08-5842-cv

United States Court of Appeals

for the

Second Circuit

LUCIAN BEBCHUK,

Plaintiff-Appellant,

– v. –

ELECTRONIC ARTS INCORPORATED

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

JONATHAN ROSENBERG
WILLIAM J. SUSON
O'MELVENY & MYERS, LLP
Attorneys for Defendant-Appellee
7 Times Square
New York, New York 10036
(212) 326-2000

CORPORATE DISCLOSURE STATEMENT

Electronic Arts Inc. ("EA" or the "Company") is a publicly owned company with no parent corporations. No publicly held company owns more than 10% of the stock of EA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES & LEGISLATIVE HISTORY

SEC RULES AND RELATED MATERIALS

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This case concerns whether Appellant, a sixty-share EA stockholder, can compel EA to include in its proxy materials a proposal that would essentially opt out of Rule 14a-8, the SEC's regulation governing shareholder access to the corporate proxy.

In Rule 14a-8, the SEC has crafted a federal right for shareholders to require their company to include their proposals in the company's proxy materials. But the SEC's federal proxy-access right is not unlimited. Rather, in Rule 14a-8 the SEC has established (i) certain eligibility and procedural requirements for shareholder proposals before Rule 14a-8 would require the company to include the proposal in its proxy materials, (ii) thirteen categories of shareholder proposals that the company is *not* required to include in its proxy materials (often referred to as "exclusionary bases" or "exclusionary categories"), and (iii) a procedure the company must follow if it believes that a shareholder proposal falls into one of the thirteen exclusionary categories and therefore does not intend to include it in the company's proxy materials.

Thus, for example, if a shareholder today were to ask a company's board of directors to include on the corporate proxy the shareholder's nominee for election to the board, Rule 14a-8 would not require the company to include that proposal in its proxy materials. That is because one of the thirteen Rule 14a-8 exclusionary bases covers any shareholder proposal that relates to a board election. In those

circumstances, the company would follow Rule 14a-8's procedure for notifying the SEC that the company did not intend to include the shareholder proposal in its proxy materials and was seeking a "no-action letter" from the SEC agreeing with the company's view that the proposal falls within one of the thirteen Rule 14a-8 exclusionary bases. And if the shareholder were similarly to request that the board seek shareholder action on a matter relating to any of the other twelve exclusionary bases—such as the company's dividend policy or a personal grievance—Rule 14a-8 would similarly not require the company to include that proposal.

Appellant Lucian Bebchuk is dissatisfied with the manner in which the SEC provides for shareholder access to company proxy materials. He has long been a proponent of *unrestricted* shareholder access to the corporate proxy. So he has proposed a way of changing the proxy rules' application to EA, and he seeks a judicial declaration here that EA must present it to all EA shareholders. Ironically, in his effort to accomplish this purpose, he invokes the very SEC-created federal proxy-access right that he seeks to change—Bebchuk seeks to use Rule 14a-8 to require the EA Board to include in EA's proxy materials a proposal (the "Proposal") for reducing from thirteen to three the Rule 14a-8 bases on which a company could rely in determining not to include a shareholder proposal in the company's proxy materials. Under Bebchuk's Proposal, EA's bylaws would be amended to provide that the Board must include any 5% shareholder's future

proposals unless such a proposal should fall within one of three (instead of thirteen) subject-matter categories. Thus, any 5% EA shareholder would be provided with the power to do in the future what Rule 14a-8 does not give it the power to do today—such as putting its own director nominees on the corporate proxy, using the corporate proxy to make its own dividend proposals, and airing its own personal grievances on the corporate proxy.

The District Court properly held that Rule 14a-8 does not compel EA to include Bebchuk's Proposal in EA's corporate proxy. As the court ruled, the Proposal is contrary to the SEC's Rule 14a-8 framework for compelled shareholder access to the corporate proxy. Bebchuk is seeking to *require* EA to include in its proxy materials a proposal that, if implemented, would in turn *require* EA to include in its proxy materials future shareholder proposals that Rule 14a-8 currently permits EA to exclude. Thus, the Proposal falls within one of the thirteen exclusionary categories—it "is contrary to any of the Commission's proxy rules" under Rule 14a-8(i)(3). Accordingly, EA cannot be compelled to include it in the Company's proxy materials.

The District Court's conclusion that EA cannot be compelled to include the Proposal in its proxy does not, as Bebchuk contends, strip Bebchuk of his rights as an EA shareholder under Delaware law. All that is at issue here is whether the SEC-established federal proxy-access right in Rule 14a-8 compels EA to include

the Proposal in EA's proxy materials. Bebchuk is free to present his Proposal to EA shareholders in his *own* (not the Company's) proxy materials or by raising the issue at the EA shareholders' meeting after proper notice. But Bebchuk cannot use Rule 14a-8 to compel the Proposal's inclusion in EA's proxy materials and thereby foist on the Company the burden and expense of soliciting proxies to vote for his Proposal.

In addition to the "contrary to" Rule 14a-8 exclusionary basis on which the District Court relied, Rule 14a-8 does not require EA to include the Proposal in its proxy materials on the following additional grounds:

- The Proposal relates to the election of directors, and therefore falls within the Rule 14a-8(i)(8) exclusion;
- The Proposal would compel the inclusion of future shareholder proposals whose inclusion would not otherwise be compelled under Rule 14a-8, due to numerous other Rule 14a-8(i) exclusions; and
- The Proposal is vague and indefinite, and therefore falls within the Rule 14a-8(i)(3) exclusion.

First, the Rule 14a-8(i)(8) "relates to election" exclusionary basis encompasses not only shareholder proposals that nominate board candidates or oppose the election of board candidates, but also shareholder proposals that address *procedures* for nominating or electing board members. If Bebchuk's Proposal were included in EA's proxy materials, and EA's shareholders then were to adopt it, it would inevitably result in shareholders' being able to compel EA to include dissident director nominees on the Company's proxy statement. In fact,

pursuing that shareholder power has long been Bebchuk's agenda. His extensive corporate-governance writings urge that shareholders should have free access to issuers' proxy materials to propose dissident director candidates. And he has submitted proposals to numerous corporations advocating such changes. Rule 14a-8(i)(8) and the adopting release for the SEC's 2007 amendments to the Rule make clear that any proposal, like Bebchuk's, that would result in contested elections in the future falls within the Rule 14a-8(i)(8) exclusionary basis.

Second, the Proposal is also excludable under Rule 14a-8 because it would strip EA of its authority to exclude future proposals under numerous other Rule14a-8(i) bases. As of now, for example, Rule 14a-8 does not require EA to include proposals concerning personal grievances or the specific amount of stock or cash dividends. But if the Company were compelled to place the Proposal on the corporate proxy and EA's shareholders were to adopt it, those and other historically excluded categories of proposals would be fair game for any 5% shareholder to include in EA's corporate proxy materials.

Third, the District Court's judgment also should be affirmed because the Proposal is excludable under Rule 14a-8(i)(3) for vagueness. While the Proposal appears to opt out of Rule 14a-8 entirely, it leaves unresolved important questions concerning shareholder access to EA's proxy materials, such as (i) whether a shareholder may correct eligibility or procedural deficiencies in future proposals

(as Rule 14a-8 requires) or correct only eligibility defects but not procedural inadequacies (as the Proposal provides); and (ii) whether the SEC's procedures for excluding a shareholder proposal (which mandate seeking "no-action letter" guidance from the SEC with notice to the shareholder-proponent and an opportunity to respond) continue to apply or there will no longer be any procedure for excluding 5% shareholder proposals that would be improper under the Proposal (as the Proposal seems to contemplate). These ambiguities would leave EA and its shareholders dangerously guessing as to important legal requirements. The Proposal is therefore so "vague and indefinite" as to be materially misleading. This renders the Proposal "contrary to the proxy rules" under Rule 14a-8(i)(3).

STATEMENT OF ISSUES

Issue 1: Under Rule 14a-8(i)(3), a shareholder cannot compel a company to include in its proxy materials a shareholder proposal that is "contrary to the proxy rules." Rule 14a-8 itself is a comprehensive regulatory framework that provides what shareholder proposals the federal proxy rules require a company to include in its proxy materials and what shareholder proposals it cannot be compelled to include under the federal proxy rules. Appellant Bebchuk's Proposal would eliminate most of the categories that the Company cannot be compelled to include, and thus would displace the SEC's carefully crafted proxy access rules. Did the District Court correctly conclude that the Proposal is contrary to Rule 14a-8 and,

therefore, that EA cannot be compelled to include the Proposal in its proxy materials?

Issue 2: Rule 14a-8(i)(8) provides that a company cannot be compelled to include in its proxy statement a shareholder proposal that "relates to a nomination or an election for membership on the company's board of directors . . . or a procedure for such an election." In amending this Rule in 2007, the SEC expressed its intent that Rule 14a-8(i)(8) would encompass the authority to exclude any proposal that "relates to procedures that would result in a contested election either in the year in which the proposal is submitted or in *any subsequent year*."[1] Bebchuk has admitted that his Proposal, if adopted, would inevitably allow shareholders to compel EA to include in its proxy statement shareholder nominees for contested board of director elections. Does Rule 14a-8(i)(8) provide an alternative basis for affirming the District Court's judgment that EA cannot be compelled to include the Proposal in its proxy materials?

Issue 3: In addition to the "relates to election exclusion" in Rule 14a-8 (i)(8), Rule 14a-8(i) contains twelve other categories of shareholder proposals that an issuer cannot be compelled to include in its proxy statement. If Bebchuk's Proposal were adopted, shareholders who meet the Proposal's minimum eligibility

---

[1] *See* A-54 (Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 34-56914, Fed. Sec. L. Rep. (CCH) ¶ 88,023 at 6 (Dec. 6, 2007) (the "2007 Final Release")).

requirements could force EA to include in its proxy materials shareholder proposals that relate to most of these exclusionary categories, such as proposals concerning personal grievances against the Company or the amount of stock or cash dividends. Do these other Rule 14a-8(i) exclusionary categories provide separate bases for holding that EA cannot be compelled to include the Proposal in the Company's proxy materials?

Issue 4: Under Rule 14a-8(i)(3), a company cannot be compelled to include a proposal if the shareholder proposal or its supporting statement "is contrary to any of the proxy rules, including § 240.14a-9, which prohibits materially false or misleading statements in proxy soliciting materials."[2] This includes circumstances where "the proposal is so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires."[3] Bebchuk's Proposal creates an alternative proxy-access regime for 5% shareholder proposals, with different eligibility requirements and procedures from those in Rule 14a-8, yet nowhere explains whether the Proposal's new requirements completely displace the SEC's requirements or are meant only to supplement them in some way. Does

---

[2] 17 C.F.R. § 240.14a-8(i)(3).

[3] A-838 (Staff Legal Bulletin No. 14B, Fed. Sec. L. Rep. (CCN) ¶ 60,014B, at 4 (Sept. 15, 2004)).

the "vagueness" component of Rule 14a-8(i)(3) provide an alternative basis for affirming the District Court's judgment that EA cannot be compelled to include the Proposal in its proxy materials?

STATEMENT OF THE CASE

Appellant Bebchuk submitted his proposal to EA on February 20, 2008, for inclusion in EA's 2008 proxy statement.[4] In compliance with Rule 14a-8's procedures, EA wrote the SEC on March 26, 2008, requesting that the SEC issue a no-action letter concurring with EA's view that it was not required to include the Proposal under Rule 14a-8.[5] EA cited (i) Rule 14a-8(i)(3), because the Proposal's alternative proxy-access scheme is contrary to Rule 14a-8 itself, (ii) numerous individual Rule 14a-8(i) categories, because the Proposal could lead to EA's being compelled to include shareholder proposals falling within those categories in the future, and (iii) Rule 14a-8(i)(3), because the Proposal is vague and indefinite in failing to explain its interaction with Rule 14a-8.[6]

Rather than following the SEC's procedures and allowing the SEC the opportunity to express its view as to whether Rule 14a-8 required EA to include the Proposal, Bebchuk instead filed this lawsuit on April 18, 2008.[7] The complaint

---

4 A-545–47.

5 A-525–45.

6 *Id.*

7 A-8–20.

seeks a declaration that Rule 14a-8 requires EA to include the Proposal in its proxy statement.[8] On May 30, 2008, EA moved to dismiss the complaint.[9]

On November 11, 2008, following (i) full briefing, including briefs by *amici* for both sides, and (ii) oral argument, the Honorable Alvin K. Hellerstein granted EA's motion to dismiss.[10] Judge Hellerstein concluded that the Proposal was contrary to Rule 14a-8 because it sought to use EA's proxy to supplant the SEC's proxy-access framework.[11] The District Court issued a summary order on November 13, 2008, adopting this ruling.[12] On November 26, 2008, Bebchuk filed his notice of appeal to this Court.[13]

STATEMENT OF FACTS

A. The Parties

EA, a Delaware corporation based in Redwood City, California, is one of the world's leading interactive entertainment software companies. Founded in 1982, the Company develops, publishes, and distributes interactive software worldwide for video game systems, personal computers, cellular handsets, and the Internet. The company markets its products under the following brand names: EA™, EA

---

8 A-19.

9 A-21–23.

10 A-1091–96; SPA-51.

11 A-1094–96.

12 SPA-50.

13 A-1105.

SPORTS™, and POGO. Some of EA's well known franchises include *Madden NFL*, *Tiger Woods PGA Tour*, *NBA Live*, *FIFA*, *Harry Potter*, and *The Sims*. In fiscal 2008, EA posted GAAP net revenue of $3.67 billion and had 27 titles that sold more than one million copies.[14]

Appellant Lucian Bebchuk is a professor at Harvard Law School.[15] He has written extensively concerning director-election processes, advocating unfettered shareholder access to the corporate proxy for contested board elections.[16] This philosophy, of course, is squarely at odds with SEC Rule 14a-8, which empowers corporations to deny shareholders access to the company proxy materials for shareholder proposals regarding contested elections or the procedures for such.[17]

In addition to his articles advocating a sea change in the proxy rules, Appellant also has submitted *amicus* briefs supporting litigants that have sought access to issuer proxies. For example, in *Am. Fed'n of State, County and Mun. Employees, Employees Pension Plan v. Am. Int'l Group, Inc.*, ("*AFSCME*"),[18]

---

14 http://investors.ea.com/.

15 A-9 (Compl. ¶ 8).

16 *See, e.g.*, Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007); Lucian A. Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43 (2003).

17 17 C.F.R. § 240.14a-8(i)(8) (allowing the issuer to exclude a shareholder proposal "[i]f the proposal relates to a nomination or an election for membership on the company's board of directors . . . or a procedure for such nomination or election").

18 462 F.3d 121 (2d Cir. 2006) .

Bebchuk submitted an *amicus* brief urging this Court to permit shareholders to propose bylaw amendments that would require companies to include dissident shareholders' director nominees on the issuer's proxy.[19] While the SEC submitted an *amicus* brief opposing Appellant's position, the Court found more persuasive an SEC interpretation from a 1976 Release that stated, "with respect to corporate elections, . . . Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature [*i.e.*, 'corporate, political or other elections to office'], since other proxy rules, including Rule 14a-11, are applicable thereto."[20] Accordingly, the Court held that then-Rule 14a-8(i)(8) allowed companies to exclude only proposals concerning a contested election itself, and not procedures for future contested elections.

In December 2007, the SEC responded to this Court's *AFSCME* decision by amending Rule 14a-8(i)(8) to provide specifically that the category of proposals issuers are not compelled to include in their proxy materials encompass not only proposals "relat[ing] to an election for membership on the company's board," but also proposals concerning "procedures" for nomination or election to the board.[21]

---

[19] A-38–47 (Brief of Amicus Curiae Harvard Law School Professors, Lucian Bebchuk *et al*., *AFSCME v. AIG*, 462 F.3d 121 (2d Cir. 2006) (No. 05-2825).

[20] *AFSCME v. AIG*, 462 F.3d at 126 (quoting Proposed Amendments to Rule 14a-8, Exchange Act Rel. No. 34-12598, 41 Fed. Reg. 29,982, 29,9845 (proposed July 7, 1976) (court's emphasis suppressed)).

[21] A-54 (2007 Final Release at 6).

Almost immediately after the SEC passed the revised Rule 14a-8(i)(8), Bebchuk set about to undermine it. Since the Rule's passage, Bebchuk has proposed to at least *eleven* other companies that they include in their proxy materials proposals substantially similar to the one at issue here.[22] In each instance, those issuers submitted no-action letters to the SEC, as required by Rule 14a-8, in which they explained the bases for their view that Rule 14a-8 did not require them to include the proposal. And in each instance, Bebchuk withdrew his proposal before the SEC could provide its views on the no-action request.

B. The Proposal

Bebchuk owns 60 EA shares. On February 20, 2008, he submitted his Proposal to EA for inclusion in EA's 2008 proxy statement.[23] That Proposal, if implemented, would obligate EA to (i) include in its notice of annual meeting of shareholders and its corporate proxy, and (ii) submit to a shareholder vote, any "Qualified Proposal."

The "Qualified Proposal" definition would establish modest conditions to including a shareholder proposal in the notice to shareholders and the corporate

---

[22] *See* A-66–523 (No-Action Requests and Bebchuk's Proposals to International Paper Company, Consolidated Edison, Inc., Omnicom Group Inc., Xerox Corporation, Time Warner Inc., The Home Depot, Inc., The Gap, Inc., Schering-Plough Corporation, McDonald's Corporation, Exxon Mobil Corporation, and El Paso Corporation).

[23] A-545–47 (Letter from R. Plesnarski to the SEC dated March 26, 2008).

proxy. The first simply establishes certain process and eligibility requirements for submitting a "Qualified Proposal" in future years:

> (a) The proposal was submitted to the Corporation no later than 120 days following the Corporation's preceding annual meeting by one or more stockholders (the "Initiator(s)") that (i) singly or together beneficially owned at the time of submission no less than 5% of the Corporation's outstanding common shares, (ii) represented in writing an intention to hold such shares through the date of the Corporation's annual meeting, and (iii) each beneficially owned continuously for at least one year prior to the submission common shares of the Corporation worth at least $2,000.00.[24]

The second condition, Subsection (b) of the definition, requires that "[i]f adopted, the proposal would effect only an amendment to the Corporation's Bylaws, and would be valid under applicable law."[25] Thus, the definition requires only that all Qualified Proposals comply with existing laws and request a change in EA's bylaws.

The third condition, Subsection (c), requires future proposals to be "a proper action for stockholders under state law" unrelated to the "Corporation's ordinary business operations."[26] This tells shareholders two things. First, if the Proposal were implemented, Rule 14a-8 would no longer supply the appropriate standards for determining whether 5% shareholders could compel EA to include their proposals in the Company's proxy statement. Second, Delaware's General

---

[24] A-546.

[25] *Id.*

[26] *Id.*

Corporate Law would govern the subject-matter-propriety of any future shareholder proposals.

The fourth condition, Subsection (d), mimics Rule 14a-8(d), and simply requires a Qualified Proposal to be 500 or fewer words.

The fifth condition, Subsection (e), requires a shareholder-proponent to give EA within 21 days "any information that was reasonably requested . . . for determining [the proponent's] eligibility to submit a Qualified Proposal or to enable the Corporation to comply with applicable law."[27] This provision supplies a procedure for the Company to seek information demonstrating compliance with the Qualified Proposal definition's eligibility requirements. Unlike Rule 14a-8, which allows shareholders an opportunity to cure both procedural and substantive defects in their proposals, Bebchuk's Proposal's sole opportunity for shareholders to cure defects is to supply additional information if requested. The Proposal nowhere explains whether Rule 14a-8 or the Proposal would apply in situations where a shareholder could meet the qualifications to make a proposal under both frameworks (or whether *both* frameworks somehow govern simultaneously).

In the "Supporting Statement," Bebchuk explains to shareholders that he is attempting to force EA to include in its proxy materials proposals from shareholders that own more than 5% of EA's stock. His sole description of the

---

[27] *Id.*

existing SEC scheme is that "[c]urrent and future SEC rules may in some cases allow companies—but do not currently require them—not to place proposals for Bylaw amendments initiated by stockholders in the Corporation's notice of an annual meeting and proxy card for the meeting."[28] He urges all shareholders to support the Proposal, even if just "to express support for facilitating stockholders' ability to decide for themselves whether to adopt Bylaw amendments initiated by stockholders."[29]

C. This Lawsuit

EA's annual shareholder meeting was set for July 31, 2008. In accordance with Rule 14a-8, on March 26, 2008, EA followed the requirements of Rule 14a-8 and timely wrote the SEC to request confirmation from the staff that EA was not required to include the Proposal in its 2008 proxy materials.[30] EA argued, among other things, that it could exclude the Proposal (i) under Rule 14a-8(i)(3) because the Proposal is contrary to the proxy rules, specifically the SEC's proxy-access framework in Rule 14a-8; (ii) under Rule 14a-8(i) because the Proposal would require the Company to include in future Company proxy materials shareholder

---

28 *Id.*

29 *Id.*

30 *See* A-525–29 (March 26, 2008 SEC Letter).

proposals that Rule 14a-8(i) would otherwise allow EA to exclude; and (iii) under Rule 14a-8(i)(3) because the Proposal is vague and indefinite.[31]

Bebchuk informed the SEC that he would respond to EA's request by April 16, 2008, and requested that the SEC staff defer responding to EA's request until then.[32] But instead of responding, Appellant sought to short-circuit the SEC's process by filing this action on April 18, 2008. That same day, he asked the SEC to refrain from acting on EA's no-action request because of this litigation.[33] On May 23, 2008, the SEC wrote EA to inform it that the SEC would not resolve EA's no-action request because this action is pending.

EA moved to dismiss this action on May 30, 2008.[34] It asserted the same grounds it had argued to the SEC. After full briefing, Judge Hellerstein held oral argument on November 12, 2008.[35] He dismissed the Complaint from the bench at the oral argument's conclusion.[36]

The District Court determined that "the point of this motion[] is to deal with whether or not there is an inconsistency between [the Proposal] and Rule 14a-8."[37]

---

31 A-526–27.

32 A-561 (Letter from M. Barry to the SEC dated April 1, 2008).

33 A-563 (Letter from M. Barry to the SEC dated April 18, 2008).

34 A-21.

35 A-1048–97.

36 A-1094–96.

37 A-1094.

After concluding that Rule 14a-8 vested issuers, acting through their directors, with discretion to exclude proposals relating to thirteen different categories of information, Judge Hellerstein found that

> The purpose of this proposal is to eliminate such discretion on the part of the directors. They will retain the discretion, in the first place, to heed or not to heed the voice of the shareholders, because the proposal, in and of itself, is innocuous, or apparently so in relationship to the 13 exclusions. But once the recommendation is made, if it's made, the inevitable effect of this proposal is to do away with the careful limitation on the part of 14a-8, to eliminate the discretion of the company, because there will be nobody to exercise it, and to have all of those questions submitted as a matter of law, federal law, to the shareholders.[38]

The District Judge therefore concluded that this contradicts Rule 14a-8, and he granted the motion without reaching EA's other bases for its motion to dismiss. This appeal followed.

SUMMARY OF ARGUMENT

Rule 14a-8 is the exclusive federal proxy-access regulation. It provides a comprehensive framework that prescribes those shareholder proposals a company must publish in its proxy statement and those it cannot be compelled to include. The Rule reflects the SEC's careful balancing of conflicting interests in setting up a federal proxy-access right—an individual shareholder's interest in access to the issuer's proxy, and the issuer's (and other shareholders') interest in avoiding the burden and expense of including certain shareholder proposals.

---

[38] A-1096.

The proxy-access rules would be entirely different, however, under the alternative scheme provided in Bebchuk's Proposal. That scheme would require EA to submit for a shareholder vote virtually any change to the Company's bylaws that a 5% shareholder might propose in the future. The District Court correctly concluded that Rule 14a-8 does not require EA to include this alternative proxy-access-framework proposal in EA's corporate proxy.

Under Rule 14a-8(i)(3), a company cannot be required to include in its proxy materials proposals that are contrary to the SEC's proxy regulations. The Proposal fits within that standard. As the District Court found, the Proposal's purpose is to eliminate the discretion EA has under Rule 14a-8 to exclude categories of shareholder proposals from its proxy materials. This purpose is plain in Bebchuk's "Supporting Statement," where he portrays the Proposal as an alternative to SEC rules that "allow companies . . . not to place proposals for Bylaw amendments initiated by stockholders in the Corporation's [proxy materials]." And that would also be the Proposal's effect: whereas Rule 14a-8(i) currently affords EA thirteen separate bases to exclude a shareholder proposal from EA's proxy, EA would have only three exclusionary bases under the Bebchuk Proposal's substitute proxy-access framework. Using Rule 14a-8 to impose this new regime on EA would clearly be inconsistent with the requirements of Rule 14a-8, and thus contrary to the federal proxy rules.

The SEC's rulemaking history and interpretive releases support this plain reading of Rule 14a-8. At various points during the last three decades, the SEC has specifically considered and rejected amending Rule 14a-8 to allow issuers to opt out of the Rule's terms in favor of their own proxy-access regimes. In 1982 and 1983, for example, the SEC considered amending the proxy rules to allow issuers to establish their own procedures for granting access to their proxies, as well as allowing shareholders to compel issuers to place proposals for such alternative proxy-access procedures on the issuer's proxy statement. After careful consideration, however, the SEC rejected those proposed Rule 14a-8 amendments, concluding that the existing rule struck the proper balance between individual shareholder-proponents' and issuers' respective interests. The SEC reaffirmed that stance in 1998, when it rejected amending Rule 14a-8 to allow holders of 3% of a company's shares to override a company's invocation of certain Rule 14a-8(i) bases to exclude a proposal. And in a 2004 no-action letter, the SEC concluded that an issuer could not be compelled to include in its proxy statement a proposal that would have created an alternative proxy-access scheme to Rule 14a-8.

EA's Board had full authority to decide whether to exclude the Proposal in reliance on Rule 14a-8(i)(3) (or under any of Rule 14a-8(i)'s other exclusionary bases). That authority comes from Delaware law (which empowers the Board to manage the Company's business and affairs) and EA's bylaws and certificate of

incorporation (which likewise delegate managerial responsibility to the Board). Thus, it makes no difference, as Bebchuk notes, that Rule 14a-8 gives "the company" exclusionary discretion rather than "the board." In EA's case—and that of most Delaware companies—the Board is authorized to decide on the Company's behalf. That is undoubtedly why Bebchuk's Proposal calls on EA's "Board of Directors" to "submit to a stockholder vote" the proposed bylaw amendment.

While EA cannot be compelled to include the Proposal in its own proxy materials, shareholders could adopt the Proposal (as long as Delaware law permits it) if Bebchuk or another shareholder were to raise the matter properly at the annual shareholders' meeting and the Proposal were to receive sufficient voting support. Indeed, Bebchuk (or another shareholder) could solicit proxies after filing his own proxy statement with the SEC. Bebchuk improperly attempts to seize on this, arguing that if the Proposal were truly "contrary to" the proxy rules, it would also be "unlawful" and could not be adopted by any means. But "contrary to" the proxy rules does not equate to "unlawful," as Bebchuk argues. The term "contrary to" in this case means "inconsistent with"—a proposal can be both lawful and contrary to the proxy rules, as is the case with Bebchuk's Proposal. A company *may* in its discretion include in its proxy materials a lawful proposal that is contrary to the federal proxy rules; but nothing in the federal proxy rules, or in the

state law *requires* it to do so. Bebchuk's argument therefore fails, and the District Court's decision should be affirmed.

In addition to the Rule 14a-8(i)(3) basis on which the District Court relied, there are at least three other Rule 14a-8 bases to affirm the District Court's decision.

First, EA had the power to exclude the Proposal under the broad director-elections exclusion, Rule 14a-8(i)(8). To address this Court's 2006 decision in *AFSCME*, the SEC amended Rule 14a-8(i)(8) in 2007 to clarify that issuers may exclude not only proposals "relat[ing] to an election for membership on the company's board," but also proposals relating to "procedures" for board nominations or elections. The SEC made clear at the time that a proposal would be excludable under Rule 14a-8 if it relates to an election this year or *in any subsequent year*.

Bebchuk is seeking to bypass the amended Rule 14a-8(i)(8). He conceded below that his Proposal would result in a shareholder's being able in future years to compel EA to publish the shareholder's board nominees in the Company's proxy statement. Thus, if his Proposal were implemented, EA would eventually lose its power under Rule 14a-8(i)(8) to exclude shareholder proposals relating to director elections. The Proposal therefore falls within the Rule 14a-8(i)(8) exclusionary category, and Bebchuk cannot compel EA to include it in the Company's proxy.

Second, the Proposal is independently excludable because it would also compel EA to include in its future proxy materials proposals that fall within other Rule 14a-8(i) exclusionary categories. Contrary to Rule 14a-8's express terms, the Proposal would force EA to include in subsequent years proposals that, among other things, (i) directly compete with the Company's own proposals (Rule 14a-8(i)(9)), (ii) the shareholders have rejected in the past (Rule 14a-8(i)(12)), (iii) pertain to policy or governance matters that the Company has substantially implemented (Rule 14a-8(i)(10)), (iv) pertain to a shareholder's personal grievance with the Company (Rule 14a-8(i)(4)), or (v) relate to dividend amounts (Rule 14a-8(i)(13)). The Proposal is therefore contrary to each of these Rule 14a-8(i) exclusionary categories, and Bebchuk cannot compel EA to include it in the Company's proxy.

Third, EA also properly excluded the Proposal for vagueness. Under Rule 14a-8(i)(3), inherently vague or indefinite shareholder proposals are "contrary to" the proxy rules. The Proposal suffers from that defect because it haphazardly adopts some (but not all) of Rule 14a-8's procedural requirements. This leaves EA and its shareholders to guess whether certain Rule 14a-8 obligations would continue to apply. It is not clear, for example, whether the proxy rules' notice and cure provisions—safeguards that provide shareholder-proponents with an opportunity to cure procedural defects in their proposals—would still apply. Thus,

Rule 14a-8(i)(3) permits EA to exclude Bebchuk's open-ended, uncertain, and indeterminate Proposal from its proxy materials. On this basis as well, the District Court's judgment should be affirmed.

ARGUMENT

I. EA CANNOT BE COMPELLED TO INCLUDE THE PROPOSAL BECAUSE IT IS CONTRARY TO THE PROXY RULES.

A. Rule 14a-8 Is a Comprehensive Regulatory Framework Governing Compelled Shareholder Access to the Company's Proxy Materials.

Rule 14a-8 is straightforward. It provides a comprehensive regulatory scheme that governs not only what shareholder proposals an issuer must include in its proxy statement, but also what shareholder proposals it cannot be compelled to include.[39] If shareholders meet certain eligibility and procedural requirements, issuers must include their proposals in the company's proxy statement unless the proposal falls within one of thirteen exclusionary categories.[40] In that event, the company could not be compelled to include the proposal. As one Delaware judge explained, Rule 14a-8 is a "compromise" that "open[s] the doors to management's proxy materials, [but] management retains significant power as gatekeeper."[41] Just

---

[39] *See* 17 C.F.R. § 240.14a-8 (providing regulations for "when a company must include a shareholder's proposal in its proxy statement" and when "the company is permitted to exclude a proposal").

[40] See 17 C.F.R. § 240.14a-8(i); A-10–12 (Compl. ¶¶ 11–13).

[41] *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 342 (Del. Ch. 2008).

as important as the federal proxy-access right that the Rule enacts is the discretion it gives the company to deny that access in certain contexts for the good of the company.

B. Bebchuk's Proposal Is Contrary to the Proxy Rules.

The exclusion in Rule 14a-8(i)(3) is also straightforward. It provides that issuers cannot be compelled to include in their proxy materials any "proposal or supporting statement that is contrary to *any* of the Commission's proxy rules." The term "contrary to" means "inconsistent with."[42] Thus, under Rule 14a-8(i)(3), if a proposal or supporting statement is inconsistent with the SEC's proxy rules, an issuer cannot be compelled to include that proposal in its proxy materials.

1. The Proposal Is Facially Contrary to Rule 14a-8.

Bebchuk's Proposal, on its face, is contrary to Rule 14a-8's comprehensive framework governing compelled access to the issuer's proxy. Under Rule 14a-8, EA cannot be compelled to include proposals that fall within one of the thirteen exclusionary categories in Rule 14a-8(i). When a company decides to exclude a proposal based on one of those exclusionary categories, Rule 14a-8 requires the

---

[42] *See Henry v. Poole*, 409 F.3d 48, 70–71 (2d Cir. 2005) ("[T]o be 'contrary to' the federal standard, a state-law principle need not be diametrically different from, or opposite in character to, or mutually opposed to, the federal standard *in toto*. Rather, . . . a state-law principle that is *inconsistent with* part of the *Strickland* standard, . . . meets the AEDPA 'contrary to' test.") (emphasis added); *accord William J. Lang Land Clearing, Inc. v. Adm., Wage and Hour Div.*, 520 F. Supp. 2d 870, 877 (E.D. Mich. 2007) (holding that "an agency adjudication or rule making" is "contrary to" the law if it is "*inconsistent with* the statutory mandate or frustrate[s] the policy that Congress sought to implement.") (emphasis added).

issuer to seek a "no-action" letter from the SEC. At least 80 calendar days before filing its definitive proxy statement, the issuer must submit to the SEC (copying the shareholder-proponent) the proposal at issue and a letter explaining why the issuer believes that it cannot be compelled to include the proposal in its proxy materials.[43] The shareholder-proponent may submit a response.[44] The SEC staff then issues either a no-action letter, stating that it agrees with the issuer's analysis, or a letter indicating that it does not agree that the company may exclude the proposal from its proxy materials.[45]

Bebchuk's Proposal would distort this longstanding proxy-access framework by drastically curtailing the Company's power to exclude shareholder bylaw-amendment proposals. In contrast to Rule 14a-8(i)'s thirteen exclusionary bases, the Board would be required to include any future proposal unless that proposal:

(i) did not meet certain procedural requirements that are similar to, but not as comprehensive as, those in Rule 14a-8 (b) through (e); or

(ii) was (a) not "valid under applicable law," (b) not a proper action for shareholders under state law, or (c) related to EA's "ordinary business operation."

---

43 17 C.F.R. § 240.14a-8(j)(1)–(2).

44 17 C.F.R. § 240.14a-8(k).

45 Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019, 1031–36 (1987).

These minimal requirements, which eliminate most of the excludable categories in Rule 14a-8(i), would "upset the policy-based delicate balance Congress directed the SEC to achieve in the regulatory regime."[46]

In his Supporting Statement, Bebchuk admits that the Proposal is contrary to the proxy rules. That Statement contrasts the Proposal (which allows "stockholders representing more than 5% of the Corporation's common shares . . . to have a vote on a Bylaw amendment proposal") with the "[c]urrent and future SEC rules [that] may in some cases allow companies . . . not to place proposals for Bylaw amendments initiated by stockholders in the Corporation's notice of an annual meeting and proxy card for the meeting."[47] Thus, by Bebchuk's own admission, the Proposal is contrary to the proxy rules, and he cannot compel EA to include it.

The SEC staff's "no-action" letter in *State Street Corporation* is on point.[48] There, a State Street shareholder demanded that the company include in its proxy statement a proposed bylaw amendment that would have required State Street to submit for a shareholder vote and include in its proxy statement any future shareholder bylaw-amendment proposals. State Street submitted a no-action

---

46 *Guice v. Charles Schwab & Co., Inc.*, 89 N.Y.2d 31, 49 (1996).

47 A-546.

48 *See* A-588–604 (State Street Corporation, SEC No-Action Letter, CCH Securities Internet Library (Feb. 3, 2004)).

request that argued, among other things, that the proposal could be excluded under Rule 14a-8(i)(3) because it was contrary to the SEC's proxy rules.[49] State Street argued that the SEC had exclusive authority to establish procedures for determining what must be included in a company's proxy and, therefore, the shareholder proposal would improperly limit State Street's discretion to exclude a shareholder proposal under the SEC's rules:

> The authority to regulate what is required or permitted in a proxy statement or on a form of proxy . . . is vested exclusively in the Commission under Section 14 of the 1934 Act and is expressed in related Rules and in Regulation 14A . . . [and the proposal's] attempt to clothe stockholders with rights of access to the Company's proxy statement and form of proxy absent compliance with Rule 14a-8 is flatly inconsistent with the scheme for access to the corporate electoral machinery that the Commission has carefully crafted, including under Rule 14a-8.

The SEC staff agreed with State Street, expressing the view that the company could exclude the proposal as contrary to the proxy rules under Rule 14a-8(i)(3).[50]

State Street demonstrates that it would be contrary to the proxy rules to *require* a company to include in its proxy materials a shareholder proposal that, if

---

[49] A-590–91.

[50] A-602. The Commission's no-action letters are entitled to deference from the courts as persuasive authority. *See New York City Employees Ret. Sys. v. SEC*, 45 F.3d 7, 13 (2d Cir. 1995). The Staff notes its concurrence with an issuer's position, as it did in *State Street*, by explaining that there "appears to be some basis" for its position. *See* A-611 (Staff Legal Bulletin No. 14, Fed. Sec. L. Rep. (CCH) ¶ 60,014, at 6 (July 13, 2001) (indicating that in responding to a no-action request the SEC will "indicate either that there appears to be some basis for the company's view that it may exclude the proposal," or that they are "unable to concur in the company's view that it may exclude the proposal")).

implemented, would in turn *require* a company to include in its proxy materials future shareholder proposals that Rule 14a-8 currently permits the company to exclude. Eliminating this discretion would be contrary to the SEC's rulemaking decision to grant shareholders compelled access to the issuer's proxy only for proposals that do not fall within Rule 14a-8(i)'s exclusionary categories. Upsetting that balance, however, is exactly what Bebchuk intends to achieve, and would achieve, with his Proposal. Under Rule 14a-8(i)(3), therefore, Bebchuk cannot compel EA to include it in its proxy materials.

Bebchuk argues that *State Street* is inapposite because unlike his Proposal, the proposal there granted the issuer no power to exclude shareholder proposals, even if they would violate the law.[51] But State Street never made that argument to the SEC staff. Rather, it argued only that the proposal there would have been inconsistent with the SEC's carefully crafted proxy access framework.[52] The SEC "will not consider" in its no-action decisions, "any basis for exclusion that is not advanced by the company."[53] Thus, the SEC's *State Street* decision could have rested *only* on the conclusion that an alternative proxy access scheme that varied from Rule 14a-8 was contrary to the proxy rules.

---

51 *See* Appellant's Br. at 26–28, n. 22.

52 A-590–91.

53 A-610 (Staff Legal Bulletin No. 14, Fed. Sec. L. Rep. (CCH) ¶ 60,014, at 5 (July 13, 2001)).

2. The SEC's Repeated Rejection of Proxy Access Schemes Like Bebchuk's Confirms that His Proposal Is Contrary to Rule 14a-8.

The SEC's rulemaking history supports this plain-meaning conclusion that an alternative proxy regulation regime—like Bebchuk's Proposal—is "contrary to" Rule 14a-8.[54] In 1982 and 1983, the SEC considered two amendments to Rule 14a-8 that would have effectively allowed issuers to opt out of the SEC's regulatory scheme and substitute their own standards for proposals that an issuer could be compelled to include. The first proposal would have required an issuer to include in its proxy any shareholder proposal to adopt alternative proxy-access standards.[55] Such future proposals could "formulate eligibility criteria and bases for exclusion . . . more or less restrictive than those set forth in the Commission's rule."[56] An even more permissive proposed amendment would have required issuers to include in their proxy materials "all proposals that are proper under state

---

[54] To the extent the Court views Rule 14a-8 to be ambiguous, the SEC's interpretations of that rule warrant deference. *See Christensen v. Harrison County*, 529 U.S. 576, 588, 120 S.Ct. 1655 (2000) (citing *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905 (1997)); *see also Levy v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001) (explaining that courts will defer to an agency's interpretation of its own regulation, presented in the agency's amicus brief, unless the interpretation is plainly erroneous or inconsistent with the regulation).

[55] A-656 n. 9 ("It should be noted that under Proposal II . . . the submission of an alternative plan would not be subject to the eligibility criteria applicable to the submission of other proposals and, as a result, such a plan could be proposed by a single shareholder owning one share of the issuer's voting securities.") (Proposed Amendments to Rule 14a-8, Exchange Act Release 34-19135, Fed. Sec. L. Rep. (CCH) ¶ 83,262, at 30 (October 14, 1982) (the "1982 Proposing Release").

[56] *See* A-630–31 (Proposal II to the 1982 Proposing Release at 4–5).

law and that do not involve the election of directors," subject only to a numerical limitation.[57]

The Commission rejected both proposed amendments. After careful consideration, it determined that "the basic framework of current Rule 14a-8 provides a fair and efficient mechanism for the security holder proposal process, and . . . should serve the interests of shareholders and issuers well."[58] Bebchuk's proposal would upset that "fair and efficient mechanism," installing an alternative opt-out scheme similar to those the SEC specifically rejected.

In 1997, the SEC revisited the issue, considering whether to "adopt some *fundamentally different approach* to the shareholder approval system . . . such as encouraging each company to adopt *its own shareholder proposal and rule process*."[59] In rejecting these changes, the SEC made clear that its involvement in the shareholder proxy-access process is important to a balanced regulatory approach:

> Some of the proposals we are not adopting share a common theme: to reduce the Commission's and its staff's role in the process and to provide shareholders and companies with greater opportunity to decide for themselves which proposals are sufficiently important and

---

57 *See* A-631 (Proposal III to the 1982 Proposing Release at 5).

58 A-665–66 (Amendments to Rule 14a-8, Exchange Act Release No. 34-20091, Fed. Sec. L. Rep. (CCH) ¶ 83,417, at 2–3 (Aug. 16, 1983).

59 A-697 (Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-39093, Fed. Sec. L. Rep. (CCH) ¶ 85,961, at 20 (Sept. 18, 1997) (emphasis added)).

> relevant to the company's business to justify inclusion in its proxy materials.[60]

Under the regime that the Bebchuk Proposal would now impose, however, the SEC's oversight role would be minimized, if not eliminated. This too illustrates that the Proposal is contrary to the SEC's proxy rules.

American Federation of State, County & Municipal Employees v. American International Group, Inc.,[61] on which Bebchuk relies, is inapposite. Bebchuk argues that the Court in *AFSCME* concluded that the SEC's rejection of an amendment to a proxy rule is irrelevant in interpreting the existing rule.[62] But *AFSCME* did not involve the rejection of any amendment, much less an amendment to the Rule at issue. The Court in *AFSCME* merely concluded that the SEC's consideration of an amendment to a different rule, Rule 14a-11, should not alter the Court's interpretation of then-existing Rule 14a-8(i)(8).[63] Thus, the issue in *AFSCME* was not whether a shareholder proposal was contrary to the proxy rules (which is the issue with Bebchuk's Proposal), but whether the proposed interpretation of one proxy rule should be enlightened by a pending amendment to a *different* proxy rule. And *AFSCME* did not involve the SEC's rejection during its

---

60 A-732 (Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, Fed. Sec. L. Rep. (CCH) ¶ 86,018 (May 21, 1998)).

61 462 F.3d 121 (2d Cir. 2006).

62 Appellant's Brief at 26, n. 22.

63 462 F.3d at 129, n. 8 (rejecting an argument that the Court's interpretation of Rule 14a-8 (i)(8) improperly conflicted with "a proposed SEC rule").

rulemaking of the very proxy-regulation scheme that the shareholder was advancing, which is the case here.

Bebchuk also argues that he is not disrupting the SEC's proxy-access framework because Rule 14a-8 provides only the "minimum requirements for the publication of shareholder proposals."[64] To support this assertion, Bebchuk relies exclusively on cases discussing Schedule 14A. But Schedule 14A and Rule 14a-8 are different animals. The former sets forth the SEC's specific line-item disclosure requirements in *any* materials that a person—an issuer, a shareholder, or some other third-party—uses to solicit proxies. As the cases Bebchuk cites explain,[65] Rule 14a-9 prohibits the party soliciting proxies from including in its proxy materials, "any statement which, at the time and in 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."[66] Accordingly, Rule 14a-9 may establish a separate requirement to include additional information that Schedule 14A may not specifically identify—it may be necessary for an issuer to include additional information that is necessary to make the disclosure not materially false or

---

64 Appellant's Br. at 32.

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

66 17 C.F.R. § 240.14a-9.

misleading. That is why Schedule 14A establishes only "minimum requirements." In contrast, Rule 14a-8 contains the *only* federal requirements for compelled inclusion of a shareholder proposal in the *company's* proxy materials. If the requirement is not in Rule 14a-8, then no federal requirement concerning the inclusion of a shareholder proposal exists. Tellingly, the "minimum requirements" cases Bebchuk cites contain no discussion of Rule 14a-8 *at all*.

C. Bebchuk's State Law Arguments Are Unfounded.

1. "The Company" Is Not "the Shareholders."

Bebchuk cannot deny that his Proposal would impose a different proxy-access framework on EA. Instead, he attempts to obfuscate the issue with a lengthy discussion about the interplay between the proxy rules and state law.[67] Bebchuk's state-law argument is simply a red herring.

Bebchuk misses the mark in focusing on Rule 14a-8's provision that "*the company*" may exclude a proposal. Bebchuk argues that this provision means that EA—not its directors—has the sole power to determine whether to exclude a proposal under Rule 14a-8, and that therefore, EA's shareholders can exercise that discretion. Bebchuk concludes that his Proposal is a permissible exercise of "the company's" discretion, acting through its shareholders, to adopt an alternative proxy framework.

---

[67] Appellant's Br. 22–50.

But "the company" is not "the shareholders." In drafting the proxy rules, the SEC knew full well how to say "the shareholders" or a "shareholder" when that is what it meant.[68] Yet, it left in Rule 14a-8 the discretion to "the company" to determine whether to exclude certain proposals. And where "the company" properly exercises that discretion, a shareholder cannot compel "the company" to include that proposal. Bebchuk concedes, as he must, that as a matter of Delaware state law, the EA Board of directors has "broad power to manage the business and affairs of the corporation."[69] In fact, Delaware General Corporation Law Section 141(a) provides that "the business and affairs of *every* corporation . . . shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."[70] Bebchuk

---

[68] *See, e.g.*, 17 C.F.R. § 240.14a-8(a) (explaining that "A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders"); 17 C.F.R. § 240.14a-8(b)(2) (In discussing shareholder eligibility to submit a proposal, noting that "[i]f you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own . . . "); 17 C.F.R. §240.14a-8(e) ("Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting."); 17 C.F.R. § 240.14a-4(c)(1) ("A proxy may confer discretionary authority to vote . . . [f]or an annual meeting of shareholders"); 17 C.F.R. § 240.14a-5(e)(1) (The "proxy statements shall disclose . . . The deadline for submitting shareholder proposals for inclusion in the registrant's proxy statement and form of proxy for the registrant's next annual meeting").

[69] *Conrad v. Blank*, 940 A.2d 28, 36 (Del. Ch. 2007) (quoted in Appellant's Brief at 28).

[70] 8 Del. C. § 141(a).

points to nothing in either the Delaware code or EA's certificate of incorporation (or bylaws) that delegates to anyone other than the Board the power under Rule 14a-8 to determine which shareholder proposals to include in EA's proxy.

In fact, Bebchuk's own Proposal acknowledges that the Board, not the shareholders, exercises the Rule 14a-8(i) exclusionary discretion. The Proposal recommends "that the Board of Directors"—not the shareholders or anyone else—"submit to a stockholder vote an amendment to the Corporation's Certificate of Incorporation or the Corporation's Bylaws."[71] Thus, Bebchuk can hardly fault Judge Hellerstein for equating "the company" with "those who act for the company and are entrusted and have the responsibility to act for the company." Any other interpretation would contradict Section 141, EA's governing documents, and Bebchuk's own Proposal.

2. Holding that the Proposal Is Excludable under Rule 14a-8(i)(3) as Contrary to Rule 14a-8 Does Not Impermissibly Interfere with Shareholders' State Law Rights.

Concluding that Rule 14a-8 does not compel EA to include the Proposal in its proxy statement would not strip Bebchuk of any state law rights. In fact, all that is at stake here is Bebchuk's attempt to broaden the *federal* proxy-access right that the SEC has fashioned in Rule 14a-8. Bebchuk cannot deny that his Proposal, if adopted, would cause EA to have a proxy-access scheme that is inconsistent with

[71] A-546.

Rule 14a-8. While shareholders may, under state law, choose to adopt such a scheme (even though it would contradict the existing proxy rules), they cannot use Rule 14a-8 to compel use of the Company's proxy materials as the vehicle for accomplishing that change.

Thus, if a shareholder wishes to change EA's corporate governance, that shareholder could file its own proxy materials and seek support from other shareholders at its own expense. Alternatively, it could raise the matter for a vote at a regularly-scheduled shareholder meeting without incurring the expense of a proxy contest. This is how EA's shareholders may exercise their power under EA's bylaws to restrict the Board's authority to act for the Company under the proxy rules, a power the shareholders have under Delaware General Corporation Law Section 141(a), Section 2.10 of EA's bylaws, and Delaware General Corporate Law Section 109(a). What Bebchuk is trying to do here, however, is short-circuit that process by looking to Rule 14a-8's federal proxy-access framework to compel inclusion of the Proposal in EA's proxy. Rule 14a-8 does not, however, compel such inclusion, which is entirely compatible with state law.

For the same reason, it is irrelevant that Comverse's board of directors has voluntarily adopted a bylaw amendment that would allow shareholders to propose their own director nominees on the company's proxy.[72] The Comverse board was

[72] Appellant's Br. at 37, n. 27.

allowed in its business judgment to do so; the key is that Rule 14a-8 did not compel the Comverse board to include a shareholder proposal in the company's proxy to achieve this result. It is likewise irrelevant that some governments (such as Bermuda and the State of North Dakota) have enacted laws requiring otherwise excludable shareholder proposals to be included on a state-law mandated "meeting notice."[73] Such meeting notices are not part of a company's federally mandated proxy materials, and so requirements concerning them have nothing to do with whether Rule 14a-8 requires EA's Board to include Bebchuk's Proposal in EA's federally mandated proxy materials.[74]

EA's agreement that shareholders or corporate boards can adopt proposals like Bebchuk's does not "concede the case," as Bebchuk contends.[75] Bebchuk's argument confuses any proposal that is "inconsistent" with the proxy rules with a proposal that "would be unlawful and violative of the proxy rules."[76] A board can make its own determination to include a proposal that would adopt an alternative

---

[73] *See* N.D. Bus. Corp. Act § 10-19.1-19(3); the Bermuda Companies Act of 1981 §§ 79, 80.

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

[75] Appellant's Br. at 37−38.

[76] Appellant's Br. at 38.

proxy-access scheme. The Rule expressly gives that board the discretion to do so, providing that it "may" exclude a shareholder proposal that falls within the Rule 14a-8(i) exclusions, not that it must. The point of Judge Hellerstein's ruling is that Bebchuk cannot look to Rule 14a-8 to compel EA's Board to include such a proposal.

Bebchuk's argument that EA voluntarily may choose to publish his Proposal[77] similarly begs the question. The issue here, as in *AFSCME* (on which Bebchuk relies), is not whether EA *may choose* to include the Proposal in its proxy, but whether EA *must include* the Proposal in its proxy.[78] Rule 14a-8 is crystal clear on that point—EA cannot be *compelled* to do so.

II. EA CANNOT BE REQUIRED TO INCLUDE THE PROPOSAL BECAUSE IT FALLS WITHIN 14A-8(i)'S EXCLUSIONARY CATEGORIES.

This Court can affirm the decision below on legal grounds that did not form a basis of the District Court's decision.[79] Rule 14a-8(i)(3) is not the only basis on

---

77 *See* Appellant's Br. at 33–37.

78 *AFSCME v. AIG*, 462 F.3d at 130 n. 9 (quoted in Appellant's Br. at 36 and stating that "[e]ven if proxy access bylaw proposals were excludable under Rule 14a-8(i)(8), a company could nevertheless decide to include the proposal in its proxy statement").

79 *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 307 (2d Cir. 2007) ("[W]e have held expressly that we are 'free to affirm a district court decision ... even [on] grounds not relied upon by the district court.' ") (quoting *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 134 (2d Cir. 2007).

which EA was entitled to exclude the Proposal. It is also excludable under the other Rule 14a-8(i) exclusionary bases (which EA also presented below).

A. EA Cannot Be Required to Include the Proposal Because It Is Subject to Rule 14a-8(i)(8).

The director-election exclusion in Rule 14a-8(i)(8) clearly applies to the Proposal. In 2007, the SEC amended that Rule to broaden its reach not only to proposals for "an election for membership on the company's board of directors," but also proposals that "relate[] to" "*a procedure for such nomination or election*."[80] The SEC adopted these amendments in response to this Court's decision in *AFSCME*, in which the Court held that issuers could invoke then-existing Rule 14a-8(i)(8) to exclude only "proposals that relate to a particular election and not to proposals that [like the shareholder's in that matter], would establish the procedural rules governing elections generally."[81] In amending the Rule, the SEC observed that Rule 14a-8(i)(8)'s invigorated "election exclusion" permits issuers to exclude any "shareholder proposal[] that may result in a contested election."[82] And it declared that the amended Rule should be interpreted broadly, allowing issuers to exclude not only shareholder-nominated director

---

80 *See* A-54 (2007 Final Release at 6 (the italicized portion was added by the 2007 amendment)).

81 462 F.3d at 130.

82 A-51 (2007 Final Release at 3).

candidates, but also shareholder procedural proposals that could lead to future contested board elections:

> [T]he phrase "relates to an election" in the election exclusion cannot be read so narrowly as to refer only to a proposal that relates to the current election . . . but rather must be read to refer to a proposal that "relates to an election" in subsequent years as well. In this regard, if one looked only to what a proposal accomplished in the current year, and not to its effect in subsequent years, the purpose of the exclusion could be evaded easily.[83]

The SEC's expressed purpose in adopting this amendment was to "assure the integrity of director elections."[84]

Bebchuk conceded below that the Proposal would eventually allow shareholders to compel EA to include in its proxy materials a proposal that would place shareholder nominees on the Company's proxy.[85] Rule 14a-8(i)(8) mandates, therefore, that EA cannot be compelled to include the Proposal, even though the contested election would not happen for several years. As the SEC explained, the 2007 Amendment was designed to allow an issuer to exclude any

---

83 A-53.

84 A-50; *see also* A-785–827 (JPMorgan Chase & Co., SEC No-Action Letter, CCH Securities Internet Library (Feb. 11, 2008) (post-2007 Amendment, granting no-action relief for proposal that would have established procedures concerning board elections); The Bear Stearns Companies, Inc., SEC No-Action Letter, CCH Securities Internet Library (Feb. 11, 2008) (same); E*Trade Financial Corp., SEC No-Action Letter, CCH Securities Internet Library (Feb. 11, 2008) (same)).

85 Bebchuk Opp. at 25–26.

proposal that "relates to procedures that would result in a contested election either in the year in which the proposal is submitted or in *any subsequent year*."[86]

Bebchuk tries to retreat from his concession below, arguing here that his Proposal merely "make[s] a contested election on the Company's proxy slightly more likely."[87] But the relative likelihood is beside the point. What matters is that a shareholder cannot now use EA's proxy to conduct a contested election, but he would be able to do so in the future if Bebchuk's Proposal were included in EA's proxy and adopted. As Bebchuk explained to the District Court, his Proposal would result in a new proxy-access regime that would allow a shareholder to force EA to include a shareholder board nominee in its proxy materials—with no opportunity for EA to prevent it—in the following manner:

- In year 1, the shareholders approve Bebchuk's Proposal;
- In year 2, the EA Board of Directors submits the requested bylaw amendment to the shareholders for a vote and shareholders approve it;
- In year 3, a shareholder meeting the minimum ownership criteria under the Proposal requires the Company to submit to shareholders a bylaw amendment that would require EA to include shareholder nominees for director in the Company's proxy materials and the shareholders approve that bylaw amendment; and
- In year 4, a shareholder meeting the requirements of the new bylaw requires EA to publish in the Company's proxy materials

---

86 A-54 (2007 Final Release at 6).

87 Appellant's Brief at 53.

> the shareholder's nominee to contest a Board of Directors' seat against EA's nominee.[88]

In year 4 under the Proposal's regime, EA would have no discretion to exclude the candidate from the Company proxy, and shareholders would therefore be able to compel EA to include a proposal for a contested director election, contrary to Rule 14a-8(i)(8).

Apart from being irrelevant, Bebchuk's "slightly more likely" description obscures Bebchuk's agenda. As discussed above, Bebchuk has long championed free shareholder access to issuers' proxy statements for contested elections.[89] Bebchuk is free to advocate his views as to what the SEC's rules should require, and to continue lobbying the SEC to reevaluate Rule 14a-8. He cannot, however, invoke Rule 14a-8 as a basis to compel EA to include the Proposal in EA's proxy materials, and thus, rewrite the SEC's rules one company at a time.

The recently proposed amendment to Delaware's General Corporation Law ("DGCL") does nothing to alter this result. The Corporation Law Council of the Delaware State Bar Association has proposed a new Section 112 that would provide a Delaware corporation with the authority to adopt a bylaw that grants shareholders the right to include shareholders' nominees for board election in the corporation's proxy solicitation materials, including any form of proxy card that it

---

[88] Bebchuk Opp. at 25; *see also* A-1085–86 (summarizing at oral argument the admissions in Bebchuk's brief on the motion to dismiss).

[89] *See supra* p. 11.

distributes, subject to any procedures or conditions the bylaw may impose.[90] Section 112 would merely make certain the authority of a Delaware corporation to adopt such a bylaw; it would not affect the operation of the federal requirement in Rule 14a-8 to include a shareholder proposal in a company's federally-mandated proxy materials. As with any bylaw that a company may adopt under the DGCL, the state law process for adopting that bylaw is entirely separate from the Rule 14a-8 requirement as to what shareholder proposals must be included in a company's proxy materials.

For example, such a bylaw could be adopted by any of the following: (i) a board could voluntarily adopt a Section 112-authorized bylaw, (ii) the bylaw could be voted on at any meeting of shareholders if it were properly raised at that meeting, (iii) shareholders could solicit their own proxies in support of such a bylaw and properly raise the bylaw for a vote at a meeting of shareholders, or (iv) a board could voluntarily choose to raise such a bylaw for a vote at a meeting of shareholders and place that proposal on the company's proxy. These steps in no way implicate the Rule 14a-8's requirements in general or Rule 14a(i)(8)'s effect. Because such a shareholder proposal to adopt a Section 112-authorized bylaw would relate to an election of directors in a subsequent year, Rule 14a-8(i)(8) provides that the company is not required to include it. As such, a shareholder

---

[90] H.R. 145 Gen. Assemb., H.B. No. 19 (Del. 2009) (available at http://legis.delaware.gov/LIS/LIS145.NSF/vwLegislation/HB+19?Opendocument).

could not look to Rule 14a-8 to compel a Delaware corporation to include that shareholder proposed bylaw in its proxy materials.

B. EA Cannot Be Required to Include the Proposal Because It Also Concerns Numerous Other Subjects that Permit Its Exclusion.

If Bebchuk's Proposal were to pass, it would also result in EA's being compelled to include in its future proxy materials numerous other types of proposals that, under the existing proxy rules, it cannot be forced to include. These subjects include:

- the redress of personal grievances against EA (Rule 14a-8(i)(4));
- EA's *de minimis* operations not otherwise significantly related to its business (Rule 14a-8(i)(5));
- matters directly conflicting with EA's own proposals it is submitting to the shareholders at the same meeting (Rule 14a-8(i)(9));
- policies or corporate governance matters that EA has substantially implemented (Rule 14a-8(i)(10));
- matters substantially duplicating those previously submitted to EA by another proponent that will already be included in the proxy materials for the same meeting (Rule 14a-8(i)(11));
- substantially the same subject matter as another proposal or proposals that EA previously included in its proxy materials within the last five years and that failed to win sufficient shareholder support to indicate shareholder interest (Rule 14a-8(i)(12)); and
- specific amounts of cash or stock dividends (Rule 14a-8(i)(13)).

Each of these Rule 14a-8(i) subparagraphs provides a separate and independent basis for concluding that Rule 14a-8 does not require EA to include the Proposal.

It does not matter, as Bebchuk argues, that the Proposal does not "on its face" expressly relate to any of the above categories. The Proposal relates to future shareholder proposals and, in so doing, limits EA's exclusionary authority to only three categories of proposals—those that are not proper for shareholder action, those are at not proper under state law, and those that relate to an issuer's "ordinary business."

Therefore, under the Proposal, if eligibility and procedural requirements were met, future shareholder proposals that relate to *every other subject* would automatically be included in EA's proxy materials. This is hardly an "indirect consequence," as Bebchuk's *amici* assert. The Proposal's intent, as the Supporting Statement makes clear, is the *required* inclusion of categories of future shareholder proposals that EA would not otherwise be required to include in its proxy materials. That would also be the Proposal's direct consequence—if it were adopted, EA would be bound to publish in its proxy materials any shareholder proposal *relating to any subject matter* that met Bebchuk's minimal "Qualified Proposal" definition.

Because Bebchuk has chosen not to structure his Proposal around Rule 14a-8(i)'s exclusionary categories, Rule 14a-8 does not require EA to include the Proposal. Merely relabeling the Proposal as "procedural" does not extricate it from those exclusionary categories. For example, a proposal to "amend the bylaws to

require including in the company's proxy materials any future bylaw amendment obligating the company to pay a specific dividend amount" obviously falls within the Rule 14a-8(i)(13) exclusion for specific stock dividend proposals. It cannot be plucked out of that exclusionary category and placed into Rule 14a-8's mandatory inclusion merely by rewording it as a "procedural" proposal to "amend the bylaws to require including in the company's proxy materials any future bylaw amendment relating to *any subject*, so long as appropriate for shareholder action, valid under state law, and not relating to ordinary business matters." This would elevate form over substance to evade the operation of Rule 14a-8.

The Proposal's reference to only three of Rule 14a-8(i)'s thirteen exclusionary categories necessarily means that it is attempting to provide for the future inclusion of proposals that would fall into any of the other ten categories. In fact, the Supporting Statement describes that as the Proposal's purpose.[91] As such, the Proposal necessarily relates to all of those ten subject matter categories, as it provides no other limits on the nature of the proposals that EA would be compelled to include in its proxy materials.

If, for example, a 5% shareholder were annoyed because he did not like a recent EA title that he had purchased, he could propose a bylaw amendment that would require EA to refund his purchase price. Under existing Rule 14a-8(i)(4),

---

[91] A-546.

the shareholder clearly could not compel EA to include such a proposal in the Company's proxy because it relates to a personal grievance. But if shareholders were to adopt the Proposal, and the shareholder were then to submit his refund bylaw amendment proposal timely and comply with the word limit and eligibility requirements, then he could compel EA to include the refund bylaw amendment proposal in the Company's proxy materials. Neither EA nor its shareholders would have any recourse. Understandably, the SEC crafted the exclusionary bases in Rule 14-8(i) to bar such absurd outcomes.

Shareholder proposals relating to the amounts of cash or stock dividends provide another example. As provided in Rule 14a-8(i)(13), Rule 14a-8 does not compel an issuer to include a proposal if it "relates to specific amounts of cash or stock dividends." In this regard, the SEC staff has stated that Rule 14a-8 does not require the inclusion in an issuer's proxy materials of proposals that request:

- "an annual dividend payment of $.60/share, paid quarterly";[92]
- "at least a $1.00 per share dividend";[93] or
- the establishment "from the pretax profits of the company's annual consolidated gross revenues a sum representing not more than 5% for distribution to shareholders as a stock dividend."[94]

---

92 *See* Cisco Systems, Inc., SEC No-Action Letter (September 9, 2005).

93 *See* Host Marriott Corporation, SEC No-Action Letter (March 5, 2003).

94 *See* Sea Change International, SEC No-Action Letter (March 30, 2007).

But under the Proposal's alternative proxy-access regime, a 5% shareholder could compel EA to include in its proxy materials *any* proposal calling for a bylaw amendment establishing a specific cash or stock dividend. As such, EA would be required to include in its proxy materials not only a proposal similar to those described above, but also any bylaw proposal relating to the specific amount of dividends, even if the proposal would require the Company to pay 100% of gross revenues to shareholders annually as a dividend.

C. The Proposal's Precatory Nature Does Not Salvage It.

Bebchuk does not argue on appeal, as he did in the District Court, that EA may be compelled to include the Proposal because it is merely "precatory," and does not require EA to *do* anything, because EA's Board could choose not to submit the Proposal for a shareholder vote. That argument is therefore waived.[95]

It is also meritless. Under Rule 14a-8(i), an issuer cannot be forced to include certain proposals regardless of whether they are mandatory or precatory. As Rule 14a-8(a) provides, a "proposal" includes "your *recommendation or* requirement that the company and/or its board of directors take action."[96] Thus, a

---

[95] *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("We begin by observing that arguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.").

[96] 17 C.F.R. 240.14a-8(a) (emphasis added).

shareholder cannot require an issuer to include even a precatory "recommendation" if it falls within an excluded category.

And with good reason. Relabeling the Proposal as "precatory" would not prevent the Proposal from achieving its intended effect. The Board would have little choice but to submit the requested bylaw amendment to a shareholder vote if EA's shareholders approved the Proposal. Should the Board refuse, the various proxy advisors, such as RiskMetrics (formerly known as "ISS"), would recommend that institutional shareholders vote against or withhold their proxy from the issuer's Board nominees.[97] As Delaware Vice Chancellor Leo Strine recently observed in a debate with Bebchuk, many institutional investors "rely heavily on the advice of … firms like Institutional Investor Services (ISS) that provide advice on how to vote on corporate ballot issues."[98] Indeed, ISS recently swayed shareholders in favor of a merger by withdrawing its opposition and urging its clients to approve it.[99]

---

97 Brief for the Chamber of Commerce of the United States of America as Amicus Curae Supporting Defendant (July 18, 2008) at 21 (quoting ISS Governance Service's proxy voting guidelines: "Vote AGAINST or WITHHOLD from all nominees of the board of directors … if … The board failed to act on a shareholder proposal that [i] received approval by a majority of the shares outstanding the previous year [or] … [ii] received approval of the majority of shares cast for the previous two consecutive years.").

98 Vice Chancellor Leo E. Strine, Jr., *Toward a True Corporate Republic*, 119 HARV. L. REV. 1759, 1765 (2006).

99 *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 801 (Del. Ch. 2007) ("[A] large number of ISS clients who had been prepared to vote no . . . took ISS's

III. EA CANNOT BE COMPELLED TO INCLUDE THE PROPOSAL BECAUSE IT IS VAGUE AND INDEFINITE.

Another basis for the EA Board's exclusion decision—and affirming the District Court decision—is that the Proposal is vague and indefinite. Rule 14a-8(i)(3) permits an issuer to exclude vague and indefinite proposals because they are contrary to Rule 14a-9, which forbids materially false and misleading information in proxy materials. As the SEC has explained, an issuer may exclude a shareholder proposal under Rule 14a-8(i)(3) where

> the resolution contained in the proposal is so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires—this objection also may be appropriate where the proposal and the supporting statement, when read together, have the same result.[100]

Under the "vague and misleading" component of Rule 14a-8(i)(3), "[s]hareholders are entitled to know precisely the breadth of the proposal on which they are asked to vote."[101] Bebchuk's Proposal fails this test.

---

advice and changed their position on the Merger."); *see also id.* at 793 (noting that ISS's initial "no" recommendation caused the acquiring company to increase its bid); *see also Hewlett v. Hewlett-Packard Co.*, Civ. No. 19513-NC, 2002 WL 818091, at *8 (Del. Ch. April 30, 2002) ("[I]t was widely known that [ISS] played a critical role, because several institutions usually follow ISS recommendations and in this case Barclays … had committed to voting its approximately 60 million shares of HP stock in accordance with the ISS recommendation.").

[100] A-838 (Staff Legal Bulletin No. 14B, Fed. Sec. L. Rep. (CCH) ¶ 60,014B, at 4 (Sept. 15, 2004)).

[101] *New York City Employees' Ret. Sys. v. Brunswick Corp.*, 789 F. Supp. 144,

While the Proposal appears to be an alternative scheme to Rule 14a-8, it nowhere explicitly states that it is supplanting that framework. Accordingly, for shareholders who meet the eligibility requirements under both Rule 14a-8 and Bebchuk's Proposal, it is unclear whether EA and the shareholder are required to comply with Rule 14a-8's procedures, the Proposal's procedures, or both.

This omission is significant. When a shareholder's proposal is rejected, Rule 14a-8 provides procedural protections not incorporated in Bebchuk's proposed scheme. If, for example, an issuer were to exclude a proposal under one of the Rule 14a-8(i) categories, Rule 14a-8 would require the issuer to submit to the SEC its reasons for the exclusion at least 80 calendar days before filing its definitive proxy statement and form of proxy, copying the shareholder-proponent on the submission.[102] The shareholder-proponent may respond to the submission, and the SEC staff would then issue a no-action letter.[103] But there is no comparable procedure under the Proposal for notifying a shareholder or seeking SEC review of a proposal's exclusion (because, for example, it is an improper stockholder action under state law or concerns EA's "ordinary business operations").

---

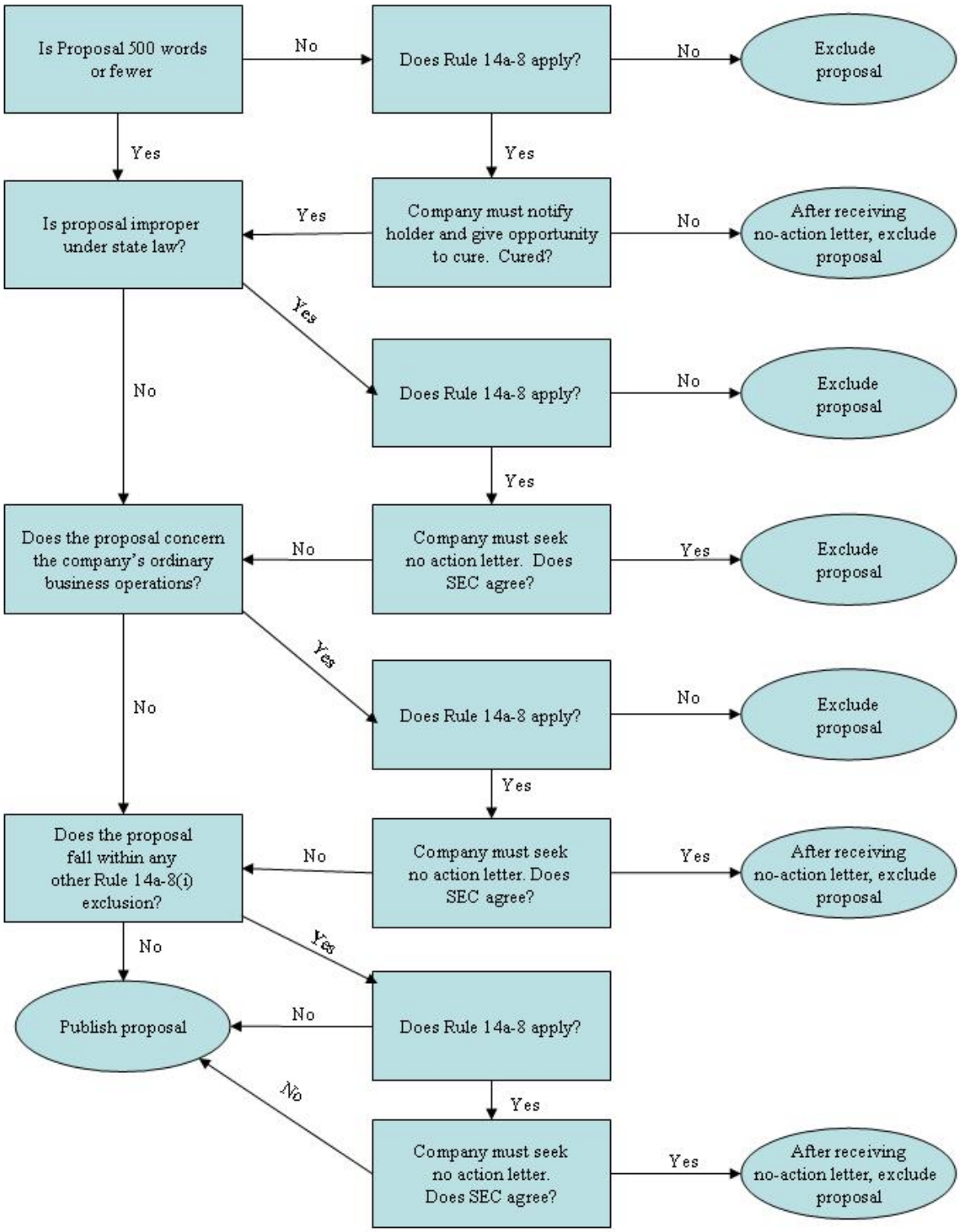
146 (S.D.N.Y. 1992).

102 17 C.F.R. § 240.14a-8 (j)(1).

103 *See* 17 C.F.R. § 240.14a-8 (k).

A similar problem arises where EA determines that a proposal suffers from an "eligibility or procedural" defect. Under Rule 14a-8, EA must give a shareholder notice of either an eligibility or a procedural defect and allow the shareholder an opportunity to cure. By contrast, Bebchuk's Proposal (in subsection (e)) allows shareholder-proponents to cure only *eligibility* defects. Thus, EA and shareholders are left in the dark as to whether Bebchuk's Proposal displaces Rule 14a-8(f). If the Proposal were intended to preempt completely the SEC's regulatory regime, EA could exclude proposals that failed the procedural requirements, such as the 500-word limit, without providing shareholders any notice. But if Bebchuk's scheme were intended to co-exist with the SEC's regulations, then EA could not exclude a procedurally defective proposal without giving notice and an opportunity to cure the failure, as SEC regulations require. The Proposal gives no guidance.

The following flow chart illustrates these conflicts:


Is Proposal 500 words or fewer
No
Does Rule 14a-8 apply?
No
Exclude proposal
Yes
Yes
Is proposal improper under state law?
Yes
Company must notify holder and give opportunity to cure. Cured?
No
After receiving no-action letter, exclude proposal
Yes
No
Does Rule 14a-8 apply?
No
Exclude proposal
Yes
Does the proposal concern the company's ordinary business operations?
No
Company must seek no action letter. Does SEC agree?
Yes
Exclude proposal
Yes
No
Does Rule 14a-8 apply?
No
Exclude proposal
Yes
Does the proposal fall within any other Rule 14a-8(i) exclusion?
No
Company must seek no action letter. Does SEC agree?
Yes
After receiving no-action letter, exclude proposal
No
Yes
Publish proposal
No
Does Rule 14a-8 apply?
No
Yes
Company must seek no action letter. Does SEC agree?
Yes
After receiving no-action letter, exclude proposal

Thus, if the Proposal were adopted, a 5% shareholder (who also meets Bebchuk's ownership duration requirements) whose proposal is excluded would not know whether he must follow the SEC's procedures for compelling EA to include the proposal, or whether he would instead have to resort to suing the EA Board in state court for violating the bylaws. EA likewise would be left to guess whether it would have to provide its shareholders an opportunity to cure all procedural defects in a proposal submitted by a 5% shareholder.

A. Bebchuk's Supporting Statement Does Not Correct the Proposal's Ambiguity.

In his brief, Bebchuk makes no meaningful effort to explain how his Proposal's alternative proxy-access scheme would interact with the SEC's comprehensive Rule 14a-8 framework. Instead, he directs the Court to his Supporting Statement, which does nothing to cure the Proposal's ambiguity. Rather, it merely urges shareholders to vote for his Proposal even if they believe there should be no change in the current bylaws "to express support for facilitating stockholders' ability to decide for themselves whether to adopt Bylaw amendments initiated by stockholders."[104] This statement does nothing to explain "the Proposal's relationship with Rule 14a-8," as Bebchuk argues.

[104] A-546 (quoted in Appellant's Brief at 55).

Bebchuk's counsel asserted at oral argument below that Rule 14a-8 would remain undisturbed, and that shareholders and EA would therefore still be required to satisfy its requirements:

> Your honor, nothing would change about Rule 14a-8. Nothing would change about the Company's obligation to comply with 14a-8 or the company's ability to exercise discretion with regard to 14a-8. The only difference is that there would be an additional requirement under state law. . . .[105]

Regardless of counsel's assertion, the specific language of the Proposal and the Supporting Statement is the only means by which EA's shareholders and its Board may understand the Proposal; the interaction between the Proposal and Rule 14a-8 is spelled out nowhere in that language. As a result, the Proposal and the Supporting Statement provide neither EA's shareholders nor its Board with a basis to determine with any reasonable degree of certainty the intended operation of the Proposal in relation to Rule 14a-8. This pervading ambiguity causes the Proposal and Supporting Statement to be materially false and misleading. Due to the materially misleading nature of the Proposal and Supporting Statement, Rule 14a-8(i)(3) provides EA with the discretion to exclude the Proposal from its proxy materials.

CONCLUSION

Bebchuk is attempting to co-opt EA's proxy statement by forcing EA to publish his Proposal, which (if adopted) would displace decades of carefully

[105] A-1052.

balanced SEC regulation governing shareholder proxy-access rights. In its place, Bebchuk would install his own shareholder proxy-access scheme that would compel EA to publish in its proxy materials virtually any proposed bylaw amendment from a 5% shareholder. Over the last 30 years, the SEC has considered—and rejected—several amendments to its proxy-access rules that would have achieved similar results, primarily by allowing companies to opt out of Rule 14a-8. As such, there can be no doubt that the Proposal is contrary to the proxy rules, and under Rule 14a-8(i)(3), Bebchuk cannot compel EA to include it in the its proxy. For this reason, the District Court's decision should be affirmed.

The District Court's decision should also be affirmed on the alternative ground that Rule 14a-8(i)(8) prohibits Bebchuk from compelling EA to publish the Proposal in its proxy. As the SEC itself has made clear, that Rule allows companies to exclude not only proposals that facially relate to a director election, but also any proposal that relates to a director election in *any subsequent year*. Because Bebchuk—a prominent advocate for shareholder access to corporate proxies for contested elections—has admitted that his Proposal could result in EA's being compelled to include shareholder nominees in future EA proxy materials, the Proposal falls squarely within the category of Proposals described in Rule 14a-8(i)(8). And his Proposal would also result in EA's forced publication of proposals concerning numerous other subjects that are clearly excludable under

Rule 14a-8(i), such as personal grievances or serial proposals that fail to win substantial shareholder support. For this reason, too, the District Court's decision should be affirmed.

The District Court's decision should also be affirmed on the alternative ground that the Proposal is vague and indefinite. Because its procedures in some ways mimic Rule 14a-8, but depart materially from the Rule in others, it is impossible for EA or its shareholders to determine what procedures would govern future proposals from 5% shareholders who meet the Proposal's eligibility requirements. The Proposal is therefore contrary to the proxy rules, and EA cannot be compelled to include it for this reason, as well.

Dated: April 13, 2009

Respectfully submitted:

O'MELVENY & MYERS LLP

Jonathan Rosenberg
William J. Sushon
Seven Times Square
New York, New York 10036
(212) 326-2000

Attorneys for Appellee Electronic Arts Inc.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (Times New Roman) of 14 points, and contains 11,531 words (excluding as permitted by Fed. R. App. P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce the brief.

Dated: April 13, 2009

Respectfully submitted:

_____

Jonathan R. Rosenberg

ANTI-VIRUS CERTIFICATION FORM
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: Bebchuk v. Electronic Arts

DOCKET NUMBER: 08-5842-cv

I, Natasha S. Johnson, certify that I have scanned for viruses the PDF version of the

_______ Appellant's Brief

___xx___ Appellee's Brief

_____ Reply Brief

_____ Amicus Brief

_____ _____

that was submitted in this case as an email attachment to <civilcases@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used:

Vipre AntiVirus version 3.1 was used.

_____
Natasha S. Johnson

Date: April 13, 2009

STATE OF NEW YORK)
) ss.: **AFFIDAVIT OF SERVICE**
COUNTY OF NEW YORK) **BY MAIL**

I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On

deponent served the within: **Brief for Defendant-Appellee**

upon:

Jay W. Eisenhofer (98-587)
Ananda Chaudhuri
Grant & Eisenhofer, P.A.
485 Lexington Avenue, 29th Floor
New York, New York 10017
(646) 722-8500
jeisenhofer@gelaw.com

Michael J. Barry (05-176558)
Grant & Eisenhofer, P.A.
1201 N. Market Street
Wilmington, DE 19801
(302) 622-7000
mbarry@gelaw.com

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on

Mariana Braylovskaya
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2010

Job # 222148