

May 20, 2022

## NINTH CIRCUIT ENFORCES FORUM SELECTION BYLAW AGAINST FEDERAL SECURITIES CLAIM

To Our Clients and Friends:

Last year we reported on a federal district court decision dismissing a federal securities law claim brought derivatively on behalf of The Gap, Inc. pursuant to a forum selection bylaw designating the Delaware Court of Chancery as the exclusive forum for derivative suits (the “Forum Bylaw”). *See Lee v. Fisher*, Case No. 20-cv-06163-SK, ECF No. 59 (N.D. Cal. Apr. 27, 2021). The plaintiff appealed that decision to the Ninth Circuit Court of Appeals, and, on May 13, 2022, the Ninth Circuit affirmed. *See Lee v. Fisher*, Case No. 21-15923. This decision is significant because it effectively bars plaintiffs from asserting federal securities law claims derivatively when a company has designated a state court venue as the exclusive forum for derivative actions.

The plaintiff in *Fisher* brought derivative claims purportedly on behalf of Gap against certain directors and officers based on their alleged failure to promote diversity at Gap and for allegedly making misleading statements about Gap’s commitment to diversity. The plaintiff asserted that the officers and directors had violated both state law by allegedly breaching their fiduciary duties and federal securities law by violating the proxy rules under Section 14(a) of the Securities Exchange Act. In the district court, defendants moved to dismiss on *forum non conveniens* grounds pursuant to the Forum Bylaw. Plaintiff argued that the court could not enforce the Forum Bylaw as to the federal Section 14(a) claim because (1) that claim was subject to exclusive federal jurisdiction and could not be asserted in the Delaware Court of Chancery, and (2) enforcing the Forum Bylaw would violate the Exchange Act provision that prohibits waiving compliance with the Exchange Act (the “anti-waiver” provision). The district court disagreed and dismissed the lawsuit.

The Ninth Circuit affirmed the district court’s ruling in full. The Court noted that under Supreme Court precedent forum selection clauses should be enforced absent “extraordinary circumstances.” The Ninth Circuit previously articulated three such circumstances, one of which plaintiff argued was implicated in this case: enforcing the Forum Bylaw “would contravene a strong public policy of the forum in which suit is brought.” As in the district court, the plaintiff pointed to the Exchange Act’s anti-waiver provision and the exclusive federal jurisdiction over Exchange Act claims as evidence that enforcing the Forum Bylaw would violate public policy. The Court rejected these arguments because neither of these statutory provisions expressly states that refusing to give effect to these provisions would violate public policy. Additionally, the Court noted it was relevant to its analysis that plaintiff failed to “identif[y] Delaware law clearly stating that she could not get any relief in the Delaware Court of Chancery.” The Ninth Circuit therefore affirmed because plaintiff failed to carry her “heavy burden” to overcome the forum provision.

# GIBSON DUNN

By holding that *all* derivative claims must be brought in the Delaware Court of Chancery, this decision fulfills the purpose of exclusive forum provisions: to prevent duplicative litigation in multiple forums and thereby increase efficiencies and decrease costs for companies. However, it is important to note that not all courts agree, and this decision sets up a potential Circuit split. Earlier this year, the Seventh Circuit refused to enforce a substantially similar forum provision against a derivative Section 14(a) claim. *See Seafarers Pension Plan on behalf of Boeing Co. v. Bradway*, 23 F.4th 714 (7th Cir. 2022). We will continue to monitor developments in this space.



*Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the Securities Litigation or Securities Regulation and Corporate Governance practice groups, or the following authors:*

*Brian M. Lutz – San Francisco/New York (+1 415-393-8379/+1 212-351-3881,  
blutz@gibsondunn.com)*

*Jason J. Mendro – Washington, D.C. (+1 202-887-3726, jmendro@gibsondunn.com)*

*Ronald O. Mueller – Washington, D.C. (+1 202-955-8671, rmueller@gibsondunn.com)*

*Michael J. Kahn – San Francisco (+1 415-393-8316, mj Kahn@gibsondunn.com)*

*Please also feel free to contact any of the following practice leaders and members:*

## ***Securities Litigation Group:***

*Monica K. Loseman – Co-Chair, Denver (+1 303-298-5784, mloseman@gibsondunn.com)*

*Brian M. Lutz – Co-Chair, San Francisco/New York (+1 415-393-8379/+1 212-351-3881,  
blutz@gibsondunn.com)*

*Craig Varnen – Co-Chair, Los Angeles (+1 213-229-7922, cvarnen@gibsondunn.com)*

*Shireen A. Barday – New York (+1 212-351-2621, sbarday@gibsondunn.com)*

*Christopher D. Belelieu – New York (+1 212-351-3801, cbelelieu@gibsondunn.com)*

*Jefferson Bell – New York (+1 212-351-2395, jbell@gibsondunn.com)*

*Matthew L. Biben – New York (+1 212-351-6300, mbiben@gibsondunn.com)*

*Michael D. Celio – Palo Alto (+1 650-849-5326, mcelio@gibsondunn.com)*

*Paul J. Collins – Palo Alto (+1 650-849-5309, pcollins@gibsondunn.com)*

*Jennifer L. Conn – New York (+1 212-351-4086, jconn@gibsondunn.com)*

*Thad A. Davis – San Francisco (+1 415-393-8251, tadavis@gibsondunn.com)*

*Ethan Dettmer – San Francisco (+1 415-393-8292, edettmer@gibsondunn.com)*

*Mark A. Kirsch – New York (+1 212-351-2662, mkirsch@gibsondunn.com)*

*Jason J. Mendro – Washington, D.C. (+1 202-887-3726, jmendro@gibsondunn.com)*

*Alex Mircheff – Los Angeles (+1 213-229-7307, amircheff@gibsondunn.com)*

*Robert F. Serio – New York (+1 212-351-3917, rserio@gibsondunn.com)*

*Jessica Valenzuela – Palo Alto (+1 650-849-5282, jvalenzuela@gibsondunn.com)*

*Robert C. Walters – Dallas (+1 214-698-3114, rwalters@gibsondunn.com)*

*Avi Weitzman – New York (+1 212-351-2465, aweitzman@gibsondunn.com)*

# GIBSON DUNN

***Securities Regulation and Corporate Governance Group:***

*Elizabeth Ising – Co-Chair, Washington, D.C. (+1 202-955-8287, eising@gibsondunn.com)*

*James J. Moloney – Co-Chair, Orange County, CA (+ 949-451-4343, jmoloney@gibsondunn.com)*

*Lori Zyskowski – Co-Chair, New York (+1 212-351-2309, lzyskowski@gibsondunn.com)*

*Brian J. Lane – Washington, D.C. (+1 202-887-3646, blane@gibsondunn.com)*

*Ronald O. Mueller – Washington, D.C. (+1 202-955-8671, rmueller@gibsondunn.com)*

*Thomas J. Kim – Washington, D.C. (+1 202-887-3550, tkim@gibsondunn.com)*

*Michael A. Titera – Orange County, CA (+1 949-451-4365, mtitera@gibsondunn.com)*

© 2022 Gibson, Dunn & Crutcher LLP

*Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.*