate with Plaintiff, many institutional investors "rely heavily on the advice of ... firms like Institutional Investor Services (ISS) that provide advice on how to vote on corporate ballot issues."[46] Indeed, ISS recently swayed shareholders in favor of a merger by withdrawing its opposition and urging its clients to approve it.[47] Thus, Plaintiff's suggestion that EA's board could choose to disregard majority shareholder support for the Proposal and refuse to implement the Requested Amendment is not only legally irrelevant, it is also unrealistic. Ultimately, Plaintiff's argument about the Proposal's being merely precatory is simply a smokescreen—if Plaintiff did not think the Proposal had teeth, he would not be spending the time and resources litigating the matter.

C. Casting the Proposal as a Process for Amending Bylaws Does Not Require EA to Include It.

Plaintiff also argues that EA's construction of Rule 14a-8(i)(8) should be rejected because it would permit issuers to exclude any proposals concerning bylaw amendment procedures.[48] This Court, of course, need only decide whether *this* Proposal relates to a process for nominations and elections—not whether other hypothetical proposals would be similarly

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45 Chamber of Commerce Br. at 21 (quoting ISS Governance Service's proxy voting guidelines: "Vote AGAINST or WITHHOLD from all nominees of the board of directors ... if ... The board failed to act on a shareholder proposal that [i] received approval by a majority of the shares outstanding the previous year [or] ... [ii] received approval of the majority of shares cast for the previous two consecutive years.").

46 Vice Chancellor Leo E. Strine, Jr., *Toward a True Corporate Republic*, 119 Harv. L. Rev. 1759, 1765 (2006).

47 *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 801–02 (Del. Ch. 2007) ("[A] large number of ISS clients who had been prepared to vote no . . . took ISS's advice and changed their position on the Merger."); *see also id.* at 793 (noting that ISS's initial "no" recommendation caused the acquiring company to increase its bid); *Hewlett v. Hewlett-Packard Co.*, Civ. No. 19513-NC, 2002 WL 818091, at *8 (Del. Ch. April 30, 2002) ("[I]t was widely known that [ISS] played a critical role, because several institutions usually follow ISS recommendations and in this case Barclays ... had committed to voting its approximately 60 million shares of HP stock in accordance with the ISS recommendation.").

48 Pl.'s Br. at 27.

objectionable. But even if Plaintiff's fear were somehow well-founded, it would simply reflect the SEC's policy decision permitting issuers to exclude proposals that could lead to shareholders' contesting board elections on the corporation's proxy materials without complying with the SEC's rules relating to contested elections. Plaintiff created this potential clash by drafting his Proposal so broadly and vaguely as to open the door to compelling EA to include a wide range of future bylaw amendments.

If Plaintiff wishes to access EA's proxy materials via Rule 14a-8, he must craft the proposal to avoid Rule 14a-8(i)'s exclusionary categories. As written, however, his Proposal may result in requiring EA to include in its proxy materials future bylaws proposals that implicate several of those categories:

- the redress of a personal grievance against the Company (which otherwise would be excludable in reliance on Rule 14a-8(i)(4));
- *de minimis* operations of the Company not otherwise significantly related to the Company's business (which otherwise would be excludable in reliance on Rule 14a-8(i)(5));
- a policy or requirement (*e.g.*, requiring directors' independence without providing a mechanism to cure) that the Company lacks the power or authority to implement (which otherwise would be excludable in reliance on Rule 14a-8(i)(6));
- a proposal that directly conflicts with one of the Company's own proposals to be submitted to shareholders at the same meeting (which otherwise would be excludable in reliance on Rule 14a-8(i)(9));
- the policies or corporate governance matters that the Company has substantially implemented (which otherwise would be excludable in reliance on Rule 14a-8(i)(10));
- a proposal that substantially duplicates another proposal previously submitted to the Company by another proponent that will be included in the Company's proxy materials for the same meeting (which otherwise would be excludable in reliance on Rule 14a-8(i)(11));
- a proposal dealing with substantially the same subject matter as another proposal or proposals that have been previously included in the Company's proxy materials (within the preceding 5 calendar years) and that have failed to receive a sufficient percentage of

the vote to evidence shareholder interest in the subject matter (which otherwise would be excludable in reliance on one of the three subparagraphs of Rule 14a-8(i)(12)); and

- specific amounts of cash or stock dividends (which otherwise would be excludable in reliance on Rule 14a-8(i)(13)).

Each of these Rule 14a-8(i) subparagraphs provides a separate and independent bases for finding that Rule 14a-8 does not require EA to include the Proposal. And because it would require EA to include proposals in its proxy materials whose inclusion cannot be mandated under Rule 14a-8, the Proposal itself may therefore be excluded by EA, regardless of Plaintiff's attempt to cast it as merely relating to bylaw amendment proposals.

D. Plaintiff's Challenge to the SEC's Balancing of Interests Is for the SEC to Resolve—Not This Court or EA's Shareholders.

The SEC designed Rule 14a-8(i)'s exclusionary categories to avoid "putting the issuer and its security holders to considerable expense."[49] The Proposal eliminates most of Rule 14a-8(i)'s exclusionary categories, potentially resulting in a gross waste of corporate resources.

Plaintiff does not disagree. Instead, he argues that the SEC's and EA's waste concerns are overblown and more appropriately directed to EA's shareholders through a statement in opposition to his Proposal.[50] But this solution would do nothing to avoid the unnecessary cost of including the Proposal and any resulting proposals in the company's proxy in the first place.

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[49] *See, e.g.*, Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34-12999, [1976–1977 Transfer Binder] Fed. Sec. L. Rep. ¶ 80,812, at 3 (November 22, 1976) (permitting exclusion of proposals by shareholder who fail to appear at the annual meeting because "[t]his provision is in keeping with the overall purpose of the notice requirement, which is to avoid putting the issuer and its security holders to considerable expense for no valid purpose") (Dowd Decl., Ex. P.); *see also* Proposed Amendments to Rule 14a-8, Exchange Act Release No. 12598 [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80, 634, at 1 (July 7, 1976) (explaining the proposed amendments are "designed to limit certain past shareholder abuses"). (Dowd Decl., Ex. H.)

[50] Pl.'s Br. at 30–31.

That is why the SEC—not individual shareholders, like Plaintiff—is empowered to weigh the burdens that increased federal shareholder access would impose.[51] The SEC has repeatedly analyzed costs to issuers as part of the rulemaking process and has cited balancing interests as a basis for retaining the existing framework.[52] For example, in 1982, the SEC "solicit[ed] specific comment with respect to the costs" of the different frameworks it considered.[53] And in 1997, the SEC shared the data it had gathered on the costs to issuers to evaluate shareholder proposals and include them on the corporate proxy, while soliciting additional data on issuer costs.[54] Because the SEC is best equipped to gather data and balance the respective interests, Plaintiff's second-guessing is meaningless here.

III. EA IS NOT REQUIRED TO INCLUDE THE PROPOSAL BECAUSE IT IS VAGUE AND INDEFINITE.

A. The Proposal's Interaction with Rule 14a-8 Is Ambiguous.

As shown in EA's opening brief, EA may also exclude the Proposal because it is vague and indefinite.[55] The SEC permits issuers to exclude proposals that are so inherently vague or indefinite that neither the shareholders voting on the proposal, nor the issuer implementing the proposal, can determine with any reasonable certainty exactly what actions or measures the proposal requires.[56]

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51 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.").

52 *See* nn.3–4 *supra*; *see also* the 2007 Final Release at 8 ("To the extent that proposals are properly excluded from proxy materials in reliance on the amended rule, companies and their shareholders will not incur additional costs that would otherwise be incurred if the proposals were included.").

53 Proposal II to Proposed Amendments to Rule 14a-8, Exchange Act Release 34-19135, Fed. Sec. L. Rep. (CCH) ¶ 83,262, at 5 (October 14, 1982) (the "1982 Proposing Release"). (Dowd Decl. Ex. L.)

54 1997 Amendments at 22.

55 *New York City Employees' Ret. Sys. v. Brunswick Corp.*, 789 F. Supp. 144, 146 (S.D.N.Y. 1992).

56 Staff Legal Bulletin No. 14B, Fed. Sec. L. Rep. (CCH) ¶ 60, 014B, at 2 (Sept. 15, 2004). (Dowd Decl., Ex. U.)

Plaintiff nevertheless contends that the Proposal is not confusing because it "would not impact the Rule 14a-8 process *at all*."[57] But he goes on to explain that, yes, it would affect the Rule 14a-8 process, but only "*when the Company would invoke the 'no action' procedure contemplated by Rule 14a-8(j)* by exercising discretion to seek permission to exclude a proposal under one of the exceptions enumerated in subsection (i) of the Rule."[58] This attempted clarification is itself confusing, and certainly is not evident in the Proposal or Plaintiff's Supporting Statement (which does not even mention Rule 14a-8(j)). Without a clearer explanation whether future proposals and Qualified Proposals are evaluated under Rule 14a-8 or some alternative scheme, EA's shareholders would have no idea that Plaintiff purports to create a shadow proxy-access scheme that provides preferential treatment to 5% shareholders rather than displace entirely Rule 14a-8.[59]

And even if Plaintiff's four-page explanation had clarified the Proposal, it would still fail for vagueness. The Proposal must be evaluated exclusively on the 500 words in the Proposal and Supporting Statement presented to shareholders in the proxy materials. The lengthy explanation that Plaintiff offers to the Court would not be before the shareholders who would have to determine whether to vote for the Proposal.

Moreover, Plaintiff's contention that his Proposal and the "Requested Amendment" would not affect the Rule 14a-8 process is at odds with his concession that it would create a process by which shareholders could contest EA's directors on the corporate proxy materials.[60] If the Rule 14a-8 process were truly unaffected, then even after shareholders use the Proposal

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57 Pl.'s Br. at 33.

58 *Id.*

59 *Id.* at 6.

60 *Id.* at 25–26.

and Requested Amendment to amend EA's bylaws, EA presumably could not be compelled to include in its proxy materials proposals seeking to contest board seats. But if EA were to exclude election-related proposals, shareholder-proponents likely would sue EA's board members for violating the bylaw amendment requiring them to include the competing slate. Thus, the Proposal creates potentially conflicting obligations, thereby rendering EA's board and its shareholders unable to "determine with any reasonable certainty exactly what actions or measures the proposal requires."[61] And Plaintiff explains none of this to shareholders, whom he keeps in the dark regarding the Proposal's scope and effect.

B. The Proposal Fails to Tell Shareholders or EA What Future Actions or Measures the Proposal Requires.

The Proposal is also vague and confusing because it fails to advise EA and its shareholders what future actions are required to cure procedural and substantive defects in future Qualified Proposals. Whereas Rule 14a-8(f) explicitly permits shareholders to cure "eligibility or procedural" defects, the Proposal permits a proponent to remedy only eligibility defects. Shareholders would be confused as to which defects, if any, they can remedy. And the Proposal's process for curing eligibility defects is also facially vague, as it ambiguously requires proponents to provide EA with "reasonably requested" information.

Plaintiff tacitly concedes this point as he fails to respond to it. He does not even attempt to explain whether the Proposal would obligate EA to permit a proponent to cure a Qualified Proposal that failed the 500-word limitation.

Instead, Plaintiff argues only that the Proposal's "reasonably requested" standard for eligibility-information requests is not vague and indefinite because EA uses "reasonable" or

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[61] SEC Staff Legal Bulletin 14B at 4.

"reasonably" five times in its bylaws.[62] But EA's use of "reasonably" elsewhere sheds no light on what materials are "reasonably requested" under the Proposal. One bylaw example Plaintiff cites is the requirement that a shareholder soliciting proxies for director nominees submit the solicitations "to holders of a percentage of the Corporation's voting shares 'reasonably believed' by such stock holder ... to be sufficient to elect the [proposed] nominee."[63] But whether that shareholder's subjective belief was reasonable turns on very different facts than the reasonableness of an eligibility request under the Proposal. At least the bylaw makes clear that it is the shareholder's subjective belief that is at issue. The Proposal, in contrast, provides no guidance as to whether "reasonable" is to be measured from EA's, the proponent's, or an impartial arbiter's perspective.

Nor is it enough to argue that EA can explain what it may "reasonably request" *after* shareholders approve the precatory Proposal. The SEC staff has noted that a proposal may be materially misleading as vague and indefinite where "any action ultimately taken by the Company upon implementation [of the proposal] could be significantly different from the actions envisioned by the shareholders voting on the proposal."[64] Here, shareholders could have significantly differing understandings of what is reasonable, and EA's own interpretation could be different still. Shareholders would thus be required to vote on a Proposal without having any way of understanding its implications, which the proxy rules forbid.[65]

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62 Pl.'s Br. at 33–34.

63 Pl.'s Br. at 33.

64 *See* Fuqua Indus., Inc. No-Action Letter, CCH Securities Internet Library, at 5, 6, 7 (March 12, 1991) (issuing No-Action Letter in response to proposal on the grounds that undefined terms such as any "major shareholder," "assets/interest" and "obtaining control" in the proposal may make the proposal vague, indefinite, and misleading). (Dowd Decl., Ex. V.)

65 SEC Staff Legal Bulletin 14B at 4.

CONCLUSION

Plaintiff seeks to require EA to include his Proposal, which would amend EA's bylaws to require EA to include future shareholder proposals. Such a Proposal is contrary to the proxy rules, and Rule 14a-8 does not require EA to include it in the company's proxy. And contrary to Plaintiff's contentions, the Proposal's rejection would not forever prohibit EA shareholders from amending EA's bylaws and thereby disrupt state laws governing EA's internal affairs. EA shareholders would always be free, as they are now, to undertake their own solicitation of proxies in support of any lawful amendment they choose.

If the Proposal were to pass, it would lead to other results that squarely contradict the proxy rules, most notably if (as appears to be Plaintiff's objective) Plaintiff used the bylaw amendment to require EA to include in its proxy proposals concerning contested director elections. But the Proposal also falls within virtually every one of the other Rule 14a-8(i) exclusionary categories. And despite Plaintiff's efforts to explain his Proposal's import in his opposition brief, it is still unclear how a shareholder would remedy procedural defects in a Qualified Proposal if Plaintiff's Proposal were adopted. Accordingly, Rule 14a-8 does not require EA to include the Proposal as a matter of law, and Plaintiff's Complaint should be dismissed.

Dated: October 13, 2008
New York, New York

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CERTIFICATE OF SERVICE

I, Orly Nhaissi, hereby certify under penalty of perjury that on this 13th day of October 2008, I caused a true and correct copy of the foregoing Reply Memorandum of Law in Further Support of Electronic Arts Inc.'s Motion to Dismiss to be served through the Court's ECF system by electronic filing on the individuals below:

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