

Another Diversity Suit Tossed on Forum Selection Grounds

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This week, another shareholder derivative suit was [dismissed](#) based on a forum selection clause contained in the company's bylaws. In November 2020, a shareholder filed a derivative action alleging that directors and officers of The Gap, Inc., an apparel company, had failed to create meaningful diversity on the Board of Directors on within the company's leadership roles. The plaintiff also alleged that Gap made false statements about the diversity of the company's workforce, as well as its efforts to increase diversity among its employees.

Importantly, the plaintiff brought her lawsuit in the Northern District of California. In its motion to dismiss the complaint, Gap argued it maintains bylaws that designate the Delaware Court of Chancery as the exclusive forum for derivative claims brought on behalf of the company. Acknowledging that her lawsuit fell within the scope of the clause and that the clause was valid, the plaintiff argued that the clause should not have been enforced against her claims, in part because she also alleged violations of federal law, namely, Section 14(a) of the Securities Exchange Act of 1934. In the plaintiff's view, the Exchange Act's "anti-waiver" provision, which provides that federal courts have exclusive jurisdiction over Exchange Act claims, mandated her entire suit being litigated in the California federal district court.

That court disagreed. It held that the anti-waiver provision does not outweigh the strong federal policy in favor of enforcing forum-selection clauses, such as the one in Gap's bylaws. As [previously noted](#) in this space, numerous companies have adopted forum selection clauses in their charters or bylaws that identify specific courts to litigate claims in recent years. The fact that the plaintiff alleged an Exchange Act claim could not, standing alone, supersede this strong public policy.

[Many](#) of the [recently-filed](#) derivative suits alleging that companies lack diversity in their corporate leadership have been filed in California. It remains to be seen which, if any, of those companies maintain similar forum selection clauses, and whether they will be subject to similar dismissals. Additionally, we may see this same suit against Gap refiled in Delaware Chancery Court – without the Exchange Act claim – in accordance with the company's forum selection clause. Watch this space for future updates.

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