IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW YORK

LUCIAN BEBCHUK,	:	
	:	
Plaintiff.	:	
	:	
-v.-	:	CV 08-3716
	:	Electronically Filed
ELECTRONIC ARTS, INCORPORATED	:	
	:	
Defendant.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN RESPONSE TO ELECTRONIC ARTS INC.'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiff Lucian Bebchuk ("Plaintiff" or "Professor Bebchuk") brought this suit to enforce his right as a shareholder of Electronic Arts, Inc. ("EA" or the "Company") to compel the Company to publish his shareholder proposal ("Proposal") in EA's proxy materials under 17 C.F.R. § 240.14a-8 ("Rule 14a-8"). Rule 14a-8, known as the "town hall meeting" rule,[1] requires companies to include in their proxy materials proposals submitted by shareholders that meet certain procedural and eligibility requirements. The rule *permits* the company to exclude proposals that fall within thirteen enumerated exceptions, but does not *require* a company to exclude any proposal from its proxy materials. In other words, even if a proposal falls within one of the enumerated exceptions, the company is not prohibited from including the proposal in the company's proxy statement; rather, Rule 14a-8 provides the company with discretion regarding whether to include it.

Professor Bebchuk's Proposal at issue here requests that EA's Board of Directors (the "Board") submit for a shareholder vote an amendment to the Company's bylaws or certificate of incorporation that, if adopted, would govern how the Company would exercise the discretion afforded to it under Rule 14a-8. Specifically, the proposed amendment ("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 imposes substantial requirements for a proposal to be qualified, including that they must be supported by significant

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[1] *See American Federation of State, County & Municipal Employees, Employees Pension Plan v. American Intern. Group, Inc.* 462 F.3d 121, 124 (2d. Cir. 2006) ("*AFSCME*").

shareholders (owning at least 5% of the Company's stock), are not illegal, and do not relate to the company's ordinary business. In this regard, the Requested Amendment, if adopted, would limit – but not eliminate – the Board's discretion to exclude shareholder proposals in certain circumstances where the Company itself is free to exclude or include the proposal under Rule 14a-8.

EA argues that it should be permitted to exclude the Proposal under the exceptions enumerated in Rule 14a-8(i). *First*, EA argues that the Proposal may be excluded under Rule 14a-8(i)(3) as contrary to Rule 14a-8 itself because rule 14a-8 occupies the field and preempts any state law regulation of inclusion in proxy materials and because the Recommended Amendment would produce an impermissible opting out of Rule 14a-8. Def. Br. at 1, 10-15. Claims that state law arrangements (including charter or bylaw provisions adopted under state law) are preempted and invalid in a corporate area must meet a very high burden. Not only can EA not meet this burden, but, on the contrary, it is clear that Rule 14a-8 does not preempt but rather co-exists with, and indeed critically relies on, a state law role in this area. As EA stated in its brief, Rule 14a-8 "prescribes those proposals that a company must include in, and those that it has the *discretion* to exclude from, its proxy material." Def. Br. at 2 (emphasis added). Contrary to EA's position, Rule 14a-8 does not mandate that boards have discretion to exclude certain proposals but rather gives the discretion to companies and leaves the internal affairs issue of to what extent and how the company will use this discretion to state law.

The Recommended Amendment also would not "opt out" of Rule 14a-8 but rather would alter the state law arrangements currently governing EA's use of the discretion left to it by the Rule. EA's arguments throughout fail to take into account that Rule 14a-8 does not require the exclusion of any proposals but rather sets some minimum federal requirements for proposals that

must be included. The creation of a state law obligation for inclusion of additional proposals among those that companies are permitted to include or exclude is fully consistent with Rule 14a-8. Indeed, the Court of Appeals for the Second Circuit has recognized that corporate bylaws include provisions that may be subject to the exclusionary provisions of Rule 14a-8 if presented as shareholder proposals. *See AFSCME*, 462 F.3d at 130 n.9 The SEC itself has recognized that charter and bylaw provisions governing access to the proxy may be validly adopted, and the Chamber of Commerce, which appears here as an *amicus* supporting EA's attempt to bar the Proposal, actually stressed the *validity* of such provisions in its a submission to the SEC last year.

Second, EA argues that the Proposal may be excluded under Rule 14a-8(i)(8) because it relates to an election of directors or a procedure to nominate or elect directors. *See* Def. Br. 15-18. This argument must be rejected because the Proposal, on its face, does not relate to procedures for director election or nomination but to procedures for bylaw amendments. EA attempts to argue around this obvious fact by imagining a complex scenario involving at least six separate steps, each of which might or might not happen and which would take at least four years to complete, that may lead to a shareholder-nominated director being placed on EA's proxy statement. Def. Br. at 17. The plain language of Rule 14a-8(i)(8), however, simply does not allow exclusion of proposals based on such speculation. *See AFSCME*, 462 F.3d at 125 ("In interpreting an administrative regulation, as in interpreting a statute, we must begin by examining the language of the provision at issue."). For similar reasons, there is no basis for EA's arguments that the Proposal may be excluded because it may lead, again through a long chain of events that may or may not happen, to the inclusion of certain types of proposals that, in

the absence of the Recommended Amendment, the Company would be free to exclude or include.

Third, EA argues that the Proposal may be excluded under Rule 14a-8(i)(3) because it is somehow "vague and misleading" and therefore contrary to Rule 14a-9, which forbids false and misleading information in the Company's proxy statement. *See* Def. Br. at 20-22. However, despite EA's attempts to conjure up ambiguities, the simple fact is that nothing about the Proposal is so confusing so as to prevent either shareholders or the Company from understanding it. EA's arguments to the contrary are without merit.

FACTUAL BACKGROUND

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.[2] Concerned with corporate governance at EA, a Delaware corporation, he submitted the Proposal to the Company on February 20, 2008. ¶15. As set forth herein, Rule 14a-8 requires EA to place the Proposal in its proxy statement.

A. Regulatory Background

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 when the company holds an annual or special meeting of shareholders." Rule 14a-8. In order for the shareholder to submit a proposal, he "must be eligible and follow certain procedures." *Id.* If an eligible shareholder follows these procedures, a "company is *permitted* to exclude" a shareholder proposal "[u]nder a few specific circumstances . . . but only after submitting its reasons to the Commission." *Id* (emphasis added). These specific circumstances are enumerated in Rule 14a-8(i)(1)-(13).

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[2] Citations to the Complaint shall appear herein as "¶ ___."

If a company wishes to exclude a proposal, it must notify the Commission and the shareholder proponent of its reasons for excluding the Proposal 80 days before it issues its proxy statement. *See* 14a-8(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." 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"). Additionally it 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 [it is] unable to concur in the company's view that it may exclude the proposal." 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.") These No-Action letters are not binding on either the company, proponent or the Commission itself. *See* 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 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.").

Importantly, the exclusions set forth in Rule 14a-8(i)(1)–(13) do not require a company to exclude any proposal, but only state when a company *may* exclude a 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)).

B. Summary of the Proposal

The Proposal is precatory, requesting that the directors of EA submit the Requested Amendment to a shareholder vote. This Requested Amendment would require the Board to take the following actions, only "to the extent permitted by law," when a shareholder submits a "Qualified Proposal" to the Company: (1) submit the Qualified Proposal to a vote of stockholders; (2) include the Qualified Proposal in the notice of an annual meeting submitted to stockholders; and (3) place the Qualified Proposal in the Company's proxy statement to be voted on by stockholders. Thus, by its very terms, the Requested Amendment would not, in any circumstance, require the Board to take action that violates either federal or state law.

To submit a Qualified Proposal, the Initiator(s) must, at the time of submission, (1) own 5% of the Company's stock; (2) represent in writing that they intend to hold such stock through the date of the annual meeting; and (3) have owned $2,000 worth of common shares for at least one year prior to submission. Additionally, a Qualified Proposal must meet *all* the following conditions:

(a) the proposal must be "valid under applicable law;"

(b) the proposal "would effect only an amendment to the Corporation's Bylaws;"

(c) the proposal "is a proper action for stockholders under state law;" and

(d) the proposal does not deal with a matter relating to the Company's ordinary business operations.

See ¶18. Further the Initiator(s) must submit, within 21 days, any information "reasonably requested" by the Company to demonstrate eligibility to submit a Qualified Proposal or to enable the Company to comply with applicable law.

C. Procedural Background

On February 20, 2008, Bebchuk submitted the Proposal to EA. EA does not dispute that Professor Bebchuk satisfied the procedural and eligibility requirements for submitting a shareholder proposal under Rule 14a-8. Nevertheless, on March 26, 2008, pursuant to Rule 14a-8(j), EA sent a letter to the Division stating its intent to exclude the Proposal from its proxy statement under the substantive requirements of Rule 14a-8(i) and requesting "No-Action Relief." ¶22. On April 18, 2008, after careful consideration of EA's arguments presented in its March 26, 2008 letter, Professor Bebchuk commenced this action. Thereafter, 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, and thus, expected authoritative resolution from a court. *See* Letter from Jonathan A. Ingram, Deputy Chief Counsel of the Division of Corporate Finance, to David J. Johnson, Jr., O'Melveny & Myers, LLP, *Re: Electronic Arts Incoming Letter Dated March 26, 2008* (May 23, 2008) (Declaration of Jay W. Eisenhofer in Support of Plaintiff's Memorandum of Law in Response to Electronic Arts Inc.'s Motion to Dismiss ("Eisenhofer Decl."), Exhibit 1).

ARGUMENT

I. THE PROPOSAL CANNOT BE EXCLUDED FROM THE COMPANY'S PROXY AS INCONSISTENT WITH RULE 14a-8 UNDER RULE 14a-8(i)(3)

Rule 14a-8(i)(3) allows a company to exclude a proposal "[i]f the proposal or supporting statement is contrary to any of the Commission's proxy rules . . ." EA and the Chamber of Commerce[3] argue that the Proposal is contrary to Rule 14a-8 itself simply because it relates to

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[3] In an *Amicus Curiae* filed on July 18, 2008 in support of EA ("Chamber Br."), The United States Chamber of Commerce argued that Rule 14a-8 may not give Plaintiff a private right of action in federal court. Chamber Br. at 9-

the inclusion of shareholder proposals in the Company's proxy materials. Essentially, EA and the Chamber argue that Rule 14a-8 completely preempts the field of shareholder resolutions, and thus preempts state laws, as well as any charter and bylaw provisions permitted by and adopted pursuant to state law, that relate in any way to shareholder resolutions. According to EA, "[b]ecause the SEC's regulatory framework is comprehensive, it has essentially 'occupied the field' of proxy regulation, and *anything* that varies that framework . . . is 'contrary to' it" and thus "is a nullity." Def. Br. at 11 (emphasis added). The Court of Appeals for the Second Circuit held that federal law may preempt state law in three ways:

> First, Congress may in express terms declare its intention to preclude state regulation in a given area. . . . Second, in the absence of an express declaration, preemption may be implied when the federal law is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementing state regulation". . . . Finally, state law may be preempted "to the extent that it actually conflicts with a valid federal statute."

Assoc. of Am. Med. Colleges v. Cuomo, 928 F.2d 519, 522 (2d Cir. 1991) (emphasis added).

Neither EA nor the Chamber argue that Congress, through the Exchange Act, expressly preempted state laws that may impact shareholder proposals. Their argument, instead, relies on an expansive interpretation of the SEC's Rules, and an incorrect assertion that the Recommended Amendment, if adopted, would somehow create a conflict with Rule 14a-8. Indeed, EA's and the Chamber's preemption argument is directly contrary to observations made by the Court of

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10. This argument is at odds with the SEC pronouncement above, settled law, and EA's own brief. *See, e.g., AFSCME*, 462 F.3d 121 (2d Cir. 2006) (finding for shareholder who sought to compel company to include its proposal in the company's proxy statement); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 424 (D.C. Cir. 1992) ("The Commission has consistently regarded the court, and not the agency, as the formal and binding adjudicator of Rule 14a-8's implementation of section 14(a)"); *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877, 879 (S.D.N.Y. 1993) ("The existence of a private right of action by a shareholder under § 14(a) of the SEA and Rule 14a-8 is well settled and uncontested here."); *The New York City Employees Retirement System v. Am. Brands, Inc.*, 634 F. Supp. 1382, 1386 (S.D.N.Y. 1986) ("[W]e conclude that [Plaintiff] can seek an interpretation of Rule 14a-8 as applied to its particular proposal in this court."). Further, EA itself admits that "this Court is the sole authority to address the Proposal's exclusion from EA's proxy." Def. Br. at 9.

Appeals for the Second Circuit *AFSCME*. There, the Court of Appeals held that, under the version of Rule 14a-8(i)(8) in effect at the time, 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 doing so, however, Court of Appeals recognized that *even if* the particular proposal could be excluded under Rule 14a-8, 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 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. The Court of Appeals thus recognized that the mere fact Rule 14a-8 may permit the exclusion of a particular proposal *does not* preclude a company from including such a proposal on its proxy statement, and *does not render* the proposal, if adopted, somehow inconsistent with the federal securities laws. This means that, the Proposal is not somehow "inconsistent" with Rule 14a-8 simply because, someday, the Recommended Amendment, if adopted, might result in the Company including a proposal it otherwise might be permitted to exclude under one of the provisions of Rule 14a-8(i).

As explained below, even assuming that the SEC's rulemaking authority on the subject of shareholder proposals *could* have preemptive effect (and this is far from certain[4]), it is clear that (a) the Recommended Amendment would *not* be preempted because there is no conflict between the Recommended Amendment and Rule 14a-8 so as to render compliance with both provisions impossible; (b) the federal regulatory regime expressly contemplates a significant role for state law in the process; and (c) the SEC, in its rulemaking capacity, specifically has acknowledged that bylaws or charter amendments such as that advocated by the Proposal here would be perfectly consistent with the federal scheme.

A. The Recommended Amendment Is Consistent With – Not Contrary To – Rule 14a-8.

The Recommended Amendment would not "actually conflict" with the disclosure requirements applicable to shareholder proposals mandated in Rule 14a-8, and neither EA nor the Chamber argues otherwise. This is because *even if* one of the thirteen exclusions enumerated in Rule 14a-8(i) apply, the Rule does not forbid a company from publishing a proposal – it merely provides a basis upon which a company, if it so chooses, may decline to publish the proposal. *See supra* 4-5 (citing Rule 14a-8(f), (i); Staff Legal Bulletin No. 14). And, of course, a company is free to publish a shareholder proposal that it otherwise may exclude under Rule 14a-8(i).[5] The Recommended Amendment, therefore, which would merely *increase* the Company's obligation to publish shareholder proposals in certain circumstances but would not decrease the Company's disclosure obligations or permit EA to exclude proposals that otherwise

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[4] *See infra* at 13 n.7.

[5] Of course, even if a corporation might be permitted to exclude a proposal under Rule 14a-8, it cannot do so if the exclusion would render the proxy statement false and misleading. *See Am. Brands, Inc.*, 634 F. Supp. at 1386 ("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.").

would be required to be published under Rule 14a-8, does not "actually conflict" with Rule 14a-8 in any way. *See Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 415 (2d Cir. 2002) ("The Supreme Court ha[s] found implied conflict pre-emption where it is impossible for a private party to comply with both state and federal requirements . . ." (internal quotations omitted)). Quite simply, it would not be "impossible" for a company such as EA to comply with both Rule 14a-8 and the Recommended Amendment advocated in the Proposal.

Unable to point to any direct conflict, both EA and the Chamber argue that the Recommended Amendment, if adopted, would be "inconsistent with" Rule 14a-8 because it someday may require EA to publish a shareholder proposal that otherwise the Company would be permitted to exclude. But in this regard, their argument proceeds from an incorrect premise. Both EA and the Chamber improperly equate the discretion afforded to a "company" under Rule 14a-8 with "corporate boards," which are charged under *state law* with the day-to-day management of corporations. In other words, EA and the Chamber argue that because Rule 14a-8 affords a certain level of discretion to a corporation in determining what kinds of shareholder proposals to exclude, this *ipso facto* means that the corporate boards are, as a matter of federal law, vested with unfettered discretion in this regard.[6] But that is not what Rule 14a-8 says. Rule 14a-8 speaks in terms of what proposals a "*company*" may exclude from proxy

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[6] The Chamber, for example, asserts that "[t]he exclusion procedures [of Rule 14a-8] entrust the company's directors and managers rather than shareholders with the task of determining whether grounds for exclusion exists . . ." (Chamber Br. at 7), and that the rule somehow "recognizes that managers and directors must be afforded some flexibility in evaluating whether certain shareholder proposals should be included [in the company's proxy material]." Chamber br. at 13-14. As discussed above, however, Rule 14a-8, by its terms, does not do any such thing. Neither the word "director" nor "management" appears anywhere in the Rule. Similarly, EA argues that the Requested Amendment is "inconsistent" with Rule 14a-8 because it would "eviscerate an issuer's discretion under the SEC rules to exclude certain proposals." Def. Br. at 14. But the adoption of the Recommended Amendment would not "eviscerate" any discretion of the *issuer* at all. Rather, the adoption of a bylaw or charter provision would constitute an *exercise* of such discretion. Indeed, the Recommended Amendment would do no more than to restrict the ability of *the Company's board* to exercise the discretion otherwise vested in it under *state law*. *See infra* at Sec. I.B.

materials. 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?" (emphasis supplied)). Rule 14a-8 says *nothing* about *how* the "company" shall exercise such discretion, and says nothing about either "directors" or "management" being required, as a matter of federal law, to exercise the discretion provided to the "company" in connection with the exclusionary provisions of the Rule.

In other words, the discretion provided to a "company" under Rule 14a-8 is separate and distinct from whatever managerial authority may be vested in that company's board of directors under state law. Thus, although the "company" may have a certain level of discretion in determining when to seek permission to exclude a shareholder proposal under Rule 14a-8, the manner in which corporate boards exercise their fiduciary responsibilities and managerial power is governed by *state law*. And because corporate bylaws may establish the rules for the internal functioning of corporations, the Recommended Amendment, which would establish a company specific rule governing how *EA* will exercise the discretion afforded to the *corporation itself* under Rule 14a-8, is perfectly consistent with – and complimentary to – the federal regime.

Courts within the Second Circuit historically have recognized a strong presumption *against* preemption of areas that traditionally have been addressed under state law. *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 93 (2nd Cir. 2006) (holding that there was a "presumption against federal preemption" in areas traditionally regulated by state law). It cannot be disputed that the adoption of corporate bylaws and certificate provisions is a matter that fundamentally relates to the internal affairs of a corporation, which traditionally has been regulated by state law. *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 ..."). Thus, for EA's preemption argument to prevail, the Court must find that Rule 14a-8 prevents companies from adopting bylaws or certificate provisions that define the limits within which corporate directors, bound by their fiduciary duties, can exercise their managerial authority to implement the discretion afforded corporations under Rule 14a-8 on the issue of shareholder proposals.

EA's argument, however, was explicitly *rejected* by the United States Supreme Court over thirty years ago. In *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462 (1977) (cited by the Chamber at 4 of its *amicus* brief), the Court held that "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." *Id.* at 479 (emphasis supplied). In this case, there can be no argument that Rule 14a-8 "expressly requires" the *directors* of a corporation to exercise the discretion afforded "issuers" under the Rule. If the SEC had, in fact, intended that only *directors* could exercise this discretion, presumably it would have said so.[7] Because neither Rule 14a-8 nor Section 14A of the Exchange Act "expressly requires" corporate

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[7] To the extent Rule 14a-8 was interpreted to regulate the relationship between shareholders and corporate boards, there would be considerable doubt that the interpretation even would be within the SEC's rulemaking authority. *See The Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990) (holding that SEC exceeded its statutory authority by promulgating a rule to regulate the voting rights of shareholders). Indeed, as the U.S. Chamber of Commerce itself once noted: "We believe the lack of Congressional action [on election-related matters in the Sarbanes-Oxley Act] should lead the Commission to act cautiously in interpreting its authority under Section 14 to relate to matters of corporate governance." Letter, from David T. Hirschmann, Senior Vice President, U.S. Chamber of Commerce, to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, at 7 ("Hirschmann Ltr") (Eisenhofer Decl. Ex. 2) .

directors to be afforded unfettered discretion in determining when to cause the corporation to exclude shareholder proposals, it cannot be said that state laws that would permit companies to adopt bylaws or certificate amendments defining when and how the *corporation* would exercise the discretion afforded under Rule 14a-8 is "preempted" by federal law or somehow "contrary" to the Rule so as to render the Proposal excludable under Rule 14a-8(i)(3).

Both EA and the Chamber argue that the Requested Amendment would cause EA to "opt-out" of Rule 14a-8. Def. Br. 22; Chamber Br. at 3, 8, 10-11. This is simply not true. The Requested Amendment, if adopted, would neither prohibit EA from publishing proposals that would be *required* under Rule 14a-9, nor would it permit EA to exclude proposals in categories *other than* the thirteen areas enumerated in subsection (i) of the Rule. For example, Rule 14a-8 *requires* the Company to publish proposals submitted by a shareholder who has "continuously held at least $2,000 in market value, or 1% of the Company's securities entitled to be voted on the proposal at the meeting for at least one year [prior to] the date [on which the shareholder] submit[ed] the proposal." Rule 14a-8(b)(1). A corporate bylaw that would *raise* this threshold – and, for example, require the shareholder to own at least $50,000 in stock in order to submit a proposal – would constitute an impermissible attempt to "opt out" of the Rule 14a-8 process. This is because the company could not comply with Rule 14a-8 and this hypothetical bylaw at the same time. Similarly, a bylaw that would permit a corporation to exclude a proposal "that is opposed by management" likewise would be unlawful because it would *add* an exclusion that is not included under subsection (i) of Rule 14a-8 (thus permitting the exclusion of a proposal that Rule 14a-8 otherwise would *require* to be included), and would thus frustrate the purpose of the Rule. *See SEC v. Transamerica Corp.*, 163 F.2d 511, 516 (3d Cir. 1947) (holding that directors could not invoke corporate bylaw to *prevent* shareholders from making a proposal that was a

proper subject for shareholder action under Delaware law and thus was *permitted* under the SEC's shareholder proposal rule).

In contrast, the Recommended Amendment urged in the Proposal would not "opt out" of Rule 14a-8 precisely because it would not permit the Company to exclude a proposal that Rule 14a-8 would require to be published. Put another way, Rule 14a-8 provides the *minimum* level for the publication of shareholder proposals. So long as the corporation does not purport to deviate from this minimum requirement, it does not "opt out" of the disclosure regime contemplated by Rule 14a-8. *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) ("it must be noted that Schedule 14A sets only minimum disclosure standards"); *Cohen v. Ayers*, 449 F. Supp. 298, 317 (N.D. Ill 1978) ("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 Recommended Amendment, therefore, would not "frustrate" Rule 14a-8 itself, and thus cannot be barred under Rule 14a-8(i)(3). *Cf. SEC v. Transamerica*, 163 F.2d at 511.[8]

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[8] In holding that the defendant corporation could not invoke a corporate bylaw to *prevent* shareholders from considering a bylaw amendment proposal that was a proper subject for action by shareholders under Delaware law, and thus was required to be published under the SEC's shareholder proposal rule, the Court of Appeals for the Third Circuit explained that the purpose of the shareholder proposal rule was to *promote shareholder sufferage*, not to limit what shareholders can or cannot consider:

> Admittedly, so long as the notice provision of By-Law 47 remains in effect unless management sees fit to include notice of a by-law amendment proposed by a stockholder in the notice of meeting the proposed amendment can never come before the stockholders' meeting with complete correctness. The same would be true even if one per centum of the stockholders backed the proposed amendment. But Transamerica's position is overnice and is untenable. In our opinion Gilbert's proposals are proper subjects for stockholder action within the purview of Proxy Rule X-14A-7 since all are subjects in respect to which stockholders have the right to act under the General Corporation Law of Delaware.

B. Rule 14a-8 Co-Exists With, And Critically Relies Upon, State Law

As discussed above, Rule 14a-8 provides a "company" with a certain level of discretion in determining whether to publish a proposal that otherwise could be excluded for one of the reasons enumerated in subsection (i) of the rule. Rule 14a-8(i). But the Rule does not dictate *how* that decision is to be made. For this, the SEC and corporations must look to state law, which regulates how corporations function. *Santa Fe Indus. Inc.*, 430 U.S at 479. State law is thus *complementary to* Rule 14a-8, not preempted by it.

EA's and the Chamber's entire argument the level of discretion that corporate boards have under the existing state of affairs at EA is premised on *state* law, not federal law. EA's Board of Directors now has the authority to exercise the discretion provided to the Company under Rule 14a-8 precisely because *state law* grants them this authority. 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). While EA's Certificate of Incorporation is presently silent on the scope of the Board's authority,[9] Section 2.1 of the Company's bylaws presently provide that "[t]he Board of Directors

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> But assuming arguendo that this was not so, we think that we have demonstrated that [Gilbert's proposals are within the reach of] security-holder action were it not for the insulation afforded management by the notice provision of By-Law 47. If this minor provision may be employed as Transamerica seeks to employ it, it will serve to circumvent the intent of Congress in enacting the Securities Exchange Act of 1934. *It was the intent of Congress to require fair opportunity for the operation of corporate suffrage. The control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a).* We entertain no doubt that Proxy Rule X-14A-7 represents a proper exercise of the authority conferred by Congress on the Commission under Section 14(a). This seems to us to end the matter. The power conferred upon the Commission by Congress cannot be frustrated by a corporate by-law.

SEC v. Transamerica, 163 F.2d at 518 (emphasis supplied).

[9] *See* Amended And Restated Certificate Of Incorporation Of Electronic Arts Inc., filed as Exhibit 3.04 to Form 10K filed by Electronic Arts, Inc., on June 29, 2000 (Eisenhofer Decl., Ex. 3.).

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."[10] And under Delaware law, the bylaws of a corporation "traditionally ... 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). It is thus only through Section 141(a) of the DGCL and Section 2.1 of the Company's existing bylaws – the "rules by which [EA's] board conducts its business" -- that EA's directors currently have the ability to exercise the discretion provided to the "company" under the exclusionary provisions of Rule 14a-8.

In their briefs, neither EA nor the Chamber even cites Section 141 of the DGCL, and both of them ignore the limiting language of Section 2.1 of EA's own bylaws entirely.[11] Nevertheless, because EA's and the Chamber's argument that EA's Board has the authority to exercise discretion in determining whether to seek permission to exclude a shareholder proposal under Rule 14a-8 depends on Delaware law and EA's governing documents, neither one of them can dispute the fact that the Board's supposed discretion in this regard can also be defined and constrained by state law arrangements. Section 141 of the DGCL, for example, expressly provides that "if any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed by the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of

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[10] Section 2.1, Powers, Amended And Restated Bylaws Of Electronic Arts Inc. (as amended through November 8, 2006), filed as Exhibit 3.1 to the Form 8-K filed by Electronic Arts, Inc., on November 13, 2006 (Eisenhofer Decl., Ex. 4).

[11] At least the Chamber acknowledges the important role of state law, stating that: "State law governs the internal affairs of the corporation, and prescribes the corporate acts that require shareholder authorization." Chamber Br. at 4.

incorporation." 8 Del. C. § 141(a). And EA's own bylaws provide that the Board's managerial authority can be limited through the Company's certificate of incorporation (and, of course, an amendment to the operative bylaw itself). Thus, to the extent the Company has a provision in the certificate of incorporation or a bylaw that establishes the rules by which EA's directors conduct the Company's business with regard to shareholder proposals, those provisions will govern how the Company uses whatever discretion is left to it by Rule 14a-8. *See JANA Master Fund, Ltd. v. CNET Networks, Inc.*, Civil Action No. 3447-CC, 2008 Del. Ch. LEXIS *35 at *18 (Del. Ch. Mar. 13, 2008), *aff'd* 947 A.2d 1120 (Del. 2008), ("[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 added).

Furthermore, neither EA nor the Chamber can dispute that the EA directors' current use of whatever discretion is left to the Company by Rule 14a-8 is regulated by state law even in the *absence* of a specific bylaw or certificate provision. Delaware fiduciary duty law *still* governs how the directors can exercise whatever corporate powers that they have. *See Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998) ("The director's fiduciary duty to both the corporation and its shareholders has been characterized by this Court as a triad: due care, good faith, and loyalty. That tripartite fiduciary duty does not operate intermittently but is the constant compass by which all director actions for the corporation and interactions with its shareholders must be guided."). Thus, EA and the Chamber cannot legitimately argue that federal law, and Rule 14a-8 in particular, "preempts" any state law procedures that govern how a corporate board deals with shareholder proposals.

Specifically, because the managerial authority of EA's Board is created by state law, and the DGCL and EA's own bylaws provide that the managerial authority of the Company's Board can be defined through, among other ways, amendments to the Company's certificate of incorporation (which is precisely what the Proposal advocates), EA's and the Chamber's "preemption" argument hinges on their ability to demonstrate that Rule 14a-8 specifically requires EA's bylaws and certificate to permit the Company's directors to exercise "discretion" with respect to shareholder proposals. And this they cannot do.

The fact that Rule 14a-8 does not bar state law arrangements that impose obligations concerning shareholder proposals whose inclusion is not required by Rule 14a-8 is demonstrated by the fact that some jurisdictions have laws that *specifically require* the Company to include proposals whose inclusion may not be required under Rule 14a-8. For example, North Dakota recently adopted a law requiring 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 (requiring company to place proposals to amend a certificate of incorporation submitted by 5 % holders of stock in the notice for a shareholder meeting).[12] Similarly, some "issuers" subject to the proxy rules are incorporated in Bermuda and subject to The Bermuda Companies Act,[13] which requires publishing notice of "any resolution that may properly be moved and is intended to be moved" at an annual meeting. *See* The Bermuda Companies Act of 1981 § 79.

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[12] In a submission to the Securities and Exchange Commission last year, the Chamber cited the North Dakota statute with approval. Hirschman Ltr., *supra* n.7, at p. 11.

[13] Corporations incorporated under Bermuda law that are listed on a U.S. securities market are subject to Rule 14a-8. *See, e.g., AmerInst Ins. Group, Ltd.* SEC No-Action Ltr., 2006 WL 1006450 (April 14, 2006).

Similarly, at least one company, Comverse Technology, Inc., recently adopted a bylaw that requires the company to place in its proxy the names of shareholder-nominated directors, which may be excluded under Rule 14a-8(i)(8). Comverse's bylaw states:

> The Corporation shall include in its proxy materials for a meeting of shareholders at which directors are to be elected the name, together with the Disclosure and Statement (both as defined below in this Section 3(b)), of any person nominated for election (the "Nominee") to the Board of Directors by a shareholder that satisfies the requirements of this Section 3(b) (the "Nominator"), and allow shareholders to vote with respect to such Nominee on the Corporation's proxy card.

By-Laws of Comverse Technology, Inc. Amended and Restated as of April 20, 2007, filed as Exhibit 3 to the Form 8-K filed by Comverse Technology, Inc. on April 23, 2007, Art IV. Sec. 3(b) (Eisenhofer Decl. Ex. 5). According to EA's novel interpretation of the proxy rules, Comverse's attempt to improve its corporate governance was a flagrant violation of Rule 14a-8. Yet, Comverse reported the adoption of the bylaw in a form 8-K filed with the SEC on April 23, 2007 and, predictably, the SEC has not instituted an enforcement action against the company.

Finally, even the U.S. Chamber of Commerce has publicly stated in a submission to the SEC that state law can establish company-specific arrangements that permit the consideration and adoption of proposals that otherwise could be excluded under Rule 14a-8. Last year, the Chamber wrote to the SEC urging the Commission not to adopt a rule that would have required corporations to accept proposals advocating bylaw amendments that would require corporations to publish the names of shareholder-nominated candidates on the company's proxy (so-called "proxy-access" proposals). At that time, the Chamber stated: "[S]tate law defines the rights of shareholders, including the extent to which shareholders can propose by-law amendments and nominate directors *and the extent to which they have access to the company's proxy to do so.*"

Hirschmann Ltr., *supra* n. 10 at 11 (emphasis supplied).[14] The Chamber's central position in its amicus brief is of course clearly opposite to the one it took last year. Its radical and obviously self-serving shift in position is completely unwarranted.

C. The SEC's Consideration And Promulgation Of Rules Is Inconsistent With EA's Position

EA's and the Chamber's argument that Rule 14a-8(i)(3) necessarily precludes corporations from adopting any charter or bylaw provisions governing how the company will determine to exercise the discretion provided to the "company" under the Rule is not only inconsistent with the language and clear design of Rule 14a-8, but with the SEC's reasoning in its past consideration of its own Rules. To begin, in adopting Rule 14a-8(i)(3), the SEC suggested that the Rule was intended to allow the exclusion of proposals that *expressly violate* or are *prohibited* by other provisions of the proxy rules. The Commission stated:

> 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.

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[14] Indeed, the Chamber's defense of state law regimes that deviate from the minimum requirements established by federal law was eloquent:

> States can and do modify their laws to adjust the balance of power between companies and shareholders as they see fit, and to give more or less discretion to companies as to the rights that shareholders have. ... State law is the traditional and appropriate forum for defining the rights of shareholders with regard to director elections, by-law amendments and other fundamental corporate matters. The recent revisions in state law in these areas illustrate that state's are appropriately responsive to shareholder concerns and are able to balance the competing interests. The laws of the various states provide flexible environments in which new corporate governance ideas can be tested, refined and applied. There is no reason for the Commission to override state decision-making in this area and impose a one-size-fits-all federal solution.

Hirschmann Ltr. *supra* n 7, at 11-12. The Chamber cannot be heard, therefore, to complain that Prof. Bebchuk's Proposal is somehow improper because it would invoke the very state law protections and privileges that the Chamber invoked last year in opposing the SEC's adoption of a uniform "proxy access" 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).

Indeed, just last year when 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, it *never* suggested a belief that a bylaw requiring "proxy access" would, in fact, be inconsistent with the proxy rules and thus excludable under Rule 14a-8(i)(3). Rather, the Commission 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 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); *see also AFSCME*, 462 F.3d at 130 n.9 (noting that whether or not Rule 14a-8(i)(8) allowed a company to exclude a bylaw relating to the nomination of directors from it proxy statement, a company could adopt such a bylaw). Thus, the SEC itself has acknowledged that the Recommended Amendment contemplated in the Proposal would be perfectly consistent with Rule 14a-8.

As a result, it is wholly irrelevant to this case that the SEC considered and rejected two alternate ways of regulating shareholder proposals. Both proposals dealt with suggestions to changing the minimum standards for disclosure of shareholder proposals under the proxy rules;

neither proposed rule would have purported to nullify any charter or bylaw provisions that governed whatever discretion was left to companies under Rule 14a-8. Under one considered rule change, the Commission considered allowing companies to follow a federally specified process for altering the minimum disclosure requirements for shareholder proposals. *See* Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release Nos. 22666, 35-22666, 34-19135, IC-12734, 26 S.E.C. Docket 494, 1982 WL 600869 (Oct. 14, 1982) ("Exchange Act Release 34-19135"). Under the other considered rule change, the federal minimum requirements would have been raised to prohibit the exclusion of any proposals that were proper under state law and did not involve the election of directors. *See id.* However, the fact that the SEC ultimately declined to adopt either proposed rule does *not* provide any basis to hold that, Recommended Amendment at issue here is necessarily precluded under the existing Rule. *See AFSCME*, 462 F.3d at 130 n.8 (SEC's failure to adopt rule on proxy access did not mean that shareholder proposal advocating adoption of proxy access bylaw was precluded under existing proxy rules).

Finally, EA's reliance on the SEC Staff's No-Action letter in *State Street Corporation* is not persuasive. In that case, the Staff issued a no action letter permitting the Company to exclude a proposal which provided that "[e]very proposed by-law amendment that is timely submitted by one or more stockholders shall be included, verbatim, in the corporation's proxy statement ..." *See State Street Corp.*, SEC No-Action Letter, 2004 WL 257703, at *2 (Feb. 3, 2004). Without further elaboration, the Staff opined that "[t]here appears to be some basis for your view that State Street may exclude the proposal under rule 14a-8(i)(3), as contrary to the Commission's proxy rules." *Id.* at *1. The Proposal at issue here does not suffer from the same defects as the proposal in *State Street*. In theory, the *State Street* proposal would have required

the Company to include proposals that contained statements that would be considered false and misleading, and thus contrary to Rule 14a-9. Professor Bebchuk's Proposal, in contrast, specifically advocates the adoption of a certificate or bylaw provision that would require the inclusion of certain proposals only to the extent permitted under applicable law. In any event, "no-action letters constitute neither agency rule-making nor adjudication and thus are entitled to no deference beyond whatever persuasive value they might have." *MONY Group, Inc. v. Highfields Capital Mgmt. L.P.*, 368 F.3d 138, 146 (2d Cir. 2004); *See also New York City Employees' Retirement Sys. v. S.E.C.* 45 F.3d 7, 13 (2d Cir. 1995) ("[T]he court need not give [No-Action letters] the same high level of deference that is accorded formal policy statements or rule-making orders."), cited in Def. Br. at 12 n.18.

II. EA MAY NOT EXCLUDE THE PROPOSAL UNDER ANY OTHER OF THE SUBSTANTIVE REQUIREMENTS OF RULE 14a-8(i)

A. The Proposal May Not be Excluded Under Rule14a-8(i)(8)

EA's argument that the Proposal may be excluded under Rule 14a-8(i)(8) (Def. Br. at 15-18) ignores the plain, unambiguous language of the rule, which states that an issuer may exclude a shareholder proposal "[i]f 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." Rule 14a-8(i)(8). The Proposal, on its face, relates to neither an election nor an election procedure; in fact it has *nothing* to do with elections. As such, it cannot be excluded from Rule 14a-8(i)(8).

When courts "interpret[] an administrative regulation, as in interpreting a statute, [they] must begin by examining the language of the provision at issue." *AFSCME*, 462 F.3d at 125; *see also Estate of Pew v. Cardarelli*, 527 F.3d 25, 30 (2nd Cir. 2008) ("We first look to the statute's plain meaning; if the language is unambiguous, we will not look farther."). On its face, the

Proposal does not "relate[] to a nomination or an election for membership on the company's board of directors... or a procedure for such nomination or election." It relates to how directors will exercise their discretion in determining whether to seek exclusion of a shareholder proposal – no more, no less. Indeed, neither EA nor the Chamber can conjure up a straight-faced argument explaining how the language of the Proposal remotely can be deemed to "relate[] to ... an election" or an election-related procedure. For this reason alone, EA's and the Chamber's reliance on Rule 14a-8(i)(8) is misplaced.

Nevertheless, ignoring the fact that the Proposal does not mention an election or election procedure, EA posits a daisy chain of events in which the Proposal may, someday lead to the Company placing shareholder-nominated directors in EA's proxy statement. *See* Def. Br. at 17. Not only does EA's argument assume a host of events that may or may not ever happen, but its analysis is irrelevant and fails to explain how the Proposal itself – as opposed to EA's creative imagination – actually relates to an election so as to be excludable under Rule 14a-8(i)(8).

As an initial matter, EA severely truncates the path from Bebchuk's Proposal being placed on EA's proxy statement to a shareholder-nominated director being placed on the Company's proxy statement. *See* Def. Br. at 17. In reality, the chain would require six steps, each of which may or may not occur, taking place over at least a four year period. It would look like the following:

- Step 1: In Year 1, shareholders approve the Proposal (which they may or may not do);
- Step 2: In Year 2, assuming shareholders pass the Proposal in Year 1, EA's Board decides to place the Requested Amendment on the Proxy (which the Board may or may not do);
- Step 3: In the annual meeting for Year 2, assuming the Board places the Recommended Bylaw on the EA's proxy statement, shareholders would have to approve it (which they may or may not do);

- Step 4: In Year 3, assuming shareholders approve the Requested Amendment during the annual meeting in Year 2, a 5% holder of EA emerges and seeks to use the adopted Recommended Amendment to place on the proxy, consistent with the requirements of the Recommended Amendment and to the extent permitted by law, a proposal for amending the bylaws to allow shareholders to place director nominees on the Company's proxy (which may or may not happen);

- Step 5: Also in Year 3, assuming that a 5% stockholder emerges with the requisite proposal, shareholders would have to vote to adopt it (which may or may not happen); and

- Step 6: In Year 4, assuming that the shareholders vote to adopt the proposal which might or might not be submitted during Year 3, a shareholder may emerge seeking to exercise rights under that bylaw to require the company to publish the name of a shareholder-nominated candidate for election as a director.

Clearly, the chain of events wherein the Proposal may lead to a Bylaw relating to an election procedure is highly attenuated and is not a basis to exclude the Proposal under Rule 14a-8(i)(8)'s plain meaning. *See AFSCME*, 462 F.3d at 125 ("holding that administrative regulations must be construed in accordance with their plain meaning").

Second, the recent amendment to Rule 14a-8 actually strengthens Professor Bebchuk's argument that the Proposal is not excludable under Rule 14a-8, not weakens it as EA argues. Def. Br. at 16. Prior to 2006, Rule 14a-8(i)(8) allowed issuers to exclude proposals "if the proposal relate[d] to an election for membership on the company's board of directors or analogous governing body." In 2006, the Court of Appeals for the Second Circuit held "that a shareholder proposal that [sought] to amend the corporate bylaws to establish a procedure by which shareholder-nominated candidates may be included on the corporate ballot [did] not relate to an election within the meaning of [Rule 14a-8(i)(8)] . . . ." *AFSCME*, 462 F.3d at 123. The SEC believed Court construed "relates to an election" too narrowly and modified the rule to clarify it. *See* Exchange Act Release No. 34-56914. The SEC Release explaining the modification states:

> 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.

Exchange Act Release No. 34-56914 at II (quoted in part by Def. Br. at 16). 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 it merely enabled company's to exclude shareholder proposals that contained a "procedure for such nomination or election" directors. It is undisputed that the Proposal does not contain such a procedure. Thus, the recent modification clarifying the scope of Rule 14a-8(i)(8) supports Professor Bebchuk's position that the Proposal is not excludable under that rule.

What EA and the Chamber of Commerce are asking is for the Court to rewrite the newly-amended Rule 14a-8(i)(8) to permit the exclusion of proposals not only if they relate to "an election for membership on the company's board of directors ... or a procedure for such nomination or election," Rule 14a-8(i)(8) but also to "a procedure for amending the company's bylaws.' But the Rule does *not* permit the exclusion of proposals that establish procedures governing the amendment of bylaws simply because that procedure *might*, someday, involve a bylaw that may be election-related. Had the SEC, which considered a huge number of comments from a wide profile of both corporate and shareholder interests, intended to permit the exclusion of any proposals relating to the adoption of bylaws, presumably it could have said so.[15]

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[15] Indeed, the Proposal and Requested Amendment are wholly consistent with the purpose behind the new amendment of Rule 14a-8(i)(8). The Exchange Act Release No. 34-56914 states: "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." Here any Qualified Proposal must be "valid under applicable law" and directors would only be required to place Qualified Proposals on the Company's proxy statement "to the extent permitted by law." Thus, there is no danger, ever, that the Proposal would require the Company to conduct an election of directors contrary to the proxy rules.

Finally, EA purports to have divined that Professor Bebchuk's true intent in submitting the Proposal was to start the long and uncertain chain which could produce a contested election at EA in four years. Def. Br. 17-18. Defendant relies on a recent law review article about election reform authored by Professor Bebchuk and a comment letter submitted to the SEC by Professor Bebchuk on behalf of thirty-nine law professor in the course of the SEC's consideration of the 2007 amendments. *See* Def. Br. at 17 (citing Letter from Lucian Bebchuk on behalf of Thirty-Nine Law Professors, to the SEC, at 2 (Oct. 2, 2007)). Defendants unfortunately did not read the part of Professor Bebchuk's work that is more directly related to the proposal under consideration – his work in support of facilitating shareholders' ability to initiate and adopt governance arrangements. *See, e.g.,* Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1784-1813 (2006); Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 Harv. L. Rev. 833, 833-914 (2005). Professor Bebchuk's proposal at EA focuses on facilitating the ability of shareholders to initiate and adopt bylaw amendments, not on election reform.

In any case, Defendant does not explain why Professor Bebchuk's intent in enacting the Proposal has any bearing on the Court's decision to apply the clear, unambiguous language of Rule 14a-8(i)(8). Further, to the extent that for some reason Professor Bebchuk's intent on enacting the Proposal is relevant, it is not an issue that can be decided on a motion to dismiss. *Bowles v. New York City Transit Auth.*, Nos. 00 Civ. 4213 and 03 Civ. 3073, 2006 WL 1418602, at *11 (S.D.N.Y. May 23, 2006) ("[I]ntent is of course an issue of fact which could not be decided on a motion to dismiss.").

B. The Requested Amendment, If Adopted, Would Not Impermissibly Obviate Other Exclusions Of Rule 14a-8(i) So As To Permit The Exclusion Of The Proposal.

Both EA and the Chamber go to great lengths to argue that the Proposal should be excluded because, if the Recommended Amendment were adopted, the provision could result (again, after a long series of events that may or may not ever occur) in the Company having to include certain proposals that in the absence of the Recommended Amendment the Company may be permitted to exclude. *See* Def. Br. at 18-20; Chamber Br. at 11-13. The mere possibility that EA someday might be required to publish a shareholder proposal that it otherwise would be permitted to exclude, EA and the Chamber argue, is enough to warrant the exclusion of the Proposal itself. *See* Def. Br. at 18-20; Chamber Br. at 11-13. Their arguments in this regard are mistaken.

EA's argument that the Proposal should be excluded because the Requested Amendment "might" one day require the Company to include a proposal that falls within one of the thirteen enumerated exclusions in Rule 14a-8(i) is not grounds to exclude the Proposal itself. Rule 14a-8 does not prohibit companies from including such proposals, and the inclusion of such a proposal, either because the Board chose to include it or because the Board was required to do so under a state law obligation, would not contradict Rule 14a-8. As a result, and as discussed above (*supra* Sec. I), EA's argument that the Recommend Amendment contradicts the securities laws and is preempted by them fails. Because (1) Rule 14a-8 provides only for the *minimum* level of required disclosures, (2) corporations are free to publish proposals that otherwise may be excluded, and (3) the Requested Amendment, if adopted, would not change the minimum

standards for the inclusion of shareholder proposals established by Rule 14a-8, the Proposal is perfectly consistent with the Rule and may not be excluded under subsection (i)(3).[16]

EA's and the Chamber's parade of supposedly horrible circumstances that would result from the inclusion of the Proposal is completely unfounded. EA warns that the proposal would potentially result in a "gross waste of corporate resources." Def. Br. at 18. The Chamber stresses its interest in this case is motivated by a concern of shareholder proposals that may promote narrow, parochial interests, or to advance social and political goals that are sponsored by a small number of individuals or so-called "special interests." Chamber Br. at 1. Yet both of their briefs ignore the moderate nature of the Proposal itself and the high threshold it sets for anyone that might use the procedure outlined in the Recommended Amendment, in the event it is ever adopted. The Recommended Amendment would apply only to by-law proposals, and only to those that are initiated by shareholders with more than a 5% stake in the Company. While the Chamber stresses that more than 600 proposals were submitted in 2007, it does not identify a single proposal introduced by a 5% shareholder. The claim that the Recommended Amendment, if adopted, could lead to a flood of proposals and a "waste" of corporate assets, therefore, is completely misplaced.

In any event, EA's and the Chamber's argument that the Recommended Amendment is just a bad idea that might result in corporate waste is misdirected. It is an argument that should

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[16] Defendant's argument that the Proposal is inconsistent with other proxy rules must also fail for similar reasons. Def. Br. at 18 n.32. The proposal may not be excluded under Rule 14a-8(i)(4) because it does not redress a personal grievance; may not be excluded under Rule 14a-8(i)(5) because it does not "relate[s] to operations which account for less than 5 percent of the company's total assets;" may not be excluded under Rule 14a-8(i)(6) because the company has the power to enact the Proposals; may not be excluded under Rule 14a-8(i)(7) because it does not relate to the Company's ordinary business operations; may not be excluded under Rule 14a-8(i)(9) because it does not conflict with the Company's proposal; may not be excluded under Rule 14a-8(i)(10) because the Proposal has not been substantially implemented; may not be excluded under Rule 14a-8(i)(11) because it does not duplicate another proposal; may not be excluded under Rule 14a-8(i)(12) because the Proposal has never been previously submitted to the company; and may not be excluded under Rule 14a-8(i)(13) because the Proposal does not relate to cash or stock dividends.

be made to the shareholders – not the Court. Rule 14a-8 does not allow a board to exclude a proposal because the directors think that the proposal is a bad idea that would result in waste or would be bad corporate policy. Rather, if the directors oppose such a proposal, Rule 14a-8 specifically provides that the Board may include a statement in the proxy articulating its opposition to the proposal. This process facilitates the kind of communication that Rule 14a-8 is designed to promote. *See Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 54 F.3d 69, 72 (2d. Cir. 1995) (holding that a purpose or Rule 14a-8 was to "facilitate communications among the shareholders as well as between shareholders and management"). What the board cannot do, however, is to simply bar the proposal altogether simply because it believes that its passage would be undesirable.

III. THE PROPOSAL IS NOT VAGUE OR INDEFINITE

In a final attempt to justify the exclusion of the Proposal, EA and the Chamber argue that the Proposal is somehow "vague and indefinite" and therefore contrary to Rule 14a-9. Def. Br. at 20-24; Chamber Br. at 16-20. To do so, however, they are forced to conjure up a series of hypotheticals that either overstate any alleged "confusion" that may result from adoption of the Recommended Amendment, ignore the language of the Proposal itself, or claim "uncertainties" that somehow may befall EA's Board if the Proposal was adopted but which actually exist even in the absence of the Recommended Amendment.

The SEC has explained that a company may only exclude a proposal for vagueness under Rule 14a-8(i)(3) where

> 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[.]

Staff Legal Bulletin 14B, Shareholder Proposals, *available at* http://www.sec.gov/interps/legal/cfslb14b.htm (Sept. 15, 2004) ("Staff Legal Bulletin 14B"). EA cannot meet this high standard.

As an initial matter, the fact that counsel for EA and the Chamber can conceptualize some uncertainties that someday might arise and call for judicial interpretation of the Recommended Amendment does *not* mean that the Proposal itself is either vague or ambiguous. *See Republic of Rwanda v. Ferone*, No. 97 Civ. 7663, 2007 WL 2890174, at * 2 (S.D.N.Y. Oct. 2, 2007) ("While defendants pretend that the words 'not approved' . . . are somehow ambiguous, such simple, straightforward language admits of no ambiguity and must be enforced."); *Oas v. Royal Maccabees Life Ins. Co.*, No. 95-CV-2451, 1995 WL 664640, at *7 (E.D. Pa. Nov. 6, 1995) ("Plaintiff's own interpretation of the provisions is contrary to common law principles of contract interpretation which stress the importance of ascertaining *the plain* meaning of the language. In addition, merely because the Plaintiff has a different interpretation than the Defendant does not mean that the language is ambiguous. The Plaintiff appears to have conjured ambiguity where there is none." (emphasis in original)).[17]

What EA and the Chamber need to show, and which they cannot demonstrate, is that the Proposal is so afflicted by serious ambiguities that neither shareholders nor the Company itself can understand exactly what the Proposal is advocating. *See* Staff Legal Bulletin Rule 14B. For example, despite the plain language of the Proposal, EA argues that the Proposal's interaction with Rule 14a-8 is ambiguous. Def. Br. at 20-22. EA feigns ignorance when it wonders whether the Recommended Amendment would establish some kind of "alternative procedure" to Rule

[17] The Chamber's attempt to manufacturer ambiguity is especially transparent given that it purported to discover ambiguities that EA, judging from its brief and its No Action Request, found crystal clear.

14a-8, and if so what procedures would apply. The answer to EA's concern is simple and straightforward. The Recommended Amendment would not impact the 14a-8 process *at all.* Rather, it would only impact *when the Company would invoke the "no action" procedure contemplated by Rule 14a-8(j)* by exercising its discretion to seek permission to exclude a proposal under one of the exceptions enumerated in subsection (i) of the Rule. Thus, the eligibility and procedural requirements for shareholders to introduce proposals remain unaffected. In other words, *if* the Recommended Amendment was submitted for a shareholder vote, and *if* it was adopted by shareholders, shareholders would still be required to meet the procedural and eligibility requirements for introducing proposals under Rule 14a-8, but *if* the proposal is submitted by a shareholder or group of shareholders (who each satisfy the eligibility requirements) who own at least 5% of the Company's outstanding shares, and the proposal would effect an amendment to the Company's bylaws, then the Company will not seek to exclude the proposal unless it is illegal or relates to the company's ordinary business. ¶ 18.

EA also complains that the provision of the Recommended Amendment that would require the proposing shareholder(s) to furnish to EA information that the Company "reasonably requested" for purposes of determining the shareholders eligibility to submit the proposal is somehow too vague because the term "reasonably request" is a "facially indefinite phrase." Def. Br. at 23. This argument is absurd. EA's own bylaws require the Company or stockholders to understand and interpret the term "reasonable" on no fewer than five separate occasions:

- Section 1.2(c) of the Company's bylaws states that when a stockholder nominates a director for election, the stockholder must give proxies to "to holders of a percentage of the Corporation's voting shares *reasonably believed* by such stockholder or beneficial owner to be sufficient to elect the nominee or nominees proposed to be nominated by such stockholder;"

- Section 1.10 of the Company's bylaws states that the company must place the names and addresses of stockholders entitled to vote at an annual meeting on a "*reasonably* accessible electronic network;"

- Section 1.11 of the Company's bylaws requires election inspectors to "retain[] for a *reasonable period* a record of the disposition of any challenges made to any determination by the Inspector(s);"

- Section 6.1 of the Company's bylaws indemnifies directors an officers "to the fullest extent permitted by the DGCL, against all expenses, liability and loss . . . *reasonably incurred* or suffered by such person;" and

- Section 9.3 of the Company's bylaws states that board members may rely "upon such information, opinions, reports or statements presented to the Corporation by any of the Corporation's officers or employees . . . as to matters the member *reasonably believes* are within such other person's professional or expert competence . . ."

Amended and Restated Bylaws of Electronics Arts, Inc. (emphasis added). In any event, the Proposal is *precatory*, so *if* the shareholders approve the Proposal, and *if* the Board thereafter to determines to craft a bylaw or certificate amendment that reflects the Recommended Amendment, the Board itself could require the production of specific documents.

In its *Amicus Curiae*, the Chamber conjures up additional supposed ambiguities, which are equally frivolous. *First* the Chamber of Commerce argues that it is unclear whether a Qualified Proposal must expressly be cast as a bylaw. Chamber Br. at 18. The answer is clearly yes: the Proposal states that a Qualified Proposal must "only effect an amendment to the Corporation's Bylaws." *See* ¶ 18. *Second*, Chamber argues that it is uncertain what would happen if an initiator stated that he had an intent to hold five percent of EA's stock, but, before the annual meeting, his holdings fell below five percent. Chamber Br. at 18-19. This complaint is absurd as well. The Recommended Amendment urged by the Proposal specifically contemplates a continuous holding requirement. ¶ 18 (contemplating that a stockholder making the proposal "represent[] in writing an intention to hold such shares through the date of the

Corporation's annual meeting."). This is the same requirement that exists under Rule 14a-8. *See* Rule 14a-8(b).

Third, the Chamber argues the Proposal is somehow ambiguous because the Recommended Amendment would require the Company to allow shareholders to vote on a proposal if it "would be valid under applicable law" or is "a proper action for stockholders under state law." Chamber Br. at 19. This is a straw-man argument. Under Rule 14a-8, an issuer may exclude a proposal "[i]f the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization" or "[i]f the proposal would, if implemented, cause the company to violate any state, federal or foreign law to which it is subject." Rule 14a-8(i)(1) and (2), respectively. The "no-action" process before the SEC's Division of Corporation Finance is purely advisory in nature. *See* SEC Release No. 19603. Thus, even in the absence of the Requested Amendment, companies that seek to exclude shareholder proposals based on an alleged violation of state law do so at their own peril. *See New York City Employees' Retirement System,* 45 F.3d at 13 ("[T]he Cracker Barrel no-action letter does not bind the courts. Should NYCERS bring a federal suit against Cracker Barrel under Rule 14a-8, the court may find a Rule 14a-8 violation despite the no-action letter.").

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied.

Respectfully submitted,

GRANT & EISENHOFER P.A.

Dated: September 8, 2008

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CERTIFICATE OF SERVICE

I, Jay W. Eisenhofer, hereby certify that on September 8, 2008, the foregoing Plaintiff's Memorandum of Law in Response to Electronic Arts Inc.'s Motion to Dismiss was electronically filed and served via the Court's CM/ECF Filing System to all known counsel of record.

Dated: September 8, 2008

s/ Jay W. Eisenhofer
Jay W. Eisenhofer (JE 5503)