No. 21-15923

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOELLE LEE, derivatively on behalf of The Gap, Inc.,

Plaintiff-Appellant,

v.

ROBERT J. FISHER; SONIA SYNGAL; ARTHUR PECK; AMY BOHUTINSKY; AMY MILES; ISABELLA D. GOREN; BOB L. MARTIN; CHRIS O'NEILL; ELIZABETH A. SMITH; JOHN J. FISHER; JORGE P. MONTOYA; MAYO A. SHATTUCK III; TRACY GARDNER; WILLIAM S. FISHER; DORIS F. FISHER; THE GAP, INC., Nominal Defendant,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of California, Case No. 3:20-cv-06163-SK

DEFENDANTS-APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee The Gap, Inc. states that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

s/ Roman Martinez

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

STATUTES AND REGULATIONS

Page(s)

OTHER AUTHORITIES

INTRODUCTION

In the summer of 2020, as racial justice protests swept the nation, Plaintiff's counsel took the opportunity to launch a rapid-fire series of lawsuits against a number of public companies, alleging that their boards of directors lied about valuing diversity. The complaints were at once inaccurate and offensive, speculating about the racial composition of different companies, undercounting a board's Black directors, and selectively discounting key forms of diversity like gender and sexual orientation. They repeated the same basic claims, even cutting and pasting certain company-specific factual allegations from one lawsuit to the next. To date, every court to rule on a dispositive motion in these cases—nine rulings so far—has granted dismissal for the defendants.

In fall 2020, Plaintiff brought a similar suit against Gap, Inc. ("Gap" or "Company"). The Complaint follows the same template as the prior suits, alleging that Gap lacks a sufficiently diverse board of directors and workforce, and therefore its directors violated their fiduciary duties and issued false and misleading proxy statements about diversity, in violation of Section 14(a) of the Exchange Act. Like the other cases, the Complaint gets basic facts wrong about Gap's Board and its longstanding commitment to diversity and inclusion. It alleges that the Board is "all-white" and that Gap has "consistently refused" to appoint Black or minorities to management positions. ER-50–54, 67, 73, 87 (¶¶ 1-2, 4, 53, 71, 105).

Those allegations are demonstrably false. Gap's CEO, Sonia Syngal, is an Indian-American woman, ER-71 (¶ 70)—one of only three women of color CEOs among all Fortune 500 companies at the time of the Complaint.[1] She is one of two non-white members of Gap's Board, the other of whom is Latino. Ex.[2] C at 7-8, 13 (2020 Proxy). Of the last three directors elected to the Board, all have been women. *Id.* at 5-8. Gap's Board has also had Black directors for much of the past two decades—Glenda Hatchett from 1999 to 2004, Ex. A at 3 (2004 Proxy), and Dr. Kneeland Youngblood from 2006 to 2012, Ex. B at 8 (2011 Proxy).

Gap has consistently been a leader among its corporate peers on diversity and inclusion. The majority of Gap's U.S. employees are non-white (56%), and over three-quarters of its global workforce are women. Ex. D. Seven of the Company's ten leadership team members are women, ER-71 (¶ 70), and women comprised six of the 13 members of the Board as of the date Plaintiff filed suit, ER-50–53, 62–64 (¶¶ 1, 28-29, 31-41). Since then, Gap has only continued to foster its commitment to diversity and inclusion.[3] The Company has been at the forefront of having third-

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[1] Unless otherwise noted, Gap's Board and workforce are described as they were at the time of the filing of the Complaint.

[2] References to "Ex. [X]" refer to exhibits to the Motion for Judicial Notice filed concurrently.

[3] In 2021, Gap added two directors to its Board, both of whom are women and one of whom is Black. *See Gap Inc. Appoints Salaam Coleman Smith to Its Board of Directors*, Business Wire (Mar. 4, 2021), https://www.businesswire.com/news/home/20210304005200/en/Gap-Inc.-Appoints-Salaam-Coleman-Smith-to-Its-

party auditors review pay data in an effort to ensure equal pay for equal work. Ex. E. Gap's commitment to diversity has been recognized by the Human Rights Campaign and Bloomberg, Ex. D, as well as Refinitiv, which ranked the Company ninth out of more than 7,000 companies in its index of the world's most diverse and inclusive companies.[4]

In addition to these factual mistakes, the Complaint is fundamentally wrong on the law. The District Court properly dismissed the case below. This Court should now affirm for any of three alternative reasons.

First, the District Court properly granted the motion to dismiss on *forum non conveniens* grounds, because Plaintiff brought suit in the wrong court. Gap's Bylaws contain a binding forum-selection clause stating that the Delaware Chancery Court "shall be the sole and exclusive forum for . . . any derivative action or proceeding

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Board-of-Directors; *Lisa Donohue Appointed to Gap Inc. Board of Directors*, Business Wire (Nov. 9, 2021), https://www.businesswire.com/news/home/20211109006537/en/Lisa-Donohue-Appointed-to-Gap-Inc.-Board-of-Directors.

[4] Press Release, Refinitiv, *Refinitiv Announces the 2019 D&I Index Top 100 Most Diverse & Inclusive Organizations Globally* (Sept. 16, 2019), https://www.refinitiv.com/en/media-center/press-releases/2019/september/refinitiv-announces-the-2019-d-and-i-index-top-100-most-diverse-and-inclusive-organizations-globally. In 2021, Refinitiv ranked Gap as the number one most diverse and inclusive company. *See* Press Release, Refinitiv, *Refinitiv Announces the 2021 D&I Index Top 100 Most Diverse & Inclusive Organizations Globally* (Sept. 14, 2021), https://www.refinitiv.com/en/media-center/press-releases/2021/september/refinitiv-announces-the-2021-d-and-i-index-top-100-most-diverse-and-inclusive-organizations-globally.

brought on behalf of the Corporation." ER-45–46. That provision is valid and enforceable, and Plaintiff's derivative claims fall within its scope.

Plaintiff argues that the District Court's decision to enforce the clause against her Section 14(a) derivative claim violates a "strong public policy" in the Exchange Act. She contends that such policies are clearly stated in the Act's "exclusive jurisdiction" and "anti-waiver" provisions. Plaintiff is mistaken. Although the Exchange Act vests federal courts with exclusive jurisdiction over Exchange Act claims, enforcing Gap's forum-selection clause does not contravene that mandate. As all parties to this case recognize, enforcing the clause does not result in state courts adjudicating Exchange Act claims. It results in dismissal of those claims.

Nor does this result contravene the Exchange Act's anti-waiver provision, which applies only to waivers of "compliance" with the Act's *substantive legal obligations*. Gap's forum-selection clause does not eliminate those obligations or prevent Plaintiff (or anyone else) from enforcing them in direct (i.e., non-derivative) actions. Moreover, this Court has already squarely rejected the argument that the Exchange Act's anti-waiver provision trumps the strong federal policy in favor of enforcing valid forum-selection clauses. *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018). Nor would enforcing the clause leave Plaintiff without a procedural mechanism for seeking redress: In addition to direct actions under the Exchange Act, Delaware law provides similar remedies for the alleged

misconduct. Plaintiff has not shown the "exceptional" or "extraordinary" circumstances required to avoid enforcing the forum-selection clause here. *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, 571 U.S. 49, 62-63 (2013).

Second, this Court may affirm the District Court's dismissal on alternative grounds, based on Plaintiff's failure to meet Delaware's strict standard for alleging demand futility, which is necessary for Plaintiff to sue derivatively on Gap's behalf. Plaintiff made no demand before filing suit, ER-60 (¶ 20), and the Complaint fails to plead with particularity why such a demand would have been futile. Eight district courts have recently dismissed similar complaints on this basis.

Finally, Plaintiff's Section 14(a) claim also fails to state a claim under Rule 12(b)(6), as several district courts have concluded under similar circumstances. The Complaint does not allege particularized facts showing that any of Gap's public statements about diversity were false or misleading. Nor does the Complaint plead that any alleged misstatement was an "essential link" to a corporate harm; it does not allege that the Company suffered any specific harm at all.

For any of these reasons, the Court should affirm the District Court's order granting Gap's motion to dismiss.

STATEMENT OF JURISDICTION

Gap agrees that this Court has jurisdiction to hear this appeal. *See* Plaintiff's Brief (PBr.) 4-5.

STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion when it enforced Gap's forum-selection clause and dismissed Plaintiff's derivative claim under Section 14(a) of the Securities Exchange Act of 1934.

2. Whether this Court should affirm the judgment of the District Court because Plaintiff failed to adequately allege demand futility.

3. Whether this Court should affirm the judgment of the District Court because Plaintiff failed to state a Section 14(a) claim under Federal Rule of Civil Procedure 12(b)(6).

STATUTORY AUTHORITIES

Pertinent statutes and regulations are set forth in the addendum.

STATEMENT OF THE CASE

A. Gap's Commitment To Diversity And Inclusion

Gap is an American clothing retail company incorporated in Delaware and headquartered in San Francisco, California. ER-62 (¶ 27). Gap believes that promoting diversity and inclusion is a "business imperative." ER-102 (¶ 133 & n.27). For that reason, the Company has long been an industry leader on workforce

diversity. The majority of Gap's U.S. employees are non-white (56%) and over three-quarters of its global workforce are women. Ex. D. Gap has been a trailblazer among Fortune 500 companies in using outside firms in an effort to ensure that it pays its employees equally for equal work, regardless of characteristics like race or gender. Ex. C at 50; Ex. E.

Gap employees participate in a number of internal organizations to further foster diversity and inclusion within the Company. The Color Proud Council is an employee-led group that seeks to improve product pipelines, talent acquisition, and retention practices by focusing on all areas of diversity. Ex. D. Gap employees also created and participate in Equality & Belonging Network Groups, which help to ensure that the Company's workforce reflects its customer base, as well as working to develop a Company culture that embraces differences and individuality. *See id.*

Gap is similarly committed to diversity and inclusion at the Board level. Under its corporate governance guidelines, the Board considers the gender, race, and ethnicity of those nominated to become directors. Ex. C at 13; Ex. G at 12. While all directors "must possess certain core competencies," the Board believes that "varying tenures and backgrounds create a balance" between directors with deep knowledge of the Company's history, and directors who bring "fresh perspectives." *Id.* Diversity along the lines of "tenure, professional, personal, gender, and

racial/ethnic" perspectives is "important to the effectiveness of the Board's oversight of the Company." *Id.*

Guided by these principles, the diversity of Gap's leadership has stood out among its corporate peers: Seven of Gap's ten top executives are women, and its CEO was one of only three women of color CEOs among all Fortune 500 companies at the time of the Complaint. ER-71 (¶ 70).[5] Gap's Board has also had a Black director for much of the past 22 years—from 1999 to 2004 and from 2006 to 2012. *See supra* at 2.

Gap's singular commitment to diversity has been widely recognized. The Human Rights Campaign named Gap one of the "Best Places to Work for LGBTQ Equality" in 2020. Ex. D. The Company was included on both Bloomberg's Gender-Equality Index and Thomson Reuters' Diversity and Inclusion Index (now Refinitiv's Diversity and Inclusion Index) for its work toward promoting equality, diversity, and inclusion. *Id.* In 2019, Gap was ranked ninth out of over 7,000 international corporations on the Thomson Reuters Global Diversity and Inclusion Index, which ranks the world's most diverse and inclusive companies. *See supra* at 3 & n.4.

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[5] *See* Courtney Connley, *The Number Of Women Running Fortune 500 Companies Hits A New High*, CNBC (May 19, 2020), https://www.cnbc.com/2020/05/19/the-number-of-women-running-fortune-500-companies-hits-a-new-high.html.

B. Gap's Corporate Governance Structure

Gap is managed by its Board of Directors, as provided in the Company's governance documents. *See* Ex. F (Amended And Restated Certificate of Incorporation ("Certificate of Incorporation")); ER-34 (Amended And Restated Bylaws ("Bylaws"), art. III, § 1). The Board oversees Gap's business and affairs, sets long-term strategic objectives, and provides oversight. ER-66 (¶ 49). Gap's Certificate of Incorporation sets out various corporate governance principles, including a provision that exculpates its Board of Directors from personal liability for breaches of fiduciary duty to the fullest extent permitted by Delaware law. Ex. F, art. 6, § 2. It also expressly authorizes the Board to alter or amend Gap's Bylaws. *Id.*, art. 9.

Gap's Bylaws, in turn, provide rules and procedures governing its operations. *See* ER-26–46. As relevant here, the Bylaws include a forum-selection clause requiring that "any derivative action" purportedly brought on behalf of Gap be litigated in the Delaware Court of Chancery. ER-45–46 (art. VII, § 5).

C. Gap's 2019 And 2020 Proxy Statements

Each year, Gap issues a proxy statement notifying stockholders of items subject to vote at the Company's annual meeting. *See, e.g.*, ER-84–85 (¶¶ 99-100); Ex. C; Ex. G. On April 9, 2019, Gap publicly filed its 2019 proxy statement with the United States Securities and Exchange Commission (SEC). ER-84 (¶ 99); Ex.

G (2019 Proxy). The 2019 Proxy contained recommendations from the Company's then-current directors.[6] Those recommendations addressed the election of the Company's director-nominees, ratifying the selection of Deloitte & Touche LLP as the Company's independent auditor, an advisory vote on executive compensation, and the amendment and restatement of Gap's Long-Term Incentive Plan. Ex. G at 2. The 2019 Proxy also contained statements about Gap's corporate governance values, including its commitment to diversity on its Board of Directors. *Id.* at 10, 12; *see e.g.*, ER-85–95 (¶¶ 101-03, 107, 110-11, 115-20). Of the twelve director-nominees disclosed at that time, four were women and one was ethnically diverse. Ex. G at 12.

On April 7, 2020, Gap publicly filed its 2020 proxy statement with the SEC. ER-85 (¶ 100); Ex. C. The 2020 Proxy similarly contained recommendations from the Company's then-current directors.[7] Those recommendations covered the election of the Company's director-nominees, ratification of Deloitte & Touche LLP

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[6] Defendants John Fisher, Bohutinsky, Robert Fisher, William Fisher, Gardner, Goren, Martin, Montoya, O'Neill, Peck, and Shattuck, as well as non-defendant directors Lexi Reese (who did not stand for re-election at the 2020 annual meeting) and Brian Goldner (who did not stand for re-election at the 2019 annual meeting). ER-84–85 (¶ 99); Ex. G at 5-9, 14.

[7] Defendants John Fisher, Bohutinsky, Robert Fisher, William Fisher, Gardner, Goren, Martin, Miles, Montoya, O'Neill, Shattuck, Smith, and Syngal, as well as non-defendant director Reese. ER-85 (¶ 100); Ex. C at 5-8, 15. This and other overviews of the Board do not include Doris Fisher, who serves as an Honorary Lifetime Director. ER-64.

as the Company's independent auditor, and an advisory vote on executive compensation. Ex. C at 2. As in 2019, the 2020 Proxy contained statements regarding Gap's commitment to diversity on its Board of Directors. *Id.* at 11-13; ER-85–87, 89–92, 96–102 (¶¶ 101-02, 104, 110-11, 115, 122, 125-28, 130-32). Of the thirteen director-nominees disclosed at that time, six were women and two were ethnically diverse. Ex. C at 13; ER-50–53 (¶ 1). The 2020 Proxy also disclosed that, in response to low support in 2019 and based on shareholder outreach, the Board had made a number of changes to its executive compensation, including adjusting performance metrics for stock awards so that they would be based on multi-year earnings goals and ensuring that a majority of long-term incentives granted to executives would be performance based rather than time-based. Ex. C at 23, 25-26. These changes were well-received—97% of advisory votes on executive compensation at the 2020 annual meeting endorsed the Board's proposal. ER-104–05 (¶ 139).

D. Plaintiff's Counsel Files A Series Of Unsuccessful Lawsuits Seeking To Capitalize On The National Unrest Over Racial Injustice

In the summer of 2020, in the wake of the social unrest galvanized by the murder of George Floyd, Plaintiff's counsel began filing a series of derivative lawsuits in quick succession against the boards of various public companies. *See, e.g.*, *Ocegueda ex rel. Facebook, Inc. v. Zuckerberg*, No. 20-cv-04444 (N.D. Cal. July 2, 2020); *Klein ex rel. Oracle Corp. v. Ellison*, No. 20-cv-04439 (N.D. Cal. July

2, 2020); *Kiger ex rel. Qualcomm Inc. v. Mollenkopf* ("*Kiger*"), No. 20-cv-01355 (S.D. Cal. July 17, 2020); *Esa v. NortonLifeLock Inc.* ("*NortonLifeLock*"), No. 20-cv-05410 (N.D. Cal. Aug. 5, 2020); *Falat ex rel. Monster Beverage Corp. v. Sacks*, No. 20-cv-01782 (C.D. Cal. Sept. 18, 2020).

The claims in this initial wave of lawsuits all followed the same template: They alleged that the companies' directors issued false or misleading proxy statements claiming that their companies valued diversity when—according to the complaints—the companies really did not. These lawsuits further alleged that the directors "impeded the nomination of qualified Black directors" and "never in good faith actively sought minority candidates." *See, e.g.*, *Elliemaria Toronto Esa v. NortonLifeLock Inc.*, 2021 WL 3861434, at *1 (N.D. Cal. Aug. 30, 2021), *appeal docketed*, No. 21-16909 (9th Cir. Nov. 12, 2021); *Ocegueda ex rel. Facebook v. Zuckerberg*, 526 F. Supp. 3d 637, 642 (N.D. Cal. 2021). Based on these allegations, the complaints brought claims against the directors for violating Section 14(a) of the Exchange Act, as well as state-law claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, abuse of control, and unjust enrichment. In none of those cases did the plaintiff purporting to act on behalf of the company make a pre-suit demand on the board of directors.

The lawsuits were materially identical, sometimes even mistakenly carrying over inapplicable allegations from a former complaint against a different

corporation.[8] Other allegations were verifiably false, for instance by misrepresenting the number of Black directors on a company's board. *See, e.g.*, *Ocegueda*, 526 F. Supp. 3d at 644 (stating that the allegations about "diversity on the board . . . are contradicted by the record about the actual composition of the board").

To date, every court that has resolved a dispositive motion in one of these cases has granted dismissal for the defendants, oftentimes on multiple independent bases. *See NortonLifeLock Inc.*, 2021 WL 3861434, at *6 (granting motion to dismiss on multiple bases, including failure to adequately allege demand futility, failure to state a claim under Rule 12(b)(6), and dismissing state-law claims under a forum-selection clause); *Ocegueda*, 526 F. Supp. 3d at 641 (granting motion to dismiss on same three bases); *Falat v. Sacks*, 2021 WL 1558940, at *4 (C.D. Cal. Apr. 8, 2021) (granting motion to dismiss for failure to adequately allege demand futility); *Klein v. Ellison*, 2021 WL 2075591, at *9 (N.D. Cal. May 24, 2021) (granting motion to dismiss for failure to adequately allege demand futility, and

[8] As just one example, the complaint against NortonLifeLock alleged that, as a result of the purportedly misleading proxies issued by the company's directors, "PWC was reappointed as the Company's auditor." *NortonLifeLock* Compl. ¶ 130, ECF No. 1. But KPMG—not PwC—had been NortonLifeLock's auditor since 2002. *See NortonLifeLock* Schedule 14A at 30, ECF No. 47-5. The PWC allegation appears to have been cut-and-pasted from counsel's earlier complaint making identical allegations against the board of Qualcomm. *See Kiger* Compl. ¶ 118, ECF No. 1.

dismissing state-law claims under a forum-selection clause); *Kiger v. Mollenkopf*, 2021 WL 5299581, at *9 (D. Del. Nov. 15, 2021) (granting motion to dismiss for failure to adequately allege demand futility and failure to state a claim under Rule 12(b)(6)).

Several other law firms began filing similar derivative actions raising the same claims. As with the cases brought by Plaintiff's counsel, every court to date that has resolved a dispositive motion in one of these cases has granted dismissal. *See, e.g.*, *In re Danaher Corp. S'holder Derivative Litig.*, No. 20-CV-02445, 2021 WL 2652367, at *12-13 (D.D.C. June 28, 2021) (granting motion to dismiss for failure to adequately allege demand futility); *City of Pontiac Police & Fire Ret. Sys. v. Caldwell*, No. 20-CV-06794-LHK, 2021 WL 2711750, at *4, *9 (N.D. Cal. July 1, 2021) (granting motion to dismiss for failure to adequately allege demand futility); *Lee v. Frost*, No. 21-20885, 2021 WL 3912651, at *14 (S.D. Fla. Sept. 1, 2021) (granting motion to dismiss for failure to adequately allege demand futility).

E. Plaintiff Files A Materially Identical Complaint Against Gap

In September 2020, Plaintiff's counsel filed this similar lawsuit against Gap. ER-47, 136. Like the others, this case is a derivative action purporting to assert claims on the Company's behalf against its Board of Directors, naming fifteen current and former directors as Defendants. ER-62–64 (¶¶ 28-42).

The Complaint alleged that despite the Company's public statements about diversity, Gap has failed to create any meaningful racial or ethnic diversity within its leadership. *See, e.g.*, ER-50–53 (¶¶ 1-2). Specifically, the Complaint asserted that the 2019 and 2020 Proxies included the false or misleading statements that diversity was a factor in the consideration of nominees to the Company's Board. ER-85 (¶ 101). Those statements were false, the Complaint alleged, because Defendants "never in good faith actively sought African American candidates," ER-87 (¶ 105), and actively sought "to prevent the addition of qualified Blacks and minorities to the Board," ER-127 (¶ 203). Based on these allegations, Plaintiff asserted claims under Section 14(a) of the Exchange Act, as well as state-law claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, abuse of control, and unjust enrichment. Plaintiff did not make a pre-suit demand on the Board. ER-127–32 (¶¶ 204-29).

Like the other complaints, Plaintiff's Complaint was based on verifiably false allegations about Gap, as well as inapplicable allegations that were mistakenly carried over from former complaints. For example, the Complaint alleged that Gap's Board of Directors is "all-white," ER-67 (¶ 53), despite the fact that Gap's Board at the time included one director who is Latino and one who is Indian-American. *See supra* at 2. It further alleged that Gap has "consistently refused to appoint Black individuals" to its Board, ER-73 (¶ 71), even though Gap has had a Black Board

member for much of the past two decades, *see supra* at 2. The Complaint also referenced Gap's "2018" Proxy Statement in its Section 14(a) Count, *see* ER-130–32, but there are no factual allegations about this Proxy Statement anywhere in the Complaint. It appears that the reference to a "2018 Proxy" was copied over from the complaint Plaintiff's counsel filed against another company. *See NortonLifeLock* Compl. ¶ 102, ECF No. 1.

Gap filed a motion to dismiss the Complaint on several independent bases. First, Gap sought dismissal on *forum non conveniens* grounds because Plaintiff failed to comply with the forum-selection clause in the Company's Bylaws, which requires bringing any derivative action in the Delaware Court of Chancery. Second, Gap argued that the Complaint should be dismissed under Federal Rule of Civil Procedure 23.1, because Plaintiff failed to make a pre-suit demand on the Board and failed to adequately allege demand futility. Finally, the Company argued, among other things, that Plaintiff's derivative Section 14(a) claim failed to state a claim under Rule 12(b)(6).

F. The District Court Dismissed The Case

The District Court agreed that Gap's forum-selection clause is enforceable and granted the motion to dismiss on that basis, without addressing Gap's remaining arguments under Rules 23.1 and 12(b)(6). *See* ER-4, 6. To analyze Gap's forum-selection clause, the Court began by considering two factors: "(1) whether the

lawsuit falls within the scope of the forum-selection clause, and if it does, (2) whether the clause is valid and enforceable." ER-7 (citing *Sun*, 901 F.3d at 1086-87). Because Plaintiff did not dispute that the suit "falls within the scope of the forum-selection clause," or that the clause was "valid," the Court turned to addressing the clause's enforceability. *Id.*

The District Court explained that, under Supreme Court precedent, a valid forum-selection clause must be enforced "in all but the most exceptional cases." ER-6–7 (quoting *Atl. Marine*, 571 U.S. at 63). The party opposing enforcement bears the burden of establishing such exceptional circumstances. ER-6. Here, the Court noted, Plaintiff's only argument against enforcing the clause was that doing so would contravene a "strong public policy of the forum in which the suit is brought." ER-7. To make such a showing, Plaintiff must "point to a statue or judicial decision that clearly states such a strong public policy." ER-8 (quoting *Sun*, 901 F.3d at 1090). The Court then considered and rejected each of Plaintiff's attempts to satisfy that standard.

First, the Court rejected Plaintiff's argument that the Exchange Act established such a "strong public policy" by giving federal courts exclusive jurisdiction over Section 14(a) claims. *Id.* As the Court explained, a clause that *prevents* a party from "asserting a federal claim does not violate principles of exclusive federal jurisdiction," because it does not permit exclusively federal claims

to be brought elsewhere. *Id.* Plaintiff's argument to the contrary was "difficult to understand" and relied on a series of cases that were "inapplicable" or that Plaintiff "misrepresent[ed]." ER-8–9 & nn.2-3.

Second, the Court rejected Plaintiff's argument that the Exchange Act's anti-waver provision, 15 U.S.C. § 78cc(a), establishes such a "strong public policy." ER-7-8, 10. That provision provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void." 15 U.S.C. § 78cc(a). Contrary to Plaintiff's claim, "the Ninth Circuit has made clear that existence of an anti-waiver clause in a statue . . . is insufficient to demonstrate the required strong public policy for purposes of overcoming a forum selection clause." ER-10 (citing *Sun*, 901 F.3d at 1090). As the District Court explained, that holds true under Ninth Circuit precedent "regardless whether the forum selection 'clause points to a state court, a foreign court, or another federal court.'" ER-8 (quoting *Sun*, 901 F.3d at 1090).

The District Court then considered the remedies available under Delaware law. *See* ER-10. As the Court explained, Plaintiff's efforts to distinguish Section 14(a) and Delaware law were irrelevant because the enforceability of a forum-selection clause does not turn on whether the designated forum offers substantially similar legal claims. *Id.* Instead, "under *Atlantic Marine*, courts must enforce a forum-

selection clause unless the contractually selected forum affords the plaintiffs *no remedies whatsoever*." *Id.* (quoting *Sun*, 901 F.3d at 1092). It is the "*availability* of a remedy that matters, not predictions of the likelihood of a win on the merits." *Id.* (citation omitted). The District Court observed that Plaintiff ultimately did not and could not argue that she would have "*no remedies whatsoever*" in Delaware Chancery Court, because "Delaware law provides for derivative actions." ER-10–11 (citations omitted).

Plaintiff appealed the District Court's ruling enforcing the forum-selection clause against the Section 14(a) claim, but did not appeal the ruling with respect to the state-law claims.

SUMMARY OF ARGUMENT

The District Court properly granted Gap's motion to dismiss, and this Court should affirm the judgment below for any of three alternative reasons.

First, the District Court correctly dismissed the Complaint on *forum non conveniens* grounds because Plaintiff failed to honor Gap's forum-selection clause. That clause is undisputedly valid and applicable to Plaintiff's derivative Section 14(a) claim, because the clause requires filing "any derivative action" in Delaware Chancery Court. Plaintiff argues only that the clause should not be *enforced*, but does not come close to carrying the heavy burden necessary to override a valid forum-selection clause.

The Supreme Court and this Court have made clear that a valid forum-selection clause must be enforced in all but the most "exceptional" or "extraordinary" circumstances. Plaintiff argues that such circumstances exist here because enforcing the clause would contravene a "strong public policy" that is clearly stated in the Exchange Act's exclusive jurisdiction and anti-waiver provisions. She is mistaken.

The Exchange Act's exclusive jurisdiction provision is intended to ensure that only federal courts apply and develop the law under the Exchange Act. Enforcing Gap's forum-selection clause does not offend that policy because it does not result in Plaintiff's Section 14(a) claim being adjudicated in state court; it results in Plaintiff's claim being dismissed. Plaintiff had several options to avoid that outcome, most notably by filing a *direct* claim under Section 14(a). But Plaintiff did not pursue those options, and that self-selected litigation strategy cannot establish a strong public policy in the Exchange Act.

Nor does the Exchange Act's anti-waiver provision establish such a strong public policy. That provision forbids waiving "compliance" with the substantive duties and obligations of the Exchange Act. Gap's forum-selection clause does not waive the Company's obligation to comply with the Exchange Act in any way. Nor does it prevent Plaintiff or others from bringing a direct claim under Section 14(a) or any other federal securities claim. Unsurprisingly, this Court and others have already rejected Plaintiff's position numerous times, holding that a statutory anti-

waiver provision is insufficient to establish a "strong public policy" that renders a forum-selection clause unenforceable. *See, e.g.*, *Sun*, 901 F.3d at 1088. The District Court was right to enforce the clause and this Court should affirm on that basis.

Second, this Court may also affirm the judgment below because Plaintiff failed to make a pre-suit demand on Gap's Board and failed to adequately allege demand futility. Eight courts have reached that conclusion when reviewing virtually identical complaints filed by Plaintiff's counsel and other law firms. The same result is warranted here, because Plaintiff has wholly failed to plead with particularity, on a director-by-director basis, that a majority of Gap's thirteen-member Board either (1) received a material personal benefit from the alleged misconduct; (2) faced a substantial likelihood of liability from the misconduct; or (3) lacked independence from another director who satisfied prong (1) or (2).

Third, the Complaint fails to state a claim under Rule 12(b)(6), as several other courts have concluded under similar circumstances. Section 14(a) requires a plaintiff to allege that a proxy statement contained a material misstatement or omission that caused a corporate harm. The Complaint fails at step one because it cannot identify any statement in the 2019 and 2020 Proxies that was false or misleading. The statements that Plaintiff does identify have been routinely dismissed as inactionable and immaterial opinion statements. The other falsity allegations are conclusory and wholly inadequate under Rule 9(b). In addition, the

Complaint fails to identify any specific corporate harm that has occurred, and failed to allege any facts showing that the alleged misstatements *caused* that harm. The Complaint's facial deficiencies on the merits provide yet another reason to affirm the judgment of the District Court.

STANDARD OF REVIEW

"The district court's decision to enforce a forum selection clause is reviewed for abuse of discretion." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004) (citation omitted); *see also Fireman's Fund Ins. Co. v. M.V. DSR Atl.*, 131 F.3d 1336, 1338 (9th Cir. 1997).

Plaintiff agrees that the District Court's decision to enforce the forum-selection clause is reviewed for abuse of discretion. PBr. 12. Plaintiff claims, however, that the short argument at the end of her brief—that the Exchange Act "void[s]" the forum-selection clause—raises a question of law that is reviewed *de novo*. *Id.* Plaintiff waived any argument about the facial validity of the forum-selection clause by failing to raise it below, but her argument fails under either standard of review. *See infra* at 38 & n.16.

ARGUMENT

I. The District Court Properly Enforced Gap's Forum-Selection Clause

A. Courts Must Enforce Valid Forum-Selection Clauses "In All But The Most Exceptional Cases"

Like other contractual provisions, a forum-selection clause specifying where a dispute must be litigated is presumptively valid and enforceable. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). Because such a clause "represents the parties' agreement," enforcing the clause "protects their legitimate expectations and furthers vital interests of the justice system." *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, 571 U.S. 49, 63 (2018) (citation omitted).

Courts enforce forum-selection clauses "through the doctrine of *forum non conveniens*." *Id.* at 60. Because the parties have already agreed upon a forum, the plaintiff "bears the burden" of establishing that the clause should not be enforced, and courts may not "consider arguments about the parties' private interests." *Id.* at 63-64. As a result, "'a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases,'" or "extraordinary circumstances." *Id.* at 62-63 (alteration in original) (citation omitted); *see also id.* at 59-60 (same).

This Court and others have faithfully implemented the requirement that only "exceptional" or "extraordinary" circumstances may render a forum-selection clause unenforceable. *See, e.g.*, *Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 914 (9th Cir. 2019); *Finsa Portafolios, S.A. DE C.V. v. OpenGate Cap., LLC*,

769 F. App'x 429, 430 (9th Cir. 2019); *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1088 (9th Cir. 2018).[9] Establishing such extraordinary circumstances imposes a "heavy burden" requiring a "strong showing" that:

> (1) the clause is invalid due to "fraud or overreaching," (2) "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision," or (3) "trial in the contractual forum will be so gravely difficult and inconvenient that [the litigant] will for all practical purposes be deprived of his day in court."

Sun, 901 F.3d at 1088 (alteration in original) (quoting *Bremen*, 407 U.S. at 15, 18); *see also Gemini*, 931 F.3d at 914 (identifying the same three exceptions from *Bremen* that establish "exceptional" circumstances); *Lewis v. Liberty Mutual Ins. Co.*, 953 F.3d 1160, 1165-66 (9th Cir. 2020) (same).

B. Gap's Forum-Selection Clause Is Valid And Covers This Case

Gap's Certificate of Incorporation and Bylaws constitute "contracts among the corporation's shareholders." *Airgas, Inc. v. Air Prods. and Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010); *see also Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) ("[A] forum selection clause adopted by a board

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[9] *See also, e.g.*, *Elna Sefcovic, LLC v. TEP Rocky Mountain, LLC*, 953 F.3d 660, 668 n.9 (10th Cir.), *cert. denied*, 141 S. Ct. 850 (2020); *Davis v. Oasis Legal Fin. Operating Co.*, 936 F.3d 1174, 1178 (11th Cir. 2019); *DeBello v. VolumeCocomo Apparel, Inc.*, 720 F. App'x 37, 41 (2d Cir. 2017); *Enerplus Res. (USA) Corp. v. Wilkinson*, 865 F.3d 1094, 1097-98 (8th Cir. 2017); *Cardoni v. Prosperity Bank*, 805 F.3d 573, 580 (5th Cir. 2015); *Milan Express Co. v. Applied Underwriters Captive Risk Assurance Co.*, 590 F. App'x 482, 487 (6th Cir. 2014).

with the authority to adopt bylaws is valid and enforceable under Delaware law to the same extent as other contractual forum selection clauses.").

Gap's Bylaws contain a mandatory forum-selection clause that requires shareholders to file "any derivative action" in the Delaware Court of Chancery. The clause states in full:

> Unless the Corporation consents in writing to the selection of an alternative forum, *the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation*, (ii) any action or proceeding asserting a claim of breach of a fiduciary duty owed by any director, officer, employee or agent of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action or proceeding asserting a claim against the Corporation arising pursuant to any provision of the Delaware General Corporation Law or the Corporation's Certificate of Incorporation or these Bylaws, or (iv) any action or proceeding asserting a claim against the Corporation governed by the internal affairs doctrine, in each case subject to said Court of Chancery having personal jurisdiction over the indispensable parties named as defendants therein.

ER-45–46 (emphasis added).

Gap's forum-selection clause is "prima facie valid," *Gemini*, 931 F.3d at 914 (quoting *Bremen*, 407 U.S. at 10). As the District Court noted, Plaintiff does not dispute that the clause is "valid" but "merely disputes whether the clause should be enforced." ER-7.

Nor does Plaintiff "dispute that th[is] suit falls within the *scope* of the forum selection clause." *Id.* (emphasis added). After all, the plain language of the clause broadly covers "*any* derivative action or proceeding brought on behalf of the

Corporation." ER-46 (emphasis added). The Complaint is a self-styled "derivative action": "Plaintiff Noelle Lee . . . submits this *Verified Shareholder Derivative Complaint* against certain directors and officers of nominal defendants The Gap, Inc." ER-50 (emphasis added). For "any" such derivative action, the forum-selection clause mandates that "the Court of Chancery of the State of Delaware *shall* be the *sole and exclusive* forum." ER-46 (emphases added). On its face, the Bylaws thus prohibit the filing of this case in the Northern District of California.

C. Gap's Forum-Selection Clause Is Enforceable Here

Because Gap's forum-selection clause applies by its plain terms, Plaintiff's derivative suit can proceed outside the designated forum only if she shows that "exceptional" or "extraordinary" circumstances bar enforcement of the clause. *Atl. Marine*, 571 U.S. at 62-63. Here, Plaintiff invokes the second *Bremen* grounds, arguing that Gap's forum-selection clause violates a "strong public policy of federal courts (which is the relevant forum)." PBr. 2; *see generally* PBr. 11-18, 26. But those grounds apply only in limited circumstances: "[T]o prove that enforcement of such a clause would contravene a strong public policy of the forum in which suit is brought, the plaintiff must point to a *statute* or *judicial decision* that *clearly states* such a strong public policy." *Sun*, 901 F.3d at 1090 (emphases added) (citation omitted); *see also Gemini*, 931 F.3d at 914; *Lewis*, 953 F.3d at 1165-66.

Here, Plaintiff argues that enforcing the clause would violate the public policies purportedly set forth in the Exchange Act's exclusive jurisdiction and anti-waiver provisions. PBr. 12-16. But as the District Court correctly held, neither provision is a valid basis for overriding the clause. ER-8.[10]

1. *Plaintiff's Exclusive-Jurisdiction Argument Fails*

Plaintiff's first argument is that enforcing the forum-selection clause "would contravene federal court[s'] exclusive jurisdiction over Section 14(a) claim[s]." PBr. 13. Section 27(a) of the Exchange Act states that "[t]he district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa(a). By its terms, Section 27(a) *forbids* any nonfederal court from adjudicating Exchange Act claims, including claims under Section 14(a). The Delaware Court of Chancery thus lacks jurisdiction to adjudicate Plaintiff's derivative Section 14(a) claim.

That does not mean, however, that Section 27(a) prevents parties from agreeing not to bring derivative actions under the Exchange Act. The exclusive

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[10] Plaintiff also briefly asserts that the forum-selection clause violates public policy insofar as federal courts have a "virtually unflagging" "obligation" to hear and decide cases within their jurisdiction. PBr. 16 (emphasis and citations omitted). Under that view, a federal court *must* adjudicate a claim if it has jurisdiction, regardless of any applicable forum-selection clause. Plaintiff can cite no support for that sweeping argument—which would appear to invalidate *any* forum-selection clause requiring cases to be brought in state court—and precedent from this Court and the Supreme Court foreclose it. ER-8–9 n.2.

jurisdiction provision reflects a public policy of prohibiting adjudication of Exchange Act claims in state court. As the Supreme Court explained, "Congress intended § 27 to serve at least the general purposes underlying most grants of exclusive jurisdiction: '[1] to achieve greater uniformity of construction and [2] more effective and expert application of that law.'" *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996) (citation omitted). Those policy concerns are not implicated where, as here, enforcement of the forum-selection clause would result in dismissal of Exchange Act claims without permitting state courts to adjudicate them.

Plaintiff never explains how enforcing Gap's forum-selection clause contravenes either federal courts' exclusive jurisdiction over Exchange Act claims or Congress's goals of more uniform and expert application of the Act. PBr. 13-18. It does neither. Enforcing the clause does *not* result in the Delaware Chancery Court adjudicating Plaintiff's derivative Section 14(a) claim; it results in that claim being dismissed. As the District Court noted, a clause that prevents a party from "asserting a federal claim does not violate principles of exclusive federal jurisdiction." ER-8.

Instead of explaining how the Exchange Act's exclusive jurisdiction provision "clearly states" a "strong public policy of federal courts," PBr. 13, Plaintiff oddly pivots from federal law and argues instead that the clause is contrary to *Delaware* law. *See id.* at 15 ("Delaware Law does *not* permit this outcome."); *see also id.* at

14-16.[11] But Plaintiff needs to show that *federal* law—the Exchange Act—established such a strong public policy. *See Sun*, 901 F.3d at 1088 (enforcement must contravene "strong public policy *of the forum in which suit is brought*" (emphasis added) (citation omitted). Delaware law is irrelevant to that inquiry. Nor does Plaintiff explain what specific Delaware laws—whether the Delaware General Corporation Law (DGCL) or otherwise—would be violated by enforcement of the clause.

In any event, Plaintiff is also wrong about the one Delaware case on which she relies—the Delaware Chancery Court's decision in *Boilermakers*. Plaintiff incorrectly states that *Boilermakers* "*specifically observed* that such a forum-selection clause would *not* be enforceable as to a claim within the federal courts' exclusive jurisdiction." PBr. 15.

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[11] Plaintiff misrepresents the one federal case she cites case in support of her exclusive-jurisdiction argument—*Butorin v. Blount*, 106 F. Supp. 3d 833 (S.D. Tex. 2015). *See* PBr. 14. The District Court expressly noted that problem below: "Plaintiff misrepresents the holding of *Butorin*." ER-9. It is *not* true that *Butorin* denied a motion to dismiss on *forum non conveniens* grounds because the "Delaware Court of Chancery lacks jurisdiction over plaintiff's § 14(a) claim." PBr. 14 (citing *Butorin*, 106 F. Supp. 3d at 837). Instead, *Butorin* simply enforced a *different* forum-selection clause that designated "the federal district court for the District of Delaware" for cases in which "no state court located within the State of Delaware has jurisdiction." 106 F. Supp. 3d at 835 (citation omitted). *Butorin*'s decision to transfer the case to Delaware federal court followed the plain language of the clause, as the District Court noted. ER-9 & n.3.

That misrepresents the case. *Boilermakers* addressed a *facial* challenge to a forum-selection clause similar to the one at issue here. The court held that when a board adopts such clauses in its bylaws, they are facially "valid and enforceable under Delaware law to the same extent as other contractual forum selection clauses." 73 A.3d at 940. Thus, any challenge to the enforceability of such clauses in bylaws should be addressed the same as any other forum-selection clause—not through a facial challenge, but by applying, on a case-by-case basis, "the principles set down by the United States Supreme Court in *Bremen* and adopted explicitly by [Delaware's] Supreme Court." *Id.* (footnote omitted).

In rejecting the plaintiff's facial challenge, *Boilermakers* specifically "decline[d]" to resolve a series of hypothetical scenarios, including whether a clause designating the Delaware Chancery Court as the forum would be enforceable in federal court against a "claim within the exclusive jurisdiction of the federal courts." *Id.* at 962. Plaintiff's selective block quote (PBr. 15-16) attempts to obscure that context, but the court in *Boilermakers* could not have been clearer that it was following the "wisdom of declining to opine on hypothetical situations." 73 A.3d at 963.[12]

[12] What's more, *Boilermakers* detailed a procedural path through which plaintiffs could potentially seek a waiver of the forum-selection clause in circumstances like this—a potential option that Plaintiff did not pursue here. 73 A.3d at 963; *id.* at 954 & n.86.

In sum, Plaintiff comes nowhere close to showing that the Exchange Act's exclusive jurisdiction provision "clearly states" a strong public policy that precludes enforcement of the clause.

2. *Plaintiff's Anti-Waiver Argument Fails*

Plaintiff also argues that Section 29(a) of the Exchange Act—the "anti-waiver provision"—is a clear statement of a "strong [federal] public policy" justifying refusal to enforce the forum-selection clause. PBr. 13, 16. This argument fares even worse. Section 29(a) provides that "[a]ny condition, stipulation, or provision binding any person to waive *compliance* with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void." 15 U.S.C. § 78cc(a) (emphasis added). According to Plaintiff, enforcing Gap's forum-selection clause violates this provision—that is, it binds her to waive compliance with the Exchange Act—because it prevents her from bringing a claim under Section 14(a). PBr. 16. That argument fails for two independent reasons: (1) the forum-selection clause does not conflict with Section 29(a) and (2) this Court's precedents foreclose it.

First, Section 29(a) is inapplicable because it only prohibits waiver of "compliance" with the Exchange Act. But Gap's forum-selection clause does not waive the Company's obligation of "compliance" in any way. The Supreme Court has explained that "compliance" in Section 29(a) refers to the "dut[ies] with which

persons trading in securities must 'comply,'" which are the "substantive obligations imposed by the Exchange Act." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 228 (1987). Here, Gap's forum-selection clause does not waive or otherwise implicate the Company's substantive compliance duties. With or without the clause, Gap remains subject to the same "duties" and "substantive obligations" with respect to Section 14(a): It may not issue proxy statements with false or misleading statements of material fact. *See* 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a-9(a).

Nor does the forum-selection clause waive the ability of Plaintiff or other shareholders to enforce Gap's substantive compliance with Section 14(a). Plaintiff may still bring a *direct* claim under Section 14(a), even if she cannot bring a derivative claim. In other words, the central premise underlying Plaintiff's anti-waiver argument—that Gap's forum-selection precludes her from bringing any claim under Section 14(a), PBr. 3, 24-25—is simply incorrect.

Gap's forum-selection clause covers "*any derivative action* or proceeding brought on behalf of the Corporation." ER-46 (emphasis added). A "derivative action" (like a class action) is not itself a substantive legal claim. Rather, it is a particular "form of action" that allows a shareholder to stand in the shoes of the corporation and "bring suit to enforce a corporate cause of action against officers, directors, and third parties." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) (emphasis and citation omitted); *see also* 12B William M. Fletcher,

Cyclopedia of the Law of Corporations § 5908 (2021 update) (derivative suits are a "form of 'representative' action").

Gap's forum-selection clause thus does not prevent Plaintiff from bringing Exchange Act claims in general. Although it prohibits bringing derivative claims in federal court, it says nothing whatsoever about whether or how *non*-derivative claims under the Exchange Act—direct claims—can be brought. Because Exchange Act claims "may be brought either as a direct or a derivative claim," *N.Y. City Emps.' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010) (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964)), Plaintiff may bring a direct claim under Section 14(a) without being bound by the forum-selection clause. The forum-selection clause does not waive Gap's obligation of "compliance" with Section 14(a) in any way.[13]

Second, and consistent with the analysis above, this Court has already held multiple times that a statutory anti-waiver provision does *not* provide the clear statement of "strong public policy" necessary to satisfy *Bremen*'s second exception. In *Richards v. Lloyd's of London*, the Court enforced a clause designating England

[13] The ability to bring a direct claim under Section 14(a) also obviates any concern about a complete waiver of the Exchange Act. *McMahon* suggested that a forum-selection clause that waives a "judicial forum" for enforcing a set of substantive statutory rights in favor of arbitration might amount to a waiver of "compliance" with those substantive statutory rights, in circumstances where arbitration is "judged inadequate to enforce the statutory rights." 482 U.S. at 228-29. Here, however, both Plaintiff and the Company itself can still enforce Section 14(a) through a direct claim.

as the exclusive forum, even though enforcing the clause precluded the plaintiffs from bringing their federal securities claims. 135 F.3d 1289, 1291-92 (9th Cir. 1998) (en banc). In doing so, as this Court later explained, *Richards* "rejected the plaintiffs' argument that the antiwaiver provisions [in the Exchange Act and in the Securities Act] barred enforcement of the forum-selection clause, holding, in effect, that the strong federal policy in favor of enforcement of such clauses superseded the statutory antiwaiver provision" in the federal securities statutes. *Sun*, 901 F.3d at 1089 (citing *Richards*, 135 F.3d at 1294-95).[14]

Plaintiff attempts to distinguish *Richards* because it was an "international" case, PBr. 20, but this Court expressly rejected that argument in *Sun*. There, the parties' forum-selection clause designated California state court as the mandatory forum, but plaintiffs brought suit under Washington securities law in Washington district court. 901 F.3d at 1085. The plaintiffs argued that enforcing the clause would violate a strong public policy and that it would deprive them of their day in court, under *Bremen*'s second and third exceptions. *Sun* rejected both of those

[14] Other Courts of Appeals reached the same conclusion. *See, e.g.*, *Haynsworth v. The Corporation*, 121 F.3d 956, 962 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229-30 (6th Cir. 1995); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 159 (7th Cir. 1993); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1362-63 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1295 (11th Cir. 1998).

arguments, and in doing so made clear that "[a]lthough *Richards* involved a forum-selection clause that pointed to a foreign forum, the conclusion is equally applicable when a clause points to a state forum." *Id.* at 1089. Because "*Atlantic Marine* did not differentiate between a state or a foreign forum," *Sun* likewise concluded that "the strong federal policy in favor of enforcing forum-selection clauses would supersede antiwaiver provisions in state statutes as well as federal statutes, regardless whether the clause points to a state court, a foreign court, or another federal court." *Id.* at 1089-90 (citing 571 U.S. at 66).

Plaintiff's other efforts to distinguish *Sun* also miss the mark. *See* PBr. 23-25. Plaintiff points out that enforcing the forum-selection clause in *Sun* likely did not foreclose the plaintiffs from pursuing their preferred remedies under Washington securities law, because the defendant agreed not to argue that Washington securities law was inapplicable in California state court. PBr. 24. That is true, but nothing in *Sun*'s discussion of *Richards* or the anti-waiver provision turned on the defendant's agreement. This Court's subsequent discussions of *Sun* do not even mention that fact, but rather confirm the holding that "an antiwaiver provision by itself does not supersede a forum-selection clause." *Gemini*, 931 F.3d at 915-16 (citation omitted); *see also Lewis*, 953 F.3d at 1167; *Huffington v. T.C. Grp.*, 637 F.3d 18, 25 (1st Cir. 2011) (noting "a 'chorus of authority" holding that anti-waiver provisions, *e.g.*, 15

U.S.C. §§ 77n, 78cc(a), do not categorically render forum selection clauses unenforceable." (citations omitted)).

Plaintiff's claim that *Sun* involved "sophisticated parties" is equally beside the point. PBr. 23. Neither *Sun* nor subsequent cases mention that issue, and *Lewis* enforced a forum-selection clause even when there was substantial asymmetry in "party sophistication." *See* 953 F.3d at 1162-63 (ruling in favor of an insurance company and enforcing a forum-selection clause against parents of an injured child in "truly tragic" case).[15]

In sum, Plaintiff has failed to carry the "heavy burden" of identifying a "statute" or "judicial decision" that "clearly states" a "strong public policy" that would be violated by enforcement of the clause. *Sun*, 901 F.3d at 1089-90, 1093.

3. *Plaintiff Has Affirmatively Disclaimed Any Reliance On* Bremen*'s Third Prong*

On appeal, Plaintiff has clarified that she is relying exclusively on *Bremen*'s second prong addressing public policy—and that she is *not* asserting that the forum-selection clause is unenforceable under *Bremen*'s third prong, which applies when

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[15] Plaintiff cites this Court's decision in *Gemini*, noting that it refused to enforce a forum-selection clause based on Idaho's anti-waiver statute. *See, e.g.*, PBr. 16, 18. But the clear statement of Idaho's public policy in the statute at issue in *Gemini* only underscores the lack of any similar statement in the Exchange Act. *See* 931 F.3d at 916 ("Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals . . . is void as it is against the public policy of Idaho." (omission in original) (quoting Idaho Code § 29-110(1))).

"trial in the contractual forum will be so gravely difficult and inconvenient that [the litigant] will for all practical purposes be deprived of his day in court." 407 U.S. at 15, 18; *see* PBr. 2, 11-13, 18, 26. Plaintiff does not argue that litigating in Delaware would be gravely difficult or inconvenient, and expressly disavows any argument based on the adequacy of the remedies available in the Delaware Chancery Court. *See* PBr. 26 ("The availability of alternative remedies is irrelevant where the plaintiff demonstrates that enforcement of the clause would contravene strong public policy of the forum.").

Plaintiff's concession is plainly correct. The third *Bremen* exception is exceedingly narrow, permitting nonenforcement only when "the contractually selected forum affords the plaintiffs *no remedies whatsoever.*" *Lewis*, 953 F.3d at 1168 (emphasis added) (quoting *Sun*, 901 F.3d at 1092). What's more, "[i]t is the *availability* of a remedy that matters, not predictions of the likelihood of a win on the merits." *Id.* (citation omitted) This Court has "long recognized 'that dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery.'" *Id.* (citation omitted); *id*. (collecting cases); *see also* ER-10–12 (District Court reviewing this case law).

Here, enforcing the forum-selection clause would not leave Plaintiff with "no remedies whatsoever." As noted, Plaintiff could bring a direct claim under Section

14(a). *See supra* at 32-33. In addition, as the District Court explained, Delaware law provides a derivative nondisclosure claim that Plaintiff may pursue to vindicate her alleged injury. *See* ER-11. Under Delaware law, shareholders may bring a derivative action against corporate directors for failing "to disclose fully and fairly all material information within the board's control when it seeks shareholder action." *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992). That duty "attaches to proxy statements and any other disclosures in contemplation of stockholder action." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (citing *Stroud*, 606 A.2d at 85). The Delaware Chancery Court thus "'provides "some remedy" for the wrong at issue,'" which is all that is required. *Lewis*, 953 F.3d at 1168 (citation omitted).[16]

* * *

[16] Plaintiff's brief concludes with a short, two-paragraph argument that the Exchange Act's anti-waiver provision "[v]oids" Gap's forum-selection clause. PBr. 28-29. It is unclear how Plaintiff intends this argument to differ from her argument that *enforcing* the clause would contravene a "strong public policy" in the Exchange Act's anti-waiver provision. *Id.* at 16. To the extent this is an attack on the facial validity of the clause, that argument is waived because Plaintiff did not raise such a facial attack below. ER-7 (District Court noting that Plaintiff does not dispute that the clause is "valid" but "merely disputes whether the clause should be enforced"). The argument is further barred on appeal because it is "inadequately presented, and therefore waived." *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 n.1 (9th Cir. 2008). In any event, the argument is wrong on the merits for the reasons stated above. *See supra* at 31-36.

Plaintiff has not carried the heavy burden to justify nonenforcement of Gap's valid forum-selection clause. The Exchange Act does not mention—let alone clearly state—a strong public policy that would be contravened by enforcement. Enforcing the clause is required by precedent from the Supreme Court and this Court, and would not deprive Plaintiff of alternative mechanisms for addressing the alleged misconduct. The District Court properly enforced Gap's forum-selection clause, and this Court should affirm.

II. There Are Multiple Alternative Bases On Which To Affirm The District Court's Judgment Of Dismissal

This Court "may affirm [the District Court's dismissal order] on any ground finding support in the record." *Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418-19 (9th Cir. 1998) (citation omitted). There are at least two such grounds available here, beyond the forum-selection clause. First, the Complaint failed to adequately allege demand futility under Rule 23.1, as eight other courts have concluded when reviewing similar lawsuits. Second, the Complaint also fails to state a claim under Rule 12(b)(6), as several courts have held in virtually identical circumstances.

A. The Complaint Failed To Adequately Allege Demand Futility

1. *Delaware Law Establishes An Exacting Test For Demand Futility*

A derivative suit is a "form of action" that allows a shareholder to stand in the shoes of the corporation and "bring 'suit to enforce a *corporate* cause of action against officers, directors, and third parties.'" *Kamen*, 500 U.S. at 95 (citation omitted); *supra* at 32-33. Before filing such a suit, a shareholder must either exhaust intracorporate remedies by demanding that the board itself take action, or adequately allege why making such a demand would have been futile. *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 366-67 (Del. 2006). The requirement of a pre-suit demand is based on the "fundamental principle of corporate governance that the directors of a corporation and not its shareholders manage the business and affairs of the corporation." 13 Fletcher, *Cyclopedia of the Law of Corporations* § 5963 (2021 update). Here, Plaintiff concedes she did not make a demand; instead, she argues that making such a demand would have been futile. ER-60, 121-27 (¶¶ 20, 176-203).

Plaintiff's demand futility allegations are subject to the heightened pleading standard imposed by Federal Rule of Civil Procedure 23.1, which requires Plaintiff to plead futility with particularity. *Potter v. Hughes*, 546 F.3d 1051, 1058 (9th Cir. 2008). Delaware law provides the "substantive law" to determine "whether demand is, in fact, futile." *Rosenbloom ex rel. Allergan, Inc. v. Pyott*, 765 F.3d 1137, 1148

(9th Cir. 2014) (citation omitted). That standard is demanding: "Delaware precedents on demand futility make clear that the bar is high, the standards are stringent, and the situations where demand will be excused are rare." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 782-83 (D.C. Cir. 2008), *abrogated on other grounds by Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553 (2017).

To assess demand futility under Delaware law, courts consider whether a majority of the board's members would have been capable of properly deciding how to address the alleged wrong, whether through litigation or otherwise. As the Delaware Supreme Court just made clear in *United Food & Commercial Workers Union & Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg*, No. 44, 2020, 2021 WL 4344361 (Del. Sept. 23, 2021), that inquiry requires asking the following three questions as to each director:

> (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
>
> (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and
>
> (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.

Id. at *17. "If the answer to any of the questions is 'yes' for at least half of the members of the demand board, then demand is excused as futile." *Id.* This analysis is conducted not only on a "director-by-director basis," *id.* at *16, but also on a "claim-by-claim basis." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 977 n.48 (Del. Ch. 2003), *aff'd*, 845 A.2d 1040 (Del. 2004).[17]

2. *The Complaint Flunks* Zuckerberg*'s Three-Part Test*

Plaintiff's demand futility allegations come nowhere close to satisfying the stringent standards of Rule 23.1 and Delaware law. The Complaint primarily alleges that demand is excused under the second *Zuckerberg* prong, arguing that a majority of Gap's 13 directors at the time of the Complaint—the Demand Board—faced a substantial likelihood of liability under Section 14(a). *See* ER-121 (¶¶ 179-82); *see generally* ER-121–27 (¶¶ 176-203). Those allegations fall short in virtually every respect. The Complaint fails to satisfy *any* of the three *Zuckerberg* prongs for *any* director—let alone the majority of directors necessary to excuse pre-suit demand.

Prong 1. As to the first *Zuckerberg* prong, the Complaint makes no particularized allegations that demand should be excused on the basis that a director

[17] The Delaware Supreme Court recently adopted this three-part test and eliminated the historical distinction between the demand futility analysis under *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000), and *Rales v. Blasband*, 634 A.2d 927 (Del. 1993). The Delaware Supreme Court made clear, however, that this "refined test" is consistent with "*Aronson*, *Rales*, and their progeny" and that cases applying those precedents "remain good law." *Zuckerberg*, 2021 WL 4344361, at *17.

received a "material personal benefit" from the allegedly false or misleading statements in the Proxies. *See* ER-121–27 (¶¶ 176-203). Nor would such an allegation make sense, given the meaning of "personal benefits" in the demand futility context. As the Delaware Supreme Court made clear in *Rales v. Blasband*, a director is disqualified from exercising judgment regarding a litigation demand only if the director received a personal benefit from the wrongdoing "that is not equally shared by the stockholders," 634 A.2d 927, 936 (Del. 1993), such as with insider trading, *see Guttman v. Huang*, 823 A.2d 492, 502 (Del. Ch. 2003).

The Complaint's Proxy allegations are nothing of that sort, because of course directors receive the same per-share dividend payments as any other shareholder. ER-115 (¶¶ 159-60).[18] Thus, to the extent the Complaint broadly alleges that demand is futile as to the Directors from the Fisher Family because of their "huge stock holdings," *see* ER-122–23 (¶¶ 187-90), those allegations do not state a material personal benefit that is not equally shared with Gap stockholders.

[18] What's more, of the thirteen directors at the time of the Complaint, the Company determined that all but two were independent under New York Stock Exchange Rules because, among other things, they had no direct or indirect material relationships with the Company. Ex. C at 5-10. Of the two non-independent directors, one was Sonia Syngal, Gap's CEO, and the other was Bob Martin, who is the Board's Executive Chairman and serves as an advisor to the CEO. *See id.* at 8, 12.

Plaintiff's allegations also impermissibly plead at the group level instead of alleging particularized facts on a director-by-director basis—a problem that runs throughout Plaintiff's demand futility allegations. Delaware law requires alleging demand futility on a "director-by-director basis," *Zuckerberg*, 2021 WL 4344361, at *17, and "does not permit the wholesale imputation of one director's knowledge to every other for demand excusal purposes," *Towers v. Iger*, 912 F.3d 523, 529 (9th Cir. 2018) (quoting *Desimone v. Barrows*, 924 A.2d 908, 943 (Del. Ch. 2007)). Thus, "a derivative complaint must plead facts *specific to each director*, demonstrating that at least half of them" knowingly violated a fiduciary duty. *Id.* (quoting same); *accord, e.g.*, *Ocegueda*, 526 F. Supp. 3d at 648-51 (same); *Caldwell*, 2021 WL 2711750, at *5 (same). Notwithstanding that clear precedent, the Complaint alleges demand futility almost exclusively on a group-wide basis, failing to even address a majority of the Board on an individual basis.

Prong 2. The Complaint attempts but fails to adequately allege that any member of the Demand Board is subject to a "substantial likelihood of liability." Demand may be deemed futile under this prong only when the potential for liability is not "'a mere threat' but instead may rise to 'a substantial likelihood.'" *Rales*, 634 A.2d at 936 (quoting *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)); *see also Janas v. McCraken (In re Silicon Graphics Inc. Sec. Litig.)*, 183 F.3d 970, 990 (9th Cir. 1999)

(requiring plaintiff to plead "particular facts showing that the directors' actions were so egregious that they faced a significant threat of liability"), *superseded by stat. on other grounds as stated in Burbrink v. Campbell*, 734 F. App'x 416 (9th Cir. 2018).

The primary reason that Plaintiff has failed to adequately allege with particularity that members of the Demand Board face a "substantial likelihood of liability" is because the Complaint is wholly meritless. As explained in greater detail below, the Complaint fails to meet even the most basic pleading requirements under Rule 12(b)(6), as several courts have concluded when addressing similar complaints. *Infra* at 53 & n.20. Section 14(a) requires a plaintiff to allege that a proxy statement contained a material misstatement or omission that caused a corporate harm. *See Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 384-85 (1970). The Complaint fails out of the gate because it cannot identify any statement in the 2019 and 2020 Proxies that was false or misleading. *Infra* at 52-53. The statements that Plaintiff identifies have been routinely dismissed as inactionable statements of opinion, puffery, or aspiration. *Id.* at 53. Plaintiff's allegations of falsity are also conclusory and wholly inadequate under any pleading standard, let alone Rule 9(b). *Id.* at 50 & n.19. The Complaint also fails to identify any specific corporate harm that has occurred, and fails to allege any facts showing that the alleged misstatements *caused* that harm. *Id.* at 57-58. These fundamental defects preclude finding that the Defendants face a substantial likelihood of liability.

Beyond these core deficiencies in Plaintiff's Section 14(a) theory, Plaintiff's attempt to satisfy the *Zuckerberg*'s second prong is further undermined by Gap's exculpation clause. The Company's Certificate of Incorporation exculpates its directors by providing that "[t]o the fullest extent permitted by" Delaware law, "a director of the corporation shall not be personally liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director." Ex. F, art. 6, § 2. Because Gap's Board members are exculpated from personal liability, Plaintiff must "alleg[e] with particularity that a director *knowingly* violated a fiduciary duty or failed to act in violation of a *known* duty to act, demonstrating a *conscious* disregard for her duties." *Towers*, 912 F.3d at 529 (emphasis in original) (quoting *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009)); *see also In re Facebook, Inc. Shareholder Derivative Privacy Litig.*, 367 F. Supp. 3d 1108, 1123-24 (N.D. Cal. 2019).

The Complaint lacks any particularized allegations that members of the Demand Board had such knowledge. Thus, Plaintiff's allegation that certain individual Defendants face a likelihood of liability because they "caused Gap to consistently make false statements about Gap's consideration of diversity in the Board nomination process and its commitment to diversity" is categorically insufficient. ER-84 (¶ 99). That allegation is not only conclusory but also fails to include any particularized allegations about Defendants' knowledge.

The Complaint also attempts to satisfy *Zuckerberg*'s second prong by improperly using broad, group-level allegations about the entire Board, ER-122, 124–25 (¶¶ 184, 195, 197), or the members of committees, ER-123–24 (¶¶ 192, 194). These allegations are insufficient as a matter of law under Delaware precedent. *See Towers*, 912 F.3d at 529; *supra* at 44. For example, the Complaint alleges that Defendants Bohutinsky, Goren, Gardner, Montoya, and Shattuck "face a substantial likelihood of liability as a result of their conduct on" the Audit Committee, ER-123–24 (¶¶ 191-96), and Defendants Robert Fisher, Martin, Gardner, and Shattuck "acted in a disloyal and bad faith manner and breached their duty of candor" by their service on the Governance & Sustainability Committee, ER-126–27 (¶¶ 200-03). Courts consistently reject attempts to plead a substantial likelihood of liability based on a defendant's committee membership. *See In re CNET Networks, Inc. S'holder Derivative Litig.*, 483 F. Supp. 2d 947, 963–64 (N.D. Cal. 2007); *In re Yahoo! Inc. S'holder Derivative Litig.*, 153 F. Supp. 3d 1107, 1123–24 (N.D. Cal. 2015); *Wood v. Baum*, 953 A.2d 136, 142-43 (Del. 2008).

Prong 3. The Complaint's allegations about directors lacking "independence" are similarly inadequate. To show a lack of independence, Plaintiff must allege with particularity that a director is "beholden" to one of the directors who satisfies *Zuckerberg*'s first or second prongs. 2021 WL 4344361, at *18 (quoting *Rales*, 634 A.2d at 936); *In re Facebook*, 367 F. Supp. 3d at 1128. But for the reasons explained,

Plaintiff has not properly alleged that *any* director satisfies those first two prongs. No further inquiry into independence is warranted.

In any event, Plaintiff identifies only *four* of the 13-member Demand Board that are allegedly non-independent—Robert Fisher, William Fisher, John Fisher, and Sonia Syngal. ER-122–23 (¶¶ 185, 190). And her allegations against these four also fail.

Plaintiff claims that the Fisher family directors are not independent because they collectively own 43% of Gap's stock. ER-113–14, 122–23 (¶¶ 157, 187-90). "[I[n the demand context," however, a "majority ownership of a company does not strip the directors of the presumptions of independence." *Aronson*, 473 A.2d at 815.

Nor can Plaintiff impugn Syngal's independence on the basis of her status as Gap's CEO. ER-122 (¶ 185). General independence from a company as an employee-director is different than "independence from an interested director" for purposes of demand futility. *See Forestal ex rel. Staar Surgical Co. v. Caldwell*, 739 F. App'x 895, 898 (9th Cir. 2018) (describing as "a non-starter" for demand futility an employee-director's "classification as a non-independent director" under public listing rules). If being a CEO established a lack of independence, that would "'eviscerate' the disinterested prong of the demand futility test and 'would find any director involved in the day-to-day running of company to be "interested" under any set of facts.'" *In re Facebook*, 367 F. Supp. 3d at 1128 (citation omitted).

For all the reasons noted above, the Complaint is wholly insufficient to satisfy the stringent standards under Rule 23.1 and Delaware law to excuse demand. *See Quinn v. Anvil Corp.*, 620 F.3d 1005, 1012 (9th Cir. 2010). That outcome is unsurprising, given that every court to rule on a related case has concluded that the complaint failed to adequately allege demand futility. *See Ocegueda*, 526 F. Supp. 3d at 641; *Kiger*, 2021 WL 5299581, at *1; *In re Danaher Corp.*, 2021 WL 2652367, at *12-13; *Falat*, 2021 WL 1558940, at *4; *Caldwell*, 2021 WL 2711750, at *4, *9; *Ellison*, 2021 WL 2075591, at *9; *NortonLifeLock*, 2021 WL 3861434, at *6; *Lee*, 2021 WL 3912651, at *14.

None of these courts has even suggested that demand futility presented a close question. This case is no different. Plaintiff's failure to plead demand futility therefore presents a valid alternative basis to affirm the decision below.

B. The Section 14(a) Count Fails To State A Claim Under Rule 12(b)(6)

Gap's forum-selection clause and Plaintiff's failure to plead demand futility are each independently sufficient grounds to dismiss the complaint. But those procedural points should not obscure the most fundamental problem with the Complaint: Plaintiff's Section 14(a) theory that Gap misled investors about its commitment to diversity is entirely without merit—indeed, it is borderline frivolous. This Court can affirm the District Court's ruling for failure to state a claim under Rule 12(b)(6).

Section 14(a) requires a plaintiff to allege that a proxy statement contained a material misstatement or omission. *See* 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a-9(a). In addition, the plaintiff must demonstrate that the misstatement or omission in "the proxy solicitation itself . . . was an essential link in the accomplishment of the transaction" (e.g., in accomplishing the proxy's proposed election of directors) that ultimately caused a corporate harm (e.g., a drop in stock price). *Mills*, 396 U.S. at 385; *see also Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022 (9th Cir. 2000).

To survive a Rule 12(b)(6) motion, the complaint must contain sufficient plausible allegations to state a claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The PSLRA requires plaintiffs to specify "(1) each statement alleged to have been misleading; (2) the reason or reasons why the statement is misleading; and (3) all facts on which that belief is formed." *Desaigoudar*, 223 F.3d at 1023. When, as here, a federal securities claim sounds in fraud, Rule 9(b)'s heightened pleading standards also apply. *Id.* at 1022-23; *see also Ocegueda*, 526 F. Supp. 3d at 650-51 (finding that similar allegations "sound in fraud").[19] Plaintiff must plead

[19] Plaintiff alleges that Defendants failed to disclose "fraudulent business practices" and "knew" the challenged statements were false but intentionally issued them anyway. ER-55–56, 90, 126–27, 132 (¶¶ 11, 113, 202, 226). Because Plaintiff "alleges a unified course of fraudulent conduct and relies entirely on that course of conduct as the basis of [her] claim," Plaintiff's "nominal efforts to disclaim allegations of fraud" for her Section 14(a) claim, ER-128 (¶ 223), is unavailing and "Plaintiff must meet Rule 9(b)'s pleading requirements." *Inter-Local Pension Fund*

particularized facts showing that the challenged statements directly caused a corporate action that led to the harm alleged. *Or. Pub. Emps. Ret. Fund v. Apollo Grp.*, 774 F.3d 598, 605 (9th Cir. 2014).

Here, the Complaint alleges that Defendants caused Gap to issue the 2019 and 2020 Proxies with false or misleading statements. ER-106–07, 130–32 (¶¶ 140, 225-26). It challenges statements related to diversity on the Company's Board, ER-84–89, 106–07 (¶¶ 99-109, 140); retention of Deloitte as Gap's auditor, ER-89–92 (¶¶ 110-16); executive compensation, ER-92–103 (¶¶ 117-36); employee salary data, ER-106 (¶ 140(c)); and internal controls regarding diversity, ER-106–07 (¶ 140). According to the Complaint, Gap's "reputation, goodwill, and market capitalization have been harmed," and the Company will "continue to expend[] significant sums of money" as a result of such alleged misstatements or omissions, ER-120–21 (¶¶ 174-75).

Plaintiff's allegations are inadequate as a matter of law, for two overarching reasons. First, the Complaint lacks particularized allegations that the challenged statements were false or misleading—or even material. Second, the Complaint never alleges facts establishing that the purported misstatements proximately caused *any* of the alleged harms. Each failure independently requires dismissal.

GCC/IBT v. Deleage (In re Rigel Pharms., Inc. Sec. Litig.), 697 F.3d 869, 885-86 (9th Cir. 2012).

1. *Plaintiff Fails To Allege Any False Or Misleading Statement*

Board Diversity. Plaintiff challenges the statement in the Proxies that diversity is a factor when Gap considers director nominees, ER-85–86 (¶¶ 101-02), alleging that "Gap has not actively sought to recruit minorities and has just attempted to create the false impression that it is 'committed' to doing so," ER-87 (¶ 105); *see also* ER-130–31 (¶ 225(a)-(b), (e)). Such "conclusory statements" of falsity cannot sustain a federal securities claim. *NortonLifeLock*, 2021 WL 3861434 at *5 (citation omitted). Plaintiff also ignores that Gap "engages third-party search firms as independent consultants" to "identify[] a diverse pool of qualified candidates" for Board membership, Ex. C at 12, and that the Company *has* in fact successfully recruited diverse candidates, including two ethnically diverse directors at the time the Complaint was filed (and more today). *See supra* at 2 & n.3.

Equally conclusory are Plaintiff's allegations that the Board lacked term limits so as to "entrench" the current directors and block Black candidates. ER-89, 127, 131 (¶¶ 109, 203, 225(b)). The Complaint has *no* well-pled allegations to support that inflammatory and implausible claim. Six of the 13 directors on the Demand Board—including four women—were appointed within the last three years, which hardly suggests "entrenchment." ER-63–65 (¶¶ 31-43); Ex. C at 5-8; *see also supra* at 2 & n.3 (noting that since the Complaint, two directors were added to the Board, both of whom are women and one of whom is ethnically diverse).

Plaintiff's allegations about the Board's diversity also challenge aspirational statements of opinion that are subject to strict pleading requirements under *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015). To allege an actionable opinion statement, Plaintiff must plead that Defendants "d[id] not honestly hold the stated belief and the belief is objectively incorrect." *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 615 (9th Cir. 2017). Plaintiff challenges, for example, the statements that "*[t]he Board believes* that . . . professional, personal, gender, and racial/ethnic diversity is important to the effectiveness of the Board's oversight of the Company." ER-85 (¶ 101) (emphasis added); *see also* ER-130–31 (¶ 225(a), (e)). That statement reflects a belief about the importance of diversity across a range of measures. Plaintiff has not alleged that Defendants did not believe the statement was true. Several courts have dismissed similar allegations on this basis. *See, e.g.*, *Ocegueda*, 526 F. Supp. 3d at 651 (dismissing allegations about similar statements as "non-actionable puffery or aspirational (and hence immaterial)").[20]

Deloitte. Plaintiff challenges the Audit and Finance Committee's statement that it was in Gap's "best interest" to continue retaining Deloitte as the Company's external auditor. ER-89–90 (¶¶ 110-13). Plaintiff alleges that those statements were

[20] *See e.g.*, *Kiger*, 2021 WL 5299581, at *2; *NortonLifeLock*, 2021 WL 3861434, at *5.

false because Defendants knew that "lengthy retention of an auditor" results in a "chummy relationship" and ineffective auditing. ER-90 (¶ 112). Again, because Plaintiff challenges statements of opinion—whether the committee members believed continued retention of Deloitte was in the Company's "best interest"—she must allege not only that Defendants did not believe that retaining Deloitte was in the Company's best interest but also that it was "objectively" not in the Company's best interest to do so. *City of Dearborn Heights*, 856 F.3d at 615. The Complaint comes nowhere close, failing to even make particularized allegations that Deloitte conducted inadequate audits of the Company's "internal controls regarding diversity." ER-90 (¶ 114). And her assertion that the Audit and Finance Committee was not properly overseeing Deloitte is undercut by the Complaint's admission that Gap requires a "five-year rotation of the lead audit partner." ER-89 (¶ 110) (quoting proxy statements). Plaintiff also acknowledges that Deloitte "research[es] board diversity among Fortune 500 companies." ER-55 (¶ 7).

Executive Compensation. Plaintiff acknowledges that Gap annually disclosed its executive compensation data and does not dispute their accuracy. ER-95–96, 108–09 (¶¶ 121, 145). Plaintiff nonetheless claims that the Proxies "misleadingly stated" that compensation was tied to "non-financial objectives" without disclosing whether executives met those objectives, and without disclosing that executive compensation was purportedly based on discriminatory pay practices. ER-100–03

(¶¶ 129, 132, 136). But Plaintiff cannot prevail on that "nondisclosure" or "omission" theory simply by alleging that the Proxies omitted relevant information, because "[o]ften, a statement will not mislead even if it is incomplete or does not include all relevant facts." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002); *see also In re Textainer P'ship Sec. Litig.*, No. C-05-0969, 2005 WL 3801596, at *6 (N.D. Cal. Dec. 12, 2005) (applying *Brody* to a Section 14(a) claim). Instead, Plaintiff must identify specific omissions and allege with particularity how those omissions rendered specific statements misleading. *See id*.

Plaintiff's allegations fail at each step. She does not identify with particularity any "omission" that caused the identified statements about executive compensation to be materially misleading. The only allegations are vague and conclusory. Plaintiff cites no "practice" that was unlawful or discriminatory. She does not allege any particular facts showing that Gap's executive compensation was *not* tied to non-financial objectives listed in the Proxies. ER-99–101 (¶¶ 127-31). Further undercutting Plaintiff's theory, Gap's management presented the Compensation Committee with a compensation risk assessment, based on input from an independent consultant, which concluded that Gap's executive compensation did not risk a material adverse effect on the Company. Ex. C at 10, 15, 39. And the 2020 Proxy disclosed that in 2019 "no executive received an annual cash incentive bonus." ER-101 (¶ 132).

Employee Salary Data. The Complaint alleges that the Proxies were false and misleading because Gap did not publish an annual "pay report regarding minorities," allegedly "to conceal existing, known pay disparity adversely affecting Blacks and minorities at the Company." ER-106 (¶ 140(c)). Plaintiff never explains how this purported omission renders a specific statement in the Proxies misleading. *See Brody*, 280 F.3d at 1006. Nor does Plaintiff allege facts supporting the claim that non-white employees are paid unequally at Gap; she instead cites data from the broader national economy. ER-74–75 (¶ 76 & n.9). That is insufficient to state a claim. Plaintiff's allegations that the Company concealed data about a racial pay disparity are disproved by reviewing the webpage that Plaintiff cites, which discloses that an independent review of Gap's California employees found no meaningful pay disparity by race—and that the Company is extending that review nationwide. *Compare* ER-73–74 (¶¶ 74-75), *with* Ex. E.

Diversity Initiatives. Plaintiff alleges that the Proxies were misleading because they failed to disclose that the Company's policies for diversity were "inadequate and ineffective to protect minorities against discrimination" and were not "being complied with." ER-106–07 (¶ 140(f), (h)). Yet Plaintiff does not identify how this alleged omission renders any specific statement in the Proxies misleading. Nor does she allege any discriminatory actions taken against anyone, let alone connect the conduct to the Board.

2. *Plaintiff Fails To Allege Any Loss-Generating Action*

The Complaint also fails to adequately allege that "the proxy solicitation itself" was "an essential link" in causing corporate harm or that Gap has suffered any corporate harm at all. *Mills*, 396 U.S. at 385. To be an essential link, the proxy statement must "*directly authorize*[]" the corporate action that causes harm to the company—"the loss-generating corporate action." *Kelley v. Rambus, Inc.*, No. C 07-1238, 2008 WL 5170598, at *7 (N.D. Cal. Dec. 9, 2008) (citation omitted). As a corollary, damages that are *not* "the result of the corporate action authorized by the proxy statement" are *not* "the type of damages sought to be remedied by section 14(a)." *Cowin v. Bresler*, 741 F.2d 410, 428 (D.C. Cir. 1984).

Here, Plaintiff failed to allege any cognizable harm caused by the Proxies or suffered by the Company. Plaintiff alleges that "as a direct and proximate result of the Individual Defendants' actions," the Company "has expended, and will continue to expend, significant sums of money," including replacing employees who have "quit in protest," settling "discrimination lawsuits" and "government investigations," and "loss of reputation." ER-120 (¶ 175). But the Complaint never alleges that any specific expenditures have actually occurred or will occur. It nowhere alleges, for example, a need "to hire new employees" or that an employee quit because of "discriminatory practices." *Id.* (¶ 175(a)). The Complaint identifies one "discrimination lawsuit[]," *id.* (¶ 175(b)), but it was settled in 2003, ER-73 (¶ 72),

which is 16 years beyond the limitations period for a Section 14(a) claim, *In re Verisign, Inc. Derivative Litig.*, 531 F. Supp. 2d 1173, 1212 (N.D. Cal. 2007). The allegation of "governmental investigations into the Individual Defendants' misconduct," ER-120 (¶ 175(c)) is conclusory and unsupported by any specific allegations. Nor does the Complaint include any specific allegations on the purported reputational harm from the alleged wrongdoing. ER-120–21 (¶ 175(d)).

The Complaint also lacks allegations about how the Proxies "authorized" the purported harm, as required under Section 14(a). Plaintiff does not connect any employee departure or the decades-old discrimination lawsuit to the 2019 and 2020 Proxies. *See* ER-73 (¶ 72). She has not identified how those Proxies caused any particular reputational harm. And the allegations about overpayment of executive compensation could not have been "caused" by the Proxies, because shareholders had only an advisory vote. Ex. G at 20; Ex. C at 23. Finally, to the extent Plaintiff baldly alleges elsewhere that the Proxies were an essential link in stockholders reelecting Board members, ER-132 (¶ 227), such an allegation is "precisely the sort of claim that courts have repeatedly found insufficient to satisfy the transaction causation requirement" of Section 14(a), *Gen. Elec. Co. ex rel. Levit v. Cathcart*, 980 F.2d 927, 933 (3d Cir. 1992).

In short, Plaintiff's Complaint is entirely without merit, and it comes nowhere close to satisfying basic pleading requirements under Rule 12(b)(6). This Court can affirm the judgment below on that basis as well.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's order granting the motion to dismiss.

Dated: December 8, 2021

Respectfully submitted,

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STATEMENT OF RELATED CASES

Ninth Circuit Rule 28-2.6(b) requires parties to identify any "known related case pending in this Court," including any case that "raise[s] the same or closely related issues." The appeal in *Elliemaria Esa v. NortonLifeLock Inc. et al.*, No. 21-16909 (9th Cir.) involves a derivative complaint filed against members of NortonLifeLock's board of directors, alleging that they issued false or misleading proxy statements claiming that their company values diversity. *See Elliemaria Toronto Esa v. NortonLifeLock Inc.*, 2021 WL 3861434, at *1 (N.D. Cal. Aug. 30, 2021). The District Court dismissed the complaint for multiple reasons. *See id.* at *6 (granting motion to dismiss for failure to adequately allege demand futility, failure to state a claim under Rule 12(b)(6), and dismissing state-law claims under a forum-selection clause). Defendants-Appellees do not believe the *NortonLifeLock* appeal qualifies as a "related case" under Rule 28-2.6(b), because the specific forum-selection clause at issue in *NortonLifeLock* is distinct from the one at issue here, and the District Court dismissed only state-law claims under the clause. In addition, the facts surrounding demand futility in that case are likewise different from those at issue here.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(5)-(7), and Ninth Circuit Rule 32-1, Defendants-Appellees' Answering Brief is proportionately spaced, has a typeface of 14 point and contains no more than 13,994 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

s/ *Roman Martinez*
Roman Martinez

ADDENDUM

Pursuant to 9th Cir. R. 28-2.7

TABLE OF CONTENTS

15 U.S.C. § 78n(a)

§ 78n. Proxies

(a) Solicitation of proxies in violation of rules and regulations

(1) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

(2) The rules and regulations prescribed by the Commission under paragraph (1) may include—

(A) a requirement that a solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer; and

(B) a requirement that an issuer follow a certain procedure in relation to a solicitation described in subparagraph (A).

* * *

15 U.S.C. § 78aa(a)

§ 78aa. Jurisdiction of offenses and suits

(a) In general

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this chapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

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15 U.S.C. § 78cc(a)

§ 78cc. Validity of contracts

(a) Waiver provisions

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.

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17 C.F.R. § 240.14a-9

§ 240.14a–9 False or misleading statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing 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 or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

(c) No nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the Federal proxy rules, an applicable state or foreign law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in a registrant's proxy materials, include in a notice on Schedule 14N (§ 240.14n–101), or include in any other related communication, 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 or necessary to correct any statement in any earlier communication with respect to a solicitation for the same meeting or subject matter which has become false or misleading.

NOTE: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this section.

a. Predictions as to specific future market values.

b. Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

c. Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

d. Claims made prior to a meeting regarding the results of a solicitation.

e. Failure to disclose material information regarding proxy voting advice covered by § 240.14a–1(l)(1)(iii)(A), such as the proxy voting advice business's methodology, sources of information, or conflicts of interest.