

THE HISTORY AND EVOLUTION OF INTRA-CORPORATE FORUM SELECTION CLAUSES: AN EMPIRICAL ANALYSIS¹

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ABSTRACT

Forum selection provisions are commonly found in the material contracts of publicly traded corporations. But they are exceedingly rare in the organic documents of the same publicly traded entities. Why?

This Article documents that, as of June 30, 2011, only 133, or 1.49%, of publicly traded entities had forum selection provisions in their charters or bylaws. The vast majority of these provisions, 117 (88.0%), were adopted after Delaware Court of Chancery's March 16, 2010, decision in Revlon observing that corporations could avoid forum disputes by adopting forum selection provisions in corporate charters. Of the forum selection provisions adopted by corporations, 58.6% appear in corporate charters and 41.4% appear in bylaws adopted without prior shareholder consent. More than 91% of these provisions follow the form introduced by Netsuite in conjunction with its 2006 IPO, and approximately 16.28% of all IPOs declared effective since Revlon are of corporations whose charters contain forum selection provisions. Corporations headquartered in California are over-represented in the population of corporations that have adopted these provisions.

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¹Claudia H. Allen of Neal, Gerber & Eisenberg, LLP has independently tracked the evolution of forum selection provisions in organic corporate documents and presented data consistent with the findings reported in this research. CLAUDIA H. ALLEN, *STUDY OF DELAWARE FORUM SELECTION IN CHARTERS AND BYLAWS* (2012) [hereinafter ALLEN STUDY]. Questions related to the enforceability of intra-corporate forum selection provisions are analyzed separately in Joseph A. Grundfest & Kristen Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis* (Rock Center for Corporate Governance at Stanford University Working Paper No. 125, Oct. 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164324.

The historic scarcity of forum selection provisions in the organic documents of publicly traded entities is consistent with the observation that, prior to the early part of this century, intra-corporate litigation was almost always brought in the state of incorporation. In such an environment, the selection of a state of incorporation acted as a de facto forum selection clause, and these clauses could reasonably have been viewed as surplusage. But as plaintiff counsel began to litigate intra-corporate claims with vastly greater frequency in courts away from the state of incorporation, a demand emerged for a contractual provision that could restore the pre-existing jurisdictional equilibrium in which each state's courts specialized in the interpretation of that state's corporate law. Viewed from this perspective, the intra-corporate forum selection clause is not an innovation that seeks to disrupt traditional litigation processes: it is, instead, better viewed as an effort to restore an equilibrium that had prevailed for decades. It promotes a balance that reflects the natural expectation of corporations and shareholders alike so that courts "stay in their lane" as they specialize in the interpretation of their own state's corporation laws.

TABLE OF CONTENTS

I INTRODUCTION.....	335
II. DATA ANALYSIS.....	353
A. <i>The Cross-Sectional Incidence of Forum Selection Provisions</i>	354
B. <i>The Incidence of Forum Selection Provisions in Corporate Organic Documents and in LLC and LLP Organic Documents</i>	357
C. <i>Incidence Over Time</i>	358
D. <i>Incidence in IPOs Over Time</i>	361
E. <i>The Content of Forum Selection Clauses</i>	362
F. <i>The Incidence of Forum Selection Provisions by Chartering and Headquarters Jurisdictions</i>	367
G. <i>Shareholder Votes on Forum Selection Provisions</i>	370
III. WHY?.....	373
A. <i>The Demand for Intra-Corporate Forum Selection Provisions</i>	373
B. <i>The Supply of Intra-Corporate Forum Selection Provisions</i>	378
1. <i>Standard Pacific: The Earliest Identified Intra-Corporate Forum Selection Provision</i>	379
2. <i>Netsuite: The Dominant Intra-Corporate Forum Selection Provision</i>	380

<i>C. Equilibrium</i>	388
IV. CONCLUSION	389
DATA APPENDIX	391
STATISTICAL APPENDIX	402
REFERENCE MATERIAL APPENDIX.....	409

I. INTRODUCTION

Forum selection clauses are widely respected and commonly applied across a broad range of commercial and corporate agreements.² They can reduce dispute resolution costs, promote efficient contracting, and enhance functional specialization in the judiciary.³ Reference works often include

²See, e.g., Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92, 94 (2012) (finding that 60% of the merger agreements in the sample contained forum selection clauses with Delaware as their choice of forum).

Forum selection provisions are now "routinely enforced." Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2078 (2009) [hereinafter Miller & Eisenberg, *The Market for Contracts*]. "Most state courts have followed the Supreme Court's lead in enforcing forum-selection clauses, but several still refuse to enforce them, or do so only with significant limitations and qualifications." *Id.* at 2079 (footnote omitted). For example, "[t]he Supreme Court's decision in *The Bremen v. Zapata* declar[ed] a forum-selection clause 'prima facie valid.'" *Id.* at 2078 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)); see also *id.* at 2079 n.31 ("Enforcement is generally favored under the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971), providing that the parties' agreement as to the place of the action is to be given effect unless it is unfair or unreasonable."). Courts that reject enforcement of forum selection provisions suggest that, in some circumstances, these provisions "contravene public policy, are unreasonable, fail to establish personal jurisdiction in the forum, or fail to accomplish 'substantial justice.'" *Id.* at 2090 (footnotes omitted). "Some [state courts] approve forum-selection clauses only grudgingly, reject them in particular types of cases, exercise discretion over whether to enforce them, or refuse to enforce them at all." *Id.* (footnotes omitted). Texas and California are, moreover, examples of states that may "apply a more demanding concept of their own public policy" when interpreting a forum selection clause. *Id.* at 2089 (footnotes omitted). The possibility that foreign states might refuse to enforce forum selection clauses may implicate future adoption rates of intra-corporate forum selection provisions. See *infra* notes 64-65 and accompanying text.

³See, e.g., Bryan Druzin, *Buying Commercial Law: Choice of Law, Choice of Forum, and Network Externalities*, 18 TUL. J. INT'L & COMP. L. 131, 144 (2009) ("The selection of a neutral forum can give parties 'predictability and certainty about the outcome of the dispute'" and "'reduce expenses and delay in the litigation, permitting the parties more promptly to focus on the merits of the case without expensive procedural distractions.'") (quoting Igor Volner, *Forum Selection Clauses: Different Regulations from the Perspective of Cruise Ship Passengers*, 8 EUR. J.L. REFORM 439, 442 (2006)); Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 424 (1991) ("The enforcement of reasonable forum-selection clauses protects the expectations of contracting parties, preserves the equities of the agreement, respects freedom of contract, encourages trade, and conserves judicial resources by limiting pretrial struggles over where to litigate.") (footnotes omitted); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1980 (2006)

instructions for drafting forum selection clauses,⁴ and the Supreme Court has enforced these clauses,⁵ even in contracts of adhesion.⁶

Forum selection clauses appear in 39.56% of the material contracts of publicly traded entities.⁷ In contrast, as of March 16, 2010, only sixteen publicly traded entities,⁸ representing less than 0.18% (eighteen hundredths of one percent) of all publicly traded entities,⁹ included intra-corporate forum

[hereinafter Eisenberg & Miller, *Ex Ante Choices of Law and Forum*] ("A substantial body of contract theory suggests . . . that choice of law and choice of forum provisions may have an impact on corporate value."). However, at least one commentator has suggested that "[t]he goals of reducing litigation costs and conserving judicial resources have been largely illusory, as enforcement of the forum selection clause has become the object of much litigation." David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 785 n.3 (1993) ("[T]hat which was intended to reduce litigation costs has actually served to contribute to them."). Thus a "general equilibrium" analysis of the costs and benefits of intra-corporate forum selection provisions would offset the costs associated with litigation over the enforceability of these provisions against the benefits that arise in situations when the provision helps mitigate litigation costs. *See id.* at 785 & n.3. That form of analysis is beyond the scope of this Article's inquiry.

⁴*See, e.g.*, LENNÉ EIDSON ESPENSCHIED, CONTRACT DRAFTING: POWERFUL PROSE IN TRANSACTIONAL PRACTICE 57-58 (2010); Palmer Brown Madden & Justene M. Adamec, *Dispute Resolution Procedures*, in DRAFTING BUSINESS CONTRACTS: PRINCIPLES, TECHNIQUES AND FORMS § 16.53 (2009); Tina L. Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 173 (Aspen 2007) (recommending inclusion of choice of forum and governing law provisions in an agreement to prevent litigation on choice of law issues).

⁵"[Forum selection] clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Bremen*, 407 U.S. at 10. More precisely, the clause would be unenforceable only if: (i) its formation was induced by fraud or overreaching; (ii) "trial in the contractual forum will be so gravely difficult and inconvenient that [plaintiff] will for all practical purposes be deprived of his day in court"; or (iii) enforcement of the clause would "contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id.* at 15, 18.

⁶*See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95 (1991), *superseded by statute*, 46 U.S.C. § 30509 (2006), *as recognized in* Yang v. M/V Minas Leo, 1996 WL 32161, at *1 (9th Cir. Jan. 26, 1996) (noting *Carnival Cruise Lines* was superseded only in the context of passenger tickets); *see also* Oran v. Fair Wind Sailing, 2009 WL 4349321, at *2, *7, *9 (D.V.I. Nov. 23, 2009) (finding a forum selection clause in a contract of adhesion was enforceable despite a lack of bargaining among the parties).

⁷Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1506 tbl. 13 (2009) [hereinafter Eisenberg & Miller, *The Flight to New York*]; *see also id.* at 1487 (reporting the results of a survey of 2865 contracts contained as exhibits to Form 8-K "current report" filings with the Securities and Exchange Commission during various periods in 2002).

⁸*See infra* Data Appendix Table A-1, rows 1-16 (listing these publicly traded entities); *infra* Data Appendix Table A-1, rows 1-133 (listing all entities with reported forum selection clauses).

⁹This estimate is calculated as 16 divided by 8929 and is based on the fact that 8929 entities filed a Form 10-K with the United States Securities and Exchange Commission during calendar year 2010. *See infra* note 85. This estimate is conservative because it fails to account for the entry and exit of listed companies attributable to mergers, acquisitions, bankruptcies, de-listings, initial offerings, and other causes over the full seventeen year period considered in this analysis. *See infra* note 85.

selection clauses in their organic documents, such as their charters or bylaws.¹⁰ The probability is less than one in 10¹⁸⁷⁰ that this difference is due to chance.¹¹

¹⁰The forum selection clauses found in organic documents are expressly limited to the resolution of disputes that arise within the corporation, LLC, or LLP and that are resolved through the application of the business entity laws of the chartering jurisdiction. *See infra* Part III.B.2. These forum selection provisions do not purport to govern all disputes involving the entity, and do not address disputes with third parties that are not governed by the business entity laws of the chartering jurisdiction. *See infra* Part III.B.2. Examples of claims covered by these intra-corporate forum selection provisions include shareholder derivative suits or direct claims alleging breaches of fiduciary duties or other violations of state corporate law, whether brought as individual or class actions. *See infra* Part III.B.2. The class of lawsuits covered by these claims can intuitively be described as the class of claims governed by the internal affairs doctrine. *See infra* Part III.B.2. For an explanation of the scope of the internal affairs doctrine, *see, e.g.*, *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112-13 (Del. 2005) ("It is now well established that only the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs."); Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 35 (2006) ("Each corporation is formed under the law of its chosen state of incorporation. To ensure consistency and predictability, that law must govern the corporation's internal affairs."); Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV. L. REV. 1480 (2002) ("The internal affairs doctrine is a judge-made choice of law canon mandating that disputes regarding 'internal affairs' . . . be governed by the laws of the state of incorporation.") (footnote omitted); *see also* *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987) ("It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs."). Shareholder class actions alleging violations of the federal securities law, third-party claims against the corporation, or other causes of action that are not governed by state business entity laws would not be covered by these intra-corporate forum selection clauses. *See infra* Part II.B.2. In this context, the term "business entity laws" is defined to include statutory provisions governing the formation and operation of corporations, limited liability companies, and limited liability partnerships, including the duties owed by officers and directors to the entity and its shareholders, members, or limited partners. In Delaware, the business entity laws would include the Delaware General Corporation Law, DEL. CODE ANN tit. 8, §§ 101 to 398 (West 2006); Delaware Limited Liability Company Act, DEL. CODE ANN tit. 6, §§ 18-101 to 18-1109 (West 2011); and Delaware Revised Uniform Partnership Act, DEL. CODE ANN tit. 6, §§ 15-101 to 15-1210 (West 2006). In California, the business entity laws would include the California Corporations Code (the California Corporations Code has separate titles for each business entity, with Title 1, Title 2, and Title 2.5 governing the laws of corporations, partnerships, and limited liability companies, respectively). *See* CAL. CORP. CODE §§ 100 to 14631 (West 2010); CAL. CORP. CODE §§ 15800 to 16962 (West 2010); CAL. CORP. CODE §§ 17000 to 17656 (West 2010). In New York, the business entity laws would include the New York Business Corporation Law, N.Y. BUS. CORP. LAW §§ 101 to 2001 (McKinney 2003), New York Limited Liability Company Law, N.Y. LTD. LIAB. CO. LAW §§ 101 to 1403 (McKinney 2007), and New York Partnership Law, N.Y. P'SHIP LAW §§ 1 to 121-1506 (McKinney 2006).

For purposes of this Article, we treat limited partnerships, or LPs, and limited liability partnerships, or LLPs, as synonymous terms.

¹¹*See infra* Statistical Appendix, Test 1.

To put this level of statistical significance into context, there are approximately 10^{80} atoms in the observable universe.¹² You, dear reader, have a much better chance of randomly picking a single pre-designated atom out of the pool of all available atoms than of generating the observed pattern of intra-corporate forum selection clauses from the statistical process that generates forum selection clauses in the agreements of publicly traded entities.

The March 16, 2010 cut-off date selected for the preceding analysis was not, however, arbitrary. Prior to that date, no judicial opinion had mentioned the possibility that an entity might, in its organic documents, adopt a forum selection clause governing the locus of intra-corporate litigation.¹³ This judicial silence was broken by dicta in Delaware Vice Chancellor Laster's opinion in *In re Revlon, Inc. Shareholders Litigation*¹⁴ ("*Revlon*") suggesting that corporations might consider adopting intra-corporate forum selection clauses in their charters.¹⁵ *Revlon* expressed no view regarding the possibility that boards might, without shareholder action, amend bylaws by adopting intra-corporate forum selection clauses.¹⁶

Read narrowly, and recognizing that corporate charters are most easily amended prior to an initial public offering ("IPO"), *Revlon* suggests that intra-corporate forum selection clauses might become more common if

¹²TONY BUICK, *THE RAINBOW SKY: AN EXPLORATION OF COLORS IN THE SOLAR SYSTEM AND BEYOND* 38 (2010).

¹³*See Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1172 (N.D. Cal. 2011) (citing *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010)) ("The parties are in agreement that these cases present a question of first impression, in that no court has previously ruled on the enforceability of a venue provision for derivative actions contained in corporate bylaws. Such bylaws are reportedly a recent phenomenon.")

¹⁴990 A.2d 940 (Del. Ch. 2010).

¹⁵"[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes." *Id.* at 960. The court further observed that:

[A] provision selecting an exclusive forum for intra-entity disputes need not choose the Delaware courts. For example, business principals who all live in the same distant locale might form a Delaware entity to gain the many benefits conferred by Delaware law, yet prefer to litigate intra-entity disputes in their local jurisdiction. I can envision that the Delaware courts would retain some measure of inherent residual authority so that entities created under the authority of Delaware law could not wholly exempt themselves from Delaware oversight.

Id. at 960 n.8.

¹⁶The possibility of a bylaw forum selection provision was suggested by Theodore Mirvis, a partner at Wachtell, Lipton, Rosen & Katz, as early as 2007. Theodore N. Mirvis, *Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, 7 M&A J. 17, 17 (May 2007).

adopted as charter provisions prior to the decision to go public.¹⁷ Read more expansively, *Revlon* can be viewed as an invitation for corporations whose shares are already publicly traded to adopt intra-corporate forum selection bylaw amendments without prior shareholder action.¹⁸ These perspectives are not mutually exclusive, and both find support in data indicating a significant increase in the rate at which corporations have adopted forum selection clauses in pre-IPO charters and in post-IPO bylaws following *Revlon*.¹⁹

During the fifteen months between *Revlon*'s issuance on March 16, 2010, and the June 30, 2011 cut-off date for this Article's data analysis, the population of publicly traded entities with intra-corporate forum selection clauses in their organic documents more than octupled, increasing from 16 to 133.²⁰ The annualized adoption rate for intra-corporate forum selection clauses during the fifteen-and-a-half months immediately following *Revlon* was thus approximately ninety-one adoptions per year.²¹ In contrast, the comparable annualized adoption rate during the fifteen-year period preceding *Revlon* was approximately one per year.²² The annualized adoption rate of intra-corporate forum selection provisions in organic corporate documents thus increased by almost a hundredfold in the wake of *Revlon*.²³ These increases are statistically significant at far beyond the one percent confidence interval.²⁴ The Allen Study, which relies on a December 31, 2011 cut-off date, reports a total of 195 publicly traded entities with intra-corporate forum selection clauses in their organic documents,²⁵ and

¹⁷Indeed, the data suggests a sharp increase in the rate at which IPOs, declared effective, disclose that corporate charters contain forum selection provisions. See *infra* Part II.D Tables 4, 5.

¹⁸Under Delaware law, shareholders would always retain the right to vote to reject the board's adoption of a bylaw forum selection provision. See DEL. CODE ANN. tit. 8, § 109(a) (West 2011). Boards of directors, therefore, cannot, as a technical matter, impose a forum selection provision over the will of a majority of shareholders. See *id.* ("[T]he power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote."). Entities can, however, attempt to make a shareholder override less likely by adopting provisions that provide that shareholders may repeal forum selection clauses only by a supermajority vote, and several entities have done so. See ALLEN STUDY, *supra* note 1, at 5.

¹⁹See *infra* Data Appendix Table A-1, rows 17-133.

²⁰See *infra* Data Appendix Table A-1, rows 17-133.

²¹A simple linear extrapolation of an adoption rate of 117 per 15.5 months leads to an estimate of 7.55 per month, or 90.58 adoptions over twelve months, which is rounded in the text to 91. See *infra* Data Appendix Table A-1, rows 17-133 (showing that 117 publicly traded companies had a forum selection clause in their organic documents post-*Revlon*).

²²There were sixteen such adoptions over this fifteen year period. See *infra* Data Appendix Table A-1, rows 1-16.

²³See *infra* Part II.C and Tables 2, 3.

²⁴See *infra* Statistical Appendix, Test 7.

²⁵See ALLEN STUDY, *supra* note 1, at 1.

indicates that sixty-two entities adopted intra-corporate forum selection provisions in the last six months of 2011.²⁶ These data imply an annualized rate of 124 adoptions per year. The Allen Study thus suggests that the adoption rate has continued to increase even beyond the cut-off date for this Article's data analysis.²⁷

The 133 publicly traded entities with intra-corporate forum selection clauses, measured as of June 30, 2011, represent no more than 1.49% of all publicly traded entities.²⁸ The probability that identical statistical processes generate forum selection incidence rates of 1.49% in organic corporate documents and 39.56% in the material agreements of the same entities remains vanishingly small—less than one in 10¹⁶⁴⁴.²⁹ Updated for a year-end incidence rate of 2.18%,³⁰ the probability that identical statistical processes generate the two population statistics is less than one in 10¹⁵⁴⁸.³¹ Either of these probabilities remain so low that atom-hunting is an easier task.³²

Revlon is not, however, the only factor that might have stimulated an increase in the rate at which publicly traded entities have adopted intra-corporate forum selection clauses. On September 30, 2010, Chevron Corporation, the third-largest member of the Fortune 500,³³ announced that its board of directors had amended its bylaws to include an intra-corporate forum selection clause without prior shareholder action.³⁴ Berkshire Hathaway, the eleventh-largest corporation in the Fortune 500,³⁵ also amended its bylaws without prior shareholder action to add an intra-corporate forum selection clause.³⁶ Corporate boards seeking guidance from

²⁶This statistic is calculated as the difference between the Allen Study's year-end total of 195 and this Article's June 30, 2011 count of 133. *Compare id.*, with *infra* Data Appendix Table A-1, rows 17-133.

²⁷See ALLEN STUDY, *supra* note 1, at 13 fig.1.

²⁸This estimate is calculated as 133 divided by 8929. See *supra* note 9; *infra* note 85.

²⁹See *infra* Statistical Appendix, Test 2.

³⁰This estimate is calculated as 195 divided by 8929. See *supra* note 9; *infra* text accompanying note 25; *infra* note 85.

³¹See *infra* Statistical Appendix, Test 3.

³²See *supra* text accompanying note 12.

³³*Fortune 500 List*, CNNMONEY (May 3, 2010), http://money.cnn.com/magazines/fortune/fortune500/2010/full_list/.

³⁴Chevron Corp., Current Report (Form 8-K) (Sept. 30, 2010), <http://www.sec.gov/Archives/edgar/data/93410/000095012310090397/f56977e8vk.htm>. On March 28, 2012, Chevron amended its forum selection bylaw provision to address shareholder concerns regarding personal and subject matter jurisdiction in the selected forum. See *infra* notes 111-13 and accompanying text.

³⁵See *Fortune 500 List*, *supra* note 33.

³⁶Berkshire Hathaway Inc., Current Report (Form 8-K) (Nov. 9, 2010), <http://www.sec.gov/Archives/edgar/data/1067983/000119312510254196/d8k.htm>.

the actions of other large, well-respected entities could have drawn comfort from these high profile corporate actions.

On the other side of the ledger, concern regarding the viability of these provisions could have been fed by the first judicial decision formally ruling on the enforceability of an intra-corporate forum selection clause, *Galaviz v. Berg*.³⁷ There, the court refused to enforce a forum selection clause adopted as a bylaw amendment by the company's board of directors without prior shareholder approval.³⁸ The court's decision is narrowly drafted and rests on a fact pattern likely to distinguish *Galaviz* from other potential litigation regarding the enforceability of intra-corporate forum selection clauses.³⁹ In particular, the *Galaviz* plaintiffs alleged that the company's board amended the corporation's bylaws only after the alleged breach of fiduciary duty had already occurred.⁴⁰ The *Galaviz* court stated that "[p]articularly where, as here, the bylaw was adopted by the very individuals who are named as defendants, and after the alleged wrongdoing took place, there is no element of mutual consent to [the bylaw amendment] at all," at least for shareholders who purchased the stock prior to adoption of the bylaw.⁴¹ Any litigation alleging a violation beginning *after* a board's adoption of an intra-corporate forum selection clause would thus be readily distinguishable from the facts of *Galaviz*. Further, and perhaps more profoundly, the logic of the *Galaviz* decision does not withstand close scrutiny, provoking a reason to question whether that precedent will or should be followed.⁴²

It remains to be seen whether *Galaviz* will slow the rate at which intra-corporate forum selection clauses are adopted and how other judicial pronouncements might implicate the rate at which these clauses propagate. Given the cut-off date for data included in this Article's data analysis, it is appropriate to be cautious in offering firm empirical observations regarding the long-term effects, if any, of the *Galaviz* decision on the rate at which intra-corporate choice of forum provisions will be adopted in the future.

³⁷763 F. Supp. 2d 1170, 1172 (N.D. Cal. 2011) ("[N]o court has previously ruled on the enforceability of a venue provision for derivative actions contained in corporate bylaws.").

³⁸*Id.* at 1174-75.

³⁹*See id.* at 1174.

⁴⁰*Id.* at 1172.

⁴¹*Galaviz*, 763 F. Supp. 2d at 1171.

⁴²The larger question of the enforceability of intra-corporate forum selection clauses is the subject of a separate, forthcoming article. *See* Grundfest, *supra* note 1; *see also* Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1, 25 (2012) ("One concern about [forum selection] provisions is that they have not yet been fully tested in the courts There is also a risk that courts in states that are not the designated forum for resolving the dispute will not abide by these provisions, leading to uncertainty.").

Early indications, however, suggest that *Galaviz* is not slowing the adoption rate.⁴³ During the six months between the issuance of *Galaviz* and the June 30, 2011 data cut-off date for this Article, sixty-eight publicly traded entities adopted forum selection clauses, including thirty-eight charter provisions, twenty-three bylaw amendments and seven LLC or LLP agreements.⁴⁴ This adoption rate annualizes to approximately 136 adoptions per year, and exceeds the annualized adoption rate of 91 observed during the period between *Revlon* and the data cut-off date for this Article.⁴⁵ The Allen Study, indicating an adoption rate of 124 issuers per year during the second half of 2011,⁴⁶ also suggests that post-*Galaviz* adoptions have not slowed. *Galaviz* thus seems not to have immediately shut the gates on the adoption of intra-corporate forum selection clauses, and, if anything, the adoption rate for such clauses may have accelerated following *Galaviz*. To be sure, adoption rates might have been even higher absent *Galaviz*, but the available data do not allow us to test that conjecture.

Perhaps in response to concerns raised by *Galaviz*, or in response to issues specific to each company's unique circumstance, at least eleven corporations have, in 2011 and 2012, sought shareholder consent for the adoption of forum selection provisions.⁴⁷ As explained in greater detail below, in four of these situations, the forum selection proposal was bundled with other shareholder proposals.⁴⁸ The confounding nature of these parallel proposals makes it difficult or impossible to draw a clean inference as to shareholder reactions to forum selection proposals in these four instances. As for the remaining seven situations, the forum proposal in five of them succeeded but failed in two.⁴⁹ But again, it is difficult to draw strong inferences from this small sample. In the five situations in which the shareholder proposal passed muster, corporate insiders and block-holders held significant voting positions that can be viewed as pivotal to the outcome.⁵⁰ And, in the two situations in which the proposal was defeated, the loss came by a slim margin, but again with meaningful insider and block-holder positions.⁵¹ In sum, the sample sizes appear to be too small, the

⁴³ See *infra* Data Appendix Table A-1, rows 66-133; see also *infra* Table 3.

⁴⁴ See *infra* Data Appendix Table A-1, rows 66-133; see also *infra* Table 3.

⁴⁵ A simple linear extrapolation of an adoption rate of 68 provisions per six months between the *Galaviz* decision on January 3, 2011 and June 30, 2011 leads to an estimate of 136 adoptions over twelve months.

⁴⁶ See *supra* text accompanying note 26.

⁴⁷ See *infra* Part II.G and Table 8.

⁴⁸ See *infra* Part II.G and Table 8.

⁴⁹ See *infra* Table 8.

⁵⁰ See *infra* Table 8.

⁵¹ See *infra* Table 8.

sample characteristics too idiosyncratic, and the experience too nascent to support any strong conclusions regarding shareholder response to forum selection provisions.

Regardless of the thin data describing shareholder electoral responses to intra-corporate forum selection provisions, the adoption data confirms a sharp recent increase in the incidence of forum selection provisions in organic corporate documents off of a very small base. These data are consistent with a narrative in which intra-corporate forum selection clauses are at an early stage of development. These data could evolve to follow the ogive (s-shaped) adoption pattern observed in diffusion processes that typically characterize the spread of legislative innovations among the states.⁵² In these diffusion processes, a very small number of subjects initially adopt an innovation that then diffuses more quickly until the adoption rate tails off because a sufficiently large percentage of all entities that could adopt the innovation have already done so.⁵³ To be sure, whether this conjecture comes to pass will require several more years of experience. Extrapolating from approximately fifteen months of data during which an adoption rate has reached only 1.49% of the potential population,⁵⁴ or even from twenty-one months of data indicating that the adoption rate has reached 2.18%,⁵⁵ is a hazardous and perhaps even foolhardy exercise. Nonetheless, a rapid dissemination process does appear to be afoot, and the question now is whether and how fast the process will continue to propagate.

If this analysis is correct, then the future of this diffusion process may depend on: (1) the substance, sequence and pace of future judicial rulings governing the enforceability of intra-corporate forum selection clauses; (2) the availability and effectiveness of alternative mechanisms for causing litigation to be heard by courts of the state of incorporation that would reduce the demand for intra-corporate forum selection provisions;⁵⁶ (3)

⁵²See Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 715 (2002) (citing Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 233-42 (1985)).

⁵³See Romano, *supra* note 52, at 234-35 & fig. 1.

⁵⁴See *infra* Table 1.

⁵⁵See *infra* Statistical Appendix, Test 3.

⁵⁶In particular, Delaware's Court of Chancery has recently emphasized the comparative advantage that each state has in the interpretation of its own laws, and has therefore been hesitant to dismiss or stay actions that raise issues of Delaware law in favor of actions filed in other states unless substantial litigation has already occurred in those venues. See, e.g., Memorandum in Support of Defendants' Motion to Proceed in One Jurisdiction and Dismiss or Stay Litigation in the Other Jurisdiction, *Parcell v. Southwall Techs., Inc.*, 2011 WL 5509983 (Del. Ch. Nov. 7, 2011), *denied*, 2011 WL 5410851 (Del. Ch. Nov. 8, 2011) (No. 7003-VCL); *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 118 (Del. Ch. 2009) ("[D]efendants have failed to meet their burden of

evolving perceptions among plaintiff and defense counsel as to the desirability of litigating in the courts of the state of incorporation, particularly in Delaware, relative to litigation in other available fora; and (4) shareholder reaction to the decision by some corporate boards to adopt a forum selection provision either as a bylaw without shareholder consent or as a post-IPO charter amendment. Indeed, with regard to this last observation, if shareholders consistently and forcefully oppose action by boards to adopt forum selection provisions, then boards may rationally determine that the costs to shareholder goodwill, generated by these provisions, outweigh the benefits that might arise in a litigation context. In that event, future data might indicate a slowing rate of bylaw adoptions and an increase in the rate at which bylaws and proposed charter amendments are withdrawn; however, where public shareholder approval is not necessary, the effect on the adoption of forum selection provisions in the charters or bylaws of pre-IPO issuers could be more moderate, if it arises at all.⁵⁷

showing hardship that would entitle them to a stay or dismissal [of the Delaware Action] in favor of the New York Action This case . . . raises important issues regarding the standards governing directors and officers of Delaware corporations, and Delaware has an ongoing interest in applying our law to director conduct in the context of current market conditions."); *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 958 (Del. Ch. 2007) ("Venerable authority recognizes that a chartering state's interest in promoting an efficient and predictable corporation law can be undercut if other states do not show comity by deferring to the courts of the chartering state when a case is presented that involves the application of the chartering state's corporation law."). *Cf.* *Diedenhofen-Lennartz v. Diedenhofen*, 931 A.2d 439, 451-52 (Del. Ch. 2007) (granting a motion to stay a Delaware action in favor of prior-pending German action where action required application of German law, thereby affording comity to a foreign jurisdiction in a dispute under foreign law). This strategy is, however, entirely ineffective at consolidating litigation in the state of incorporation if plaintiffs file complaints only outside the state of incorporation.

⁵⁷Delaware has recently signaled its willingness to offer large rewards to plaintiffs—and to plaintiff counsel—who litigate large, meritorious class actions in that state. *See* Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation*, at 2 (Apr. 2012) (unpublished manuscript) [hereinafter Cain, *A Great Game*], available at <http://papers.ssrn.com/abstract=1984758>. Chancellor Leo Strine noted, in a symposium at Columbia Law School in November 2011, that the Delaware courts "had previously awarded numerous million dollar plus attorneys' fee awards" to plaintiff counsel who had litigated successful cases there. *See id.* at 2 n.1. A month later, Chancellor Strine awarded more than \$304 million in attorneys' fees to plaintiff counsel in the Southern Peru Copper Corporation shareholder derivative litigation, an action in which plaintiff shareholders were awarded \$1.347 billion in damages plus pre-judgment interest. *In re Southern Peru Copper Corp. S'holder Deriv. Litig.*, 2011 WL 6382006, at *1 (Del. Ch. Dec. 20, 2011). Some commentators hypothesize that the award in *Southern Peru Copper Corporation* serves as an invitation to plaintiff counsel to bring more meritorious shareholder lawsuits in Delaware courts. *See, e.g.*, Alison Frankel, *Record \$285 ml Fee Award is Strine's Message to Plaintiffs' Bar*, REUTERS (Dec. 21, 2011), <http://blogs.reuters.com/alison-frankel/2011/12/21/record-285-ml-fee-award-is-strines-message-to-plaintiffs-bar/> ("[Southern Peru] made it clear that the chancellor wants a certain kind of (legal) business to remain in Delaware."); Cain, *A Great Game*, *supra* note 57 (manuscript at 8) ("The \$300 million Southern Peru attorneys' fee award can be viewed as a further attempt by Chancellor Strine to attract corporate shareholder litigation to Delaware."); *see also* Cain, *A Great Game*, *supra* note 57 (manuscript at 27) ("[C]ertain states with

Viewed from this perspective, the recent filing of twelve class action complaints in the Delaware Court of Chancery,⁵⁸ and one class action

an interest in attracting business litigation respond to this jurisdictional forum shopping by rewarding higher attorneys' fees and more favorable outcomes when these states have seen cases migrating towards other jurisdictions.").

At the same time, academic research suggests that Delaware has been losing cases to other venues because plaintiff counsel perceives the Court of Chancery as an unfriendly jurisdiction. *See* John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?* 42 (Eur. Corp. Governance Inst. Law Working Paper No. 151/2010, Nw. Univ. Law Sch. Law and Econ. Research Paper No. 10-03, Feb. 2012) [hereinafter Armour, *Is Delaware Losing Its Cases?*], available at <http://papers.ssrn.com/abstract=1578404>. Plaintiff attorneys, who are highly responsive to incentives provided by high fee awards and settlements, may respond to these signals by filing clearly meritorious shareholder actions in Delaware, and weaker suits in other jurisdictions where they have a greater likelihood of achieving a favorable settlement or securing an award of attorneys' fees. *See, e.g.*, Cain, *A Great Game*, *supra* note 57 (manuscript at 3) ("Entrepreneurial plaintiffs' attorneys constantly recalibrate the optimal jurisdiction in which to bring litigation . . . react[ing] to prior court decisions to bring future litigation in the most favorable forum."). This form of a separating equilibrium can be viewed as contrary to shareholders' best interests because, while it assures handsome rewards for meritorious actions, it also fails to deter the filing of the weakest cases.

⁵⁸*See* Verified Complaint at ¶ 1, Schellman v. Jack In The Box Inc., No. 7274-CS, 2012 WL 667844 (Del. Ch. Feb. 23, 2012); Verified Complaint at ¶ 1, Neighbors v. Air Prods. & Chems., Inc., No. 7240-CS, 2012 WL 467520 (Del. Ch. Feb. 13, 2012); Verified Complaint at ¶ 1, ICLUB Inv. P'ship v. FedEx Corp., No. 7238-CS, 2012 WL 467504 (Del. Ch. Feb. 13, 2012); Verified Complaint at ¶ 1, Laborers' Local No. 1174 Pension Fund v. SPX Corp., No. 7225-CS, 2012 WL 485399 (Del. Ch. Feb. 7, 2012); Verified Complaint at ¶ 1, Stead v. Franklin Res., Inc., No. 7223-CS, 2012 WL 381855 (Del. Ch. Feb. 7, 2012); Verified Complaint at ¶ 1, City of Sunrise Gen. Emps.' Pension Plan v. Superior Energy Servs., Inc., No. 7224-CS, 2012 WL 485388 (Del. Ch. Feb. 6, 2012); Verified Complaint at ¶ 1, Singh v. Navistar Int'l Corp., No. 7222-CS, 2012 WL 485387 (Del. Ch. Feb. 6, 2012); Verified Complaint at ¶ 1, Sutton v. Autonation, Inc., No. 7221-CS, 2012 WL 381851 (Del. Ch. Feb. 6, 2012); Verified Complaint at ¶ 1, Boilermakers Local 154 Ret. Fund v. Chevron Corp., No. 7220-CS, 2012 WL 485390 (Del. Ch. Feb. 6, 2012); Verified Complaint at ¶ 1, Boilermakers Local 154 Ret. Fund v. Curtiss-Wright Corp., No. 7219-CS, 2012 WL 381849 (Del. Ch. Feb. 6, 2012); Verified Complaint at ¶ 1, Boilermakers Local 154 Ret. Fund v. Danaher Corp., No. 7218-CS, 2012 WL 381847 (Del. Ch. Feb. 6, 2012); Verified Complaint at ¶ 1, Boilermakers Local 154 Ret. Fund v. Priceline.com, Inc., No. 7216-CS, 2012 WL 420778 (Del. Ch. Feb. 6, 2012). The twelve companies named as defendants in the suits are: Air Products and Chemicals, Inc.; AutoNation, Inc.; Chevron; Curtiss-Wright; Danaher Corporation; FedEx Corporation; Franklin Resources, Inc.; Jack In The Box, Inc.; Navistar International Corporation; Priceline.com, Inc.; SPX Corporation; and Superior Energy Services, Inc. The complaints allege, among other matters, "that the forum selection bylaw is not limited to derivative or class litigation, and instead applies to individual claims;" that "while shareholders are required by the by-laws to bring their claims in Delaware, the bylaws provide no forum restrictions on the corporations themselves;" and that the bylaws "require claims to be brought in Delaware even where there may not be personal jurisdiction over prospective defendants" or subject matter jurisdiction over the claims. Kevin LaCroix, *All the M&A-Related Litigation Reference Material in One Convenient Location*, THE D&O DIARY (Feb. 13, 2012), <http://www.dandodiary.com/2012/02/articles/shareholders-derivative-litiga/all-the-marelated-litigation-reference-material-in-one-convenient-location/>; *see also* Alison Frankel, *Shareholder Lawyers Sue Over Delaware Forum-Selection Bylaws*, THOMPSON REUTERS NEWS & INSIGHT (Feb. 8, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/2012/02_-February/Shareholder_lawyers_sue_over_Delaware_forum-selection_bylaws/; Tom Hals, *Nine Companies Sued Over "Exclusive Forum" Bylaws*, REUTERS

complaint in the Federal District Court for the Northern District of California,⁵⁹ challenging the adoption of forum selection clauses in bylaw provisions without prior shareholder approval, as well as the filing of four stockholder actions in the Delaware Court of Chancery challenging *proposed* exclusive forum charter or bylaw amendments that were adopted by the board but not yet submitted to a shareholder vote,⁶⁰ present a signal event. Since the filing of the lawsuits, ten of the twelve corporate defendants voluntarily withdrew the challenged forum selection bylaw provisions; three corporate defendants (Calix, Fairchild Semiconductor International and Hittite Microwave Corporation) withdrew proposals to adopt exclusive forum provisions;⁶¹ and two corporate defendants (Chevron and Cameron

(Feb. 7, 2012), <http://www.reuters.com/article/2012/02/08/delaware-law-forum-idUSL2E8D808M20120208>; Ron Oran, *The Preemptive Strike Against Exclusive-Forum Bylaws*, SEC. LITIG. INSIGHTS (Vinson & Elkins LLP), at 7, 9 (Winter 2012), available at <http://www.velaw.com/uploadedFiles/VEsite/Resources/SLEG2012Winter.pdf> (discussing the complaint in *Singh v. Navistar Int'l Corp.*).

⁵⁹Chevron has also been sued in the Northern District of California on a virtually identical set of facts and legal arguments as the Delaware action, although the federal complaint tacks on additional causes of action for aiding and abetting, abuse of control, corporate waste, and indemnification. Verified Shareholder Derivative Complaint at ¶¶ 1, 124, 127, 131, 135, *Bushansky v. Armacost*, No. CV 12 1597, 2012 WL 1120475 (N.D. Cal. Mar. 30, 2012). On August 9, 2012, the district court in California granted Chevron's motion to stay the federal action pending resolution of the substantively similar Delaware proceedings. *Bushansky v. Armacost*, 2012 WL 3276937 at *1, *7 (N.D. Cal. Aug. 9, 2012).

⁶⁰Three of the lawsuits filed in the Delaware Court of Chancery challenge board-supported *proposals* to amend the companies' certificates of incorporation to include exclusive forum provisions. Verified Complaint at ¶ 1, *Rebhun v. Calix, Inc.*, No. 7444-CS, 2012 WL 1425236 (Del. Ch. Apr. 19, 2012); Verified Complaint at ¶ 1, *Everhard v. Cameron Int'l Corp.*, No. 7415-CS, 2012 WL 1339413 (Del. Ch. Apr. 11, 2012); Verified Complaint at ¶ 1, *Jones v. Fairchild Semiconductor Int'l, Inc.*, No. 7408-CS, 2012 WL 1339408 (Del. Ch. Apr. 9, 2012). The remaining lawsuit filed in the Delaware Court of Chancery challenges a board-supported proposal to add an exclusive forum provision to the company's bylaws. Verified Complaint at ¶ 2, *City of Sunrise Firefighters Ret. Fund v. Hittite Microwave Corp.*, No. 7426-CS, 2012 WL 1425219 (Del. Ch. Apr. 13, 2012). These complaints allege that the directors "breached their fiduciary duties by approving the Amendment[s] and by recommending the Amendment[s] to the stockholders," and that the proxy statements filed by the companies failed to fully and fairly disclose the purposes, scope and effects of the proposed amendments. See, e.g., Verified Complaint at ¶¶ 67-72, *Everhard v. Cameron Int'l Corp.*, No. 7415-CS, 2012 WL 1339413 (Del. Ch. Apr. 11, 2012); Verified Complaint at ¶¶ 73-77, *Jones v. Fairchild Semiconductor Int'l, Inc.*, No. 7408-CS, 2012 WL 1339408 (Del. Ch. Apr. 9, 2012).

⁶¹The ten corporate defendants that withdrew exclusive forum bylaw provisions are Air Products and Chemicals, AutoNation, Curtiss-Wright, Danaher Corporation, Franklin Resources, Jack-in-the-Box, Navistar International, Priceline.com, SPX Corporation, and Superior Energy Services. See *Air Prods. & Chems., Inc.*, Current Report (Form 8-K), at 2 (Mar. 19, 2012); *AutoNation, Inc.*, Current Report (Form 8-K), at 2 (Mar. 23, 2012); *Curtiss-Wright Corp.*, Current Report (Form 8-K), at 2 (Mar. 23, 2012); *Danaher Corp.*, Annual Report (Form 10-K), at 109 (Feb. 24, 2012); *Franklin Res., Inc.*, Current Report (Form 8-K), at 2 (Mar. 14, 2012); *Jack In The Box, Inc.*, Current Report (Form 8-K), at 2 (Apr. 10, 2012); *Navistar Int'l Corp.*, Current Report (Form 8-K), at 2 (Mar. 22, 2012); *Priceline.com, Inc.*, Current Report (Form 8-K), at 2 (Mar. 29, 2012); *SPX*

Corp., Current Report (Form 8-K), at 2 (Mar. 30, 2012); Superior Energy Servs., Inc., Current Report (Form 8-K), at 2 (Mar. 12, 2012). Each of these actions has since been dismissed. *See* Order of Consolidation at 1-5, *Neighbors v. Air Prods. & Chems., Inc.*, Nos. 7240-CS, 7221-CS, 7219-CS, 7223-CS, 7222-CS, 7216-CS, 7225-CS, 7224-CS, 7274-CS, 7408-CS, 7415-CS, 7426-CS, 7444-CS, 2012 WL 2004813 (Del. Ch. June 4, 2012); Stipulated (Proposed) Order Dismissing Action as Moot at 1, *Boilermakers Local 154 Ret. Fund v. Danaher Corp.*, No. 7218-CS, 2012 WL 1440407 (Del. Ch. Apr. 23, 2012). Chevron and Federal Express continue to litigate class action challenges to their director-enacted exclusive forum bylaw provisions. *See* Answer to Plaintiffs' Verified Complaint at 1-2, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, No. 7220-CS, 2012 WL 1136360 (Del. Ch. Mar. 30, 2012); Answer to Plaintiff's Verified Complaint at 1-2, *ICLUB Inv. P'ship v. FedEx Corp.*, No. 7238-CS, 2012 WL 1339394 (Apr. 13, 2012).

In addition, Calix, Fairchild, and Hittite each withdrew from the agenda for its annual stockholders' meetings its proposal to amend the company's certificate of incorporation or bylaws to include a Delaware forum selection clause. *See* Katie Wagner, *Exclusive-Forum Provisions Spur a Backlash*, AGENDA (Financial Times, New York, N.Y.), May 7, 2012, at 10; Calix, Inc., Definitive Additional Materials (Schedule 14A) (Apr. 24, 2012); Fairchild Semiconductor Int'l, Inc., Definitive Additional Materials (Schedule 14A) (Apr. 12, 2012). *Compare* Hittite Microwave Corp., Preliminary Proxy Statement (Schedule 14A), at 12 (Apr. 6, 2012), with Hittite Microwave Corp., Proxy Statement (Schedule 14A) (Apr. 18, 2012). The actions against Calix, Fairchild, and Hittite have since been dismissed. *See* Order of Consolidation at 4-5, *Neighbors v. Air Prods. & Chems., Inc.*, Nos. 7240-CS, 7221-CS, 7219-CS, 7223-CS, 7222-CS, 7216-CS, 7225-CS, 7224-CS, 7274-CS, 7408-CS, 7415-CS, 7426-CS, 7444-CS, 2012 WL 2004813 (Del. Ch. June 4, 2012).

Plaintiffs have sought "mootness" attorneys' fees from the corporate defendants that voluntarily withdrew exclusive forum bylaw provisions or proposals. *See, e.g.*, Plaintiff's Petition for Attorneys' Fees and Expenses at 1, *Neighbors v. Air Prods. & Chems., Inc.*, No. 7240-CS, (Del. Ch. Apr. 20, 2012) (requesting \$400,000); Plaintiff's Petition for Attorneys' Fees and Expenses at 1, *Jones v. Fairchild Semiconductor Int'l, Inc.*, No. 7408-CS, (Del. Ch. Apr. 20, 2012) (requesting \$500,000). On April 19, 2012, Navistar moved to stay consideration of any forthcoming fee application until after the court rules on the validity of the exclusive forum bylaw provisions at issue in the ongoing Chevron and Federal Express litigations, and other defendants followed suit. The Navistar Defendants' Motion to Stay Application for Mootness Fees at 1-2, *Singh v. Navistar Int'l Corp.*, No. 7222-CS, 2012 WL 1390147 (Del. Ch. Apr. 19, 2012); *see* Defendant Fairchild Semiconductor Int'l, Inc.'s Motion to Stay Plaintiff's Petition for Attorneys' Fees and Expenses at 1-3, *Jones v. Fairchild Semiconductor Int'l, Inc.*, No. 7408-CS, 2012 WL 1669822 (Del. Ch. May 9, 2012). *But see* Omnibus Reply In Support Of The AutoNation, Curtiss-Wright, Franklin Res., Navistar, priceline.com and Superior Energy Defendants' Motions [To Stay Discovery And-Or For A Protective Order] And Letters To The Court, *Sutton v. Autonation, Inc.* at 3 n.3, Nos. 7221-CS, 7219-CS, 7223-CS, 7222-CS, 7216-CS, 7224-CS (Del. Ch. May 28, 2012) ("No Defendant suggests that the idiosyncratic facts surrounding the Chevron and Fed Ex boards' decision to adopt their respective bylaws would assist the Court in addressing the fee petitions.").

On June 4, 2012, the mootness fee proceedings in thirteen separate actions were consolidated into a single proceeding before Chancellor Strine. Order of Consolidation at 5-6, *Neighbors v. Air Prods. & Chems., Inc.*, Nos. 7240-CS, 7221-CS, 7219-CS, 7223-CS, 7222-CS, 7216-CS, 7225-CS, 7224-CS, 7274-CS, 7408-CS, 7415-CS, 7426-CS, 7444-CS, 2012 WL 2004813 (Del. Ch. June 4, 2012). On June 19, plaintiffs informed the court that they had reached a settlement with ten of the thirteen defendants: Air Products and Chemicals; SPX, Navistar, Superior Energy, Priceline.com, Jack In The Box, Hittite Microwave, AutoNation, Curtiss-Wright, and Franklin Resources. Letter to Chancellor Strine dated June 19, 2012, *In re Exclusive Forum Provision Mootness Fee Petitions*, Consol. C.A. No. 7216-CS (Del. Ch. June 19, 2012). The fee petitions as to Fairchild, Cameron International and Calix appear to have been resolved by stipulation as well. *See* Stipulation and [Proposed] Final Order, *In re Exclusive Forum Provision Mootness Fee Petitions*, No. 7216-CS (Del. Ch. July 10, 2012).

International) modified the forum selection provisions' language to address concerns raised by shareholders regarding personal and subject matter jurisdiction in the designated forum.⁶² These modifications and withdrawals could—at least until the courts rule on the enforceability of the provisions—slow the rate at which corporations adopt forum selection bylaw provisions and charter amendments, and encourage corporations that had

⁶²See *infra* notes 112-13 and accompanying text (discussing amendments to Chevron's forum selection provision).

Cameron International's board of directors met on April 17, 2012 to discuss the allegations in the shareholder complaint, and determined that the proposed forum selection charter amendment "could be refined to clarify its purpose and intended application." Cameron Int'l Corp., Definitive Additional Materials (Schedule 14A), at 2 (Apr. 18, 2012). The board acknowledged that considerations favoring a forum selection provision,

[D]id not apply in the same degree to litigation filed by non-stockholders, and that, in any event, non-stockholder plaintiffs would not be subject to a provision in the Company's Certificate of Incorporation in the same manner as the stockholders and, accordingly, the Board determined to clarify that the Forum Selection Amendment would only address stockholder claims.

Id. The board further determined that "[t]his change eliminated the need for an express provision allowing the Company to consent to litigation outside of the Court of Chancery, so the clause providing for such consent was eliminated, although such consent could still be granted." *Id.* Finally, the board "added language to make it clear that the Forum Selection Amendment would not operate to prevent stockholders from bringing a claim in another jurisdiction if the claim could not be brought in the Court of Chancery." *Id.*

The revised proposed amendment provides that:

[T]he Court of Chancery of the State of Delaware will be the exclusive forum for any stockholder (including a beneficial owner) to bring (i) any derivative action or proceeding brought on behalf of the Company, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or employee of the Company to the Company or the Company's stockholders, (iii) any action asserting a claim against the Company or any of its directors, officers or employees alleging a violation of the Delaware General Corporation Law or the Company's Certificate of Incorporation or bylaws, or (iv) any action asserting a claim against the Company, its directors, officers or employees governed by the internal affairs doctrine, except for, as to each (i) through (iv) above, any claim as to which the Court of Chancery determines that there is an indispensable party not subject to the jurisdiction of the Court of Chancery (and the indispensable party does not consent to the personal jurisdiction of the Court of Chancery within ten days following such determination), which is vested in the exclusive jurisdiction of a court or forum other than the Court of Chancery, or for which the Court of Chancery does not have subject matter jurisdiction.

Id. at 3.

Cameron submitted its modified forum selection proposal to a shareholder vote on May 11, 2012. Cameron Int'l Corp., Current Report (Form 8-K), at 2, Item 5.03, (May 11, 2012). Shareholders rejected the proposal, with 98,776,468 shares voting in favor, and 116,426,945 shares voting against. *Id.* at 3, Item 5.07(5); see also *infra* Part II.G. and Table 8. The lawsuit against Cameron was dismissed by stipulation of all parties on May 21, 2012. Stipulation and (Proposed) Order of Dismissal at 1, *Everhard v. Cameron Int'l Corp.*, No. 7415-CS, 2012 WL 1913471 (Del. Ch. May 21, 2012).

previously adopted forum selection bylaw provisions without shareholder consent to withdraw or revise those provisions as a means of avoiding similar litigation.

If courts have the opportunity to rule on the validity of forum selection bylaw provisions adopted without shareholder consent, the results of those rulings will almost certainly impact future adoption rates. If courts uphold the validity of the provisions, then the phenomenon could propagate even more broadly and rapidly. If the courts invalidate forum selection provisions adopted without prior shareholder consent, then the possibility remains that forum selection provisions could continue to propagate through charter provisions adopted pre-IPO or through bylaw provisions adopted with shareholder consent.⁶³ Regardless, the adoption rate will almost certainly decrease. Moreover, whatever the decision reached by the Delaware Court of Chancery and the District Court for the Northern District of California, conflicting views may emerge from other courts who may, on public policy or other grounds, refuse to dismiss complaints brought in their home courts notwithstanding a forum selection provision indicating that venue is improper.⁶⁴ The final resolution of the matter may therefore have to be determined by a decision of the United States Supreme Court that could also address important matters regarding the definition and application of the internal affairs doctrine.⁶⁵

⁶³See *supra* note 17 and accompanying text; *infra* Part II.D and Tables 4, 5.

⁶⁴See, e.g., *Mathers Family Trust v. Cagle*, 2011 WL 1797222, at *3-*5 (Colo. App. May 12, 2011) (holding that forum selection clauses in investment contracts were void because they conflicted with the public policy behind the Colorado Securities Act and its waiver provisions); *Walker v. Frontier Leasing Corp.*, 2010 WL 1221413, at *5 (Tenn. Ct. App. Mar. 30, 2010) ("[I]t could not be clearer that [forum selection] provisions cannot defeat the ability of a Tennessee consumer to bring an action under the TCPA within the appropriate forum in this state."). "California has been particularly active in rejecting forum selection clauses on public policy grounds." Miller & Eisenberg, *The Market for Contracts*, *supra* note 2, at 2090 n.112; see also *GMAC Commercial Fin. LLC v. Superior Court*, 2003 WL 21398319, at *4 (Cal. Ct. App. June 18, 2003) ("The combination of the New York forum selection clause and the New York choice of law provision in the factoring agreement effectively constitute a waiver of the statutory and regulatory provisions of the California Finance Lenders Law. Thus, we conclude enforcement of the contractual forum selection clause in the factoring agreement would violate a strong California public policy."); *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 710 (Cal. Ct. App. 2001) (finding enforcement of the contractual forum selection and choice-of-law clauses in defendant's service agreements held to be unenforceable because they were the functional equivalent of a contractual waiver of the consumer protections under the California Legal Remedies Act and violated public policy); *Hall v. Superior Court*, 197 Cal. Rptr. 757, 763 (Cal. Ct. App. 1983) ("[W]e hold the choice of Nevada law provision in this agreement violates section 25701 and the public policy of this state and for that reason deny enforcement of the forum selection clause as unreasonable.") (citation omitted).

⁶⁵For example, if Delaware upholds the validity of the bylaw provisions challenged in these class action complaints, and if foreign state courts later refuse to enforce these provisions on grounds

But whatever the future of the trend toward intra-corporate forum selection provisions, the data generated to this point raise two simple and powerful questions: First, why is there such a gaping difference in the rate at which forum selection clauses have appeared in organic documents and the rate at which they have appeared in material agreements entered into by these same firms? Second, why has this difference narrowed only recently?

Put somewhat differently, the academic literature presents the conjecture that the process by which forum selection provisions enter material agreements of publicly traded firms is "reasonably analogous" to the process by which they enter the organic documents of the same entities.⁶⁶ The data presented in this Article strongly refute that conjecture, but the question then is "why?"

More precisely, why is it that, over many decades, the identical cohort of experienced, highly-paid, commercial attorneys, savvy in the extreme when it comes to structuring complex business arrangements, regularly included forum selection clauses in many important commercial agreements but not in organic documents, perhaps the most important category of all commercial agreements?⁶⁷ And, why has this cohort only recently awakened to the possibility of including forum selection clauses in a firm's organic documents?⁶⁸

While there are several potentially competing explanations for the observed pattern in the evolution of intra-corporate forum selection provisions,⁶⁹ the most parsimonious relies on a legal equivalent of Newton's First Law of Motion: "Every body perseveres in its state of rest, or of uniform motion in a right line, unless it is compelled to change that state by forces impressed thereon."⁷⁰ Under this theory, the initial perception among corporate counsel was that litigants—plaintiffs and defendants alike—expected that the state of incorporation's courts would resolve intra-corporate disputes. This expectation was fulfilled by the consistent decisions of plaintiff counsel to file actions alleging intra-corporate disputes almost exclusively in the state of incorporation. The selection of the state of

that they are contrary to the foreign state's policy, or on other grounds used to invalidate choice of forum provisions, then a *cert*-worthy question implicating the internal affairs doctrine may be presented to the Supreme Court. See Miller & Eisenberg, *The Market for Contracts*, *supra* note 2 at 2078-79 (describing how the Supreme Court has intervened in the past to settle inter-state disagreement on the enforceability of forum selection clauses).

⁶⁶Eisenberg & Miller, *Ex Ante Choices of Law and Forum*, *supra* note 3, at 1981.

⁶⁷See *supra* notes 8-10 and accompanying text.

⁶⁸See *supra* text accompanying note 20; *infra* Data Appendix Table A-1, rows 17-133.

⁶⁹See, e.g., *supra* pp. 340-41 (explaining that corporate boards may also follow the actions of other large, well-respected entities such as Chevron and Berkshire Hathaway).

⁷⁰ISAAC NEWTON, *The Mathematical Principles of Natural Philosophy*, in *THE PRINCIPIA* 19 (Andrew Motte trans., Prometheus Books 1995) (1729).

incorporation thus acted as a *de facto* choice of law and choice of forum provision. In this equilibrium, formal forum selection clauses could rationally be perceived as superfluous.⁷¹

This equilibrium appears, however, to have been unsettled in the late 1990s and in the early years of this century as plaintiff law firms began to engage in more aggressive forum shopping and, for the first time, began filing significant numbers of intra-corporate challenges outside the state of incorporation.⁷² More specifically, plaintiff lawyers began bringing derivative and other intra-corporate claims against Delaware chartered corporations in the states in which those corporations were headquartered, and not in Delaware.⁷³ Corporations, shareholders, and directors alike could rationally view this new litigation strategy as perturbing the established expectations that generated an equilibrium in which organic documents rationally omitted forum selection clauses. This change in plaintiff litigation strategy would therefore constitute the Newtonian "forces impressed thereon" that generate the incentive to innovate through the adoption of intra-corporate forum selection clauses.⁷⁴ Viewed from this perspective, intra-corporate forum selection clauses are perhaps better appreciated as an effort to restore a pre-existing equilibrium that had prevailed for decades, and that reflected the long-held natural expectations of corporations and of shareholders alike, than as an innovation that unsettles a market.⁷⁵

But even if this hypothesis successfully explains the evolution of the demand for intra-corporate forum selection clauses, it does not explain the origin of the innovation that most successfully responds to that demand. As in epidemiology, a legal diffusion process, or contagion, begins with an initial "index case" from which other cases spread, and there is often substantial interest and some mystery as to the circumstances surrounding the evolution of the index case.⁷⁶ In the case of intra-corporate forum selection provisions, however, the mystery as to the origin of the innovation is easily resolved, because the dominant form of the language used to adopt these provisions can be traced to a very specific document for which I am directly responsible.⁷⁷ To be sure, whether I deserve blame or credit for this

⁷¹See *infra* Part III.A.

⁷²See *infra* Part III.A.

⁷³See *infra* Part II.F.

⁷⁴See NEWTON, *supra* note 70, at 19.

⁷⁵See *infra* Part III.C.

⁷⁶See RAY M. MERRILL & THOMAS C. TIMMRECK, INTRODUCTION TO EPIDEMIOLOGY 7 (4th ed. 2006) ("The first disease case brought to the attention of the epidemiologist is the **index case**.").

⁷⁷See *infra* Part III.B.2 (discussing the Netsuite forum selection provision).

role depends on whether intra-corporate forum selection clauses are perceived as bane or boon, but the origin of the index case is rather easily explained.

Of the sixteen publicly traded entities with intra-corporate forum selection clauses preceding Delaware Chancery's March 16, 2010 *Revlon* decision, eight were LLCs or LLPs and eight were corporations.⁷⁸ The earliest three of these eight pre-*Revlon* corporate forum selection clauses appeared in 1991, 1992, and 1994, but were evolutionary dead-ends.⁷⁹ No other publicly traded corporation adopted an organic document forum selection provision for the next twelve years until Oracle did so in 2006, and no other publicly traded entity replicated the language of the forum selection clauses found in these three examples or in the Oracle provision.⁸⁰ Of the five publicly traded corporations that adopted intra-corporate forum selection provisions between 2006 and the *Revlon* decision, I was personally involved in the decision to adopt the provision at three of these entities: Oracle, Netsuite, and Financial Engines.

The Netsuite experience is, however, most salient from the perspective of identifying the relevant index case because the language of Netsuite's 2007 IPO forum selection provision appears identical, or with minor variation, in 91.9% of all intra-corporate forum selection clauses included in today's corporate charters and bylaws.⁸¹ The Netsuite provision, which I drafted together with counsel at Wilson, Sonsini, Goodrich and Rosati P.C., thus appears inadvertently to have become the standard form of forum selection language that today dominates the market for intra-corporate forum selection provisions. I say "inadvertently" because none of the framers of that forum selection language consciously anticipated that it would become the dominant form of forum selection provision to appear in the organic documents of publicly traded corporations following the *Revlon* decision.

This Article proceeds in four parts, with three appendixes. Part II presents the study's empirical findings in greater detail. Part III addresses the question of why forum selection clauses governing intra-corporate litigation have been so rare and why those provisions have only recently begun appearing in any appreciable number. Part IV concludes. The Data Appendix describes the data collection methodology and lists all examples of

⁷⁸See *infra* Data Appendix Table A-1, rows 1-16 (the eight corporations are Standard Pacific, Kennedy-Wilson, CKE Restaurants, Oracle, Netlist, Netsuite, Financial Engines, and Meru Networks).

⁷⁹See *infra* Part III.B.1; *infra* Data Appendix Table A-1, rows 1-3.

⁸⁰See *infra* Part III.B.2.

⁸¹See *infra* Part II.E and Table 6.

intra-corporate forum selection clauses upon which this research is based, together with the characteristics of the clauses adopted. The Statistical Appendix describes the methodology employed in the reported tests of statistical significance. The Reference Material Appendix sets forth the notes to Table 8 concerning shareholder votes on intra-corporate forum selection provisions in 2011 and 2012. This Article does not address legal arguments as to the validity of those provisions, or public policy arguments as to their desirability. Those considerations are the subject of a separate analysis.⁸²

II. DATA ANALYSIS

The hand-gathered dataset supporting this analysis spans a sixteen-and-one-half year period running from January 1, 1994, through June 30, 2011.⁸³ The objective of the data gathering exercise was to identify and analyze every forum selection provision that appeared in the organic documents of any publicly traded entity during the sample period. We identified 133 instances during the sample period in which publicly traded entities adopted forum selection provisions either before or after going public, and we subjected those provisions to seven distinct forms of analysis.

We initially describe the incidence of forum selection provisions in the organic documents of publicly traded corporations, LLCs, and LLPs. For the corporate sub-sample, we further describe whether forum selection provisions appear in the charters or bylaws. We then test whether the incidence of forum selection clauses in the organic documents of publicly traded entities differs in a statistically significant manner from the incidence of forum selection clauses in other material contracts within the same population of publicly traded entities. We find that the difference is highly significant and is almost certainly not due to chance. Second, among the population of publicly traded corporations, we test cross-sectionally for differences in incidence rates in charters or bylaws, and find that the difference in incidence rates is not statistically significant at the five percent confidence interval. Third, we test for differences in incidence rates of intra-corporate forum selection clauses in publicly traded corporations as opposed to publicly traded LLCs or LLPs, and find that LLCs and LLPs have been adopting these provisions more frequently, and that the difference is statistically significant.

⁸²See Grundfest, *supra* note 1.

⁸³The data gathering methodology is described in greater detail in the Data Appendix *infra*.

Fourth, we test for changes in adoption rates over time and document a statistically significant increase in adoption rates after the *Revlon* decision and a further statistically significant acceleration after Chevron's adoption of a bylaw forum selection provision without prior shareholder approval. Fifth, we study the incidence of forum selection clauses among entities recently registered to go public and demonstrate that the greatest concentration of forum selection provisions, by a wide margin, is found in the organic documents of companies that have recently filed registration statements with the Securities and Exchange Commission. Sixth, we categorize the content of the forum selection clauses adopted to date to determine whether a dominant form has emerged. We acknowledge that the form of forum selection provision that initially appeared in Netsuite's charter provision, filed in connection with its 2007 IPO, has come to dominate the marketplace, as it appears in 91.9% of the charter and bylaw provisions in our corporate sub-sample. Seventh, we test for state-related patterns in the adoption of forum selection clauses and find that Delaware chartered corporations, headquartered in California, are over-represented in the population of entities that have adopted forum selection provisions to date, and that the rate of over-representation is statistically significant.

This section closes with a review of instances in which publicly traded entities have sought shareholder approval for the adoption of forum selection provisions and describes the outcome of these electoral initiatives. The Data Appendix presents the full dataset used to generate this analysis, and the Statistical Appendix describes the methodologies used to generate the tests of statistical significance reported in this Article. The Reference Material Appendix sets forth the notes to Table 8 concerning shareholder votes on intra-corporate forum selection provisions in 2011 and 2012.

A. *The Cross-Sectional Incidence of Forum Selection Provisions*

Table 1 documents the number of publicly traded corporations, LLPs, and LLCs that have adopted intra-firm forum selection provisions in their organic documents during the sample period. Table 1 also describes, for the subsample of identified corporations, whether the forum selection provisions appear in a charter or bylaw. Of the 133 total examples of publicly traded entities with forum selection provisions, 111 provisions (83.5%) appear in corporate charters or bylaws, and 22 (16.5%) appear in the organic documents of LLCs or LLPs. Of the 111 corporate provisions, 65 are found in charters (48.9% of the 133 total, or 58.6% of the 111 corporate

provisions) and 46 are found in bylaws (34.6% of the 133 total, or 41.4% of the 111 corporate provisions).⁸⁴

*Table 1 — Intra-Corporate Forum Selection Clauses
October 7, 1991 - June 30, 2011*

	NUMBER OF ENTITIES WITH FORUM CLAUSES	NUMBER OF ENTITIES FILING FORM 10-K IN 2010 ⁸⁵	PERCENTAGE OF ENTITIES WITH FORUM CLAUSES
CORPORATIONS	111 (83.5%)	8499	1.31%
CHARTERS	65 (48.9%)	8499	0.76%
BYLAWS	46 (34.6%)	8499	0.54%
LLCS AND LLPS	22 (16.5%)	430	5.12%
TOTAL	133 (100.0%)	8929	1.49%

The data also indicate that forum selection provisions in corporate charters or bylaws (1.31%) appear at roughly a quarter of the rate of equivalent provisions in the organic documents of LLCs or LLPs (5.12%).

As previously observed, there is a striking contrast between the 1.49% incidence rate observed in the overall population of organic documents of publicly traded entities, and the 39.56% incidence rate in the material contracts of the same population of publicly traded entities.⁸⁶ The probability that the same statistical process generates forum selection clauses in organic documents as in the material contracts of the same entities is approximately

⁸⁴Accord ALLEN STUDY, *supra* note 1, at 1 (reporting that 55.9% of corporate forum selection provisions appear in charters (compared to the 58.6% reported in this study)). The Allen Study's findings are thus consistent with the data reported in this Article.

⁸⁵We relied on the Morningstar database to identify the number of firms that filed a Form 10-K by selecting "Form 10-K" on the "Data Search—Filing Search" page as the relevant filing type and specifying the applicable date range as January 1, 2010 to December 31, 2010. As of April 14, 2011, the search identified 8929 entities. Of these 8929 firms, approximately 430 are limited liability companies and partnerships, which we identified by further limiting the firm names to those containing "LP," "L.P.," "LLP," "L.L.P.," "LLC," "L.L.C.," "limited partnership," "limited liability partnership," or "limited liability company." This count understates the total number of publicly traded entities over the sample period because it excludes all entities that were publicly traded at any point during those seventeen years, but that were no longer filing a Form 10-K in 2010.

⁸⁶See Eisenberg & Miller, *The Flight to New York*, *supra* note 7, at 1506 tbl.13.

one in 10^{1644} .⁸⁷ The probability that identical statistical processes generate the 5.12% incidence rate observed among LLCs or LLPs and the 39.56% incidence rate observed in material contracts is approximately one in 10^{60} .⁸⁸ Evidently there are profound differences in the process by which forum selection clauses appear in organic documents, and the process by which they appear in the material contracts of the same publicly traded entities.

The data regarding the incidence of forum selection provisions in charters (65 instances) as opposed to bylaws (46 instances) suggest that the difference is not statistically significant at the five percent confidence level.⁸⁹ This statistic must, however, be interpreted with caution. Every corporation that is already publicly traded can, at relatively low cost, adopt a bylaw provision if its board so desires.⁹⁰ In contrast, there is a materially higher cost to adopt a charter provision if a corporation is already publicly traded; absent special circumstances, the charter provision would have to be put to a shareholder vote through the proxy process.⁹¹ The lowest cost approach to the adoption of a forum selection provision in a corporate charter would, instead, likely arise prior to initial public listing when the charter is easily amended by the corporation's private board and shareholders. As documented below, when the analysis is restricted to the population of firms that have adopted intra-corporate forum selection provisions in connection with a completed IPO, the incidence of charter provisions is significantly greater than the incidence of bylaw provisions. As documented below, when the analysis is restricted to the population of firms that have adopted intra-corporate forum selection provisions in connection with a completed IPO,

⁸⁷See *infra* Statistical Appendix, Test 2.

⁸⁸See *infra* Statistical Appendix, Test 4.

⁸⁹The difference is statistically significant at the 8% confidence level ($p = 0.087$). See *infra* Statistical Appendix, Test 5.

⁹⁰See DEL CODE ANN. tit. 8, § 109 (West 2010) ("[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors . . .").

⁹¹Compare DEL CODE ANN. tit. 8, § 241(a) (West 2010) (allowing a corporation's charter to be amended at any time before receiving payment for any of its stock), with DEL CODE ANN. tit. 8, § 242(b)(2) (West 2010) (requiring shareholder vote for charter amendments that would alter the "powers, preferences, or special rights" of the shareholders). Alternatively, forum selection provisions can appear in corporate charters or bylaws as a result of spin-offs, reorganizations, or emergence from bankruptcy. Accord ALLEN STUDY, *supra* note 1, at 1, 4, 15 fig.3 (reporting fifteen instances of forum selection provisions appearing as a result of spin-offs or reorganizations, and five in conjunction with bankruptcy reorganizations). Reincorporations can also result in the adoption of forum selection provisions, but require express shareholder approval of the new corporate charter. See DEL CODE ANN. tit. 8, § 242(b)(2) (West 2010). The Allen Study reports ten instances of reincorporation in Delaware where the new charter and/or bylaws contain a forum selection provision. See ALLEN STUDY, *supra* note 1, at 4.

the incidence of charter provisions is significantly greater than the incidence of bylaw provisions.⁹²

B. *The Incidence of Forum Selection Provisions in Corporate Organic Documents and in LLC and LLP Organic Documents*

Forum selection provisions appear in 5.12% of the organic documents of publicly traded LLCs and LLPs, and only 1.31% of the organic documents of publicly traded corporations.⁹³ The probability that this difference is due to chance is less than one in 10⁹.⁹⁴ The greater incidence of forum selection provisions in LLC and LLP agreements dates back to the earliest days of the forum selection phenomenon: Of the 16 provisions adopted prior to *Revlon*, eight (50%) appeared in the organic documents of LLCs and LLPs, most of which were in the energy sector, even though LLCs and LLPs constitute a small percentage of the population of publicly traded entities.⁹⁵

Several factors explain the higher incidence of forum selection provisions in the organic documents of publicly traded LLCs and LLPs. First, as an evolutionary matter, privately held forms of these agreements likely contained forum selection provisions that, as a rule, would govern the resolution of internal disputes.⁹⁶ To the extent that the filing of publicly traded forms of these agreements involved a mark-up of the pre-existing private documentation, the forum selection provision would already be in place. In contrast, until quite recently, neither publicly traded nor privately

⁹²See *infra* Data Appendix Table A-1. A review of the Data Appendix reveals 57 companies that first disclosed the adoption of an intra-corporate forum selection provision in a registration form typically filed in connection with an IPO, such as a Form S-1, S-1/A, S-3AS, S-4, or S-11. Of these 57 companies, 51 included an intra-corporate forum selection provision in the charter, while 6 included an intra-corporate forum selection provision in the bylaws.

⁹³See *supra* Table 1. The Allen Study reports 27 instances of forum selection provisions in the organic documents of LLCs or LLPs, rather than the 22 instances documented in this Article. ALLEN STUDY, *supra* note 1, at 10. This difference can be attributed to an increase in the rate at which publicly traded LLCs and LLPs are incorporating forum selection provisions during the final six months of 2011, a period included in the Allen Study's sample, but beyond the data cutoff date for this Article. See *id.* at 1.

⁹⁴See *infra* Statistical Appendix, Test 6.

⁹⁵See *infra* Table 2.

⁹⁶I am aware of no data that documents this observation. However, standard form LP and LLC agreements regularly contain instructions for the drafting of such provisions. See, e.g., COLBY A. CAMPBELL & GEORGE GRELLAS, *Limited Partnership Agreements*, in ADVISING CALIFORNIA PARTNERSHIPS § 8.72 (3d ed. 2012) (exemplar jurisdiction provision for LP agreements); 2 GERALD V. NIESAR, BENJAMIN BERK & MARK CASILLAS, CALIFORNIA LIMITED LIABILITY COMPANY: FORMS AND PRACTICE MANUAL A-18, § 9.8 (Supp. 2011) (exemplar jurisdiction and venue provision for LLC operating agreements).

held forms of corporate charters or bylaws contained equivalent forum selection provisions. Second, once the provision takes sufficient root in the documentation of publicly traded entities, it is readily emulated by new LLCs and LLPs seeking to go public.

Third, as a doctrinal matter, some courts observe that:

[The state chartering law's] basic approach is to permit partners to have the broadest possible discretion in drafting their partnership agreements and to furnish answers only in situations where the partners have not expressly made provisions in their partnership agreement. . . . Once partners exercise their contractual freedom in their partnership agreement, the partners have a great deal of certainty that their partnership agreement will be enforced in accordance with its terms. In general, the commentators observe that only where the agreement is inconsistent with mandatory statutory provisions will the members' agreement be invalidated. Such statutory provisions are likely to be those intended to protect third parties, not necessarily the contracting members.⁹⁷

To the extent that practitioners, correctly or not, perceive a greater degree of flexibility in fashioning forum selection provisions for LLCs and LLPs than for traditional corporations, this perception could also explain the higher incidence of forum selection provisions in LLC and LLP agreements.

C. Incidence Over Time

The data clearly indicate that the rate at which publicly traded entities have been adopting forum selection clauses in organic documents increased significantly following *Revlon*.⁹⁸ The data also suggest a further acceleration following Chevron's decision to adopt a forum selection provision as a bylaw.⁹⁹ The data do not, however, allow us to determine whether the Chevron action caused, or was merely contemporaneous with, the subsequent increase in adoption rates. In contrast, given the abrupt increase

⁹⁷*Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291-92 (Del. 1999) (upholding the enforcement of a forum selection provision providing for arbitration in California and finding that "only a court of law or arbitrator in California is empowered" to hear the claims brought by the plaintiff) (citations omitted).

⁹⁸*See infra* Table 2.

⁹⁹*See infra* Table 2.

in adoption rates following *Revlon*, *Revlon's* position as the first judicial pronouncement regarding forum selection provisions in the organic documents of publicly traded entities, and the lack of confounding events, it is far easier to conclude that *Revlon* had a causal effect on the subsequent increase in adoption rates.

Table 2 documents the incidence of intra-corporate forum selection provisions over three distinct time periods: (1) the "pre-*Revlon*" period spanning the beginning of the sample period and the issuance of the *Revlon* decision on March 16, 2010; (2) the "*Revlon-Chevron*" period, spanning the dates between the *Revlon* decision and Chevron's September 30, 2010 announcement of its bylaw amendment; and (3) the "post-Chevron" period, spanning the date of Chevron's announcement and the June 30, 2011 cut-off date for this article. These dates are reported for the population as a whole, then separately for corporations as a group, subdivided by charter provision and bylaw, and finally for LLC and LLP agreements.

*Table 2 — Incidence of Intra-Corporate Forum Selection Clauses
Pre-Revlon, Revlon-Chevron, Post-Chevron
October 7, 1991 to June 30, 2011*

	PRE- REVLON (10/07/91 – 3/16/10)	REVLON – CHEVRON (3/17/10 – 9/29/10)	POST- CHEVRON (9/30/10 – 6/30/11)	TOTAL
CORPORATIONS	8	19	84	111
CHARTERS	3	14	48	65
BYLAWS	5	5	36	46
LLCS AND LLPS	8	6	8	22
TOTAL	16	25	92	133

Table 3 documents the monthly rate at which intra-corporate forum selection clauses were adopted over the same time periods.

*Table 3 — Intra-Corporate Forum Selection Clauses:
Monthly Adoption Rates
Pre-Revlon, Revlon-Chevron, Post-Chevron
October 7, 1991 to June 30, 2011*

	PRE- REVLON (10/07/91 – 3/16/10) 221.5 months	REVLON – CHEVRON (3/17/10 – 9/29/10) 6.5 months	POST- CHEVRON (9/30/10 – 6/30/11) 9 months	TOTAL 237 months
CORPORATIONS	0.036	2.923	9.333	0.468
CHARTERS	0.014	2.154	5.333	0.274
BYLAWS	0.023	0.769	4.000	0.194
LLCS AND LLPS	0.036	0.923	.889	0.093
TOTAL	0.072	3.846	10.222	0.561

As described in the Statistical Appendix, each adoption rate observed during the *Revlon*-Chevron period is greater than the corresponding adoption rate during the pre-*Revlon* period by a very high degree of statistical significance.¹⁰⁰ Similarly, each adoption rate observed during the post-Chevron period is greater than the corresponding adoption rates during both the pre-*Revlon* and *Revlon*-Chevron periods, again by a very high degree of statistical significance, with the exception of the adoption rate observed among LLCs and LLPs, where there was a mild slowing during the post-Chevron period.¹⁰¹ Thus, in all aspects of the corporate sub-sample, the forum selection adoption rate increased significantly following the *Revlon* decision, and then accelerated further after Chevron. In the LLC and LLP sub-sample, the adoption rate increased significantly following *Revlon*, but did not accelerate following Chevron.

There is, of course, no assurance that these adoption rates will continue in the future. The resolution of pending litigation regarding the validity of forum selection provisions adopted as bylaw amendments without prior shareholder approval will likely have a significant effect on adoption rates.¹⁰²

¹⁰⁰See *infra* Statistical Appendix, Test 7.

¹⁰¹See *infra* Statistical Appendix, Test 7.

¹⁰²See *supra* notes 58-61 and accompanying text; *infra* notes 112-13 and accompanying

D. Incidence in IPOs Over Time

As previously suggested, a simple comparison of adoption rates in charter provisions and bylaws does not offer a true apples-to-apples comparison. The cost of adopting a charter provision for a firm that is already publicly traded can be materially greater than the cost of adopting a comparable bylaw or charter provision prior to an initial public offering. A more precise comparison is obtained by examining the rate at which corporate charters disclosed in IPO filings contain forum selection provisions. As documented in Table 4, these instances were quite rare in the period spanning 2006 through 2009.

Table 4 — Percentage of IPOs Declared Effective with Forum Selection Provisions in Charters/Bylaws

	TOTAL IPOS¹⁰³	IPOS WITH FORUM PROVISIONS IN CHARTERS	IPOS WITH FORUM PROVISIONS IN BYLAWS	PERCENTAGE OF IPOS WITH FORUM PROVISIONS
2006	163	0	1	0.61%
2007	149	1	0	0.67%
2008	22	0	0	0%
2009	39	0	0	0%

However, Table 5 shows that the incidence of these provisions as disclosed in IPO filings declared effective began to mushroom in 2010, following the *Revlon* decision.

text.

¹⁰³See 2010 IPO Report, WILMERHALE (2010), http://www.wilmerhale.com/files/upload/IPO_report_2010.pdf.

*Table 5 — Percentage of IPOs Declared Effective with
Forum Selection Provisions in Organic Documents
Q1 2010 – Q2 2011*

	TOTAL IPOS ¹⁰⁴	CORPORATE IPOS WITH FORUM PROVISIONS	LLC/LLP IPOS WITH FORUM PROVISIONS	PERCENTAGE OF IPOS WITH FORUM PROVISIONS
Q1 2010	24	2	0	8.33%
Q2 2010	41	1	1	4.88%
Q3 2010	29	2	3	17.24%
Q4 2010	50	7	2	18.00%
Q1 2011	27	3	0	11.11%
Q2 2011	44	10	4	31.82%
TOTAL	215	25	10	16.28%

Thus, in the most recent quarter covered in our sample period, almost one-third of all IPOs declared effective by the SEC were for entities that included forum selection provisions in their organic documents. For the full period spanning the calendar quarter in which *Revlon* was decided, to the cut-off date for this article's analysis, 16.28% of all IPOs declared effective by the SEC contained forum selection provisions in their organic documents. These are clearly the highest incidence rates found in our research and suggest that, consistent with the narrow language of *Revlon's* dicta, intra-corporate forum selection provisions have, to date, found the greatest traction among entities engaged in an initial public offering.

E. The Content of Forum Selection Clauses

A content analysis of the forum selection provisions identified in our sample indicates that the provisions can be categorized along two distinct dimensions. First, among corporate entities, the vast majority of forum selection provisions copy the language that first appeared either in the

¹⁰⁴*IPO Performance*, HOOVER'S, <http://www.hoovers.com/ipo-central/ipo-performance/100004163-1.html?q=12010> (last visited October 9, 2012).

Netsuite IPO¹⁰⁵ or in the Standard Pacific family bylaws.¹⁰⁶ As described in greater detail below, the Netsuite precedent is clearly dominant and appears in 102 of the 111 corporate charter and bylaw provisions in our sample (91.9%).¹⁰⁷ Second, among publicly traded LLCs and LLPs, the Niska Gas public offering provided the template¹⁰⁸ that has been followed in more than

¹⁰⁵Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the DGCL, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Article VI, Section 8.

Netsuite, Inc., Amended and Restated Certificate of Incorporation (Form S-1/A), Exhibit 3.2, at 3 (Nov. 29, 2007).

¹⁰⁶Members of the Standard Pacific family adopted forum provisions with language similar to the following: "Any action brought by any stockholder against the Corporation or against any officer, director, employee, agent or advisor of the Corporation, including without limitation any such action brought on behalf of the Corporation, shall be brought solely in a court of competent jurisdiction located in the State of Delaware." *E.g.*, CKE Rests., Inc., Registration Statement (Form S-4), at 54 (Mar. 7, 1994).

¹⁰⁷*See infra* Table 6.

¹⁰⁸Members of the Niska Gas family adopted forum provisions with language similar to the following:

To the fullest extent permitted by law, each of the Partners and each Person holding any beneficial interest in the Partnership (whether through a broker, dealer, bank, trust company or clearing corporation or an agent of any of the foregoing or otherwise): (i) irrevocably agrees that any claims, suits, actions or proceedings (A) arising out of or relating in any way to this Agreement (including any claims, suits or actions to interpret, apply or enforce the provisions of this Agreement or the duties, obligations or liabilities among Partners or of Partners to the Partnership, or the rights or powers of, or restrictions on, the Partners or the Partnership), (B) brought in a derivative manner on behalf of the Partnership, (C) asserting a claim of breach of a fiduciary duty owed by any director, officer, or other employee of the Partnership or the General Partner, or owed by the General Partner, to the Partnership or the Partners, (D) asserting a claim arising pursuant to any provision of the Delaware Act or (E) asserting a claim governed by the internal affairs doctrine shall be exclusively brought in the Court of Chancery of the State of Delaware, in each case regardless of whether such claims, suits, actions or proceedings sound in contract, tort, fraud or otherwise, are based on common law, statutory, equitable, legal or other grounds, or are derivative or direct claims; (ii) irrevocably submits to the exclusive jurisdiction of the Court of Chancery of the State of Delaware in connection with any such claim, suit, action or proceeding; (iii) agrees not to, and waives any right to, assert in any such claim, suit, action or proceeding that (A) it is not personally subject to the jurisdiction of the Court of Chancery of the State of Delaware or of any other court to which proceedings in the Court of Chancery of the State of Delaware may be appealed,

half of all offerings.¹⁰⁹ No other language has generated such a significant following.

Like the majority of corporate provisions in the sample, Chevron Corporation's exclusive forum bylaw provision originally followed the language used in the Netsuite IPO.¹¹⁰ On March 28, 2012, however, Chevron amended this language in response to a class action lawsuit challenging the validity of its bylaw.¹¹¹ Chevron's amended bylaw permits litigation to be brought in "any state or federal court in the State of Delaware, rather than just the Delaware Court of Chancery,"—an apparent effort "to ensure the effectiveness of the by-law in light of the Court of Chancery's jurisdictional limitations."¹¹² In addition, the amended bylaw makes clear that it "will not apply where the Delaware courts cannot obtain personal jurisdiction over an indispensable party named as a defendant, so that stockholders retain the right to sue outside of Delaware when a case does not involve Delaware law and/or jurisdiction cannot be obtained in

(B) such claim, suit, action or proceeding is brought in an inconvenient forum, or (C) the venue of such claim, suit, action or proceeding is improper; (iv) expressly waives any requirement for the posting of a bond by a party bringing such claim, suit, action or proceeding; and (v) consents to process being served in any such claim, suit, action or proceeding by mailing, certified mail, return receipt requested, a copy thereof to such party at the address in effect for notices hereunder, and agrees that such services shall constitute good and sufficient service of process and notice thereof; provided, nothing in clause (v) hereof shall affect or limit any right to serve process in any other manner permitted by law.

E.g., Oxford Res. Partners, LP, Third Amended and Restated Agreement of Limited Partnership (Form 8-K), Exhibit 3.1, at 75-76 (July 19, 2010).

¹⁰⁹*See infra* Table 6.

¹¹⁰*See infra* Data Appendix Table A-1, row 38.

¹¹¹*See* Verified Complaint at ¶ 1, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, No. 7220, 2012 WL 485390 (Del. Ch. Feb. 6, 2012). Subsequently, Chevron faced a shareholder proposal to repeal its amended exclusive forum bylaw provision. *See* Wagner, *supra* note 61, at 10; *see also* Chevron Corp., Definitive Additional Materials (Schedule 14A) (May 3, 2012), *available at* <http://www.sec.gov/Archives/edgar/data/93410/000119312512205610/d346685ddefa14a.htm>.

At the May 30, 2012 annual meeting, shareholders rejected the proposal, with approximately 61% of votes cast voting against the proposal. *See* Chevron Highlights 2011 Performance, Corporate Responsibility and Future Growth at Annual Meeting of Stockholders, BLOOMBERG (May 30, 2012), *available at* <http://www.bloomberg.com/article/2012-05-30/a08wHJ35ocS4.html>. In other words, three out of every five shares voted on the proposal were voted in favor of retaining the exclusive forum bylaw provision that was adopted by the board without shareholder consent.

On June 8, 2012, shareholders at United Rentals, Inc. also voted to reject a stockholder proposal to repeal the company's forum selection bylaw provision, with 64% of votes cast voting against the proposal. *See* United Rentals, Inc., Current Report (Form 8-K), at 4 (June 8, 2012), *available at* <http://www.sec.gov/Archives/edgar/data/1067701/000119312512265068/d364614d8k.htm>. Again, that means that three out of five shares voted on the proposal were voted in favor of retaining the exclusive forum bylaw provision that was adopted by the board without shareholder consent.

¹¹²Chevron Corp., Current Report (Form 8-K) (Mar. 29, 2012).

Delaware."¹¹³ Given Chevron's size, prominence, and the impact of its initial decision to adopt a forum selection bylaw provision,¹¹⁴ the language of its amended bylaw may influence the content of future forum selection provisions, and may serve as a template for further modifications of the Netsuite language.¹¹⁵

The forum selection provisions in our sample can also be categorized according to whether they are: (1) elective:¹¹⁶ the corporation has express discretion to waive application of the forum selection provision; or (2) mandatory:¹¹⁷ the corporation does not have express discretion as to whether to enforce the forum selection provision. Even if a provision is deemed mandatory, however, the court can transform it into one that is elective if strict application of the provision would constitute breach of a director's duty of loyalty or care.¹¹⁸ Here, the data suggests a migration from the use of the mandatory form during the *Revlon*-Chevron period (20 of 25 instances, or 80.0%) to the elective form in the post-Chevron period (55 of 92 instances, or 59.8%). The percentage of companies adopting elective provisions has

¹¹³*Id.* The new bylaw provision reads as follows:

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

Chevron Corp., By-Laws of Chevron Corporation, (Form 8-K), Exhibit 3.1, Article VII (Mar. 29, 2012).

¹¹⁴See *supra* note 34 and accompanying text.

¹¹⁵See *supra* Tables 2, 3.

¹¹⁶The original Netsuite language is an example of an elective provision because it contains the phrase "[u]nless the Corporation consents in writing to the selection of an alternative forum" See *supra* note 105.

¹¹⁷A sample mandatory forum selection provision of the Netsuite family states:

The Court of Chancery shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director or officer of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim against the Corporation arising pursuant to any provision of the DGCL or the Certificate or these By-laws, or (iv) any action asserting a claim against the Corporation governed by the internal affairs doctrine.

Blount Int'l, By-Laws of Blount International, Inc., (Form 8-K), Exhibit 3.1, at 19 (Jan. 25, 2011).

¹¹⁸See *infra* note 180 and accompanying text.

steadily increased during the post-Chevron period as well. Allen's analysis of intra-corporate forum selection provisions found that as of April 2011, 56.1% of forum selection provisions were elective, whereas by December 2011, that number had increased to 64.1%.¹¹⁹

Table 6 presents the findings of this content analysis.

Table 6 — Content Analysis of Intra-Corporate Forum Selection Provisions

	MANDATORY			ELECTIVE			TOTAL
	PRE-REVLON	REVLON TO CHEVRON	CHEVRON TO 6/30/11	PRE-REVLON	REVLON TO CHEVRON	CHEVRON TO 6/30/11	
CHARTER							
Netsuite	0	9	14	3	4	32	62
Family	0	1	1	0	0	1	3
Other							
BYLAW							
Netsuite Family	0	4	14	0	1	21	40
Standard Pacific	3	0	0	0	0	0	3
Family							
Other	2	0	0	0	0	1	3
TOTAL CORPORATE							
Netsuite Family	0	13	28	3	5	53	102
Standard Pacific	3	0	0	0	0	0	3
Family							
Other	2	1	1	0	0	2	6
LLC/LLP AGREEMENT							
Niska Gas Family	0	6	8	0	0	0	14
Other	8	0	0	0	0	0	8
TOTAL	13	20	37	3	5	55	133

¹¹⁹See ALLEN STUDY, *supra* note 1, at 7-8.

F. *The Incidence of Forum Selection Provisions by Chartering and Headquarters Jurisdictions*

Table 7 documents the frequency with which entities headquartered in the jurisdiction identified in each row of the table, and chartered in the jurisdiction designated in each column, adopt a forum selection provision. Every entity that has adopted a forum selection provision has designated its chartering jurisdiction as the forum for the resolution of intra-corporate disputes. As is immediately apparent, the overwhelming majority of entities in the sample are chartered in Delaware (130 of 133 entities, or 97.8% of the population) and designate Delaware as the forum for the resolution of intra-corporate disputes. Missouri, Nevada, and the Cayman Islands are the only other fora designated for the resolution of intra-corporate disputes. The forum selection provision phenomenon thus appears to be primarily a Delaware phenomenon.

*Table 7 — Incidence of Forum Selection Provisions By
Chartering Jurisdiction and Headquarters Jurisdiction*

HEADQUARTERS STATE	CHARTERING STATE				Total
	DE	MO	NV	Cayman	
DE	2	-	-	-	2
CA	42	-	-	-	42
TX	11	-	-	-	11
FL	8	-	-	-	8
IL	7	-	-	-	7
IL	-	-	-	1	1
CO	6	-	-	-	6
NY	6	-	-	-	6
MA	5	-	-	-	5
NJ	5	-	-	-	5
PA	4	-	-	-	4
AZ	3	-	-	-	3
OK	3	-	-	-	3
NE	3	-	-	-	3
TN	3	-	-	-	3
MO	2	1	-	-	3
CT	2	-	-	-	2
GA	2	-	-	-	2
MI	2	-	-	-	2
OH	2	-	-	-	2
NV	1	-	1	-	2
Other ¹²⁰	10	-	-	-	10
Total	130	1	1	1	133

The largest percentage of publicly traded entities with intra-corporate forum selection provisions, 31.6% of the sample (42 of 133), are headquartered in California, and all of these entities designate Delaware as the forum for the resolution of intra-corporate disputes. Earlier research indicates that approximately 23.8% of Delaware chartered corporations are headquartered in California.¹²¹ This difference appears to be statistically

¹²⁰The remaining firms are headquartered in IN, KY, LA, MD, OH, OR, VA, Canada, Israel and Luxembourg. See *infra* Data Appendix Table A-1, rows 12, 15, 23-24, 51, 69, 83, 110, 120 & 132.

¹²¹Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L.

significant, and the probability that it is attributable to chance is only 4.1%.¹²² The next greatest incidence is of entities headquartered in Texas (8.3% of the total population), but because they are largely publicly traded LLPs or LLCs in the energy sector, these entities are atypical.¹²³ No other jurisdiction accounts for more than 8 headquarters, or 6.0% of the sample. California-headquartered entities appear to have the largest incentive to adopt a forum selection provision designating Delaware as the forum for the resolution of intra-corporate disputes. The forum selection phenomenon can thus be described as a general migration to Delaware as the forum in which intra-corporate disputes should be resolved, and a particular emigration from California as the forum in which intra-corporate disputes might otherwise have been resolved.

The over-representation of California headquartered firms in this sample may also be due to the fact that Delaware-chartered corporations headquartered in California tend to disproportionately litigate in California, not Delaware.¹²⁴ Combine this fact with a perception that Delaware courts have an expertise in the resolution of complex business matters that other courts generally lack;¹²⁵ that Delaware courts clearly have a comparative advantage in the interpretation of Delaware law;¹²⁶ and that California courts have been criticized by some business trade groups,¹²⁷ the over-representation of California firms in the sample becomes readily explicable.

ECON. 383, 392-93 tbl.3 (2003) (indicating that 898 of 3771 corporations chartered in Delaware were headquartered in California).

¹²²See *infra* Statistical Appendix, Test 8.

¹²³See *infra* Data Appendix Table A-1, rows 7, 18, 19, 36, 65, 92, 95, 97, 102, 113 & 126.

¹²⁴See Cain, *A Great Game*, *supra* note 57 (manuscript at 26-27 & tbl.9B) (reporting that intra-corporate disputes involving Delaware-chartered corporations headquartered in California are heard by California courts rather than Delaware courts in 71.7% of the cases in their sample).

¹²⁵The expertise of Delaware's courts is the subject of a great deal of commentary. See Eisenberg & Miller, *The Flight to New York*, *supra* note 7, at 1480 ("Delaware courts have been applauded for their high degree of competence and for the integrity of the state's judiciary."); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1362, 1385 (2000) (collecting references; noting the Delaware Court of Chancery's expertise and "long history of able judges"); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 277 (1985); Armour, *Is Delaware Losing Its Cases?*, *supra* note 57, at 2.

¹²⁶See generally discussion accompanying *supra* note 56 (noting the Court of Chancery's emphasis on a state's advantage in interpreting its own laws).

¹²⁷The Chamber of Commerce of the United States ranks Delaware's civil justice system as the best in the United States and California's as 46th. 2010 *United States Chamber of Commerce State Liability Systems Ranking Study*, HARRIS INTERACTIVE STUDY, 14 tbl.3 (2010), available at http://courts.delaware.gov/Superior/pdf/harris_2010.pdf.

G. Shareholder Votes on Forum Selection Provisions

Since the recent increase in the incidence of forum selection provisions, shareholders have had the opportunity to express their views regarding these provisions on at least eleven occasions.¹²⁸

These eleven instances are described in Table 8, but because the sample size is so small, and the phenomenon is still so young, we urge great caution in interpreting these data. However, as an initial matter, it is valuable to observe that in four of these eleven situations (CapTerra Financial Group, Life Technologies, Pure Bioscience, and Williams-Sonoma), the approval of the forum selection provision was bundled with other shareholder proposals and therefore cannot be interpreted as a clean test of shareholder response to the notion of a forum selection provision. At Life Technologies Corporation, the forum selection provision was bundled with proposals to de-classify the board of directors and eliminate certain obsolete provisions contained in the former charter.¹²⁹ At CapTerra, Pure Bioscience and Williams-Sonoma, shareholders voted to change the company's state of incorporation, and the new charter and/or bylaws that took effect (or will take effect) as a result of the reincorporation include a forum selection provision.¹³⁰

¹²⁸In addition to the eleven instances discussed above, at least one company in 2011 informed its shareholders in advance of adopting a bylaw forum selection provision that it intended to adopt such a provision after the shareholder meeting, although it did not put the bylaw to a shareholder vote. In its March 2011 proxy material, USA Truck, Inc. revealed a series of proposed bylaw amendments, some of which required shareholder approval and some of which did not. *See* USA Truck, Inc., Definitive Proxy Statement (Schedule 14A), at 10-15 (Apr. 6, 2011); USA Truck, Inc., Preliminary Proxy Statement (Schedule 14A), at 8-12 (Mar. 17, 2011). One of the proposals that did not require shareholder approval, and for which no vote was solicited or held, was a proposal to amend the company's bylaws to insert a Delaware forum selection clause. USA Truck, Inc., Definitive Proxy Statement (Schedule 14A), at 15 (Apr. 6, 2011). The forum selection bylaw was provided to the shareholders only for context, so that "as they consider the changes to the sections that do require their approval [] they can make an informed decision based on the totality of the Board's desired changes." *Id.*

¹²⁹*See* Life Techs. Corp., Current Report (Form 8-K), at 1 (Apr. 28, 2011).

¹³⁰In January 2011, CapTerra Financial Group, Inc.'s Board of Directors adopted resolutions approving a change in the company's state of incorporation from Colorado to Delaware (the "Reincorporation") and recommended that the company's shareholders approve the Reincorporation. CapTerra Fin. Grp., Inc., Definitive Information Statement (Schedule 14C), at 2 (Mar. 7, 2011). As part of the Reincorporation, the company adopted a new charter which includes a Delaware forum selection clause. *Id.* at 8.

In November 2010, Pure Bioscience filed a Schedule 14A informing shareholders that a shareholder meeting would be held in January 2011 for the purpose of voting on, among other things, a change in the Company's state of incorporation from California to Delaware (the "Reincorporation"). Pure Bioscience, Definitive Proxy Statement (Schedule 14A), at 9-22 (Nov. 30, 2010). As part of the Reincorporation, the company adopted a new charter and bylaws that included

In the seven instances in which the forum selection proposal was not bundled, the proposal was approved in five cases (Altera, DirecTV, Insweb, Lighting Science, and Sally Beauty Holdings). But here too, a closer look at the data urges caution. In each of these five instances, insiders and control shareholders could drive a large percentage of the vote. For example, the lowest insider-control shareholder block at any of these five corporations was 20.1%.¹³¹ In the two instances in which shareholders rejected the proposal (Allstate and Cameron International), the vote was lost by a thin margin of 51.1% to 48.9% at Allstate (of votes cast, excluding abstentions) and 54.1% to 45.9% at Cameron International, but there too management and controlling shareholders held a 12.79% position at Allstate and a 15.27% position at Cameron International.¹³² The margin of victory at the five entities where shareholders approved the forum selection provision suggests the possibility that the margin of victory is positively correlated with the size of the insider holdings.

a Delaware forum selection provision. *Id.* at B-2, Art. XI. Shareholders voted to approve the Reincorporation in early 2011. Pure Bioscience, Current Report (Form 8-K) (Feb. 11, 2011).

In April 2011, Williams-Sonoma sought shareholder approval for a proposed reincorporation from California to Delaware. Williams-Sonoma, Inc., Definitive Proxy Statement (Schedule 14A), at 18-32 (Apr. 7, 2011). The amended and restated certificate of incorporation that became effective after the reincorporation includes a Delaware forum selection clause. *Id.* at B-4, Art. XIV.

In addition, Pacific Entertainment Corp., a California company that is reincorporating in Nevada, made reference to a Nevada forum selection provision in its September 2011 proxy material, although the provision does not appear in the company's Nevada charter or bylaws which were attached as exhibits thereto. *Compare* Pac. Entm't Corp., Definitive Information Statement (Schedule 14C), at 17 (Sept. 21, 2011), *with id.* at Exhibits B, C.

¹³¹See *infra* Table 8.

¹³²See *infra* Table 8.

Table 8 — Shareholder Votes On Intra-Corporate Forum Selection Provisions 2011 and 2012

ISSUER	% VOTES CAST (EXCLUDING ABSTENTIONS)	% VOTES OUTSTANDING ^d	PASSED/NOT PASSED	BUNDLED OR STAND-ALONE	CHARTER/ BYLAW/ REINCORP.	% CONTROLLED BY CERTAIN BENEFICIAL OWNERS AND MANAGEMENT ⁱⁱ
ALLSTATE CORP.	For: 48.9% ⁱⁱⁱ Against: 51.1%	For: 42% ^{iv} Against: 58%	Not Passed	Stand- Alone	Charter	12.79% ^v
ALTERA CORP.	For: 59.2% ^{vi} Against: 40.8%	For: 53.2% ^{vii} Against: 46.8%	Passed	Stand- Alone	Charter	38.13% ^{viii}
CAMERON INT'L CORP.	For: 45.9% ^{ix} Against: 54.1%	For: 40.1% ^x Against: 59.9%	Not Passed	Stand- Alone	Charter	15.27% ^{xi}
DIRECTV	For: 59.5% ^{xii} Against: 40.5%	For: 50.3% ^{xiii} Against: 49.7%	Passed	Stand- Alone	Charter	20.1% ^{xiv}
INSWEB CORP. ^{xv}	For: 96.7% ^{xvi} Against: 3.3%	For: 90.3% ^{xvii} Against: 9.7%	Passed	Stand- Alone	Charter	73.59% ^{xviii}
LIGHTING SCIENCE GRP. CORP.	For: 99.9% ^{xix} Against: .1%	For: 83.1% ^{xx} Against: 16.9%	Passed	Stand- Alone	Charter	87.71% ^{xxi}
SALLY BEAUTY HOLDINGS, INC.	For: 75% ^{xxii} Against: 25%	For: 73% ^{xxiii} Against: 27%	Passed	Stand- Alone	Charter	47.3% ^{xxiv}
CAPTERRA FIN. GRP., INC.	For: 100% ^{xxv} Against: 0% ^{xxvi}	For: 93% ^{xxvii} Against: 7% ^{xxviii}	Passed	Bundled	Reincorporation	99.74% ^{xxix}
LIFE TECHS. CORP.	For: 99.3% ^{xxx} Against: .7%	For: 76.9% ^{xxxi} Against: 23.1%	Passed	Bundled	Charter	8.6% ^{xxxii}
PURE BIOSCIENCE	For: 79.2% ^{xxxiii} Against: 20.8%	For: 52.3% ^{xxxiv} Against: 47.7%	Passed	Bundled	Reincorporation	13.37% ^{xxxv}
WILLIAMS- SONOMA CORP.	For: 92.2% ^{xxxvi} Against: 7.8%	For: 82.8% ^{xxxvii} Against: 17.2%	Passed	Bundled	Reincorporation	36.9% ^{xxxviii}

III. WHY?

Some scholars have suggested that the process by which choice of law and choice of forum clauses enter material corporate agreements and the process by which they enter corporate charters of the same entities are "reasonably analogous."¹³³ The data presented in this Article, however, caution against pressing too hard on this analogy. Indeed, because the probability of identical statistical processes generating the observed pattern of forum selection provisions in organic documents and material agreements is generously estimated at about one in 10^{1644} ,¹³⁴ the conjecture that there is a quantitative similarity in the incidence of forum selection provisions in the two samples is easily rejected.

But rejecting this analogy—particularly when the statistical disparity is so striking—then only raises two more fundamental questions. First, why is there such a gaping difference in the rate at which forum selection clauses have appeared in the organic documents of publicly traded entities compared to the rate at which they have appeared in material agreements entered into by these same firms? Second, why has this difference narrowed only recently?

These puzzles can also be re-framed as posing questions regarding the demand and supply functions that support the observed market equilibrium and shifts in that equilibrium over time. From the demand side, why have corporations not demanded the inclusion of intra-corporate forum selection provisions in their organic documents until relatively recently? And, from the supply side, how has the market responded to that demand, and why has that response taken the observed form?

A. *The Demand for Intra-Corporate Forum Selection Provisions*

As previously suggested, the most parsimonious explanation for the historic scarcity of intra-corporate forum selection provisions in the organic documents of publicly traded entities relies on the fact that, until the latter portion of the 1990s, plaintiffs tended to file complaints alleging intra-corporate disputes exclusively in the jurisdiction of the state of incorporation. The choice of law embedded in the decision to incorporate in any given state thus also operated as a *de facto* choice of forum provision.¹³⁵

¹³³Eisenberg & Miller, *Ex Ante Choices of Law and Forum*, *supra* note 3, at 1981.

¹³⁴See *infra* Statistical Appendix, Test 2.

¹³⁵See Eisenberg & Miller, *Ex Ante Choices of Law and Forum*, *supra* note 3, at 1981 ("If a particular state's law is chosen, that state's forum is also very likely to be selected."); Eisenberg &

The largest body of empirical scholarship exploring the relationship between the state of incorporation and the forum in which intra-corporate disputes are litigated focuses on litigation involving Delaware chartered entities because Delaware charters dominate the market for publicly traded equity.¹³⁶

Until the last decade or so, the dominant perspective was that plaintiffs and defendants alike preferred Delaware as a forum for dispute resolution because Delaware's courts were broadly perceived as having a comparative advantage in the resolution of complex business disputes.¹³⁷ Professor Roberta Romano's survey of data from the late 1960s through 1987 "make[s] plain that plaintiffs do not perceive it to be undesirable to litigate in Delaware and instead take advantage of its valuable asset of legal capital."¹³⁸ Thus, "[f]or years, the conventional wisdom . . . has been that most corporate law cases involving Delaware public companies were brought in Delaware."¹³⁹ Consistent with that conclusion, other data confirm that, through 1999 or so, Delaware courts took an essentially *laissez faire* approach to the award of plaintiff attorneys' fees—if the plaintiff and defendant agreed on the amount, then the amount was good enough for the court.¹⁴⁰ In addition, for years Delaware awarded attorneys' fees based on the value of relief obtained by counsel, and this "approach [to the award of attorneys' fees] was widely believed to be more generous" to the plaintiffs' lawyers than the "lodestar" methodology used by other states.¹⁴¹ The

Miller, *The Flight to New York*, *supra* note 7, at 1503 ("When a forum is specified [in a contract], it overwhelmingly corresponds with a contract's choice of law.").

¹³⁶More than 50% of all publicly-traded companies in the United States including 63% of the Fortune 500 have chosen Delaware as their legal home." Division of Corporations, *About Agency*, STATE OF DEL., <http://www.corp.delaware.gov/aboutagency.shtml> (last visited May 23, 2012); *see also* Bebchuk & Cohen, *supra* note 121, at 389, 391 tbl.2 ("Delaware has by far the largest stake of incorporations: 58 percent of all [publicly traded] firms, 59 percent of Fortune 500 firms, and even a higher percentage—68 percent—of firms that went public in the period 1996-2000."); Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1131 & n.12 (2008) ("[Delaware's] preeminence in the market for corporate charters has lasted for nearly a century and Delaware shows no sign of relinquishing its dominance."); Murali Jagannathan & Adam C. Pritchard, *Delaware Incorporation and Managerial Entrenchment* 10-11, 34 tbl.1 (U. Mich. L. & Econ., Olin Working Paper No. 08-024, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313274 (finding, between 1993 and 2009, 58% of S&P 1,500 firms were incorporated in Delaware). Further, more than 80% of public companies that incorporate outside of their headquarters state select Delaware. Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 567 tbl.2, 578 tbl.5 (2002).

¹³⁷ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 41 (1993).

¹³⁸*Id.*

¹³⁹Armour, *Is Delaware Losing Its Cases?*, *supra* note 57, at 7.

¹⁴⁰John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1370-71 & n.113 (2012) [hereinafter Armour, *Delaware's Balancing Act*].

¹⁴¹*See id.* at 1370.

literature also cites hard evidence confirming that Delaware courts were generous in dealing with attorneys' fees.¹⁴²

In that environment, plaintiff counsel would have little incentive to file claims alleging intra-corporate violations by Delaware-chartered corporations in jurisdictions other than Delaware. Rational investors, corporations, and counsel alike would therefore assume that the choice of the state of incorporation, particularly if it was Delaware, would also act as a *de facto* choice of forum. In this equilibrium, a separate forum selection provision could easily be perceived as mere surplusage.

This equilibrium began to unravel in the late 1990s and in the early part of this century. Professors John Armour, Bernard S. Black, and Brian R. Cheffins' report that Delaware's share of shareholder suits against directors has dropped sharply in the last 15 years.¹⁴³ Their analysis of litigation related to merger transactions shows that:

[T]hrough 2001, Delaware was often the sole forum, and was always a forum, when a shareholder suit arising from a large M&A transaction was filed. From 2002 on, it has rarely been the sole forum, and is sometimes not a forum at all. . . . The proportion of large M&A transactions where Delaware had sole or shared influence fell sharply over 2002-2006, reaching a low of under 30% in 2006.¹⁴⁴

In a sample of leveraged buyout ("LBO") transactions, they document that "[d]uring the late 1990s a large majority of all suits involving Delaware companies undergoing LBOs . . . were filed in Delaware, but this proportion fell below 50% in 2005 and has generally continued to fall since then."¹⁴⁵ In an analysis of judicial opinions regarding litigation against corporate directors, they find that "[i]n 1995, over 80% of the cases . . . involving directors of Delaware companies were heard in Delaware. This proportion dropped to below 50% by 2004 and has remained below 50% since, dipping below 30% in 2005 and 2008."¹⁴⁶ And, in a study of option-backdating cases

¹⁴²*See id.* at 1370-71.

¹⁴³Armour, *Is Delaware Losing Its Cases?*, *supra* note 57, at 8 ("Delaware courts have been losing market share, likely since the late 1990s, but are not seeing fewer cases in absolute numbers.")

¹⁴⁴*Id.* at 19-20.

¹⁴⁵*Id.* at 20.

¹⁴⁶*Id.* at 22.

filed in 2006 and 2007, they find that only 11% of the cases against Delaware companies were filed in Delaware.¹⁴⁷

Armour, Black, and Cheffins hypothesize that the balance of litigation shifted away from Delaware because of the incentives of plaintiff counsel who are often the real parties in interest in shareholder lawsuits involving public companies that are sued under corporate law.¹⁴⁸ Plaintiff counsel appear to be concerned that Delaware's courts have become far more hostile to plaintiff counsel fee awards than had previously been the case. In support of this theory, Armour, Black, and Cheffins point to Chancery's decision in *In re Cox Communications Inc. Shareholders Litigation*, in particular where the agreed-upon plaintiff attorneys' fees in a settled class action arising from a going-private buyout was reduced from \$5 million to \$1.275 million.¹⁴⁹ To buttress this conclusion, Armour, Black, and Cheffins report that their discussions with attorneys specializing in corporate litigation indicate dissatisfaction among plaintiff counsel concerning the approach of Delaware's judiciary to the approval of attorneys' fees in a wide range of settlements.¹⁵⁰ Indeed, they describe *Cox Communications* as "the first in a line of cases involving not only fee cuts but outspoken rhetoric against certain aspects of the plaintiffs' bar."¹⁵¹ The migration of litigation out of Delaware would then reflect the plaintiffs' bar's disaffection with the compensation they are offered, and the warmth of the welcome they receive in Delaware, rather than any more fundamental change in the substance or procedure of Delaware law that would affect shareholder rights or directorial or managerial obligations.¹⁵²

Data gathered by Professors Matthew D. Cain and Steven M. Davidoff confirm this trend. In a survey of takeover-related litigation spanning the years 2005 through 2009, Cain and Davidoff document both a dramatic

¹⁴⁷ Armour, *Is Delaware Losing Its Cases?*, *supra* note 57, at 23.

¹⁴⁸ *See id.* at 38-42 & nn.76, 82-83 (discussing how the Delaware Court of Chancery's increased scrutiny of fee awards and selection of lead counsel may lead plaintiffs' attorneys to file outside of Delaware).

¹⁴⁹ *Id.* at 40; *In re Cox Comm'ns Inc. S'holders Litig.*, 879 A.2d 604, 640, 642 (Del. Ch. 2005).

¹⁵⁰ *See* Armour, *Is Delaware Losing Its Cases?*, *supra* note 57, at 33; Armour, *Delaware's Balancing Act*, *supra* note 140 at 1373 (observing that Delaware courts had earlier expressed views that plaintiff counsel could interpret as inimical to their interests in obtaining higher fee awards); David Marcus, *Half a Loaf is Still Plenty of Bread*, DEL. L. WEEKLY, May 29, 2001, at 1 (discussing a reduction in a plaintiff fee award from \$24.75 million to \$12.3 million). Subsequent to *Cox Communications*, plaintiff counsel's award for fees and costs in *In re Instinet Group, Inc. Shareholders Litigation* was reduced from \$1.623 million to \$450,000. *In re Instinet Grp., Inc. S'holders Litig.*, 2005 WL 3501708, at *1 (Del. Ch. Dec. 14, 2005).

¹⁵¹ Armour, *Is Delaware Losing Its Cases?*, *supra* note 57, at 35.

¹⁵² *See id.* at 33-34.

increase in the percentage of merger transactions that are challenged in court, increasing from 38.7% in 2005 to 94.2% in 2011,¹⁵³ and an increase in the percentage of those cases that are filed in multiple jurisdictions, rising from 8.6% in 2005 to 47.4% in 2011.¹⁵⁴ The frequency with which defense counsel can expect to litigate a forum selection issue in the context of a merger claim is calculated as the product of the frequency with which merger claims arise, and the frequency with which the claims are filed in multiple jurisdictions.¹⁵⁵ The Cain-Davidoff data therefore imply that the probability of encountering a forum selection issue in a takeover-related suit has increased from 3.33% in 2005 (38.7% multiplied by 8.6%) to 44.65% in 2011 (94.2% multiplied by 47.4%).¹⁵⁶ The incidence of forum-related disputes in the context of takeover-related litigation has therefore increased by a factor of more than thirteen.¹⁵⁷ Furthermore, because these data fail to account for cases in which plaintiff counsel file exclusively in a single jurisdiction other than the state of incorporation, the Cain-Davidoff data understate the frequency with which claims might be resolved in courts other than those of the state of incorporation even if there is no dispute over the appropriate forum.¹⁵⁸

In the same vein, Professor Brian JM Quinn's analysis of merger-related litigation between August 2009 and August 2010 involving Delaware corporations documents that of 97 transactions with deal-related litigation, Delaware was the sole forum in only 8 cases.¹⁵⁹ Professor Jennifer J. Johnson similarly examines Delaware state law class actions filed in 2010, and documents that for 93 of the 196 companies sued in state courts, plaintiffs avoided Delaware altogether.¹⁶⁰

Taken together, these multiple data sources reviewed by several different authors all point in a common direction: intra-corporate litigation involving Delaware-chartered corporations began navigating out of

¹⁵³Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2011*, at 2 (Feb. 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998482.

¹⁵⁴*Id.*

¹⁵⁵*See id.*

¹⁵⁶*See id.*

¹⁵⁷*See* Cain & Davidoff, *supra* note 153, at 2.

¹⁵⁸*See id.*

¹⁵⁹Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 147-48 & tbl.2 (2011).

¹⁶⁰Jennifer J. Johnson, *Securities Class Actions in State Court*, U. CIN. L. REV. (forthcoming) (manuscript at 37 fig.11), available at <http://ssrn.com/abstract=1856695>; *see also* Mirvis, *supra* note 16, at 17 ("[I]t's now twice as likely as it was previous that the [merger and acquisition] litigation will be brought and litigated outside of Delaware . . .").

Delaware in the later part of the last century and the first part of this one. Today, Delaware corporations face both an increased probability of litigation and an increased probability that the litigation will be filed and resolved outside of Delaware, hence, an increase in the demand for intra-corporate forum selection provisions.¹⁶¹

B. *The Supply of Intra-Corporate Forum Selection Provisions*

From a supply perspective, the analytic challenge is a bit different. Drafting a forum selection provision is not a profoundly difficult task. To be sure, careful attention may be necessary to limit the scope of the provision so that it addresses only intra-corporate disputes and so that it provides an appropriate "fiduciary out" that can, in advance, accommodate situations in which fiduciary considerations might militate against strict application of the forum selection provision according to its narrow terms.¹⁶² But this is hardly rocket science. The challenge is not to find some major conceptual breakthrough that constitutes a significant invention in the law; instead, the challenge is a bit more prosaic and comes in two parts.

¹⁶¹This point is underscored by the recent filing of two class action complaints against Chevron Corporation and its board of directors, challenging Chevron's adoption of a bylaw forum selection provision without shareholder consent. See Verified Shareholder Derivative Complaint at ¶ 1, *Bushansky v. Armacost*, No. CV 12 1597, 2012 WL 1120475 (N.D. Cal. Mar. 30, 2012); Verified Complaint at ¶ 1, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, No. 7220, 2012 WL 485390 (Del. Ch. Feb. 6, 2012). Plaintiffs' counsel filed the first action in February 2012 in Delaware Court of Chancery, Chevron's selected forum and the place of its incorporation. See *Chevron Corp., By-Laws of Chevron Corporation (Form 8-K)*, Exhibit 3.1, Article VII (Mar. 29, 2012) (amending its bylaws to include a Delaware exclusive forum provision); Verified Complaint at ¶ 1, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, No. 7220, 2012 WL 485390 (Del. Ch. Feb. 6, 2012). A different group of plaintiffs' attorneys filed another complaint less than two months later in the Northern District of California, where Chevron maintains its principal place of business. See Verified Shareholder Derivative Complaint at ¶¶ 1, 12, *Bushansky v. Armacost*, No. CV 12 1597, 2012 WL 1120475 (N.D. Cal. Mar. 30, 2012). This multi-jurisdictional battle over the validity of the bylaw forum selection provision is further evidence of the shifting equilibrium which gave rise to the demand for intra-corporate forum selection provisions in the first place.

¹⁶²Strictly speaking, even if an express "fiduciary out" is absent from a contractual provision, directors can simply decline to enforce the provision if compliance with their fiduciary obligations necessitates that the litigation proceed outside of the chartering state. See *Paramount Comm'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 48 (Del. 1994) ("[Contractual] provisions, whether or not they are presumptively valid in the abstract, may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the Paramount directors from carrying out their fiduciary duties under Delaware law. To the extent such provisions are inconsistent with those duties, they are invalid and unenforceable."). Further, as the U.S. Supreme Court recognized in *M/S Bremen v. Zapata Off-Shore Co.*, there are circumstances in which courts can legitimately decide not to enforce forum selection provisions, and breach of a fiduciary duty may constitute just such a circumstance. 407 U.S. 1, 15-18 (1972).

The first challenge is to identify the initial instance in which an intra-corporate forum selection provision appears in the marketplace.¹⁶³ Identifying this event locates the first instance in which the demand for an intra-corporate forum selection provision was satisfied by the supply of such a provision. The second challenge is to identify the form of a forum selection provision, if any, that comes to dominate the market as a form of "boilerplate."¹⁶⁴ This language would then characterize the dominant contemporary equilibrium in the market for intra-corporate forum selection provisions. Both inquiries might point to the same instance, but that outcome is not pre-ordained.

1. Standard Pacific: The Earliest Identified Intra-Corporate Forum Selection Provision

The earliest identified instance of an intra-corporate forum selection provision in the organic documents of a publicly traded corporation appears to arise in Section 8.5 of Standard Pacific Corporation's bylaws adopted in October of 1991.¹⁶⁵ This provision states that "[a]ny action brought by any stockholder against the Corporation or against any officer, director, employee, agent or advisor of the Corporation, including without limitation any such action brought on behalf of the Corporation, shall be brought solely in a court of competent jurisdiction located in the State of Delaware."¹⁶⁶ Public filings indicate that this provision was likely introduced by Mr. Robert Montgomery of Gibson, Dunn, and Crutcher, who was also likely involved in the insertion of identical language in the bylaws of CKE Restaurants in 1994.¹⁶⁷ Although we have been unable to gain any further

¹⁶³See *infra* Data Appendix Table A-1, row 1.

¹⁶⁴A large literature explores the economics of "boilerplate" contractual provisions. See, e.g., Eisenberg & Miller, *Ex Ante Choices of Law and Forum*, *supra* note 3, at 1978-80 & nn.23-31 ("A rich literature on boilerplate . . . suggests that despite its repetitive and standardized nature, boilerplate can have significant efficiency effects."); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 719-740 (1997) (noting that standardized contract terms can increase drafting efficiency, reduce judicial uncertainty with respect to the validity and meaning of terms, reduce the costs and improve the quality of legal and professional services, and reduce the expense that investors and securities analysts incur in evaluating a firm's securities and comparing them to alternative investments; however, also suggesting that atomistic contracting may fail to yield an optimal degree of standardization or innovation).

¹⁶⁵See *infra* Data Appendix Table A-1, row 1.

¹⁶⁶Standard Pac. Corp., Bylaws art. VIII § 8.5 (Mar. 20, 2008), available at <http://www.sec.gov/Archives/edgar/data/878560/000119312508110784/dex31.htm>.

¹⁶⁷Standard Pac. Corp., Registration Statement (Form S-4), Annex D, Amendment 2, (Oct. 4, 1991); CKE Rests., Inc., Registration Statement (Form S-4), at C-9 (May 4, 1994), available at

information regarding the circumstances surrounding the adoption of these provisions, as explained below, these provisions did not provide the template for the spate of forum selection provisions recently adopted by publicly traded entities. These provisions—which appeared prior to the documented exodus of litigation out of Delaware—seem not to have influenced the later evolution of corporate practice.

2. Netsuite: The Dominant Intra-Corporate Forum Selection Provision

The Standard Pacific provision and the other corporate provisions adopted through October of 2006¹⁶⁸ constitute an evolutionary cul-de-sac; they have not been broadly emulated in the market. Instead, as previously noted,¹⁶⁹ the currently dominant form of intra-corporate forum selection provision that appears in approximately 91.9% of the population of corporate adopters has its roots in the charter provision adopted by Netsuite in conjunction with its November 2007 IPO.¹⁷⁰ The structure of the Netsuite provision is easily explained inasmuch as I was personally involved in its drafting, together with outside counsel from Wilson, Sonsini, Goodrich and Rosati.

Article VI, Section 8 of Netsuite's charter states as follows:

Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the DGCL, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have

<http://sec.gov/Archives/edgar/data/919628/0000950148-94-000247.txt>; *Executive Profile: Robert K. Montgomery*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/person.asp?personId=638657&privcapId=107782&previousCapId=312343&previousTitle=VIRCO%20MFG%20CORPORATION> (last visited July 16, 2012) (describing Mr. Montgomery as a Partner at Gibson, Dunn & Crutcher LLP since 1971 with a practice concentration in mergers and acquisitions).

¹⁶⁸See *infra* Data Appendix Table A-1, rows 1-9.

¹⁶⁹See *supra* Part II.E. and Table 6.

¹⁷⁰See *infra* Data Appendix Table A-1, row 10.

notice of and consented to the provisions of this Article VI, Section 8.¹⁷¹

While none of the drafters contemplated that this provision would become the template for scores of intra-corporate forum selection provisions, hindsight and informal conversation with other corporate counsel offer several clues as to why this form has come to dominate in the market.¹⁷²

First, the basic structure of the provision is generic in the sense that it is easily modified to designate as a forum the courts of any chartering jurisdiction, and not just Delaware.¹⁷³ In the case of Netsuite, a Delaware chartered corporation, the natural reference is to the Delaware courts. In general, however, the objective is to assure that intra-corporate litigation proceeds in the forum with the greatest expertise over the matters central to the pending litigation.¹⁷⁴ That forum is most likely found in the chartering state's courts because each state has a comparative advantage in the interpretation of its own laws.¹⁷⁵ Put another way, there is nothing in the

¹⁷¹Netsuite, Inc., Amended and Restated Certificate of Incorporation, art. VI § 8 (Nov. 29, 2011), available at <http://sec.gov/Archives/edgar/data/1117106/000119312507255707/dex32.htm>.

¹⁷²Indeed, there is no expectation that this form of forum selection provision cannot be improved upon, or that the courts will not fashion language that is perceived as more suitable. Chevron's recent amendments to its Netsuite-form of forum selection provision stands as an example of just such an evolutionary development. See *supra* notes 112-13 and accompanying text.

¹⁷³See *supra* text accompanying note 171.

¹⁷⁴To be sure, the litigation might proceed in the state of incorporation even in the absence of a forum selection provision if the court evaluates a motion to dismiss or to stay based on forum non conveniens. See, e.g., *Dias v. Purches*, 2012 WL 689160, at *1-*2 (Del. Ch. Mar. 5, 2012) (declining to stay later-filed Delaware action in favor of Florida actions where the matter involved a Delaware corporate citizen and finding Delaware corporate law would apply). "[Delaware] courts have a 'significant and substantial' interest in 'overseeing the conduct of those owing fiduciary duties to shareholders of Delaware corporations.'" *Id.* at *2 (quoting *In re Chambers Dev. Co. S'holders Litig.*, 1993 WL 179335, at *3 (Del. Ch. May 20, 1993)).

¹⁷⁵For this reason, it is common practice for courts and agencies to certify questions concerning the interpretation of a state's laws to the state's Supreme Court for resolution. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997) ("Certification procedure . . . allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."); *Virginia v. Am. Booksellers Assn., Inc.*, 484 U.S. 383, 398 (1988) (certifying two questions defining statutory terms to the Virginia Supreme Court); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 4248 & n.30 (3d ed. 2012) (identifying the "many" states that have adopted certification procedures); Beth A. Hardy, Note, *Federal Courts—Certification Before Facial Invalidation: A Return to Federalism*, 12 W. NEW ENG. L. REV. 217, 219 (1990) ("[C]ertification presents the best way to accommodate a reasonable balance between principles of federalism and the expeditious relief required when constitutionally protected rights are potentially at stake."). Also, when the Securities and Exchange Commission was faced with a question of Delaware law it turned for resolution to the Delaware courts, and not to the courts of New Jersey, Pennsylvania, Maryland, or of any other state. See 76

structure, design, or intent of this provision that inherently privileges Delaware over any other forum because the provision is expressly designed with a "fill in the blank" feature that allows any entity, chartered in any jurisdiction, to designate the courts of its chartering jurisdiction as the proper forum for the resolution of intra-corporate disputes. A corporation chartered in California, for example, could use the same language to designate California's state courts as the appropriate forum for the resolution of intra-corporate disputes, and the same approach would apply to a corporation chartered in any other jurisdiction.

Second, the structure of this forum selection provision strives to be precise in terms of the types of lawsuits intended to be covered and not to be covered. The four subsections seek to make it clear that the forum selection provision does not apply to any action that is not a derivative action, does not assert a breach of fiduciary duty claim, does not implicate a violation of the Delaware General Corporation Law, or does not fall within the scope of the internal affairs doctrine.¹⁷⁶ Traditional derivative actions or claims for breach of a fiduciary duty would thus clearly be covered by this provision. In contrast, a class action alleging a violation of Section 10(b) of the Securities and Exchange Act of 1934 would not be covered. Nor would any action brought by third parties that was not intra-corporate in nature.¹⁷⁷ To be sure,

Del. Laws 37 (2007) (amending the Delaware State Constitution to permit the Supreme Court of Delaware to hear and determine questions of law certified to it by (in addition to the tribunals already specified therein) the United States Securities and Exchange Commission); *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 230-31 (Del. 2008) (resolving two questions of Delaware law certified to the Delaware Supreme Court by the SEC). Similarly, when the Ninth Circuit was faced with a question that arose under California law, it turned to the California courts, and not to the Delaware Court of Chancery. *See Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011) (certifying a question of California Constitutional law to the California Supreme Court). This approach is entirely consistent with Chancellor Strine's observation that the equilibrium solution for forum battles is to have each state "stay in its lane" and exercise jurisdiction only over cases that call upon the court to interpret the corporate laws of its own jurisdiction, absent special circumstances. *See Leo E. Strine, Jr., The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 684-87 (2005) (expressing the hope that the federal government would leave internal corporate governance to Delaware and "stay in its lane"). Intra-corporate forum selection provisions can thus be viewed as private ordering mechanisms that facilitate a rule of law in which each state "stays in its lane" as a matter of contract law and not just as a rule of judicial procedure.

¹⁷⁶*See supra* text accompanying note 171.

¹⁷⁷The Netsuite forum selection provision is far more modest than the mandatory arbitration provision proposed by The Carlyle Group that would mandate arbitration of all investor claims, including federal and state securities fraud claims, even if not intra-corporate in nature and not governed by the business entity laws of the state of incorporation. The Carlyle Grp. L.P., Registration Statement (Form S-1/A), at 66 (Jan. 10, 2012). This provision was, however, withdrawn under pressure from the staff of the Securities and Exchange Commission, shareholder rights activists, and potential investors. Miles Weiss, Jesse Hamilton & Cristina Alesci, *Carlyle Drops Class-Action Lawsuit Ban as Opposition Mounts*, BLOOMBERG (Feb. 3, 2012),

every contract is incomplete, and this forum selection language can generate disputes over its application in specific instances, but the courts have developed well-established procedures for addressing potential ambiguities in the construction and interpretation of contractual provisions.¹⁷⁸ Charter and bylaw provisions are no different, as courts are commonly called upon to rule on the proper interpretation and scope of many such provisions.¹⁷⁹

Third, the savings clause in the elective form of the provision expressly grants authority to the corporation to consent to jurisdiction in a forum other than the one designated by the forum selection provision. It thereby operates as a form of a "fiduciary out," which creates the flexibility necessary to preserve directors' obligations to fulfill their fiduciary duties to shareholders if it is in the best interests of the shareholders and the corporation that the litigation proceed outside of Delaware. Indeed, Delaware courts have been clear, particularly in the takeover context, that boards of directors cannot be contractually bound in a manner that violates the fiduciary duties owed to the corporation's shareholders.¹⁸⁰ If a decision to proceed exclusively in the Delaware Court of Chancery can, for any reason, be characterized as breaching the board's fiduciary duties, then this "savings clause" provides a board with the authority it needs to allow the claim to proceed elsewhere. For example, if, in order to obtain meaningful relief, it is necessary to pursue a claim against "defendants over whom the Delaware

<http://www.bloomberg.com/apps/news?pid=20602011&sid=ar9v3jfZQ7HM>.

¹⁷⁸See, e.g., *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779-80 (Del. 2012) (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)) ("When interpreting a contract, the Court will give priority to the parties' intentions as reflected in the four corners of the agreement Where a contract is ambiguous, 'the interpreting court must look beyond the language of the contract to ascertain the parties' intentions.'"); *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006) (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)) ("When interpreting a contract, the role of a court is to effectuate the parties' intent 'Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.'"); *Eagle Indus.*, 702 A.2d at 1232-33 (discussing what constitutes an ambiguous contract term and how courts should proceed in interpreting such terms).

¹⁷⁹See, e.g., *Smith v. Adventist Health Sys./West*, 106 Cal. Rptr. 3d 318, 339-42 (Cal. Ct. App. 2010) (applying general rules of contract interpretation to interpret disputed bylaw provisions); *Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 339-46 (Del. Ch. 2008) (addressing validity and scope of a challenged bylaw provision under the general rules of contract interpretation); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 171 (Del. Ch. 2005) (quoting *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990)) ("Corporate charters and by-laws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply.").

¹⁸⁰*Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 936 (Del. 2003) (quoting *Paramount Comm'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1993)) ("To the extent that a [merger] contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable.").

Court of Chancery would not have personal jurisdiction,"¹⁸¹ then a board has the authority to allow a claim to proceed elsewhere and could well have a fiduciary obligation to do so. But this is not to suggest that a board automatically breaches a fiduciary duty if it determines that litigation should proceed in Delaware even though Delaware courts cannot obtain personal jurisdiction over each and every defendant in each and every case. Plaintiffs commonly proceed with litigation in courts where they cannot obtain personal jurisdiction over all potential defendants, either by choice, or because no forum exists that could gain personal jurisdiction over every potential defendant.¹⁸²

Whether proceeding in a case without personal jurisdiction over every defendant violates a fiduciary obligation depends on the nature of the claim, and the ability to obtain meaningful relief absent that defendant.¹⁸³ This sort of fact-intensive inquiry cannot be resolved in the abstract, and the "savings

¹⁸¹See Verified Complaint at ¶ 28, *Boilermakers Local 154 Ret. Fund v. Priceline.com, Inc.*, No. 7216, 2012 WL 420778 (Del. Ch. Feb. 6, 2012).

¹⁸²See Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 825 & n.85 (1989) (noting strategic reasons why a plaintiff might choose not to join all possible defendants in a lawsuit, including jurisdictional restrictions in plaintiff's chosen forum); *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 296 (3d Cir. 1994) ("[W]here venue is proper for one defendant but not for another . . . [a district court may] sever the claims, retaining jurisdiction over one defendant and transferring the case as to the other defendant to an appropriate district."); *Forest Labs. Inc. v. Cobalt Labs. Inc.*, 2009 WL 2753427, at *1 & n.1, *4 (D. Del. Aug. 27, 2009) (transferring case in part where court lacked personal jurisdiction over some, but not all, of the defendants); *Russell v. Krowne*, 2009 WL 2058171, at *1 (D. Md. July 14, 2009) (dismissing the complaint against defendants over whom the Maryland court did not have jurisdiction, continuing litigation with the remaining defendants in Maryland upon election to do so by the plaintiff rather than transferring the entire case to another venue); *Russell*, 2009 WL 2058171, at *1 ("[W]hen the court lacks personal jurisdiction over some, but not all, defendants, the court may retain the case as to the remaining defendants over which personal jurisdiction is proper."); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3807 (3d ed. 2012) ("[U]nless the party for whom venue is improper is 'indispensable,' in the conclusory sense in which that term is used in Rule 19(b), the district court may dismiss the action as to that party and continue the litigation with the other parties."); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 409 (2000) (arguing that in situations where defendants are geographically dispersed, the requirements of personal jurisdiction often "doom" joinder to "incompleteness").

¹⁸³See generally FED. R. CIV. P. 19(b)(3-4) (illustrating the general principle that decisions made to proceed in litigation without all potential parties depend partly on the adequacy of the remedy available absent that party); 19 C.J.S. *Directors, Officers, and Agents* § 573 (2007) (pursuing litigation is "left to the discretion of the directors" and that decision is subject to the business judgment rule).

clause" provides the flexibility necessary to address these and similar challenges over time, as the circumstances of the litigation market evolve.¹⁸⁴

Here, an analogy to the evolution of poison pill jurisprudence may be constructive. The courts' initial challenge was to consider the validity of the pill as it might potentially be deployed across a wide variety of situations and not as it had actually been deployed.¹⁸⁵ It became immediately apparent to the courts that the pill could, in the future, be deployed either in a constructive manner that could optimize returns to shareholders, or in a destructive manner that could entrench management against legitimate market forces.¹⁸⁶ The courts thus developed a jurisprudence that served to monitor and control the application of shareholder rights plans to minimize opportunities for entrenchment; however, the danger of potential abuse in abstract fact patterns that might arise in the future was not viewed as sufficient to invalidate these shareholder rights plans *ab initio*.¹⁸⁷ Precisely the same form of jurisprudential evolution is possible with regard to the interpretation and application of intra-corporate forum selection provisions. The initial adoption of such a provision can be entirely legitimate, and if a

¹⁸⁴By addressing only one of the many challenges to the Netsuite-form of forum selection provision, this Article does not intend to suggest that there is any merit to any of the other arguments presented in the thirteen class action complaints recently filed challenging the enforceability of this form of provision. See *supra* notes 58-59.

¹⁸⁵See, e.g., *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1354 (Del. 1985) (rejecting the argument that the Rights Plan will deter "virtually all hostile tender offers" and noting several methods that could still accomplish a hostile takeover); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (establishing a general test to be used in determining the validity of a poison pill).

¹⁸⁶See *Selectica, Inc. v. Versata Enters., Inc.*, 2010 WL 703062, at *12 (Del. Ch. Feb. 26, 2010), reprinted in 36 DEL. J. CORP. L. 319, 336-37 (2011) ("Since their first appearance nearly thirty years ago, shareholder rights plans—so-called 'poison pills'—have been the subject of much debate. Some commentators have suggested that poison pills may be detrimental to shareholder interests because they help perpetuate existing management, preclude value-adding transactions from taking place, and destroy shareholder wealth. In spite of their rather contentious early history and the various arguments made against their use, poison pills remain a common feature of the corporate landscape, and Delaware courts have repeatedly upheld their adoption as consistent with a board's fiduciary duties and business judgment.") (footnotes omitted); *Moran*, 490 A.2d at 1083 (holding that "adoption of the [Shareholders'] Rights Plan is an appropriate exercise of managerial judgment under the business judgment rule," while acknowledging "that the Rights Plan also creates the potential for the misuse of directorial authority").

¹⁸⁷See, e.g., *Unocal*, 493 A.2d at 955, 958 (Del. 1985) (explaining that to justify use of a poison pill as a defensive measure, the target board must show (1) that it had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed" (*i.e.*, the board must articulate a legally cognizable threat) and (2) that any board action taken in response to that threat is "reasonable in relation to the threat posed"); *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 122-25, 129 (Del. Ch. 2011) (applying *Unocal's* framework and holding that Airgas's board articulated reasonable grounds for its continued maintenance of a poison pill).

board or corporation seeks to apply that provision in a manner that is contrary to corporate or shareholder interests, the courts retain sufficient jurisdiction to override the forum selection provision.

Fourth, factors totally independent of fiduciary considerations may make it reasonable to proceed with litigation in a jurisdiction other than Delaware. Indeed, as plaintiffs frequently like to point out when arguing against proceeding in Delaware, fact witnesses and documents are generally concentrated in the state where the corporate headquarters or other facilities are located, and it could be cost-effective to proceed in that alternative jurisdiction for this reason alone.¹⁸⁸ Thus, there may well be cases in which fiduciary considerations do not compel litigation to proceed outside of Delaware, but standard business judgment considerations could support the designation of a forum other than Delaware.¹⁸⁹ To be sure, this degree of flexibility raises the specter of a board agreeing to a forum other than Delaware in order to enter into a collusive, sweetheart settlement that allows

¹⁸⁸*Celebrity Cruises, Inc. v. Hitois*, 785 So. 2d 521, 522-23 (Fla. Dist. Ct. App. 2000) (affirming trial court orders denying motions to dismiss based on a forum selection clause and on forum non conveniens grounds, where defendant-corporation had its headquarters in Florida and the relevant witnesses were located there); *Anglim v. Mo. Pac. R.R. Co.*, 832 S.W.2d 298, 303-05 (Mo. 1992) (en banc) (denying motion to dismiss based on forum non conveniens where defendant-corporation was a resident of and conducted business in Missouri and plaintiff's treating physician was located there). On the other hand, the practical costs of proceeding in Delaware are often *de minimus* even if all witnesses and documents reside in the distant headquarters state. Discovery and depositions will occur in the headquarters state and the only additional cost will be that of travel and appearance in Delaware for the resolution of disputed matters that could not be addressed by teleconference or other forms of electronic communication. See, e.g., *In re Topps Co. S'holder Litig.*, 924 A.2d 951, 961-63 (Del. Ch. 2007) (citing *Langfelder v. Universal Labs.*, 56 N.E.2d 550, 553 (N.Y. 1944)) ("[T]he fact that a foreign corporation may have its records and principal place of business in New York does not affect a decision to decline jurisdiction under the internal affairs doctrine," particularly given that "the discovery will take place in a location convenient to the party producing the documents and being deposed"); *Asten v. Wangner*, 1997 WL 634330, at *3-*4 (Del. Ch. Oct. 3, 1997) (denying motion to dismiss on the theory of forum non conveniens; although "the principal place of business of the parties is in South Carolina and it is likely that most of the relevant documents are situated in the offices of the respective principal places of business[,] [m]odern methods of information transfer render concerns about transmission of documents virtually irrelevant"); *In re Asbestos Litig.*, 929 A.2d 373, 378, 384 (Del. Super. Ct. 2006) (quoting *Sequa Corp. v. Aetna Cas. and Sur. Co.*, 1990 WL 123006, at *5 (Del. Super. Ct. July 13, 1990)) (denying motion to dismiss for forum non conveniens where "defendants, who regularly face litigation in many states, have both the knowledge and means to locate and transport witnesses and evidence across state lines, particularly 'in an age where air travel, express mail, electronic data transmissions and videotaped depositions are part of the normal course of business for companies such as these'").

¹⁸⁹See, e.g., *Topps*, 924 A.2d at 962 & n.41 ("[A] myriad of contract, employment, worker safety, environmental, and tort claims against [the defendant-corporation] that would be much more properly heard in [the state where the entity was headquartered] than in this court [where the entity was incorporated].").

it and the entity to escape liability on the cheap.¹⁹⁰ But this problem is hardly unique to the operation of the Netsuite-form of forum selection provisions, and it arises in every situation in which plaintiffs file claims in multiple jurisdictions but the defendant agrees to settle in only one.¹⁹¹ The Delaware courts have been sensitive to this danger for decades,¹⁹² and have developed express means of addressing the problem of collusive settlements.¹⁹³ Precisely the same tools would be available to Delaware courts in assessing whether a corporation has, for legitimate cause, determined to proceed with litigation outside of Delaware. From this perspective, the Netsuite-style forum selection provision changes nothing and preserves the court's ability to monitor the integrity of the settlement process. Indeed, to the extent that a forum selection provision causes litigation to consolidate in any jurisdiction, the provision eliminates the possibility that defendants will be able to play off one jurisdiction against another to fashion a sweetheart settlement. The forum selection provision thus cures the very problem that plaintiff counsel incorrectly suggests it creates.

Fifth, the problem of incomplete contracting is well understood in academic literature.¹⁹⁴ Just as no contract can effectively anticipate every

¹⁹⁰See, e.g., Verified Complaint at ¶ 36, *Boilermakers Local 154 Ret. Fund v. Priceline.com, Inc.*, No. 7216, 2012 WL 420778 (Del. Ch. Feb. 6, 2012).

¹⁹¹See Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 775-76 (1998) (discussing techniques defendants use to try to achieve the cheapest settlement in multi-jurisdictional class action lawsuits).

¹⁹²See, e.g., *Stepak v. Tracinda Corp.*, 1989 WL 100884, at *6 (Del. Ch. Aug. 21, 1989), reprinted in 15 DEL. J. CORP. L. 750, 761 (1990) ("Where there are two or more attorneys purporting to act on behalf of the same or overlapping classes, there is a special risk that a defendant will seek advantage in choosing the adversary with whom it will negotiate, and a risk that the blessed plaintiff will be accommodating in exchange for an agreement that includes legal fees."); Brief of Special Counsel at 2-8, 27-30, *Scully v. Nighthawk Radiology Holdings, Inc.*, No. 5890-VCL, 2011 WL 863887 (Del. Ch. Mar. 11, 2011) (discussing forum shopping, reverse auctions, and collusive settlements in multi-jurisdictional class actions, and concluding that the settlement in the *Nighthawk* action was not collusive).

¹⁹³*MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 639 (Del. 2001) ("It has been recognized that there is an inherent conflict when class counsel seeks to settle claims on behalf of a class whose claims have been asserted globally in different jurisdictions on different grounds. . . . Courts have recognized the problem inherent in this situation and have established standards to prevent class counsel from selling out the class merely to collect that fee."); Brief of Special Counsel, *supra* note 192, at 12-26, 31-35 (discussing judicial scrutiny of potentially collusive class settlements in multi-jurisdictional litigation under both Delaware and federal law, as well as the role that courts should play in preventing such collusion).

¹⁹⁴See Joseph A. Grundfest, *Wind-down Plans, Incomplete Contracting, and Renegotiation Risk: Lessons from Tiger Woods*, in *ENDING GOVERNMENT BAILOUTS AS WE KNOW THEM* 163, 166 (Kenneth E. Scott, George P. Schultz & John B. Taylor eds., 2009), available at <http://media.hoover.org/sites/default/files/documents/08EndingGovernmentBailoutsAsWeKnowThe>

state of nature that might arise in the future, no forum selection provision, whether included in a standard commercial agreement or in an organic document, can anticipate every challenge that might arise in its enforcement. Accordingly, there is an inherent demand for flexibility in the application of these provisions and in their interpretation by the courts, and it makes no sense to hold forum selection provisions to a standard of precision and completeness that applies to no other provision of a charter or bylaw.¹⁹⁵ Again, the "savings clause" is crafted to be responsive to this demand.

C. *Equilibrium*

The recent evolution of the market for intra-corporate forum selection provisions thus suggests an equilibrium in which: (1) the demand for these provisions is stimulated by the increased incidence with which forum selection disputes arise in intra-corporate litigation; and (2) the supply is met by the Netsuite-form of forum selection provision. When corporations have the opportunity to adopt these provisions in conjunction with the IPO process or other forms of corporate reorganization, they are doing so with greater frequency.¹⁹⁶ In addition, an increasing number of firms have been adopting forum selection provisions as part of their bylaws without prior

mGrundfest.pdf (acknowledging that every contract is incomplete because every contingency cannot be anticipated or drafted around); Scott Baker & Kimberly D. Krawiec, *Incomplete Contracts in a Complete Contract World*, 33 FLA. ST. U. L. REV. 725, 725-26 (2006) (discussing investment problems created by incomplete contracts); Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 ECONOMETRICA 755-56 (1988); Claire A. Hill, *Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts*, 34 DEL. J. CORP. L. 191, 192-94 (2009) (noting the difficulty and impracticality of trying to draft a complete contract); Eric Bennett Rasmusen, *Explaining Incomplete Contracts as the Result of Contract-Reading Costs*, 1 B.E. J. OF ECON. ANALYSIS AND POLICY 1, 2-3 (2001), <http://www.degruyter.com/view/j/bejeap.2001.1.issue-1/bejeap.2001.1.1.1000/bejeap.2001.1.1.1000.xml?format=INT> (acknowledging a variety of explanations for incomplete contracts and positing a theory for why contracts are inherently incomplete); Patrick W. Schmitz, *The Hold-Up Problem and Incomplete Contracts: A Survey of Recent Topics in Contract Theory*, 53 BULL. ECON. RES. 1, 2-3 (2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=264969 (noting the various definitions of an "incomplete contract").

¹⁹⁵See, e.g., *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-18 (1972) (addressing circumstances in which courts can legitimately decide not to enforce forum selection provisions); *P & S Bus. Machs., Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) ("The validity [and scope] of a forum selection clause [are] determined under the usual rules governing the enforcement of contracts in general."); see also *New Jersey v. Merrill Lynch & Co.*, 640 F.3d 545, 546, 548 (3d Cir. 2011) (interpreting the phrase "appropriate courts [of] the State of New Jersey," as used in the forum selection clause in parties' share exchange agreement); *Ashall Homes Ltd. v. ROK Entm't Grp. Inc.*, 992 A.2d 1239, 1245-54 (Del. Ch. 2010) (analyzing application and scope of forum selection provisions in Subscription Agreements and Share Sale Agreements).

¹⁹⁶See *supra* Part II.D.

shareholder approval.¹⁹⁷ The thirteen class action challenges to forum selection bylaw provisions and the four stockholder challenges to proposed exclusive forum bylaw and charter amendments may, however, slow the rate at which such provisions are adopted. The decision of thirteen of the fifteen corporate defendants to voluntarily withdraw the challenged provisions in the face of shareholder litigation may—at least until the courts rule on the enforceability of the provisions—contribute to that slowdown, and prompt other corporations to withdraw bylaw provisions adopted without shareholder consent as a means of avoiding similar litigation or loss of shareholder goodwill. Broad-based shareholder opposition to forum selection charter amendments and bylaw provisions could also slow the adoption of these provisions. The current equilibrium, and the trends that have generated that equilibrium, are thus hardly set in stone, and additional legal and political developments will likely exert great influence on the evolution of intra-corporate forum selection provisions.

IV. CONCLUSION

The history of forum selection provisions in the organic documents of publicly traded entities can be described with great precision. As of June 30, 2011, only 133, or 1.49%, of publicly traded entities had forum selection provisions in their charters or bylaws. The vast majority of these provisions, 117 (88.0%), were adopted after Delaware Court of Chancery's March 16, 2010 decision in *Revlon*, observing that corporations could avoid forum dispute battles by adopting forum selection provisions in corporate charters. Of the corporations that have adopted forum selection provisions, 58.6% appear in corporate charters and 41.4% appear in bylaws adopted without prior shareholder consent. More than 91% of these provisions follow the form introduced by Netsuite in conjunction with its 2006 IPO, and approximately 16.28% of all IPOs declared effective since *Revlon* are of corporations whose charters contain forum selection provisions. Corporations headquartered in California are over-represented in the population of corporations that have adopted these provisions.

The mechanisms of action that drove this evolution can also be described with precision. Prior to the early part of this century, intra-corporate litigation was almost always brought in the state of incorporation. In such an environment, the selection of the state of incorporation acted as a *de facto* forum selection clause and these clauses could reasonably have been

¹⁹⁷See *supra* Part II.C.

viewed as surplusage. But as plaintiff counsel began to litigate intra-corporate claims with vastly greater frequency in courts away from the state of incorporation, a demand emerged for a contractual provision that could restore the pre-existing jurisdictional equilibrium in which each state's courts specialized in the interpretation of its own corporate law. Viewed from this perspective, the intra-corporate forum selection clause is not an innovation that seeks to disrupt traditional litigation processes; instead, it is better viewed as an effort to restore an equilibrium that had prevailed for decades and that reflected the natural expectation of corporations and shareholders alike that courts would "stay in their lane" as they specialized in the interpretation of their own state's corporation laws.¹⁹⁸

The future evolution of this innovation, however, is very much up in the air. If recent trends continue unabated, much larger numbers of publicly traded entities could be adopting forum selection provisions in the near future. Several developments could, however, slow, stall, or even reverse this trend. Twelve class action complaints have been filed in the Delaware Court of Chancery and one has been filed in the District Court for the Northern District of California, challenging the legality of forum selection provisions adopted as bylaw provisions through board action without prior shareholder consent. Four shareholder actions have been filed in the Delaware Court of Chancery challenging proposed exclusive forum charter and bylaw amendments approved by corporate boards but not yet submitted to a shareholder vote. Many of these lawsuits will be mooted by the voluntary withdrawal of the challenged provisions by thirteen of the fifteen corporate defendants; however, two entities continue to litigate the legality of their bylaw forum selection provisions.¹⁹⁹ If courts rule that forum selection provisions cannot be legally adopted by board action without prior shareholder consent, then future adoption rates will certainly slow and bylaw provisions adopted to date, may have to be undone. Furthermore, because the pending lawsuits also challenge the scope of forum selection provisions that have been adopted as bylaw provisions, if the courts concur that the existing forum selection language is sufficiently flawed, then the enforceability of charter provisions may also be at issue. Moreover, as a governance matter, if shareholders express sufficient opposition to forum selection provisions, then boards of directors may conclude that the game is not worth the candle because the governance costs of adopting forum selection provisions may exceed the litigation benefits. Stay tuned.

¹⁹⁸See Strine, *supra* note 175, at 684-87.

¹⁹⁹See *supra* note 61.

DATA APPENDIX

Methodology

To identify organic documents of publicly traded entities containing intra-corporate forum selection provisions, we searched the Morningstar Document Research database ("Morningstar"), an archive of SEC filings dating to January 1, 1994. The search spanned the sixteen-and-one-half year period from January 1, 1994, through June 30, 2011, the sample cut-off date for this article's analysis.²⁰⁰

The exhibits to SEC filings and the bodies of the main filings were searched separately using Morningstar's "Data Search–Exhibit" and "Data Search–Filing Search" functions. In the "Data Search–Exhibit" page, we conducted a full-text search of exhibits with the objective of identifying a smaller pool of organic documents that might contain forum selection clauses and that could then be subject to individual review. More precisely, we entered the terms (i) "(exclusive! or sole!) w/8 (court or forum or jurisdiction)" in the "Exhibit Body Word Search" field, and (ii) "bylaws or by-laws or incorporation or operating or LLC or LP or limited" in the "Exhibit Title Word Search" field. As of June 30, 2011, this search yielded 3,397 documents. Each of these documents was then manually reviewed to identify publicly traded entities with forum selection provisions in their organic documents. We excluded from our data (i) all non-organic documents, (ii) organic documents of private firms, (iii) organic corporate documents whose forum selection provisions do not apply to intra-corporate disputes, and (iv) duplicate documents.²⁰¹ We also excluded trust agreements and their corresponding investment funds from our data and analysis.

We also conducted a separate full-text search of the body of SEC filings to capture instances where a filing refers to, but does not attach as an exhibit, an organic document with forum selection provisions. On the "Data Search–Filing Search" page, we limited our search to Forms S-1, S-1/A, 10-K, 10-Q, and 8-K²⁰² that included the following text search query:

²⁰⁰Morningstar Document Research database (formerly known as 10K Wizard) is available to paid subscribers at <http://www.10kwizard.com/home.php?g=12651114994cccdac2ec2>.

²⁰¹When conducting our search, we frequently encountered organic documents with forum provisions specific to certain types of disputes only, such as disputes over indemnity obligations or directorial inspection rights. Our study primarily focused on forum selection clauses as applied to intra-corporate litigation. Thus, where a forum selection clause only applies to other types of disputes, we excluded it from our data.

²⁰²In exploring and setting the parameters for our database searches, we discovered that bylaws, charters, operating agreements, and their amendments are most often discussed in, or attached to, Forms S-1 (registration statements), Forms S-1/A (amendment to registration statement), Forms 10-K (annual reports), Forms 10-Q (quarterly reports), and Forms 8-K (reports of

"(exclusive! or sole!) w/8 (court or forum or jurisdiction)." We also telephonically canvassed counsel experienced in the field, and reviewed other publicly available documents citing to forum selection clauses in organic corporate documents.²⁰³ This more informal process identified twelve entities with forum selection clauses, including a bylaw provision dated as far back as October 1991 that might otherwise not have been discovered through formal database searches.²⁰⁴ Upon reviewing these additional search results and interviews with counsel, we added ten publicly traded entities to our data pool. Thus, as of June 30, 2011, our two-step search, combined with the information provided by experienced counsel, identified a total of 133 publicly traded firms whose charters, bylaws, or operating agreements prescribe a specific forum for the resolution of intra-corporate disputes.

For each publicly traded entity identified as having adopted an intra-corporate forum selection clause, this table documents the entity's name, the date on which the clause was adopted (year and month), the entity's chartering jurisdiction, the entity's headquarters' jurisdiction, the type of document containing the forum selection clause, the type of filing with the Securities and Exchange Commission in which the document was found, whether the clause follows the Netsuite-form,²⁰⁵ and the jurisdiction that is identified as the forum selected for litigation.

The *Revlon* decision dated March 16, 2010 issued after the Meru Networks IPO filing²⁰⁶ but before the Primerica filing.²⁰⁷

unscheduled material events).

²⁰³The Allen Study was particularly useful in validating our research results. See ALLEN STUDY, *supra* note 1.

²⁰⁴See *infra* Data Appendix Table A-1, row 1.

²⁰⁵See *supra* note 105 (providing the Netsuite forum selection provision).

²⁰⁶See Meru Networks, Inc., Fourth Amended Registration Statement (Form S-1/A) (Mar. 12, 2010).

²⁰⁷See Primerica, Inc., Fifth Amended Registration Statement (Form S-1/A) (Mar. 29, 2010).

Table A-1

	NAME	DATE OF ADOPTION	CHARTER STATE	HQ STATE	DOCUMENT TYPE	SOURCE	ELECTIVE ("E") OR MANDATORY ("M")	NETSUITE ("N") OR OTHER ("O")	FORUM
1	STANDARD PAC. CORP.	1991-10	DE	CA	Bylaws	S-4	M	O	DE
2	KENNEDY-WILSON INC.	1992-04	DE	CA	Bylaws	S-4	M	O	DE
3	CKE RESTS. INC.	1994-03	DE	CA	Bylaws	S-4	M	O	DE
4	JONES FIN. COS. LLP	1998-03	MO	MO	LLP Agreement	8-K	M	O	MO
5	GROVE INVESTORS LLC/PA LLC	1998-03	DE	PA	LP Agreement	S-4	M	O	DE
6	TENASKA GEORGIA PARTNERS LP	1999-12	DE	NE	LP Agreement	10-K405	M	O	DE
7	PLAINS ALL AMERICAN PIPELINE, LP	2001-06	DE	TX	LP Agreement	8-K	M	O	DE, TX
8	ORACLE CORP.	2006-07	DE	CA	Bylaws	8-K	M	O	DE
9	NETLIST, INC.	2006-10	DE	CA	Bylaws	S-1/A	M	O	DE
10	NETSUITE INC.	2007-11	DE	CA	Charter	S-1/A	E	N	DE
11	RIDGEWOOD ENERGY A-1 FUND, LLC	2009-03	DE	NJ	LLC Agreement	10-12G	M	O	DE
12	DISCOVERY COMM'NS HOLDING, LLC	2009-05	DE	MD	LLC Agreement	S-3AS	M	O	DE
13	CHRYSLER GRP. LLC	2009-06	DE	MI	LLC Agreement	10-12G	M	O	DE
14	FINANCIAL ENGINES, INC.	2009-12	DE	CA	Charter	S-1	E	N	DE
15	MAGNACHIP SEMI-CONDUCTOR LLC	2010-02	DE	Luxembourg	LLC Agreement	S-1/A	M	O	DE
16	MERU NETWORKS INC.	2010-03	DE	CA	Charter	S-1/A	E	N	DE
17	PRIMERICA, INC.	2010-03	DE	GA	Charter	S-1/A	E	N	DE

	NAME	DATE OF ADOPTION	CHARTER STATE	HQ STATE	DOCUMENT TYPE	SOURCE	ELECTIVE ("E") OR MANDATORY ("M")	NETSUITE ("N") OR OTHER ("O")	FORUM
18	NISKA GAS STORAGE PARTNERS LLC	2010-05	DE	TX	LLC Agreement	8-K	M	O	DE
19	INTRUSION INC.	2010-06	DE	TX	Charter	8-K	M	O	NY
20	INPHI CORP.	2010-06	DE	CA	Charter	S-1	E	N	DE
21	GORDMANS STORES, INC.	2010-06	DE	NE	Charter	S-1/A	M	N	DE
22	KKR & CO. LP, LLC	2010-07	DE	NY	LLC Agreement	8-K	M	O	DE
23	OXFORD RES. PARTNERS LP	2010-07	DE	OH	LP Agreement	8-K	M	O	DE
24	RHINO RES. PARTNERS LP	2010-07	DE	KY	LP Agreement	S-1/A	M	O	DE
25	LPL INV. HOLDINGS INC.	2010-07	DE	MA	Charter	S-1/A	M	N	DE
26	ENVESTNET, INC.	2010-07	DE	IL	Charter	S-1/A	E	N	DE
27	SWIFT HOLDINGS CORP.	2010-07	DE	AZ	Charter	S-1	M	N	DE
28	CHESAPEAKE MIDSTREAM PARTNERS, LP	2010-08	DE	OK	LP Agreement	8-K	M	O	DE
29	AMERICAN PAC. INVESTCORP LP	2010-08	DE	NY	LP Agreement	S-1/A	M	O	DE
30	AMN HEALTHCARE SERVS., INC.	2010-07	DE	CA	Bylaws	10-Q	M	N	DE
31	GRAND CANYON EDUC., INC.	2010-08	DE	AZ	Bylaws	8-K	M	N	DE
32	FURNITURE BRANDS INT'L INC.	2010-08	DE	MO	Bylaws	8-K	M	N	DE
33	CHARTER COMM'NS, INC.	2010-08	DE	MO	Charter	8-K	M	N	DE
34	TMS INT'L CORP.	2010-08	DE	PA	Charter	S-1/A	M	N	DE
35	CHEMTURACORP.	2010-08	DE	CT	Charter	S-1/A	M	N	DE
36	U.S. CONCRETE, INC.	2010-08	DE	TX	Charter	8-A12G	M	N	DE

	NAME	DATE OF ADOPTION	CHARTER STATE	HQ STATE	DOCUMENT TYPE	SOURCE	ELECTIVE ("E") OR MANDATORY ("M")	NETSUITE ("N") OR OTHER ("O")	FORUM
37	AMERCO	2010-09	NV	NV	Bylaws	8-K	M	N	NV
38	CHEVRON CORP.	2010-09	DE	CA	Bylaws	8-K	E	N ²⁰⁸	DE
39	FXCM INC.	2010-09	DE	NY	Charter	S-1	E	N	DE
40	LIBERTY MUT. AGENCY CORP.	2010-09	DE	MA	Charter	S-1/A	M	N	DE
41	SPIRIT AIRLINES INC.	2010-09	DE	FL	Charter	S-1	M	N	DE
42	IMMUNO-CELLULAR THERAPEUTICS LTD.	2010-10	DE	CA	Bylaws	8-K	M	N	DE
43	LIFE TECHS. CORP.	2010-10	DE	CA	Bylaws	8-K	M	N	DE
44	EVERBANK FIN. CORP.	2010-10	DE	FL	Charter	S-1	M	N	DE
45	DEMAND MEDIA INC.	2010-10	DE	CA	Charter	S-1/A	E	N	DE
46	EXAMWORKS GRP., INC.	2010-10	DE	GA	Charter	S-1/A	E	N	DE
47	CTPARTNERS EXEC. SEARCH, INC.	2010-10	DE	NY	Charter	S-1/A	E	N	DE
48	HOWARD HUGHES CORP.	2010-10	DE	IL	Charter	S-1	M	N	DE
49	AURORA DIAGNOSTICS, INC.	2010-10	DE	FL	Charter	S-1/A	E	N	DE
50	NEW GGP, INC. (AKA GENERAL GROWTH PROPS. INC.)	2010-10	DE	IL	Charter	S-11	M	N	DE

²⁰⁸On March 28, 2012, Chevron amended its forum selection bylaw provision to address concerns raised in two shareholder class action lawsuits challenging the validity of the provision, which was adopted by the board without shareholder consent. *See supra* text accompanying notes 111-113; *supra* note 113 (providing Chevron's amended bylaw).

	NAME	DATE OF ADOPTION	CHARTER STATE	HQ STATE	DOCUMENT TYPE	SOURCE	ELECTIVE ("E") OR MANDATORY ("M")	NETSUITE ("N") OR OTHER ("O")	FORUM
51	BOOZ ALLEN HAMILTON HOLDING CORP.	2010-11	DE	VA	Charter	S-1/A	M	N	DE
52	HARRAH'S ENTMT INC. (AKA CEASARS ENTMT CORP.)	2010-11	DE	NV	Charter	S-1/A	E	N	DE
53	SWIFT TRANSP. CO.	2010-11	DE	AZ	Charter	S-1/A	M	N	DE
54	APPLIED MICRO CIRCUITS CORP.	2010-11	DE	CA	Bylaws	10-Q	E	N	DE
55	DIADEXUS, INC.	2010-11	DE	CA	Bylaws	8-K	M	N	DE
56	DELPHI FIN. GRP., INC.	2010-11	DE	DE	Bylaws	10-Q	M	N	DE
57	BERKSHIRE HATHAWAY INC.	2010-11	DE	NE	Bylaws	8-K	E	N	DE
58	VARIAN MED. SYS. INC.	2010-11	DE	CA	Bylaws	8-K/A	M	N	DE
59	INTREPID POTASH, INC.	2010-11	DE	CO	Bylaws	8-K	E	N	DE
60	SEMILEDs CORP.	2010-11	DE	DE	Bylaws	S-1/A	M	N	DE
61	NAVISTAR INT'L CO. ²⁰⁹	2010-12	DE	IL	Bylaws	8-K	E	N	DE
62	MATTSON TECH. INC.	2010-12	DE	CA	Bylaws	8-K	M	N	DE
63	FRANKLIN RES. INC. ²¹⁰	2010-12	DE	CA	Bylaws	8-K	E	N	DE
64	UNITED RENTALS N. AM., INC.	2010-12	DE	CT	Bylaws	8-K	E	N	DE

²⁰⁹Navistar voluntarily withdrew its exclusive forum bylaw provision on March 22, 2012 after shareholders filed a class action lawsuit challenging the provision. *See Navistar Int'l Corp.*, Current Report (Form 8-K), at Item 5.03 (Mar. 22, 2012).

²¹⁰Franklin Resources voluntarily withdrew its exclusive forum bylaw provision on March 14, 2012 after shareholders filed a class action lawsuit challenging the provision. *See Franklin Res., Inc.*, Current Report (Form 8-K), at Item 5.03 (Mar. 14, 2012).

	NAME	DATE OF ADOPTION	CHARTER STATE	HQ STATE	DOCUMENT TYPE	SOURCE	ELECTIVE ("E") OR MANDATORY ("M")	NETSUITE ("N") OR OTHER ("O")	FORUM
65	QR ENERGY LP	2010-12	DE	TX	LP Agreement	8-K	M	O	DE
66	CBAY SYS. HOLDINGS LTD.	2011-01	DE	TN	Charter	S-1/A	E	N	DE
67	GEVO, INC.	2011-01	DE	CO	Charter	S-1/A	E	N	DE
68	RPX CORP.	2011-01	DE	CA	Charter	S-1/A	E	N	DE
69	BLOUNT INT'L INC.	2011-01	DE	OR	Bylaws	8-K	M	N	DE
70	LINKEDIN CORP.	2011-01	DE	CA	Charter	S-1	M	N	DE
71	LIBERTY SPLITCO, INC.	2011-01	DE	CO	Charter	S-4/A	E	N	DE
72	MEDQUIST HOLDINGS INC.	2011-01	DE	TN	Charter	S-1/A	E	N	DE
73	DOMUS HOLDING CORP.	2011-01	DE	NJ	Charter	S-1	E	N	DE
74	SAGENT HOLDING CO.	2011-02	Cayman Islands	IL	Charter	S-1/A	M	N	DE
75	AUTONATION INC. ²¹¹	2011-02	DE	FL	Bylaws	8-K	M	N	DE
76	LOOPNET, INC.	2011-02	DE	CA	Bylaws	8-K	M	N	DE
77	INSWEB CORP.	2011-02	DE	CA	Bylaws	8-K	E	N	DE
78	GNC ACQUISITION HOLDINGS INC.	2011-02	DE	PA	Charter	S-1/A	E	N	DE
79	NEOPHOTONICS CORP.	2011-02	DE	CA	Charter	8-K	E	N	DE
80	ZEBRA TECH. CORP.	2011-02	DE	IL	Bylaws	8-K	E	N	DE

²¹¹ AutoNation voluntarily withdrew its exclusive forum bylaw provision on March 23, 2012 after shareholders filed a class action lawsuit challenging the provision. *See* AutoNation, Inc., Current Report (Form 8-K), at Item 5.03 (Mar. 23, 2012).

	NAME	DATE OF ADOPTION	CHARTER STATE	HQ STATE	DOCUMENT TYPE	SOURCE	ELECTIVE ("E") OR MANDATORY ("M")	NETSUITE ("N") OR OTHER ("O")	FORUM
81	AIR LEASE CORP.	2011-02	DE	CA	Bylaws	S-1/A	E	N	DE
82	LANDSTAR SYS. INC.	2011-02	DE	FL	Bylaws	10-K	E	N	DE
83	SUPERIOR ENERGY SERVS. INC. ²¹²	2011-02	DE	LA	Bylaws	8-K	E	N	DE
84	PURE BIOSCIENCE, INC.	2011-02	DE	CA	Charter	8-K	E	O	DE
85	COMPRESSCO PARTNERS, LP	2011-02	DE	OK	LP Agreement	S-1/A	M	O	DE
86	MODUSLINK GLOBAL SOLUTIONS INC.	2011-03	DE	MA	Bylaws	8-K	M	N	DE
87	VMWARE INC.	2011-03	DE	CA	Bylaws	8-K	E	O	DE
88	APACHE DESIGN SOLUTIONS INC.	2011-03	DE	CA	Charter	S-1	E	N	DE
89	SPECTRANETICS CORP.	2011-03	DE	CO	Bylaws	8-K	M	N	DE
90	FEDEX CORP.	2011-03	DE	TN	Bylaws	8-K	E	N	DE
91	AFFINIA GRP. HOLDINGS INC.	2011-03	DE	MI	Charter	S-1/A	M	N	DE
92	METROPC COMMC'NS INC.	2011-03	DE	TX	Bylaws	8-K	E	N	DE
93	ROPER INDUS. INC.	2011-03	DE	FL	Bylaws	8-K	M	N	DE
94	CAPTERRA FIN. GRP., INC. (AKA NEXCORE HEALTHCARE CAPITAL CORP.)	2011-03	DE	CO	Charter	DEF14B	E	N	DE
95	CVR PARTNERS, LP	2011-03	DE	TX	LP Agreement	S-1/A	M	O	DE

²¹²Superior Energy voluntarily withdrew its exclusive forum bylaw provision on March 7, 2012 after shareholders filed a class action lawsuit challenging the provision. See Superior Energy Servs., Inc., Current Report (Form 8-K), at Item 5.03 (Mar. 12, 2012).

	NAME	DATE OF ADOPTION	CHARTER STATE	HQ STATE	DOCUMENT TYPE	SOURCE	ELECTIVE ("E") OR MANDATORY ("M")	NETSUITE ("N") OR OTHER ("O")	FORUM
96	NGL PARTNERS LP	2011-03	DE	OK	LP Agreement	S-1/A	M	O	DE
97	OILTANKING PARTNERS, LP	2011-03	DE	TX	LP Agreement	S-1	M	O	DE
98	NEW MOUNTAIN FIN. AIV HOLDINGS CORP.	2011-03	DE	NY	Charter	10-12G	E	N	DE
99	ALTERA CORP.	2011-04	DE	CA	Charter	DEF-14A	E	N	DE
100	DIRECTV	2011-04	DE	CA	Charter	DEF-14B	E	N	DE
101	PANDORA MEDIA, INC.	2011-04	DE	CA	Charter	S-1/A	M	N	DE
102	TESORO LOGISTICS LP	2011-04	DE	TX	LP Agreement	S-1/A	M	O	DE
103	THE ALLSTATE CORP.	2011-04	DE	IL	Charter	DEF-14A	E	N	DE
104	USA TRUCK, INC.	2011-04	DE	AR	Bylaws	DEF-14A	E	N	DE
105	WILLIAMS-SONOMA, INC.	2011-04	DE	CA	Charter	PRE-14A	E	N	DE
106	LIGHTING SCIENCE GRP. CORP.	2011-04	DE	FL	Charter	PRE-14A	E	N	DE
107	PARTY CITY HOLDINGS INC.	2011-04	DE	NY	Charter	S-1	M	O	DE
108	MARATHON PETROLEUM CORP.	2011-04	DE	OH	Charter	10-12B/A	M	N	DE
109	SYMANTEC CORP.	2011-04	DE	CA	Bylaws	8-K	E	N	DE
110	LONE PINE RES. INC.	2011-04	DE	Alberta, Canada	Charter	S-1/A	E	N	DE
111	RIDGEWOOD ENERGY X FUND, LLC	2011-04	DE	NJ	LLC Agreement	10-Q	M	O	DE
112	RIDGEWOOD ENERGY W FUND, LLC	2011-04	DE	NJ	LLC Agreement	10-Q	M	O	DE
113	WHITEGLOVE HOUSE CALL HEALTH INC.	2011-05	DE	TX	Charter	S-1	E	N	DE

	NAME	DATE OF ADOPTION	CHARTER STATE	HQ STATE	DOCUMENT TYPE	SOURCE	ELECTIVE ("E") OR MANDATORY ("M")	NETSUITE ("N") OR OTHER ("O")	FORUM
114	APACHE DESIGN SOLUTIONS, INC.	2011-05	DE	CA	Charter	S-1	M	N	DE
115	SABRE INDUS., INC.	2011-05	DE	PA	Charter	S-1/A	E	N	DE
116	CURTISS WRIGHT CORP. ²¹³	2011-05	DE	NJ	Bylaws	8-K	E	N	DE
117	ASSURANT INC.	2011-05	DE	NY	Bylaws	8-K	E	N	DE
118	BANKRATE INC.	2011-05	DE	FL	Charter	S-1/A	M	N	DE
119	LAM RESEARCH CORP.	2011-05	DE	CA	Bylaws	8-K	E	N	DE
120	REMY INT'L, INC.	2011-05	DE	IN	Charter	S-1/A	E	N	DE
121	MINDSPEED TECHS., INC.	2011-05	DE	CA	Bylaws	8-K	E	N	DE
122	ENVIVIO INC.	2011-06	DE	CA	Charter	S-1/A	E	N	DE
123	WESCO AIRCRAFT HOLDINGS, INC.	2011-06	DE	CA	Charter	S-1/A	E	N	DE
124	BIOGEN IDEC INC.	2011-06	DE	MA	Bylaws	8-K	M	N	DE
125	CAFEPRESS INC.	2011-06	DE	CA	Charter	S-1	E	N	DE
126	MATTRESS FIRM HOLDING CORP.	2011-06	DE	TX	Charter	S-1	E	N	DE
127	CARBONITE INC.	2011-06	DE	MA	Charter	S-1/A	M	N	DE
128	FORTUNE BRANDS HOME & SEC. LLC	2011-06	DE	IL	Charter	10-12B/A	E	N	DE
129	LIVE NATION ENTMT, INC.	2011-06	DE	CA	Bylaws	8-K	E	N	DE

²¹³Curtiss-Wright voluntarily withdrew its exclusive forum bylaw provision on March 20, 2012 after shareholders filed a class action lawsuit challenging the provision. See Curtiss-Wright Corp., Current Report (Form 8-K), at Item 5.03 (Mar. 23, 2012).

	NAME	DATE OF ADOPTION	CHARTER STATE	HQ STATE	DOCUMENT TYPE	SOURCE	ELECTIVE ("E") OR MANDATORY ("M")	NETSUITE ("N") OR OTHER ("O")	FORUM
130	IRONPLANET INC.	2011-06	DE	CA	Charter	S-1/A	E	N	DE
131	CLOVIS ONCOLOGY, INC.	2011-06	DE	CO	Charter	S-1	E	N	DE
132	WHITESMOKE, INC.	2011-06	DE	Israel	Charter	S-1/A	M	N	DE
133	CHEROKEE INC.	2011-06	DE	CA	Bylaws	8-K	E	N	DE

STATISTICAL APPENDIX

Neil Miller**

Test 1²¹⁴

This test estimates the probability that, as of March 16, 2010, the statistical process that generates forum selection clauses in 39%²¹⁵ of the material contracts of publicly traded entities is identically distributed to the statistical process that generates forum selection clauses in sixteen of 8929 of these same entities, or 0.18% of the population. We apply the binomial test to our sample assuming that the probability of a forum selection clause in material contracts is 39% and calculate that the probability of this occurrence is less than one in 10¹⁸⁷⁰.

The following R code was used to perform this calculation:

```
log10fact = function(n) {
  sum = 0.
  for(i in 1:n) {
    sum = sum + log10(i) }
  log10fact = sum }

log10choose = function(N,K) {
  log10choose = log10fact(N) - log10fact(K) - log10fact(N-K) }

logPBinTest=function(p, N, maxI) {
  logp0 = log10choose(N, maxI) + maxI * log10(p) + (N - maxI) *
  log10(1-p)
  ref = round(logp0)
  sum = 0.

  for(i in maxI:1) {
    logp = log10choose(N,i) + i * log10(p) + (N - i) * log10(1-p)
    sum = sum + 10^(logp - ref) }
  logPBinTest = ref + log10(sum) }
```

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²¹⁴See text accompanying *supra* note 11 (discussing Test 1).

²¹⁵Although this number is actually reported as 39.56%, for ease of analysis we utilize 39% in the statistical tests. See Eisenberg & Miller, *The Flight to New York*, *supra* note 7, at 1506 tbl.13.

```
p = 0.39
N = 8929
maxI = 16
print(logPBinTest(p,N,maxI))
```

This code returns a value of -1870. Note that in order to obtain a precise p-value, it is necessary to run the code using logarithmic values. Otherwise the code returns a value of zero.

Test 2²¹⁶

This test estimates the probability that, as of June 30, 2011, the statistical process that generates forum selection clauses in 39% of the material contracts of publicly traded entities is identically distributed to the statistical process that generates forum selection clauses in 133 of 8929 of these same entities, or 1.49% of the population. We apply the binomial test and calculate that the probability of this occurrence is less than one in 10^{1644} . Coding the test, as above, in R, and applying logarithmic values, with the following parameter specifications:

```
p = 0.39
N = 8929
maxI = 133
print(logPBinTest(p,N,max
```

returns a value of -1644.

Test 3²¹⁷

This test estimates the probability that, as of December 31, 2011, the statistical process that generates forum selection clauses in 39% of the material contracts of publicly traded entities is identically distributed to the statistical process that generates forum selection clauses in 195 of 8929 of these same entities, or 2.18% of the population. We apply the binomial test and calculate that the probability of this occurrence is less than one in 10^{1548} . Coding the test, as above, in R, and applying logarithmic values, with the following parameter specifications:

²¹⁶See text accompanying *supra* notes 29, 87, and 134 (discussing Test 2).

²¹⁷See text accompanying *supra* notes 31 and 55 (discussing Test 3).

```
p = 0.39
N = 8929
maxI = 195
print(logPBinTest(p,N,maxI))
```

returns a value of -1548.

Test 4²¹⁸

This test estimates the probability that, as of June 30, 2011, the statistical process that generates forum selection clauses in 39% of the material contracts of publicly traded entities is identical to the statistical process that generates forum selection clauses in the organic documents of 22 of 430 publicly traded LLCs and LLPs, or 5.12% of the population of publicly traded LLCs and LLPs. We apply the binomial test and calculate that the probability of this occurrence is less than one in 10⁶⁰. Coding the test, as above, in R, and applying logarithmic values, with the following parameter specifications:

```
p = 0.39
N = 430
maxI = 22
print(logPBinTest(p,N,maxI))
```

returns a value of -60.

Test 5²¹⁹

This test estimates the probability that, as of June 30, 2011, the statistical process that causes forum selection clauses to appear in charter provisions of publicly traded corporations in 65 of 111 instances, or 58.6% of the population, is identical to the process that causes forum selection provisions to appear in the bylaw provisions of publicly traded entities in 46 of 111 instances, or 41.4% of the population. We apply the standard pre-written R binomial test routine and determine that the probability of this occurrence is 0.087, which is not statistically significant at the standard 5% level, and therefore cannot reject the null hypothesis that forum selection clauses are as likely to appear in charter provisions as in bylaw provisions.

²¹⁸See text accompanying *supra* note 88 (discussing Test 4).

²¹⁹See text accompanying *supra* note 89 (discussing Test 5).

```

> binom.test (x=46,n=111)
Exact binomial test:
data: 46 and 111
number of successes = 46, number of trials = 111, p-value =
0.08709
alternative hypothesis: true probability of success is not equal to 0.5
95% confidence interval:
 0.3217008 0.5118113
sample estimates:
probability of success
 0.4144144

```

Test 6²²⁰

This test estimates the probability that, as of June 30, 2011, the statistical process that causes forum selection provisions to appear in the organic documents of 22 of 430 publicly traded LLCs and LLPs is identically distributed to the process that leads forum selection provisions to appear in 111 of 8499 publicly traded corporations. Testing the null hypothesis that the true probability is equal, we find a p-value of less than 10^{-9} and therefore conclude that these are not identically distributed.

```

> prop.test(c(22,111), c(430,8499), p=NULL,
alternative="two.sided")

```

2-sample test for equality of proportions with continuity correction

```

data: c(22, 111) out of c(430, 8499)
X-squared = 37.9405, df = 1, p-value = 7.294e-10
alternative hypothesis: two.sided
95% confidence interval:
 0.01591631 0.06028855
sample estimates:
 prop 1   prop 2
0.05116279 0.01306036

```

²²⁰See text accompanying *supra* note 94 (discussing Test 6).

Test 7²²¹

This test measures the probability that: (1) the rate at which forum selection clauses were adopted during the *Revlon*-Chevron period differs from the rate at which they were adopted during the pre-*Revlon* period; and (2) the rate at which forum selection clauses were adopted during the post-Chevron period differs from the rate at which they were adopted during both the pre-*Revlon* and *Revlon*-Chevron periods. The results of these tests of statistical significance are, for the difference between the *Revlon*-Chevron period and the pre-*Revlon* period (noted below as p_{12}), presented below the relevant incidence rate. The results of these tests of statistical significance for the difference between the post-Chevron period and the pre-*Revlon* period (noted below as p_{13}) are presented as the first value below the relevant incidence rate. The result of the same test measuring the difference between the post-Chevron period and the *Revlon*-Chevron period (noted below as p_{23}) are presented as the second value below the relevant incidence rate.

²²¹See text accompanying *supra* notes 24 and 100-01 (discussing Test 7).

*Table A-2 — Intra-Corporate Forum Selection Clauses:
Monthly Adoption Rates Pre-Revlon, Revlon-Chevron, Post-Chevron
October 7, 1991 to June 30, 2011*

	PRE-REVLON (10/07/91 - 3/16/10) 221.5 months	REVLON-CHEVRON (3/17/10 - 9/29/10) 6.5 months	POST-CHEVRON (9/30/10 - 6/30/11) 9 months	TOTAL 237 months
CORPORATIONS	0.036	2.923 $p_{12} < 2.2 \times 10^{-16}$	9.333 $p_{13} < 2.2 \times 10^{-16}$ $p_{23} = 7 \times 10^{-7}$	0.468
CHARTERS	0.014	2.154 $p_{12} < 2.2 \times 10^{-16}$	5.333 $p_{13} < 2.2 \times 10^{-16}$ $p_{23} = 0.002256$	0.274
BYLAWS	0.023	0.769 $p_{12} = 8.41 \times 10^{-6}$	4.000 $p_{13} < 2.2 \times 10^{-16}$ $p_{23} = 7.5 \times 10^{-7}$	0.194
LLCS AND LLPS	0.036	0.923 $p_{12} = 2.64 \times 10^{-6}$.889 $p_{13} = 1 \times 10^{-7}$ $p_{23} = 1$	0.093
TOTAL	0.072	3.846 $p_{12} < 2.2 \times 10^{-16}$	10.222 $p_{13} < 2.2 \times 10^{-16}$ $p_{23} = 4.5 \times 10^{-6}$	0.561

We test the hypothesis that the rate of forum selection clause introduction is equal for each group in between two periods of time. We assume that a Poisson process applies and use the standard R package "rateratio.test" to determine the p-values listed in the table. In all cases, except for the difference in LLC and LLP adoption rates between the *Revlon-Chevron* period and the post-Chevron period, the differences in adoption rates are highly significant.

Test 8²²²

This test estimates the probability that the statistical process that results in 23.8% of Delaware-chartered entities being headquartered in California is identically distributed to the process that results in 31.6% of entities (42 of 133) with forum selection provisions as of June 30, 2011, also being chartered in California. Using the standard R binomial test routine, we find that this event has a p-value of 0.04127.

```
> binom.test(x=42,n=133,p=0.238)
Exact binomial test:
```

²²²See text accompanying *supra* note 122 (discussing Test 8).

data: 42 and 133

number of successes = 42, number of trials = 133, p-value =
0.04127

Alternative hypothesis: true probability of success is not equal to
0.238

95% confidence interval: 0.2379760

sample estimates: 0.4020185

probability of success: 0.3157895

REFERENCE MATERIAL APPENDIX

Notes to Table 8:

ⁱ"Against" votes include abstentions and non-votes.

ⁱⁱThese percentages reflect the shares of common stock beneficially owned by all directors, executive officers, and certain persons who own more than 5% of the company's outstanding stock as a group, as reported in recently-filed Schedules 14A or 14C.

ⁱⁱⁱSee Allstate, Current Report (Form 8-K), at 3-4 (May 18, 2011).

^{iv}*Id.*; see also Claudia H. Allen, *Forum-Shopping and Exclusive Forum Clauses: "Anywhere But Delaware" or Only in Delaware?*, CORP. ACCOUNTABILITY REPORT, 1, 4 & n.14 (June 10, 2011) [hereinafter Allen, *Forum-Shopping*], available at <http://www.ngelaw.com/files/Publication/76b2f6d6-c9ad-4e3f-8d47435084f03e00/Presentation/PublicationAttachment/7fb12d13-f9c8-4909-ace2-49a80257c16e/PDFArtic.pdf> (calculating the percentage of votes cast in support of the proposal); Council of Institutional Investors, *Exclusive Forum Proposals Elicit Shareholder Skepticism*, 16 COUNCIL GOVERNANCE ALERT 21, 1 (2011) ("[S]hareowners voted down an 'exclusive forum' proposal governing where lawsuits can be brought."), available at <http://www.cii.org/UserFiles/file/resource%20center/council%20governance%20alert/2011%20Archive/Alert%2021.pdf>.

^vSee Allstate Corp., Definitive Additional Materials (Schedule 14A), at 56 (Apr. 1, 2011). The April 2011 proxy material indicates that "shares of common stock beneficially owned by any Allstate director or nominee or by all directors and executive officers of Allstate as a group does not exceed 1%." *Id.* The 12.79% figure set forth above estimates a combined ownership interest of 1% for all directors and executive officers, which may overstate the actual ownership interest of this group. See *id.*

^{vi}Altera Corp., Current Report (Form 8-K), at Item 5.07 (May 16, 2011); see also Allen, *Forum-Shopping*, *supra* note iv, at 4 & n.14 (discussing the shareholder vote on Altera's charter amendment).

^{vii}See Altera Corp., Current Report, *supra* note vi, at Item 5.07; see also Allen, *Forum-Shopping*, *supra* note iv, at 4 & n.14 (discussing the shareholder vote on Altera's charter amendment).

^{viii}See Altera Corp., Definitive Proxy Statement (Schedule 14A), at 17 (Mar. 23, 2011). This percentage is calculated based on "322,029,687 shares of common stock outstanding as of the record date, together with applicable stock options and RSUs for each stockholder." *Id.*

^{ix}See Cameron Int'l Corp., Current Report (Form 8-K), at 3 (May 15, 2012).

^xSee *id.* Information regarding the number of outstanding shares on the Record Date can be found at Cameron Int'l Corp., Definitive Proxy Statement (Schedule 14A), at 3 (Mar. 28, 2012).

^{xi}See Cameron Int'l Corp., Definitive Proxy Statement *supra* note x, at 4-5.

^{xii}See DIRECTV, Current Report (Form 8-K), at Item 5.07 (May 3, 2011); Allen, *Forum-Shopping*, *supra* note iv, at 4 & n.14 (discussing the shareholder vote on DIRECTV's charter amendment).

^{xiii}See DIRECTV, Current Report, *supra* note xii, at Item 5.07; Allen, *Forum-Shopping*, *supra* note iv, at 4 & n.14 (discussing the shareholder vote on DIRECTV's charter amendment).

^{xiv}See DIRECTV, Definitive Proxy Statement (Schedule 14A), at 21 (Mar. 18, 2011). The March 2011 proxy material indicates that "[e]ach of the individuals listed above, as well as all of the current directors and officers as a group own less than 1% of the outstanding shares and voting power of Common Stock." *Id.* The 20.1% figure set forth above estimates a combined ownership interest for all directors and officers of 1%, which may overstate the actual ownership interest of this group. See *id.*

^{xv}In December 2011, Insweb Corporation changed its name to Internet Patents Corporation. See Internet Patents Corp., Current Report (Form 8-K), at 1 (Dec. 28, 2011).

^{xvi}See Insweb Corp., Current Report (Form 8-K), at 2 (July 21, 2011).

^{xvii}*Id.*

^{xviii}*See* Insweb Corp., Definitive Proxy Statement (Schedule 14A), at 52 (Nov. 23, 2011). This figure is "[c]alculated on the basis of 6,397,166 shares of Common Stock outstanding as of November 15, 2011." *Id.*

^{xix}*See* Lighting Science Grp. Corp., Current Report (Form 8-K), at Item 5.07 (Aug. 12, 2011); ALLEN STUDY, *supra* note 1, at 5 & n.17 (discussing the outcome of shareholder votes on charter amendment proposals in 2011).

^{xx}*See* Lighting Science Grp. Corp., Current Report, *supra* note xix, at Item 5.07; ALLEN STUDY, *supra* note 1, at 5 & n.17 (discussing the outcome of shareholder votes on charter amendment proposals in 2011).

^{xxi}*See* Lighting Science Grp. Corp., Definitive Proxy Statement (Schedule 14A), at 34 (July 28, 2011).

^{xxii}*See* Sally Beauty Holdings, Inc., Current Report (Form 8-K), at 2-3 (Jan. 27, 2012).

^{xxiii}*Id.*

^{xxiv}*See* Sally Beauty Holdings, Inc., Definitive Proxy Statement (Schedule 14A), at 61-62 (Dec. 7, 2011).

^{xxv}*See* CapTerra Fin. Grp., Inc., Definitive Information Statement (Schedule 14C), at 2 (Mar. 7, 2011).

^{xxvi}In January 2011, CapTerra's Board of Directors adopted resolutions approving the Reincorporation, then elected to seek the written consent of the Majority Shareholders in lieu of a shareholder vote. *See id.* at 2. Four shareholders who collectively controlled approximately 93% of the outstanding shares of the corporation's common stock consented in writing to the Reincorporation. *Id.* No other shareholder consent was required or solicited. *Id.*

^{xxvii}*See* CapTerra Fin. Grp., Inc., Definitive Information Statement, *supra* note xxv, at 2.

^{xxviii}*See id.*

^{xxix}*See id.* at 16. Note that in the proxy material, 11,770,397 shares are double counted between GDBA Investments, LLC and Mr. Backman, who controls GDBA Investments, LLC. *See id.* The 99.74% figure is based on 49,326,534 shares beneficially owned by all directors, designees and executive officers as a group out of a total of 49,455,841 shares outstanding as of January 15, 2011. *See* CapTerra Fin. Grp., Inc., Definitive Information Statement, *supra* note xxv, at 16. The proxy material calculates the group's ownership percentage to be 98.4%, but the percentage actually appears to be 99.74%. *See id.*

^{xxx}*See* Life Techs. Corp., Current Report (Form 8-K), at Item 5.07 (Apr. 28, 2011); Walter J. Mostek, Jr. & Peter B. Wolf, *United States: Exclusive Forum Provisions in Corporate Charters and Bylaws* (July 18, 2011), available at <http://www.mondaq.com/unitedstates/x/138308/Directors+Officers+Executives+Shareholders/Exclusive+Forum+Provisions+In+Corporate+Charters+And+Bylaws>; ALLEN STUDY, *supra* note 1, at 5 & n.17.

^{xxxi}*See* Life Techs. Corp., Current Report, *supra* note xxx, at Item 5.07; Mostek & Wolf, *supra* note xxx; ALLEN STUDY, *supra* note 1, at 5 & n.17.

^{xxxii}*See* Life Techs. Corp., Definitive Proxy Statement (Schedule 14A), at 42-43 (Mar. 18, 2011).

^{xxxiii}*See* Pure Bioscience, Current Report (Form 8-K), at Item 5.07 (Feb. 11, 2011); *Pure Bioscience Receives Shareholder Approval for Delaware Reincorporation and Increase in Authorized Shares*, PURE BIOSCIENCE (Feb. 11, 2011), available at <http://www.purebio.com/about/article/145>.

^{xxxiv}*See* Pure Bioscience, Current Report, *supra* note xxxiii, at Item 5.07; *Bioscience Receives Shareholder Approval for Delaware Reincorporation and Increase in Authorized Shares*, *supra* note xxxiii.

^{xxxv}*See* Pure Bioscience, Definitive Proxy Statement (Schedule 14A), at 23 (Nov. 30, 2010).

^{xxxvi}*See* Williams-Sonoma, Inc., Current Report (Form 8-K), at 3 (May 25, 2011).

^{xxxvii}*See id.*; Williams-Sonoma, Inc., Definitive Proxy Statement (Schedule 14A), at 2 (Apr. 7, 2011) (identifying number of outstanding shares).

^{xxxviii}*See* Williams-Sonoma, Inc., Definitive Proxy Statement, *supra* note xxxvii, at 88-89.