

Trends in Exclusive Forum Bylaws: They're Valid, Now What?

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For Delaware corporations facing a rising tide of strike suits, the Delaware Court of Chancery's June 25, 2013 *Boilermakers*¹ decision upholding the validity of "exclusive forum" bylaws adopted by Chevron Corporation and FedEx Corporation² marked an important milestone. Exclusive forum bylaws require that derivative actions, stockholder class actions and other intra-corporate disputes be litigated exclusively in a specified forum—prior to the decision, almost always the Delaware Court of Chancery. Such provisions are intended to address plaintiff forum shopping and the related phenomenon of plaintiffs' attorneys filing lawsuits arising out of the same facts in multiple jurisdictions to obtain attorneys' fees. In particular, these provisions seek to avoid the cost and uncertainty of parallel litigation, the risk of inconsistent outcomes and the potential for Delaware law, which governs these disputes, to be misinterpreted by other courts. Additionally, they are intended to allow Delaware corporations to have intra-corporate disputes resolved by the courts most familiar with the state's corporate law.³ As suggested in *Boilermakers*, there is a benefit in having cases "decided in the courts whose Supreme Court has the authoritative final say as to what the governing law means. . . ."⁴

Multi-forum litigation is most well known in the context of mergers and acquisitions. For example, in 2012, 93% of merger and acquisition transactions valued at more than \$100 million resulted in litigation, with an average of 4.8 lawsuits per transaction.⁵ For transactions with Delaware-incorporated targets, 65% resulted in multi-forum litigation in Delaware and other jurisdictions, 19% were challenged outside Delaware only and 16% were challenged solely in the Delaware Court of Chancery.⁶ The most common outcome of such lawsuits was a settlement that provided for the payment of attorneys' fees and additional disclosure,⁷ or in some cases, changes in deal protections, but no increase in purchase consideration for stockholders. The entrepreneurial plaintiffs' bar has also

been pursuing lawsuits, modeled on merger litigation, alleging fiduciary breaches by boards of directors in connection with executive compensation matters. The current generation of such lawsuits typically seeks to enjoin annual meetings where stockholders are being asked to cast annual non-binding votes on executive compensation ("say on pay") or approve equity compensation plans. Such litigation tends to be brought outside a company's state of incorporation.

This article will provide a brief overview of the history of exclusive forum bylaws, followed by an in-depth analysis of: (a) the extent to which *Boilermakers* has prompted corporations to adopt exclusive forum bylaws; (b) the specific language being included in such bylaws; (c) litigation testing the enforceability of exclusive forum bylaws and (d) issues to consider before adopting such a provision.

I. HISTORY OF EXCLUSIVE FORUM BYLAWS

As discussed in *Exclusive Forum Provisions: Putting on the Brakes*, public companies began to adopt exclusive forum bylaws in 2010 through unilateral board action, while companies going public, being spun off, emerging from bankruptcy or otherwise in situations where they were not yet publicly traded, overwhelmingly included provisions in their charters.⁸ Unlike bylaws, charter amendments must be approved by both the board and stockholders. Thus, as a practical matter, bylaws are easier to adopt than charter amendments, and may be easily amended by the board to take into account case law developments and refinements. However, stockholders retain the right to amend or repeal bylaws, including exclusive forum bylaws, and bylaws are generally easier to attack than stockholder-approved charter amendments.

Since 2010, charter adoptions have continued unabated, and have become an accepted norm in initial public offerings (IPOs). However, bylaw adoptions ground to a halt in early

2012 after plaintiffs' firms filed 12 virtually identical lawsuits in the Delaware Court of Chancery challenging the validity of exclusive forum provisions adopted by large, public corporations.⁹ Among other things, the complaints asserted that, under Delaware law, the boards of these companies lacked the power to adopt such bylaws without stockholder approval. While 10 of the 12 companies repealed their bylaws, and nine of those companies paid attorneys' fees as a result, Chevron and FedEx opted to litigate. In Boilermakers, Chancellor Strine unambiguously found that their exclusive forum bylaws were valid both statutorily and contractually.

II. ANALYZING COMPANY RESPONSES TO BOILERMAKERS

A. Level of Bylaw Adoptions. The plaintiffs' appeal to the Delaware Supreme Court raised the question of whether corporations interested in adopting an exclusive forum bylaw would await a determination from the Delaware Supreme Court or view Boilermakers as a sufficient basis for stepping off the sidelines. Based on the author's research, many companies were comfortable acting. The chart below illustrates bylaw adoptions from June 25, 2013–October 31, 2013:

MONTHLY ADOPTION OF DELAWARE EXCLUSIVE FORUM BYLAWS						
[June 25–October 31, 2013]						
	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	TOTAL
Number of Companies	2	21	42	18	22	105
Number S&P 500 Companies	0	6	3	3	7	19

SOURCE: CLAUDIA H. ALLEN

Consistent with prior statements, the plaintiffs appealed the decision to the Delaware Supreme Court. It appeared likely that the well-reasoned Boilermakers opinion would be upheld. However, on October 15, 2013, the plaintiffs unexpectedly withdrew the appeal. They seemingly concluded that the Delaware Supreme Court would affirm, creating a binding precedent from a higher level court. Compared to the opinion from the Court of Chancery, such a precedent would make it more difficult to successfully mount an “as applied” challenge to the enforcement of a forum selection bylaw in a non-Delaware court. While the plaintiffs in Boilermakers asserted a number of other claims, including breaches of fiduciary duty,¹⁰ the opinion only addressed the facial validity of the bylaws. On October 28, 2013, the plaintiffs moved for an order voluntarily dismissing all remaining claims without prejudice, an option that was not attractive to either defendant. Ultimately, the lawsuit against FedEx was dismissed with prejudice on November 1, 2013,¹¹ while the case against Chevron remains pending. Chevron is in a different position from FedEx since it is facing a parallel case in the United States District Court for the Northern District of California that had been stayed pending the outcome of a Delaware appeal.¹² According to the Delaware plaintiffs' October 28 motion, Chevron wanted to “certify a class and litigate all of the remaining claims.”¹³ Chevron may also be considering whether it is possible to obtain binding precedent.

Additionally, five companies planning to go public and two corporations seeking to reincorporate in Delaware announced plans to adopt exclusive forum bylaws during this period. In total, 112 Delaware corporations (listed on Appendix A) adopted or announced plans to adopt exclusive forum bylaws from June 25, 2013 through October 31, 2013.¹⁴ To put these numbers in perspective, during the comparable period in 2012, only one company adopted an exclusive forum bylaw.¹⁵

While the statistics above relate to bylaws adopted by Delaware corporations, corporations in other states also appear to be responding to Boilermakers, although to a lesser degree. In Maryland,¹⁶ 18 corporations or real estate investment trusts adopted (or announced plans to adopt) exclusive forum bylaws during the same period, followed by four corporations in Pennsylvania, two in each of Nevada and Oregon and one in each of Florida, South Carolina, Texas and Virginia. Of these 30 corporations (listed on Appendix B), three are S&P 500 constituents.¹⁷

B. Circumstances of Adoption. Largely consistent with past patterns, 85% of the exclusive forum bylaws analyzed were adopted or proposed by corporations that were already public. In addition, 11% of the bylaws analyzed were (or are being) adopted in connection with IPOs, 2% are being adopted in connection with reincorporation in Delaware, and 1% were

(or are being) adopted in connection with each of a spin-off and emergence from bankruptcy. The percentage of bylaws being adopted in connection with IPOs reflects an increase from 6.6% as of January 1, 2013.¹⁸ It is unclear whether more IPO companies are opting for an exclusive forum bylaw, rather than a charter provision, to provide the board with the unilateral ability to effect future amendments, to appear more stockholder-friendly by providing stockholders with the means to repeal or amend such provisions, or for other reasons. Of the 12 IPO companies analyzed, four included (or plan to include) exclusive forum provisions in both their charters and bylaws, thereby lessening the significance of their exclusive forum bylaws for purposes of this analysis. Additionally, one company that adopted an exclusive forum bylaw announced that it will present the bylaw for approval at its next annual meeting of stockholders. The ratification approach is reminiscent of the ratification approach many companies have taken when adopting poison pills, in response to the policies of Institutional Shareholder Services, Inc. (ISS), the influential proxy advisor.¹⁹

C. Consenting to an Alternate Forum. In *Boilermakers*, the Court noted that the boards of directors of Chevron and FedEx may consent to being sued in another jurisdiction under their exclusive forum bylaws. Bylaws that permit such optionality are viewed as “elective” and generally begin with the language: “Unless the Corporation consents in writing to the selection of an alternative forum” The Court in *Boilermakers* stated that the elective consent language allows boards “to meet their obligation to use their power only for proper corporate purposes.”²⁰ In other words, whenever a lawsuit otherwise covered by an exclusive forum bylaw is brought outside the specified forum, the board must make a determination as to whether it is in the best interests of the corporation for the lawsuit to proceed in that alternate forum.²¹ In some cases, a board might determine that the other forum serves the best interests of the corporation. While some academics and practitioners questioned whether the elective language inequitably allows only the board to select among fora, from the point of view of corporations, that issue has effectively been eliminated by Chancellor Strine’s endorsement. Of the Delaware exclusive forum bylaws adopted after *Boilermakers*, 97% provide that the board may consent to an alternate forum. The remaining companies adopted “mandatory” forum selection provisions, which do not provide flexibility. As of January 2012, only 64% of exclusive forum bylaws included elective language.²²

In connection with future as-applied challenges, plaintiffs may argue that a board has breached its fiduciary duty by

seeking to enforce an exclusive forum bylaw rather than consenting to litigation in the forum chosen by the plaintiffs. In that regard, clearly documenting the board’s rationale for not proceeding in a foreign jurisdiction should be helpful if the issue is raised.

D. Forum and Jurisdiction. Prior to the wave of lawsuits that began in February 2012, 96% of exclusive forum bylaws adopted by Delaware corporations specified the Delaware Court of Chancery as the exclusive forum.²³ After the lawsuits challenging exclusive forum bylaws were filed, and seemingly in response to some of the arguments advanced in the complaint, Chevron amended its bylaw to specify that intra-corporate claims may be brought in any state or federal court in Delaware, and to include a carve-out for situations in which the court does not have jurisdiction over the indispensable parties. Although Fed Ex chose not to amend its bylaw, the Chancellor upheld the validity of both companies’ bylaws.

Of the 112 post-*Boilermakers* bylaws, only 43% provide that the Delaware Court of Chancery is the exclusive forum, 34% provide that if the specified court (usually the Delaware Court of Chancery or a “state court” in Delaware) lacks subject matter jurisdiction, jurisdiction will vest in another Delaware state or federal court, and 23% take the Chevron approach of specifying the state and federal courts in Delaware. The alternatives highlight a potential downside of only specifying the Court of Chancery—the Court may not have jurisdiction. For example, the federal courts or a different Delaware state court, such as the Superior Court, might have jurisdiction. If the federal courts have jurisdiction, plaintiffs could elect to sue the corporation in the federal district court where it is headquartered or otherwise has sufficient contacts. Those federal courts might not have as deep an understanding of Delaware law as the United States District Court for the District of Delaware. In view of these issues, companies should consider describing the exclusive forum as:

the Court of Chancery of the State of Delaware (or, if the Court of Chancery does not have jurisdiction, another state court located within the State of Delaware or, if no state court located within the State of Delaware has jurisdiction, the federal district court for the District of Delaware).

As to potential personal jurisdiction issues,²⁴ 35% of the exclusive forum bylaws adopted after *Boilermakers* require that the court have “personal jurisdiction over the indispensable parties named as defendants.” The comparable

percentage in January 2012 was 19%.²⁵ Similarly, 13% of post-Boilermakers bylaws state that the specified court or courts shall have exclusive jurisdiction “to the fullest extent permitted by law,” in contrast to less than 1% in January 2012.²⁶ Both of these increases reflect heightened sensitivity to jurisdictional arguments made by the plaintiffs.

In connection with the facial challenge in Boilermakers, Chancellor Strine quickly dispensed with plaintiffs’ arguments as to defects in subject matter or personal jurisdiction:

it bears repeating that in the main, and as the plaintiffs themselves concede, the kind of cases in which claims covered by the forum selection clause predominate are already overwhelmingly likely to be resolved by a state, not federal, court. And as with the issue of personal jurisdiction, the plaintiffs ignore a number of factors that suggest that their hypothetical concern that the forum selection clause will operate unreasonably is overstated.²⁷

However, in the context of future “as-applied” challenges to the enforceability of exclusive forum bylaws, any defects in jurisdiction will not be “hypothetical.” While including additional language addressing potential defects in personal or subject matter jurisdiction may not make a difference in the majority of cases, it could in others. Accordingly, it is important to consider these issues when crafting an exclusive forum provision.

E. Deemed Consent. Sixty-six percent of the exclusive forum bylaws analyzed specify that any person or entity owning, purchasing or otherwise acquiring any interest in shares of the corporation’s stock “shall be deemed to have notice of and consented to the provisions of this bylaw.” This percentage contrasts with 33% as of January 2012.²⁸ Under Delaware law, each of the charter and bylaws is deemed a contract that binds all stockholders.²⁹ Thus, the language appears to be a belt and suspenders effort to ensure that stockholders are bound by the bylaw and that non-Delaware courts where the corporation may be sued are on notice of such consent.³⁰ This language; however, raises potential contract interpretation questions. For example, other important process-oriented bylaw provisions, such as those relating to advance notice of stockholder nominations and business, do not include “deemed consent” language.³¹ Accordingly, a stockholder could argue that it is not bound by bylaws that do not include “deemed consent” language. Such an argument would, however, conflict with the precept that all stockholders are bound by all bylaws, regardless of when the bylaws are adopted. Arguably, a better

solution would be to include a deemed consent clause that covers the bylaws in their entirety.

Lennar Incorporated adopted an exclusive forum bylaw³² with deemed consent language that goes a step further. That bylaw states that stockholders will be deemed to have consented to personal jurisdiction in the Court of Chancery (and other specified Delaware courts) “in any proceeding brought to enjoin any action by that person or entity that is inconsistent with the exclusive jurisdiction provided for” in the bylaw.³³ Thus, the Lennar language contemplates that, in the event a stockholder sues outside Delaware, the corporation may also seek an anti-suit injunction against the stockholder in the specified Delaware court. The underlying theory is that any such injunction should be respected in the non-Delaware court. However, the strategy of seeking an anti-suit injunction in Delaware, whether or not the exclusive forum provision explicitly provides for consent to personal jurisdiction in the specified court, may not always work, as exemplified by recent proceedings in a merger lawsuit against Edgen Corporation, discussed in Section III below.

The additional language employed by Lennar raises the question of whether the standard “deemed consent” language in most exclusive forum provisions is sufficient to confer personal jurisdiction. The Delaware Supreme Court has held that where: “the parties to the forum selection clause have consented freely and knowingly to the court’s exercise of jurisdiction, the clause is sufficient to confer personal jurisdiction on a court.”³⁴ However, it is not clear whether the standard language reflects the type of free and knowing submission to jurisdiction contemplated by the Delaware Supreme Court, again as evidenced in the Edgen merger litigation.

F. Sole Bylaw Amendment. Of the 112 companies that have adopted (or indicated an intention to adopt) an exclusive forum bylaw subsequent to Boilermakers, 54% amended their bylaws for the sole purpose of adopting an exclusive forum provision. By contrast, as of January 2012, only 8% of the companies that adopted exclusive forum bylaws did so on a stand-alone basis—generally preferring to bundle exclusive forum amendments with other bylaw amendments.³⁵ The current percentage appears to be another indicator of the relative comfort of public corporations in adopting exclusive forum bylaws.

G. Adoption Prior to Significant Event. Some companies continue to adopt exclusive forum bylaws in advance of, or concurrently with, public announcements of a merger or other

event that could result in litigation. For example, on August 26, 2013, HiTech Pharmacal Co., Inc. agreed to be acquired. On the same day, the board amended the company's bylaws to include a forum selection provision, likely in anticipation of the lawsuits that follow such announcements.³⁶ Air Products and Chemicals, Inc. adopted an exclusive forum bylaw on July 18, 2013.³⁷ On July 31, Pershing Square Capital Management, L.P., the hedge fund, together with affiliated entities, announced that they had acquired a 9.8% beneficial interest in the company.³⁸ Notably, Air Products was one of the ten companies that had repealed a forum selection bylaw after being sued in 2012. Illustrating the changes in practice, Air Products' new bylaw, unlike the original, specifies that if the Delaware Court of Chancery lacks subject matter jurisdiction, the Superior Court of Delaware, followed by the United States District Court for the District of Delaware will have exclusive jurisdiction. In addition, the bylaw specifies that the board may consent to being sued in another jurisdiction.

H. Experimentation. As companies continue to experiment with exclusive forum provisions, a number of other clauses have appeared. For example, 4% of the exclusive forum bylaws analyzed specify that a company shall be entitled to injunctive relief and specific enforcement; 4% include severability language, likely with a view toward as-applied challenges; one provision specifies that the forum provision is solely procedural in nature, seemingly in anticipation of arguments that the bylaw deprives stockholders of substantive rights; and, as discussed above, one company has stated that it will present its exclusive forum bylaw to its stockholders for ratification at the next annual meeting.

I. Size of Companies Adopting Provisions. The market capitalization of companies adopting exclusive forum bylaws ranges from less than \$100 million to more than \$85 billion, indicating interest from both the smallest and largest public companies. Market capitalizations for 100 of the 112 companies analyzed are available on Yahoo Finance. As shown below, the bulk of those companies have market capitalizations below \$5 billion:

- LESS THAN \$1 BILLION—52%
- \$1 BILLION UP TO \$5 BILLION—31%
- \$5 BILLION UP TO \$10 BILLION—7%
- \$10 BILLION UP TO \$20 BILLION—2%
- GREATER THAN \$20 BILLION—8%.

J. Principal Place of Business. The largest percentage of the 112 companies are headquartered in California (26%), followed by Texas (12%), New York (10%), and Arkansas, Illinois, Massachusetts and New Jersey (each, 4%). Corporations headquartered in 21 other states have adopted exclusive forum bylaws since June 25, 2013. The high percentage of corporations headquartered in California is consistent with the high percentage identified in previous analyses of exclusive forum provisions.³⁹ The extent to which these percentages correlate with perceived litigation climates is unclear.⁴⁰

III. ENFORCEMENT AND “AS-APPLIED” CHALLENGES

Although the Court of Chancery found that the Chevron and FedEx exclusive forum bylaws were valid, future skirmishes between plaintiffs and corporations are likely to take place in courts outside Delaware, when defendants seek to dismiss or stay cases based on exclusive forum provisions—and plaintiffs then challenge the enforceability of such provisions.⁴¹ Enforcement disputes could also spill over into Delaware, as described below.

Delaware forum selection bylaws, like other forum selection clauses, should be “construed like any other contractual forum selection clause and [be] considered presumptively, but not necessarily situationally, enforceable,”⁴² according to *Boilermakers*. Plaintiffs may rebut this presumption by showing that enforcement is unreasonable or unjust.⁴³ Plaintiffs may also allege that the board breached its fiduciary duties in enforcing⁴⁴ or adopting a bylaw. Accordingly, exclusive forum provisions are not self-enforcing, a point often overlooked by opponents. Courts in jurisdictions outside Delaware where lawsuits are filed will undertake situational reviews.

The existing case law concerning the enforceability of exclusive forum provisions in bylaws (or charters) is scant and inconsistent. This is not surprising, given that such provisions are relatively new. In *Galaviz v. Berg*,⁴⁵ the first litigated as-applied challenge to a forum selection bylaw, the United States District Court for the Northern District of California declined to dismiss a stockholder derivative action against Oracle on the basis of its mandatory forum selection clause. The Court, in this 2011 case, focused upon the fact that the bylaw was unilaterally adopted by the board after the majority of the alleged wrongdoing occurred and without the consent of stockholders who had purchased shares before the amendment. On the basis of federal common law, the Court found that the bylaw

did not bind stockholders, since it had been adopted without stockholder consent.⁴⁶ The Court did not address whether the provision was valid as a matter of Delaware corporate law. Many practitioners and academics believe that this case of first impression was incorrectly decided, in particular since bylaws customarily provide that they may be amended by the board. In *Boilermakers*, Chancellor Strine sharply criticized *Galaviz* as resting “on a failure to appreciate the contractual framework established by the [Delaware General Corporation Law] for Delaware corporations and their stockholders.”⁴⁷

Another litigated as-applied challenge involved an exclusive forum provision in a certificate of incorporation, and arose in the context of Facebook’s IPO. In a February 2013 ruling, Judge Sweet of the United States District Court of the Southern District of New York denied a motion to dismiss four IPO derivative actions against Facebook on the basis of the exclusive forum provision in its charter.⁴⁸ The Court denied the forum selection motion on narrow technical grounds—the amended charter containing the forum clause was not filed with the Delaware Secretary of State until four days after the IPO. Thus, the provision was not in effect when shares were purchased in the offering. Moreover, since the Court dismissed the cases on other grounds, it did not need to wade into a controversial area:

The Court recognizes the considerable debate on the efficacy, enforceability and desirability of the use of exclusive forum provisions and declines to advance any position here.⁴⁹

On February 15, 2013, in *Daugherty v. Ahn*,⁵⁰ a derivative action brought in Texas against Furmanite Corp., the Texas court granted a motion to dismiss on the basis of Furmanite’s mandatory exclusive forum bylaw, adopted in 2006. That bylaw, which predates the current generation of provisions, is much like Oracle’s, and only addresses derivative actions:

Venue for Derivative Suits. Any derivative action or proceeding by or in the name of the Corporation shall be brought only in the Chancery Court of the State of Delaware.

The case involved allegations of inadequate internal controls and violations of the Foreign Corrupt Practices Act, thus highlighting that exclusive forum provisions are relevant in more than the merger and acquisition context.

On October 1, 2013, Edgen entered into a definitive agreement to be acquired by Sumitomo Corporation. On October 11, the company was sued in Louisiana,⁵¹ where the

company is headquartered. Edgen filed a motion to dismiss in Louisiana based on the mandatory forum clause in its charter. In addition, Edgen, concerned about timing, filed a complaint against the Louisiana plaintiff in the Delaware Court of Chancery, based upon its exclusive forum provision. Edgen sought an anti-suit injunction that would enjoin the plaintiff from prosecuting his claims in the Louisiana action.⁵² Edgen appears to be the first company to employ this strategy. The case was assigned to Vice Chancellor Laster who characterized the plaintiffs’ claims as “an exceedingly weak challenge to a deal.”⁵³

He found that Edgen had stated a colorable claim since the claims in the Louisiana case were within the scope of the exclusive forum provision and the stockholder had facially violated the forum provision. He also found irreparable harm sufficient to support an injunction, since violating a forum selection clause constitutes irreparable harm under Delaware precedent. However, in balancing the equities, he declined to issue an injunction for two primary reasons: (a) potential questions about personal jurisdiction over the plaintiff and (b) concerns over the “aggressive” means by which the company was pursuing enforcement and related concerns regarding respect for other courts.

As to personal jurisdiction, Vice Chancellor Laster stated that the absence of an explicit reference to personal jurisdiction created a “litigable issue.”⁵⁴ With respect to deferring to the court in which litigation was commenced, Vice Chancellor Laster emphasized that *Boilermakers* contemplated that the enforceability of an exclusive forum clause: “would be considered in the first instance by the other court, by the court where the breaching party filed its litigation, not through an anti-suit injunction in the contractually specified court.”⁵⁵ Moreover, he noted that proceedings in Louisiana scheduled for the next day lessened the need for immediate action. Although he declined to issue an injunction, Vice Chancellor Laster stated: “It may be that in the right case an anti-suit injunction is appropriate”⁵⁶ The Louisiana court has since set December 13, 2013 as the hearing date for Edgen’s motion to dismiss.⁵⁷

Additionally, an October 2012 stockholder class and derivative action against MetroPCS Communication, Inc., which has an exclusive forum bylaw remains pending in Texas.⁵⁸ The litigation arose from a business combination involving MetroPCS, Deutsche Telekom and T-Mobile USA, Inc. The Texas trial court granted a temporary restraining order with respect to certain aspects of the transaction, without first considering the defendants’ motion to stay or dismiss the litigation on the

basis of its exclusive forum bylaw. However, the Texas Court of Appeals found that “the trial court abused its discretion by granting injunctive relief without first ruling on . . . motions respecting the forum selection clause in question.”⁵⁹ The Court of Appeals also stated that forcing a party to litigate in a forum different from that provided for in a forum selection clause, and requiring an appeal to enforce the rights granted in that clause is “clear harassment.”⁶⁰ The defendants’ motion to dismiss or stay is scheduled for hearing in February 2014.

IV. CONSIDERATIONS RELATING TO ADOPTION

For corporations that have been involved in multi-forum litigation, the appeal of an exclusive forum bylaw is obvious. For others contemplating adoption of an exclusive forum bylaw, the statistics concerning the incidence of intra-corporate litigation brought outside a corporation’s state of incorporation serve as a powerful incentive to act.

Nonetheless, consistent with their fiduciary duties, boards must thoughtfully evaluate whether a forum selection bylaw would be in the best interests of the corporation and all of its stockholders. In *Boilermakers*, the plaintiffs alleged that board adoption of an exclusive forum bylaw was self-interested, so it is important to create a record establishing an independent, informed and balanced consideration of whether to adopt an exclusive forum bylaw. As part of its analysis, the board should evaluate whether there are reasons to favor litigating in a company’s headquarters state and whether the status quo may be a superior option. For corporations formed outside Delaware, determining whether to adopt an exclusive forum bylaw will also involve assessing the quality of the state courts that would be specified.

As a practical matter, boards should analyze the views of their stockholders on exclusive forum provisions. Some institutional investors support exclusive forum bylaws, while others object on the theory that such provisions deprive investors of an important right. Notably, over time, some institutional investors who originally opposed exclusive forum provisions have changed their views, recognizing that strike suits are effectively a tax on their investments. Companies should review the proxy voting guidelines of their institutional investors, Forms N-PX revealing how they voted in the prior proxy season and the extent to which they follow the voting recommendations of ISS and/or Glass Lewis & Co. Both proxy advisors generally oppose company proposals to adopt exclusive forum provisions, although they technically

make case-by-case determinations.⁶¹ Glass Lewis takes its opposition one step further by recommending against the election of the governance committee chair, if during the past year, the board adopted a forum selection clause without stockholder approval.⁶²

The reaction of stockholders to proposals seeking the repeal of exclusive forum bylaws provides evidence that stockholders are listening to what well-run corporations have to say about the costs of multi-forum litigation. In 2012, Amalgamated Bank LongView Funds submitted four non-binding repeal proposals. Amalgamated Bank describes itself as “America’s Labor Bank.” In response, two of the targeted companies repealed their bylaws, while Chevron and United Rentals, Inc. took the proposals to their stockholders and defeated the proposals by almost a two-to-one margin. It is unclear whether there will be any repeal proposals this season. But the results of the Chevron and United Rentals votes indicate that providing stockholders with a balanced and thoughtful explanation of a company’s reasoning can be persuasive.

Additionally, boards should be aware that exclusive forum bylaws are relatively new and case law is only beginning to develop. When corporations seek to enforce such provisions in non-Delaware courts, the provisions will be subject to situational reasonableness review and likely challenges from plaintiffs. Although arguments in favor of enforcement are strong, there can be no guarantee that a non-Delaware court will enforce a bylaw providing that the exclusive forum will be in Delaware, and courts in different jurisdictions may reach inconsistent conclusions.

V. CONCLUSION

Companies should carefully consider whether to adopt an exclusive forum bylaw, taking into account the issues discussed above, as well as the timing of adoption. For companies that are already public, exclusive forum bylaws represent the best tool currently available to address the phenomenon of strike suits for which stockholders pay—either directly or indirectly. *Boilermakers* serves as an important endorsement of the underlying soundness of exclusive forum bylaws. Action is now likely to move to courts in other states as plaintiffs challenge the enforcement of these provisions. The reaction of non-Delaware courts to these provisions, particularly in states such as California, will be a key determinant of their success. ■

ENDNOTES

¹ Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013) judgment entered sub nom. Boilermakers Local 154 Ret. Fund & Key W. Police & Fire Pension Fund v. Chevron Corp., 7220-CS, 2013 WL3810127 (Del. Ch. June 25, 2013) [hereinafter Boilermakers].

² The Chevron bylaw is representative of the current generation of provisions, and provides as follows:

Unless the Corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine shall be a state or federal court located within the state of Delaware, in all cases subject to the court's having personal jurisdiction over the indispensable parties named as defendants. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Article VII.

Chevron Corporation, Bylaws, as amended Mar. 28, 2012. Filed as Exhibit 3.1 to Current Report on Form 8-K filed on Mar. 28, 2012, available at <http://www.sec.gov/Archives/edgar/data/93410/000119312512139980/d326116dex31.htm>. The FedEx bylaw differs from the Chevron bylaw in that: (a) the exclusive forum specified is limited to the Delaware Court of Chancery and (b) it does not include a carve-out for situations in which the court lacks personal jurisdiction over indispensable parties. Both of these features were added to Chevron's bylaw after it was sued in the Court of Chancery.

³ See John Armour, Bernard Black & Brian Cheffins, Delaware's Balancing Act, 87 INDIANA L.J. 1345, 1347 (2012) ("An extensive body of precedent, developed by expert judges, has been a key part of Delaware's 'value-added' for firms, which has helped to sustain its high share in the market for corporate law, despite premium pricing in the form of sizeable 'franchise taxes' levied on firms that incorporate there.").

⁴ Boilermakers at 953.

⁵ Robert M. Daines & Olga Koumrian, Shareholder Litigation Involving Mergers and Acquisitions, CORNERSTONE RESEARCH, February 2013, at 1-3, available at <http://www.cornerstone.com/getattachment/199b1351-abao-4f6d-92fo-24b5of4a4b29/Shareholder-Litigation-Involving-Mergers-and-Acqui.aspx>. See also Matthew D. Cain & Steven M. Davidoff, Takeover Litigation in 2012, February 1, 2013, at 1-3, available at <http://ssrn.com/abstract=2216727>. Similar to Daines and Koumrian, Cain and Davidoff found that 91.7% of 2012 deals resulted in litigation, and the average number of lawsuits per transaction was five.

⁶ Shareholder Litigation Involving Mergers and Acquisitions, *supra* note 5, at 3.

⁷ *Id.* at 6 (indicating that in 81% of settlements, stockholders received only supplemental disclosures "and the parties in only one settlement acknowledged that litigation contributed to an increase in the merger price.")

⁸ Claudia H. Allen, Exclusive Forum Provisions: Putting on the Brakes, 10 CORP. ACCOUNTABILITY REP. 1286, (December 14, 2012) [hereinafter Putting on the Brakes], available at <http://65.17.213.81/>

[Files/45101_BNA_121412_Exclusive_Forum_Provisions.pdf](#). In order to adopt a bylaw, the board must be granted authority to do so under the charter. Such a grant is customary. Only a small number of public companies have put exclusive forum charter amendment proposals to a stockholder vote. *Id.* Institutional Shareholder Services, Inc. and Glass Lewis & Co., Inc., the influential proxy advisory firms, have recommended against approval of such management proposals. See *infra* note 61.

⁹ Putting on the Brakes, *supra* note 8.

¹⁰ The opinion in Boilermakers noted that Chevron and FedEx had argued that multi-forum litigation "imposes high costs on the corporations and hurts investors by causing needless costs that are ultimately born by stockholders, and that these costs are not justified by rational benefits for stockholders from multiforum filings." Boilermakers at 944. Essentially, both companies argued that adopting such a bylaw was a rational response to a known problem, and thus their boards should be protected by the deferential business judgment rule.

¹¹ Stipulation and Order of Dismissal, IClub Partnership v. FedEx Corporation, C.A. No. 7238-CS (Del. Ch. Nov. 1, 2013).

¹² The parallel suit, largely copied from the Delaware complaint, was filed in March 2012. Bushansky v. Armacost, No. CV 12 1597 (N.D. Cal. 2012). This is the same court that refused to dismiss the case against Oracle Corporation discussed *infra* in note 45. On August 9, 2012, the United States District Court for the Northern District of California stayed the Bushansky case until August 8, 2013, pending the outcome of the litigation in the Court of Chancery. Order Granting in Part and Denying in Part Defendants' Motion to Abstain or Stay and Setting Case Management Conference, Bushansky v. Armacost, No. CV 12 1597 (N.D. Cal. Aug. 9, 2012). Then on August 20, 2013, the action was stayed "until the Supreme Court of Delaware decides the likely appeal of the Delaware Decision." Stipulation and Order to Continue Stay, Bushansky v. Armacost, No. CV 12 1597 (N.D. Cal. Aug. 20, 2013). The case remains pending.

¹³ Motion for Dismissal Without Prejudice, Boilermakers Local 154 Ret. Fund v Chevron Corp., C.A. No. 7220-CS (Del. Ch. Oct. 28, 2013).

¹⁴ The total does not include THL Credit Senior Loan Fund, a Delaware statutory trust, that adopted an exclusive forum bylaw in August 2013 designating the state or federal courts in Delaware.

¹⁵ See Putting on the Brakes, *supra* note 8.

¹⁶ The provisions of the Maryland General Corporation law relating to the permissible scope of a bylaw are similar to the parallel provisions in the Delaware General Corporation Law, and Maryland courts "have historically found Delaware law in matters involving business law highly persuasive." Venable LLP, Exclusive Forum Selection Bylaws in Maryland, July 9, 2013 (citing In re Nationwide Health Properties, Inc. Shareholder Litigation, No 24-C-11-001476, slip op. at 16 (Md. Cir. Ct. May 27, 2011)).

¹⁷ The total does not include Genco Shipping & Trading Limited, a Marshall Islands corporation, that adopted an exclusive forum bylaw in October, 2013, designating the state or federal courts in the State of New York.

¹⁸ This percentage is derived from data gathered in connection with preparing Claudia H. Allen, Study of Delaware Forum Selection in Charters and Bylaws, January 25, 2012 [hereinafter, Study of Delaware

Forum Selection], available at http://65.17.213.81/Files/45103_Jan_%202012_Forum_Study.pdf.

¹⁹ See, e.g., Institutional Shareholder Services, Inc., 2013 U.S. Proxy Voting Summary Guidelines, January 31, 2013, available at <http://www.issgovernance.com/files/2013ISSUSSummaryGuidelines1312013.pdf>. ISS recommends voting against or withholding votes from the entire board of directors (other than new nominees, who it evaluates on a case-by-case basis) if: “The board adopts a poison pill with a term of more than 12 months (“long-term pill”), or renews any existing pill, including any “short-term” pill (12 months or less), without shareholder approval.”

²⁰ *Boilermakers* at 954.

²¹ If the defendant corporation asserts that the lawsuit should be dismissed or stayed on the basis of its exclusive forum bylaw, the foreign court must make a determination as to whether to enforce that bylaw. That determination involves a three part analysis under which the foreign court: (a) applies the laws of the state of incorporation to evaluate the validity of adoption, (b) applies the foreign jurisdiction’s laws to determine whether the motion should be granted and (c) applies the laws of the state of incorporation to determine whether enforcing the bylaw would lead to a breach of the board’s fiduciary duty or an inequitable result. See Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: a Legal, Economic, and Political Analysis*, 68 THE BUS. LAWYER 325, 330 (2013).

²² This statistic was derived from the data gathered in connection with preparing the *Study of Delaware Forum Selection*, *supra* note 18. The first generation of exclusive forum provisions were largely mandatory, unlike the current generation. See *Study of Delaware Forum Selection*, *supra* note 18, at 7-8.

²³ This percentage is derived from data gathered in connection with preparing the *Study of Delaware Forum Selection*, *supra* note 18. According to that data, the remaining 4% specified a court of competent jurisdiction in Delaware or the state and federal courts in Delaware. Note that the latter formulation is the same as Chevron’s amended formulation. The data also indicate that as of December 31, 2011, 13% of companies with exclusive forum bylaws included language recognizing the potential for federal courts to have exclusive jurisdiction.

²⁴ Chancellor Strine suggested a practical solution to ensuring that the Court would have jurisdiction over officers, employees and affiliates not subject to 10 Del. C. § 3114, concerning service of process on non-residents—namely, conditioning advancement and indemnification on assent to jurisdiction in Delaware over the categories of claims covered by an exclusive forum bylaw, or including consent to jurisdiction provisions in employment agreements.

²⁵ This percentage is derived from data gathered in connection with preparing the *Study of Delaware Forum Selection*, *supra* note 18.

²⁶ *Id.*

²⁷ *Boilermakers* at 961 (citations omitted).

²⁸ This percentage is derived from data gathered in connection with preparing the *Study of Delaware Forum Selection*, *supra* note 18.

²⁹ See *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) (“Corporate charters and bylaws are contracts among a corporation’s shareholders.”); *Centaur Partners, IV v. Nat’l Intergroup, Inc.*, 582 A.2d 923, 938 (Del. 1990) (“Corporate charters and by-laws are contracts among the shareholders of a corporation and the general rules of

contract interpretation are held to apply.”); *Boilermakers* at 955 (“In an unbroken line of decisions dating back several generations, [the Delaware] Supreme Court has made clear that bylaws constitute a binding part of the contract between a Delaware corporation and its shareholders.”).

³⁰ This percentage is derived from data gathered in connection with preparing the *Study of Delaware Forum Selection*, *supra* note 18.

³¹ Moreover, the Delaware courts have rejected the notion that stockholders have “vested rights” that may not be changed through board-adopted bylaw amendments. *Boilermakers* at 940; *Kidsco v. Dinsmore*, 953 A.2d 227, 234 (Del. 2008).

³² Lennar Corporation, Bylaws as amended as of October 3, 2013. Filed as Exhibit 3.6 to Current Report on Form 8-K filed on October 4, 2013, available at <http://www.sec.gov/Archives/edgar/data/920760/000119312513391695/d607840dex36.htm>.

³³ Explicitly providing that investors are deemed to have submitted to the exclusive jurisdiction of a specified court has been more common in the context of publicly traded limited partnerships and limited liability companies. See e.g., LRR Energy, L.P., Section 16.9 of First Amended and Restated Agreement of Limited Partnership Agreement, dated as of Nov. 16, 2011. Filed as Exhibit 3.1 to Current Report on Form 8-K filed on Nov. 22, 2011, available at http://www.sec.gov/Archives/edgar/data/1519632/000110465911065590/a11-30123_1ex3d1.htm; Vanguard Natural Resources, LLC., Section 15.8 of Amendment No. 1 to Third Amended and Restated Limited Liability Company Agreement, filed as Exhibit 3.1 to Current Report on Form 8-K filed on August 5, 2013, available at <http://www.sec.gov/Archives/edgar/data/1384072/000138407213000075/vnr-amendmentno1tollcagree.htm>.

³⁴ *Nat’l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 381 (Del. 2013).

³⁵ This statistic is derived from the data collected in connection with preparing the *Study of Delaware Forum Selection*, *supra* note 18.

³⁶ See Items 1.01 and 5.03 of Current Report on Form 8-K filed on Aug. 27, 2013, available at http://www.sec.gov/Archives/edgar/data/887497/000114420413047928/v353808_8k.htm.

³⁷ Air Products and Chemicals, Inc., Amended and Restated Bylaws. Filed as Exhibit 3.1 to Current Report on Form 8-K filed on July 23, 2012, available at <http://www.sec.gov/Archives/edgar/data/2969/000119312513298998/d571094dex31.htm>.

³⁸ Schedule 13D filed on July 31, 2013, available at <http://www.sec.gov/Archives/edgar/data/2969/000119312513311732/d576548dsc13d.htm>.

³⁹ *Study of Delaware Forum Selection*, *supra* note 18, at 8; Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. LAW, 333, 354, 368-369 (2012) (noting that Delaware chartered corporations headquartered in California were over-represented in the group of entities that had adopted exclusive forum provisions, and that previous research indicated approximately 23.8% of Delaware corporations are headquartered in California). Since the cited statistic is from 2003, and the pool of companies analyzed in this article is modest, it is unclear whether California remains over-represented.

⁴⁰ For example, the 2012 edition of State Liability Systems Survey: Lawsuit Climate, Ranking the States, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (conducted by Harris Interactive Inc.), September 2012, available at http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuit_Climate_Report_2012.pdf, ranked California-47, Texas-36, New York-18, Arkansas-35, Illinois-46, Massachusetts-19 and New Jersey-32.

⁴¹ Exclusive forum bylaws and charter provisions can be analyzed in largely the same light as stockholder rights plans (poison pills). The validity of these provisions has been established, but they are subject to situational challenge.

⁴² Boilermakers at 957.

⁴³ M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (United States Supreme Court held that a forum selection clause should be enforced unless the resisting party can meet the heavy burden of showing that enforcement would be “unreasonable” under the circumstances.”); Ingres Corp. v. CA, Inc., 8 A.3d 1143, 1445, 1147 (Del. 2010) (Delaware Supreme Court held that “where contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties’ contract and enforce the clause” unless the resisting party can show that the “clause was unreasonable, unjust, or otherwise invalid.”); Boilermakers at 958.

⁴⁴ Plaintiffs might argue that the bylaw is being used for inequitable purposes. See Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971).

⁴⁵ 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

⁴⁶ The Court suggested that if the provision had been approved by stockholders and in the company’s charter, the argument for enforceability would be stronger. Id. at 1175. It is possible that other courts might share this view.

⁴⁷ Boilermakers at 956.

⁴⁸ In re Facebook, Inc., IPO Sec. & Derivative Litig., 922 F. Supp. 2d 445, 463 (S.D.N.Y. 2013).

⁴⁹ Id. at 462, note 16 (citations omitted).

⁵⁰ Order Granting Defendants’ Motion to Dismiss Because of Mandatory Forum Selection Clause, Daugherty v. Ahn, Cause No. CC-11-06211 (Cnty. Ct. at Law No. 3, Dallas Cnty. Tex., Feb. 15, 2013).

⁵¹ Amended Petition for Breach of Fiduciary Duty, Genoud v. Edgen Grp., Inc., No. 625244 (La. 19th Jud. Dist. Ct. filed Oct. 22, 2013)

⁵² Verified Complaint for Injunctive Relief, Edgen Grp., Inc. v. Genoud, No. 9055-VCL (Del. Ch. filed Oct. 31, 2013).

⁵³ Telephonic Hearing on Plaintiffs’ Motions for Expedited Proceedings and For Temporary Restraining Order and Rulings of the Court at 22, Edgen Grp., Inc. v. Genoud, No. 9055-VCL (Del. Ch. Nov. 5, 2013).

⁵⁴ Id. at 36. The Vice Chancellor also stated: “Now, I am not making a ruling today that I do not have personal jurisdiction.” Id.

⁵⁵ Id. at 39 (emphasis added).

⁵⁶ Id. at 41.

⁵⁷ Letter, dated November 8, 2013, from P. Clarkson Collins, Jr., counsel for Edgen Group Inc., to Vice Chancellor Strine, describing the November 6, 2013 status conference in Genoud v. Edgen Group Inc., No. 625244 (La. Dist. Ct.).

⁵⁸ Golovoy v. Deutsche Telekom, Cause No. CC-12-06144-A (Cnty. Ct. at Law No. 1, Dallas Cnty., Tex., Oct. 10, 2012). In April 2013, in connection with the consummation of the business combination described below, stockholders also approved an exclusive forum charter amendment and the company changed its name to T-Mobile US, Inc.

⁵⁹ In Re MetroPCS Communications, Inc., 391 S.W.3d 329, 340 (Tex. App. 2013).

⁶⁰ Id. at 15 (citing In re AutoNation, 228 S.W.3d 663, 667-68 (Tex. 2007)).

⁶¹ See ISS 2013 U.S. Proxy Voting Summary Guidelines, January 31, 2013, available at <http://www.issgovernance.com/files/2013ISSUSummaryGuidelines1312013.pdf>. ISS has a “case-by-case” policy on exclusive forum proposals, that takes into account:

- Whether the company has been materially harmed by shareholder litigation outside its jurisdiction of incorporation, based on disclosure in the company’s proxy statement; and
- Whether the company has the following good governance features:
 - An annually elected board;
 - A majority vote standard in uncontested director elections; and
 - The absence of a poison pill, unless the pill was approved by shareholders.

However, as a practical matter, ISS has yet to identify a company it believes has experienced “material harm.”

See Glass Lewis & Co., Proxy Paper Guidelines: 2013 Proxy Season. Glass Lewis also has a case-by-case policy:

we recommend that shareholders vote against any bylaw or charter amendment seeking to adopt an exclusive forum provision unless the company: (i) provides a compelling argument on why the provision would directly benefit shareholders; (ii) provides evidence of abuse of legal process in other, non-favored jurisdictions; and (ii) maintains a strong record of good corporate governance practices.

Again, no company has qualified for the exception. See also Study of Delaware Forum Selection, supra note 18, at 6. Glass Lewis has taken the position that exclusive forum provisions may discourage derivative actions by making them more costly and difficult to pursue. Note that these policies do not apply to board-adopted bylaws, but it is nonetheless important to take these positions into account.

⁶² Glass Lewis & Co., Proxy Paper Guidelines: 2013 Proxy Season.



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APPENDIX A

DELAWARE CORPORATIONS ANALYZED¹

ACADIA Pharmaceuticals, Inc.	Electronic Arts Inc.	PAR Technology Corporation
Air Products and Chemicals, Inc.	Entropic Communications, Inc.	Peabody Energy Corporation
Alexion Pharmaceuticals, Inc.	ExamWorks Group, Inc.	PennyMac Financial Services, Inc.
Allied Nevada Gold Corp.	The ExOne Company	Positron Corporation
Amgen Inc.	Fuel Systems Solutions, Inc.	PROS Holdings, Inc.
Amtrust Financial Services, Inc.	Galena Biopharma, Inc.	Quest Diagnostics Incorporated
Anchor BanCorp Wisconsin Inc.	GAMCO Investors, Inc.	Relypsa, Inc.
Arkansas Best Corporation	GigOptix, Inc.	Renewable Energy Group, Inc.
Atlantic Tele-Network, Inc.	Greif, Inc.	RigNet, Inc.
Atrion Corporation	Harte-Hanks, Inc.	Rockwood Holdings, Inc.
The Babcock & Wilcox Company	HCC Insurance Holdings, Inc.	Royal Gold, Inc.
Baker Hughes Incorporated	Hi-Tech Pharmacal Co., Inc.	Safeway Inc.
Benefitfocus, Inc.	Honeywell International Inc.	SanDisk Corporation
Blucora, Inc.	Houghton Mifflin Harcourt (f/k/a HMMH Holdings (Delaware), Inc.)	SEACOR Holdings Inc.
Caesar's Acquisition Company	Huntsman Corporation	ServisFirst Bancshares, Inc.
CARBO Ceramics Inc.	Integrated Device Technology, Inc.	SFX Entertainment, Inc.
Career Education Corporation	InterMune, Inc.	Skilled Healthcare Group, Inc.
Celladon Corporation	International Rectifier Corporation	Steinway Musical Instruments, Inc.
Chemed Corporation	iPass Inc.	Stock Building Supply
Chrysler Group Corporation	J. C. Penney Company, Inc.	StoneCastle Financial Corp.
Cirrus Logic, Inc.	Jos. A. Bank Clothiers, Inc.	Sucampo Pharmaceuticals, Inc.
Coleman Cable, Inc.	Joy Global Inc.	SunCoke Energy, Inc.
Computer Programs and Systems, Inc.	Lennar Corporation	ThermoEnergy Corporation
Cornerstone Therapeutics Inc.	Libbey Inc.	Twenty-First Century Fox, Inc.
Covanta Holding Corporation	Lifetime Brands, Inc.	Twitter, Inc.
Crosstex Energy, Inc.	Lyrus, Inc.	Tyson Foods, Inc.
Cubic Corporation	Marrone Bio Innovations, Inc.	Uranium Resources, Inc.
CytRx Corporation	MGM Resorts International	Verenium Corporation
Datawatch Corporation	Molina Healthcare, Inc.	Verso Paper Corp.
DeVry Education Group Inc. (f/k/a DeVry Inc.)	Monster Beverage Corporation	Vitamin Shoppe, Inc.
Dillard's, Inc.	Murphy USA Inc.	Vocera Communications, Inc.
Dover Downs Gaming & Entertainment, Inc.	National American University Holdings	Vocus, Inc.
Dover Motorsports, Inc.	National General Holdings Corp.	Volcano Corporation
Dresser-Rand Group Inc.	Newfield Exploration Company	VSE Corporation
DST Systems, Inc.	Nutraceutical International Corporation	Waters Corporation
E. I. du Pont de Nemours and Company	Old Republic International Corporation	Websense, Inc.
EarthLink, Inc.	Overstock.com, Inc.	Willis Lease Finance Corporation
		Xencor, Inc.

¹ THL Credit Senior Loan Fund, a Delaware statutory trust, adopted an exclusive forum bylaw in August 2013.

APPENDIX B

NON-DELAWARE CORPORATIONS ANALYZED²

Albemarle Corporation	Recro Pharma, Inc.
NGP Capital Resources Company	First Financial Holdings, Inc.
Annaly Capital Management, Inc	Rexford Industrial Realty, Inc.
NorthStar Healthcare Income, Inc	Flir Systems, Inc.
Brixmor Property Group Inc.	Schnitzer Steel Industries, Inc.
NorthStar Real Estate Income II, Inc	Gaming and Leisure Properties, Inc
CBS Outdoor Americas Inc.	Steadfast Apartment REIT, Inc.
NorthStar Real Estate Income Trust, Inc.	iStar Financial Inc.
Cole Real Estate Investments, Inc	Sunchip Technology, Inc.
NorthStar Realty Finance Corp.	Monmouth Real Estate Investment Corporation
Crown Holdings, Inc.	Swift Energy Company
PennyMac Mortgage Investment Trust	Neurotrope, Inc.
Douglas Emmett, Inc.	UMH Properties, Inc.
The PNC Financial Services Group, Inc	NF Investment Corp.
FelCor Lodging Trust Incorporated	Wynn Resorts, Limited

² Genco Shipping & Trading Limited, a Marshall Islands corporation, adopted an exclusive forum bylaw in October, 2013 designating the state or federal courts in the State of New York.