UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYMENT RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION	:	Master File No. 09 MDL 2058 (DC)
THIS DOCUMENT RELATES TO: All Securities Actions	:	

LEAD PLAINTIFFS' BRIEF IN OPPOSITION
TO THE BANK DEFENDANTS' MOTION TO CERTIFY

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Preliminary Statement

Defendants ask this Court to do what no court has ever done: abdicate to a state court the interpretation of the Securities Exchange Act of 1934 ("Exchange Act"), and the determination of when a plaintiff can bring a direct action to enforce Section 14(a) of the Exchange Act in federal court. Not surprisingly, however, Defendants fail to cite a single case where a federal court has certified any question arising under the Exchange Act to a state court. This is because no such case exists in the more than 75 years since the Exchange Act became law. For this and the other reasons summarized below, Defendants' request for certification should be rejected.

First, Congress granted federal courts exclusive jurisdiction over Exchange Act claims. Thus, state courts may not be called upon to issue opinions on when a plaintiff can or cannot pursue rights and remedies under Section 14(a) in federal court. Recognizing this fundamental tenet, the Delaware Supreme Court has long held that it may not "usurp" exclusive federal jurisdiction over Section 14(a) claims, and for over 60 years has explicitly declined to "attempt to resolve" any issue implicating that provision, even when such issues are framed as state law questions. *Standard Power & Light Corp. v. Inv. Assocs.*, 51 A.2d 572, 579 (Del. 1947) (refusing to decide state law issue which required interpretation of the Exchange Act and holding that "[t]his issue lies solely within the exclusive jurisdiction of other tribunals under Section 27 of the [Exchange] Act, and this Court will not usurp the jurisdiction or any portion thereof").

Second, certification is not appropriate here because the question at issue has long been settled as a matter of federal law. As the U.S. Supreme Court held almost 50 years ago in sustaining a claim brought directly under Section 14(a), a shareholder alleging that its right to "fair corporate suffrage" has been infringed possesses a "right of action [] as to both derivative and direct causes." *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964). Following *Borak*, every court to have addressed the issue has held that where, as here, a plaintiff alleges that its right to cast an informed

vote has been infringed, its Section 14(a) claim is direct. *See, e.g.*, *Katz v. Pels*, 774 F. Supp. 121, 127 (S.D.N.Y. 1991) (Duffy, J.) and authorities cited in Sections IV and V, *infra*. Significantly, the Delaware Supreme Court has explicitly recognized that Congress granted shareholders a direct right of action under Section 14(a), and that this right exists independently of Delaware's separate body of fiduciary duty law. *See Arnold v. Society For Savs. Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996) (*en banc*) ("The corporation, as the issuer of the proxy statement, is directly liable under [Section 14(a)] and [Rule 14a-9]."") (emphasis added). Tellingly, Defendants ignore the dozens of decisions – including those from the United States Supreme Court, the Second Circuit, courts within this District, and Delaware's highest court – which expressly recognize that a plaintiff has a federal right to bring a direct Section 14(a) claim without any inquiry into state law. Defendants' failure to address these cases speaks volumes about the weakness of their certification motion.

Third, while the vast majority of courts have looked only to federal law in holding that Section 14(a) claims alleging infringement of the right to an informed vote are direct, even the few federal courts who have looked to Delaware law for guidance have uniformly concluded that a shareholder may bring such claims directly, without the need to first seek guidance from the Delaware Supreme Court. *See, e.g.*, *New York City Employees' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010).

Fourth, although Delaware's breach of fiduciary duty law does not control here (and Lead Plaintiffs do not assert any breach of fiduciary duty claims), even if it did, Delaware law is clear and settled on this issue. It is a bedrock principle of Delaware law that infringement of the right to an informed vote gives rise to a direct breach of fiduciary duty claim. The Delaware Supreme Court has repeatedly held with respect to breach of fiduciary duty claims that "where it is claimed that a duty of disclosure violation impaired the stockholders' right to cast an informed vote, that claim is direct." *J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 772 (Del. 2006) (*en banc*)

(emphasis added). Given these clear holdings, the Delaware Court of Chancery has issued a host of decisions unanimously reaffirming the settled tenet that such claims are "quite obviously" direct. *See, e.g.*, *Wells Fargo & Co. v. First Interstate Bancorp*, 1996 WL 32169, at *8 (Del. Ch. Jan. 18, 1996) and authorities cited in Section VI, *infra*.

Delaware law is so well-settled on this point that Defendants concede in their brief that shareholders who are denied the right to cast an informed vote "have a direct claim" under Delaware law. Defs. Br. at 11. Recognizing that the question they originally sought to certify has been decided against them, Defendants now change course and ask the Court to certify an entirely different question: namely, what damages Lead Plaintiffs may seek for their direct claim. *Id*. at 12. The fact that Defendants have now asked the Court to certify a second question shows that there is no merit to their request for certification. Moreover, even if the Court were inclined to consider Defendants' new certification proposal, it fares no better than their first one. While Defendants principally argue that Delaware law prohibits an award of damages in connection with a consummated merger, the United States Supreme Court rejected this argument in *Borak*, holding that federal law, not state law, "control[s]" what remedies exist under Section 14(a), and that federal law specifically authorizes "damages to a corporate stockholder with respect to a consummated merger." 377 U.S. at 428, 434.

In sum, whether courts consider only federal law or also look to Delaware law, each and every court nationwide to have ever considered the issue has uniformly held that a Section 14(a) claim alleging infringement of the right to an informed vote constitutes a direct claim under the Exchange Act. Demonstrating the unprecedented nature of Defendants' assertion, Defendants have failed to cite a single case where a court has held that a Section 14(a) claim must be pleaded derivatively. The contention that this question of settled law should be certified to any court – let alone one that lacks jurisdiction to hear Exchange Act claims – is meritless.

Argument

I. Standards For Certification

Certification is permitted only in "exceptional circumstances." *DiBella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005) ("issues of state law are not to be routinely certified"). Courts must "use much judgment, restraint and discretion in certifying. We do not abdicate." *L. Cohen & Co., Inc. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1419, 1424 (D. Conn. 1986). As Judge Cabranes held in a comprehensive opinion, certification should occur only in circumstances entirely absent here, namely, when certification would avoid: (1) "the premature decision of federal constitutional claims;" or (2) "the unnecessary disruption of state governmental functions." *Id.* at 1423; *see also Strougo v. Bassini*, 1 F. Supp. 2d 268, 274 (S.D.N.Y. 1998) (Sweet, J.) (*Cohen* is "the most authoritative guidance on when certification should be sought"), *vacated in part on other grounds by* 282 F.3d 162 (2d Cir. 2002).

Questions of settled law may not be certified. Even where state law on an issue is unclear, it is the court's "job to predict how the forum state's highest court would decide the issues." *DiBella*, 403 F.3d at 111. Certification is also disfavored where the question to be certified would not "resolve the litigation" (*Fid. & Guar. Ins. Underwriters, Inc. v. JASAM Realty Corp.*, 540 F.3d 133, 144 (2d Cir. 2008)), or where the delay and increased costs would potentially prejudice litigants (*see Cohen*, 629 F. Supp. at 1423-24 (listing factors)).

As set forth below, Defendants' motion fails to meet the most rudimentary requirements for certification. Federal law, not state law, governs whether Lead Plaintiffs' Section 14(a) claim is direct. Further, this issue has been settled for decades, as courts uniformly hold that a plaintiff may assert a direct Section 14(a) claim alleging infringement of its right to an informed vote – exactly as Lead Plaintiffs have alleged here.

II. Whether Lead Plaintiffs' Section 14(a) Claim Is Direct Is A Question Of Federal Law That Never Has Been, And Cannot Be, Certified To A State Court

Defendants ask this Court to take the remarkable action of certifying to the Delaware Supreme Court a question arising under a federal statute, namely, whether Lead Plaintiffs' Section 14(a) claim is direct. It is axiomatic that federal courts, not state courts, are the sole arbiters of Exchange Act claims. Section 27 of the Exchange Act grants federal courts "exclusive jurisdiction" over all "suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa. Since state courts may not even entertain Exchange Act claims, there is no basis to delegate to a state court the authority to determine the Exchange Act's scope and a plaintiff's ability to enforce its rights and remedies thereunder in federal court. Indeed, such delegation would directly contravene Congress's decision to lodge responsibility for these decisions exclusively in the federal courts. *See D'Alessio v. New York Stock Exchange*, 258 F.3d 93, 103-04 (2d Cir. 2001) (holding that "interpret[ation] [] of the Exchange Act is wholly a matter of federal law and, indeed, a matter of intense federal concern given the importance of federal regulation of the stock market"). Thus, no court has ever certified to a state court the question of what causes of action or type of relief a plaintiff may pursue in federal court under the Exchange Act.

Recognizing that the interpretation of the Exchange Act is solely the province of federal courts, the Delaware Supreme Court has long held that it may not decide any "issue" arising under Section 14(a) – even when those issues have been shoehorned into purported questions of state law, as Defendants have attempted to do here. *Standard Power*, 51 A.2d at 579. In *Standard Power*, the plaintiff challenged a corporate election under Delaware law, arguing that certain votes cast in the election should be voided under the state law doctrine of "unclean hands" because the defendant had solicited proxies in violation of Section 14(a). *Id.* Because this purported state law argument required the court to decide an issue arising under Section 14, the Delaware Supreme Court held

that "[w]e will not attempt to resolve" it, stating:

> This issue lies solely within the exclusive jurisdiction of other tribunals under Section 27 of the [Exchange] Act, and this Court will not usurp the jurisdiction or any portion thereof. It is understandable why the legislative intent as to jurisdiction was so clearly expressed under Section 27, for, if uniformity of enforcement in the true sense is the object of the purpose to be attained, centralization of judicial decision should be as designated. Likewise, the doctrine of unclean hands as advanced is not properly before us by reason of our refusal to consider the validity of the solicitation.

Id. (emphasis added).

As the Delaware Supreme Court recognized in *Standard Power*, strict adherence to the grant of exclusive federal jurisdiction is critical to allowing the Exchange Act to function as an effective scheme of interstate securities regulation. Indeed, if Defendants' argument were accepted, and state law were allowed to determine the existence of direct liability under the Exchange Act, then the enforcement of the Exchange Act would vary from state to state and company to company, depending on where the company chose to incorporate itself and the unique contours of the law of that particular jurisdiction. This is an absurd result and an outcome that the Second Circuit has rejected as antithetical to the system of uniform federal regulation that Congress enacted in the Exchange Act. *See Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 355, 357 (2d Cir. 1990) (rejecting the "crazy-quilt consequences of borrowing from state law for federal securities laws claims" because it would create "uncertainty and lack of uniformity, promote forum shopping by plaintiffs and result in wholly unjustified disparities in the rights of parties litigating identical claims in different states") (emphasis added). Thus, contrary to what Defendants contend, whether they are directly liable under Section 14(a) does not turn on which state BoA chose to incorporate itself in.

In deference to the uniform scheme of interstate securities regulation that Congress enacted in the Exchange Act, Delaware courts have repeatedly reaffirmed *Standard Power* and refused to consider matters arising under the Exchange Act and similar federal securities statutes. *See Am. Hardware Corp. v. Savage Arms Corp.*, 136 A.2d 690, 693 (Del. 1957) ("The Courts of this State

will not assume to trespass upon this exclusive jurisdiction" over Section 14(a) claims); *Friedman v. Alcatel*, 752 A.2d 544, 556 (Del. Ch. 1999) ("Compelling circumstances here demand respect for federal courts' determination of federal laws especially where the federal statute mandates that the federal system exercise exclusive jurisdiction."); *EAC Indus. v. Frantz Mfg. Co.*, 1985 WL 3200, at *10 n.2 (Del. Ch. June 28, 1985) (declining to address claimed "violations of federal securities law" in parallel federal suit because "[t]his court will not intrude into this federal preserve"); *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431, 434 (Del. Ch. 1972) (holding that Section 14(a) claim in parallel federal proceeding "involves a purely Federal remedy as to which this court does not have subject matter jurisdiction"); *Williams v. Sterling Oil of Okla., Inc.*, 267 A.2d 630, 633 (Del. Ch. 1970) (refusing to consider issues concerning "enforce[ment] [of] rules and regulations promulgated under the [Exchange] act"), *rev'd on other grounds by* 273 A.2d 264 (Del. 1970).

These decisions comport with longstanding Supreme Court authority establishing that legal rules affecting the viability of federal claims are a matter of federal law. For example, in *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942), the Court rejected the argument that state law could limit a party's ability to assert a claim under a federal statute (in that case, the Sherman Antitrust Act), and unequivocally held that:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.

Id. at 176 (emphasis added).

In *Borak*, 377 U.S. 426, the Supreme Court squarely addressed the precise issue here, namely, whether state law governed a plaintiff's rights and remedies under Section 14(a). Quoting the holding of *Sola* set forth directly above, the Court flatly rejected the argument that state law governed, and held that any questions concerning a plaintiff's rights and remedies under Section 14(a) were "federal questions, the answers to which are to be derived from the statute and the

federal policy which it has adopted." *Id.* at 433. The *Borak* Court explained that it was imperative for federal law to govern in order to effectuate Section 14(a)'s purpose of "protection of investors," noting that, if state law were to control, "the hurdles that the victim might face … might well prove insuperable to effective relief" and "the whole purpose of [ ] section [14(a)] might be frustrated." *Id.* at 432, 435.

In accord with *Borak*, Judge Friendly held in *Electronic Specialty Co. v. International Controls Co.*, 409 F.2d 937 (2d Cir. 1969), that federal law, rather than state common law concerning derivative actions, governs whether a shareholder has standing to sue directly under Section 14(e) of the Exchange Act. In sustaining the direct claim at issue there, Judge Friendly wrote: "In determining who has standing to enforce duties created by statute, a court's quest must be for what will best accomplish the purposes of the legislature. In the instant context the proper solution is not necessarily determined by the rules developed in equity to delimit the circumstances under which a stockholder may assert a claim on his corporation's behalf." *Id*. at 946.

Following *Borak* and *Electronic Specialty*, numerous courts – including those within this District – have repeatedly held that the question of whether a Section 14(a) claim is direct is purely a matter of federal law. *See Katz v. Pels*, 774 F. Supp. 121, 127 (S.D.N.Y. 1991) (Duffy, J.) (holding that "in light of ... *Borak*, a shareholder who alleges a deceptive or misleading proxy solicitation is entitled to bring both direct and derivative suits" under Section 14(a)); *Yamamoto v. Omiya*, 564 F.2d 1319, 1326 (9th Cir. 1977); *Rudolph v. Cummins*, 2007 WL 1189632, at *2 n.4 (S.D. Tex. Apr. 19, 2007) ("[F]ederal common law governs the analysis of whether a shareholder is asserting a direct or derivative claim under Section 14(a)."); *Edge Partners, L.P. v. Dockser*, 944 F. Supp. 438, 440 (D. Md. 1996); *see also In re Price/Costco S'holder Litig.*, 1995 WL 786631, at *7 (W.D. Wash. Oct. 30, 1995) (for Section 14(e) claim, "federal law controls the determination of whether the claim is direct or derivative").

Significantly, in their motion, Defendants ignore each and every decision cited above. Rather than address any of these cases, Defendants rely principally on *Halebian v. Berv*, 590 F.3d 195 (2d Cir. 2009) to advance the sweeping proposition that the Second Circuit supposedly endorses the certification of questions concerning "whether shareholders have standing to assert a direct claim under a federal statutory provision." Defs. Br. at 1 & n.2. Defendants are wrong. First, *Halebian* did not involve an Exchange Act claim, but derivative and direct breach of fiduciary duty claims that arose under Massachusetts law, and a claim arising under the Investment Company Act ("ICA"). *Id.* at 201. Second, the question that the Second Circuit actually certified concerned only the derivative breach of fiduciary duty claim and the application of a Massachusetts state statute to that claim, and not the ICA. *Id.* at 214. Third, the Second Circuit agreed to certify the question presented only because "no appellate court ha[d] ever discussed" the state statute at issue (*id*. at 214) – a far cry from the situation here, where Defendants concede that the Delaware Supreme Court has "expressly addressed" the very issue they seek to certify (Defs. Br. at 7).

Moreover, *Halebian* does not stand for the proposition that courts should look to state law when determining whether an Exchange Act claim is direct, as Defendants contend. *See* Defs. Br. at 1-2 & n.2. In *Halebian*, while the Second Circuit also invited the Massachusetts court to address any state law issues that might be relevant to the claim arising under the ICA, there is a critical distinction between the ICA and the Exchange Act. Unlike the Exchange Act, the ICA provides for concurrent state and federal jurisdiction, thus allowing state courts to interpret and apply the statute. *See* 15 U.S.C. § 80a-43. Indeed, the Supreme Court has specifically held that federal courts may look to state law in determining whether an action brought under the ICA is direct or derivative. *See, e.g., Kamen v. Kemper Fin. Servs.*, 500 U.S. 90 (1991). In contrast, with respect to Exchange Act claims, the Supreme Court has expressly held the opposite, instructing courts in *Borak* to look solely to federal law. *Borak*, 377 U.S. at 433-35. Notably, in *Borak*, the Supreme Court had ample

opportunity to look to state law to determine whether the plaintiff could assert his direct Section 14(a) claim – indeed, it was explicitly asked to do so – and refused. Accordingly, *Halebian* does not stand for the proposition that Delaware state law is relevant to Lead Plaintiffs' Exchange Act claim, or that this Court should look to state law in determining whether Lead Plaintiffs' claim is direct.

Moreover, even when courts have looked to Delaware law for guidance in determining whether a Section 14(a) claim is direct – which, as discussed herein, is incorrect and represents the small minority of courts to consider the issue – the ultimate question remains one of federal law which cannot be delegated to a state court. *See Borak*, 377 U.S. at 434 ("[T]he fact that questions of state law must be decided does not change the character of the right; it remains federal."). Indeed, even in the narrow context in which the Supreme Court has looked to state law for guidance – in interpreting the demand requirements for derivative suits under the ICA – the Supreme Court has repeatedly held that such interpretation unquestionably remains a matter of "federal common law," not state law. *See Kamen*, 500 U.S. at 97 ("[I]t is clear that the contours of the demand requirement in a derivative action founded on the ICA are governed by federal law. Because the ICA is a federal statute, any common law rule necessary to effectuate a private cause of action under that statute is necessarily federal in character.") (emphasis in original) (citing *Sola*, 317 U.S. at 176); *Burks v. Lasker*, 441 U.S. 471, 477 (1979) (same).

In sum, whether Lead Plaintiffs' Section 14(a) claim is direct is a question of federal law that lies within this Court's exclusive jurisdiction, and cannot be – and never has been – certified to a state court. *See, e.g., Stewart v. Milford-Whitinsville Hosp.*, 349 F. Supp. 2d 68, 70, 71 n.1 (D. Mass. 2004) (denying certification of question concerning the application of state law to federal statutory claim because it raised a "question of federal law").

III. The Delaware Supreme Court Has Recognized That Section 14(a) Provides A Direct Right Of Action That Is Distinct From And Independent Of Delaware's Fiduciary Duty Law

In *Arnold*, 678 A.2d at 534, the Delaware Supreme Court expressly recognized that Section 14(a) creates a direct cause of action for a "disclosure violation in a merger proxy statement," and that this direct cause of action is entirely distinct from Delaware's separate body of fiduciary duty law. There, the plaintiff sought to bring a direct claim against Bancorp for breach of the fiduciary duty of disclosure. However, because corporations owe no fiduciary duties under Delaware law, Delaware courts did not recognize a direct claim against a corporation for breach of the duty of disclosure. *Id.* at 534-35, 539. The plaintiff argued that the court should model Delaware law on Section 14(a) – which, unlike state law, imposed direct liability on a company for misleading merger proxy solicitations. *Id.* at 539. In refusing to do so, the unanimous *en banc* Delaware Supreme Court first held that, unlike state common law, Section 14(a) clearly imposed direct liability on a company for misleading merger proxy solicitations. Relying exclusively on the terms of the statute and the federal case law interpreting it, the Delaware Supreme Court held:

> Section 14(a) and Rule 14a-9 make it "unlawful for any person … to solicit any proxy" by way of a materially misleading proxy statement. *Gould v. American Hawaiian Steamship Co.*, D. Del., 331 F. Supp. 981, 998 (1971). The corporation, as the issuer of the proxy statement, is directly liable under the statute and the rule. *Id.* Liability can be imposed against a corporation for negligently preparing a proxy statement. *Gerstle v. Gamble-Skogmo, Inc.*, 2d Cir. 478 F.2d 1281 (1973). Individual directors can also be liable personally if they participated sufficiently in the drafting. *See Salit v. Stanley Works*, D. Conn., 802 F. Supp. 728, 733 (1992); *Wilson v. Great Am. Indus., Inc.*, 2d Cir. 855 F.2d 987, 995 (1988).

Id. at 539 (emphasis added).

Next, recognizing that the scheme of direct corporate liability Congress created under Section 14(a) was entirely distinct from and independent of Delaware's fiduciary duty law, the Delaware Supreme Court refused to conflate the two very different legal regimes:

> We see no legitimate basis to create a new cause of action which would replicate, by state decisional law, the provisions of section 14 of the 1934 Act. Such a result would represent a significant change to the existing matrix of [state law fiduciary]

> duties which governs the relationship among stockholders, directors, and corporations. If such a change is to be, it is best left to the General Assembly.

Id.

Thus, *Arnold* makes clear that, contrary to Defendants' assertion, Delaware's fiduciary duty law is entirely distinct from the direct cause of action that Congress authorized under Section 14(a) of the Exchange Act. Since *Arnold*, Delaware courts have repeatedly reaffirmed this principle. Indeed, Vice Chancellor Strine and other Delaware courts have specifically recognized that Delaware law is distinct from federal securities law, and that the decisions of Delaware courts do not implicate the Exchange Act:

> An exercise in judicial legislation of this sort would be disrespectful of the pre-eminent role played by the federal government in the regulation of the nation's securities markets. While Delaware courts have recognized equitable [common law] causes of action addressing certain activities also regulated by federal law, those causes of action regulate the fiduciary conduct of corporate directors, an area of traditional state concern recognized by the federal government. Outside of that narrow area, the Delaware courts have consistently refused to regulate the securities markets through the judicial recognition of new equitable claims, especially when those claims (as here) would mirror statutory claims falling within the exclusive jurisdiction of the federal courts.

RGC Int'l Invest., LDC v. Greka Energy Corp., 2001 WL 312454, at *9 (Del. Ch. Mar. 13, 2001) (emphasis added). *See also Malone v. Brincat*, 722 A.2d 5, 12-13 (Del. 1998) (because "federal law has regulated disclosures by corporate directors into the general interstate market," Delaware has refused to create "fraud on the market" claims mirroring the Exchange Act "[i]n deference to the panoply of federal protections that are available to investors"); *Loudon v. Archer-Daniels Midland Co.*, 700 A.2d 135, 141 n.18 (Del. 1997) ("[T]he federal scheme of disclosure is not replicated in Delaware law."); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 475 n.8 (Del. 1992) (cases "based on federal securities law violations" are "readily distinguishable" from Delaware common law actions); *Friedman*, 752 A.2d at 556 (action based solely on federal securities law did not implicate "Delaware's interest in its statutory or common law"); *Kahn Bros. & Co. v. Fischbach Corp.*, 1988 WL 122517, at *5 (Del. Ch. Nov. 5, 1988) (Section 14(a) is "an independent source of relief" from

state law).

In sum, the Delaware Supreme Court – the very court to which Defendants seek certification – has already recognized that Congress created direct liability under Section 14(a) for claims alleging misleading proxy solicitations, and that such direct liability exists independently of Delaware's separate body of fiduciary duty law.

IV. The U.S. Supreme Court And Federal Courts Across The Country Have Repeatedly Recognized The Right Of Shareholders To Bring Direct Claims Under Section 14(a) As A Matter Of Federal Law

The United States Supreme Court has repeatedly recognized, without regard to state law, the right of shareholders to bring direct Section 14(a) claims where they have been deprived of the right to cast an informed vote. The Supreme Court first recognized this right almost fifty years ago in *Borak*, 377 U.S. at 431. There, the plaintiff brought a direct Section 14(a) claim alleging that the defendant had solicited shareholder approval of a merger through a misleading proxy. *Id.* at 427, 429-30. The defendant argued that Section 14(a) did not authorize any private right of action; that even if it did, it authorized only direct claims; and that the plaintiff's claim was derivative in nature and thus outside the scope of Section 14(a). *Id.* at 431. The Supreme Court emphatically rejected these arguments. Underscoring that Congress designed Section 14(a) specifically to "protect[] investors," and that the statute embodied "the congressional belief that fair corporate suffrage is an important right that should attach to every equity security brought on a public exchange," the Supreme Court held "that a right of action exists as to both derivative and direct causes," and sustained the direct claim under review. *Id.* at 431, 432.

In its subsequent decisions sustaining direct Section 14(a) claims, the Supreme Court has continued to affirm *Borak's* holding that shareholders may bring a direct Section 14(a) claim where their right to "fair corporate suffrage" has been infringed. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) (allowing direct Section 14(a) claim based on misleading merger proxy to

proceed to trial); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970) (upholding both direct and derivative Section 14(a) claims based on a misleading merger proxy). The Supreme Court emphasized in those decisions that it was guided by the broad remedial purpose of Section 14(a), namely, to protect a shareholder's right to an informed vote:

> As we stressed in *Borak*, section 14(a) stemmed from a congressional belief that '(f)air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.' The provision was intended to promote 'the free exercise of the voting rights of stockholders' by ensuring that proxies would be solicited with 'explanation to the stockholder of the real nature of the questions for authority to cast his vote is sought.'

Mills, 396 U.S. at 381 (internal citations omitted); *see also TSC Indus.*, 426 U.S. at 448 (Court "guided" by Section 14(a) and Rule 14a-9's "broad remedial purpose" to "ensure disclosures by corporate management in order to enable the shareholders to make an informed choice").

Relying on the Supreme Court's decisions in *Borak* and *Mills*, federal courts have repeatedly held for almost 50 years that shareholders may plead Section 14(a) claims directly, without regard to state law. As the Ninth Circuit held in *Yamamoto*:

> We [ ] hold that in light of the teachings of *Borak* and *Mills*, a shareholder who alleges a deceptive or misleading proxy solicitation is entitled to bring both direct and derivative suits. The former action protects the shareholders' interest in "fair corporate suffrage."

564 F.2d at 1326. Likewise, in *Katz*, Judge Duffy relied on *Borak* to reject the argument that Section 14(a) claims alleging misleading proxy solicitations must be brought derivatively, and to explicitly hold that "a shareholder who alleges a deceptive or misleading proxy solicitation is entitled to bring both direct and derivative suits." 774 F. Supp. at 127 (citing *Borak*).

The Second Circuit similarly relied on *Borak* to reject a challenge to a shareholder's standing to bring a direct Section 14(a) claim in *United Paperworkers Int'l Union v. Int'l Paper Co.*, 985 F.2d 1190 (2d Cir. 1993). There, the plaintiff alleged that the defendant made misleading statements concerning a shareholder proposal in a proxy statement. The defendant argued that only the sponsor of the proposal, and not the plaintiff, had standing to bring the direct claim. *Id.* at 1197.

In rejecting this argument, the Second Circuit emphasized that there was "no sound basis" for denying "any shareholder" a right of action under Section 14(a):

> The *Borak* Court found that implicit in § 14(a)'s broad remedial purposes, which include promotion of the free exercise of the voting rights of stockholders and the protection of investors, was the availability of judicial relief where necessary to achieve that result. 377 U.S. at 432, 84 S.Ct. at 1559. We see no sound basis for denying a right of action to any shareholder who seeks to remedy the issuer's misleading statements in or omissions from proxy materials circulated in connection with a matter submitted for shareholder vote.

Id. at 1198 (emphasis added).

Precisely because federal law so clearly establishes a shareholder's right to bring a direct Section 14(a) claim for misleading proxy solicitations, the Second Circuit has repeatedly sustained direct Section 14(a) claims without any inquiry into state law. *See Koppel v. 4987 Corp.*, 167 F.3d 125 (2d Cir. 1999); *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 54 F.3d 69 (2d Cir. 1995); *Wilson v. Great Am. Indus., Inc.*, 979 F.2d 924 (2d Cir. 1992); *Mendell v. Greenberg*, 927 F.2d 667 (2d Cir. 1991); *Osofsky v. Zipf*, 645 F.2d 107 (2d Cir. 1981); *Weisberg v. Coastal States Gas Corp.*, 609 F.2d 650 (2d Cir. 1979); *Shore v. Parklane Hosiery Co.*, 565 F.2d 815 (2d Cir. 1977); *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973) (Friendly, C.J.). *See also Electronic Specialty*, 409 F.2d at 946 (Friendly, J.) (relying on the "rule already recognized" allowing shareholder to bring direct Section 14(a) claim to permit shareholder to also bring direct Section 14(e) claim).

In light of the Second Circuit's recognition that shareholders may bring direct Section 14(a) claims alleging misleading proxy solicitations, numerous courts in this District have upheld such claims solely as a matter of federal law. *See, e.g., Police and Fire Ret. Sys. of Detroit v. SafeNet, Inc.*, 645 F. Supp. 2d 210 (S.D.N.Y. 2009) (Crotty, J.); *In re AOL Time Warner, Inc. Sec. Litig.*, 381 F. Supp. 2d 192 (S.D.N.Y. 2004) (Kram, J.); *United Paperworkers Int'l Union v. Int'l Paper Co.*, 801 F. Supp. 1134 (S.D.N.Y. 1992) (Brieant, C.J.); *Katz*, 774 F. Supp. 121.

Likewise, Circuit Courts across the country uniformly uphold direct Section 14(a) claims for misleading proxy solicitations, without any reference to state law. *See, e.g., Stahl v. Gibraltar Fin. Corp.*, 967 F.2d 335 (9th Cir. 1992); *W. Dist. Council of Lumber Prod. and Indus. Workers v. La. Pac. Corp.*, 892 F.2d 1412 (9th Cir. 1989); *Herskowitz v. Nutri/System, Inc.*, 857 F.2d 179 (3d Cir. 1988) (allowing direct Section 14(a) claim based on misleading proxy statement to proceed to trial); *Lockspeiser v. W. Md. Co.*, 768 F.2d 558 (4th Cir. 1985); *Pavlidis v. New England Patriots Football Club*, 737 F.2d 1227 (1st Cir. 1984); *Smillie v. Park Chem. Co.*, 710 F.2d 271 (6th Cir. 1983) (awarding attorney's fees in connection with direct and derivative Section 14(a) claims based on misleading proxy); *Gladwin v. Medfield Corp.*, 540 F.2d 1266 (5th Cir. 1976); *Northway, Inc. v. TSC Indus., Inc.*, 512 F.2d 324 (7th Cir. 1975) (granting summary judgment on direct Section 14(a) claim based on misleading merger proxy), *rev'd on other grounds*, 426 U.S. 438 (1976).

In sum, federal courts nationwide have overwhelmingly recognized, without reference to state law, that a plaintiff may assert a direct Section 14(a) claim based on misleading proxy solicitations. Defendants ignore each of the cases cited above, and have failed to offer a single decision that departs from this uniform precedent.

V. The Few Courts That Have Considered State Law Have Uniformly Concluded That A Section 14(a) Claim Is Direct Where, As Here, It Alleges Infringement Of The Right To An Informed Vote

While a handful of courts have improperly considered state law in determining whether a Section 14(a) claim is direct, those courts too have uniformly concluded that deprivation of the right to a fully informed vote gives rise to a direct claim under Delaware law. Significantly, none of these courts saw any need to certify the question.

In *New York City Employees' Retirement System v. Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010) ("*Jobs*"), the Ninth Circuit cited *J.P. Morgan* – the same case on which Defendants principally rely – and held that a deprivation of shareholders' "right to a fully informed vote"

clearly gave rise to a direct claim under Delaware law:

> In the pleadings, NYCERS alleges that Apple shareholders were deprived of the right to a fully informed vote. This claimed injury is independent of any injury to the corporation and implicates a duty of disclosure owed to shareholders. *See In re Tyson Foods, Inc.*, 919 A.2d 563, 601 (Del. Ch. 2007) ("Where a shareholder has been denied one of the most critical rights he or she possesses – the right to a fully informed vote – the harm suffered is almost always an individual, not corporate, harm."); *Dieterich v. Harrer*, 857 A.2d 1017, 1029 (Del. Ch. 2004) ("Dieterich's disclosure allegations are direct claims, as they are based in rights secured to stockholders by various statutes."). Thus, under state law, NYCERS' claim for injury to its right to a fully informed vote is a direct claim. *See also In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 772 (Del. 2006) ("[W]here it is claimed that duty of disclosure violation impaired the stockholders' right to cast an informed vote, that claim is direct." (citing *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 330 n.12, 332 (Del. 1993))). Because NYCERS' § 14(a) claim is direct, the district court erred in dismissing the consolidated complaint on the ground the claim was derivative and had to be pleaded as such.

Id. at 1022-23 (emphasis added).[1] The Ninth Circuit subsequently reaffirmed its holding in *Jobs* in *Calamore v. Juniper Networks, Inc.*, 2010 WL 411138, at *1 (9th Cir. Feb. 5, 2010) ("As explained in [*Jobs*], a claim that shareholders were deprived of the right to a fully informed vote is direct under [Delaware] state law.").

Likewise, in *St. Clair Shores Gen. Ret. Sys. v. Eibeler*, 2008 WL 2941174, at *23 (S.D.N.Y. July 30, 2008), Judge Kram relied on *J.P. Morgan* to conclude that Section 14(a) claims asserting a deprivation of the "right to cast an informed vote" were direct claims under Delaware law:

> [W]ith respect to the right to cast an informed vote, Delaware courts permit shareholders to bring a direct action for relief. *See, e.g., In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 772 (Del. 2006) ("This Court has recognized … that where it is claimed that a duty of disclosure violation impaired the stockholders' right to cast an informed vote, that claim is direct.") (citing *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 330 n. 12, 332 (Del. 1993)).

Id. The Second Circuit has agreed with these courts' conclusions concerning Delaware law. In *Halebian*, 590 F.3d at 209, the Second Circuit agreed that under Delaware law, shareholders have

[1] Significantly, in *Jobs*, the Ninth Circuit reversed Judge Fogel's holding in *Vogel v. Jobs*, 2007 WL 3461163 (N.D. Cal. Nov. 14, 2007) – the only reported decision to conclude that a Section 14(a) claim must be pleaded derivatively – and flatly repudiated Judge Fogel's dicta on this issue in *Kelley v. Rambus, Inc.*, 2008 WL 5170598, at *3 n.5 (N.D. Cal. Dec. 9, 2008). Defendants relied heavily on these two now-discredited decisions in their motion to dismiss papers. *See* BoA Br. at 71; BoA Reply Br. at 5, 6.

the "right to cast an informed vote," and that "where a shareholder has been denied one of the most critical rights he or she possesses [as a shareholder] – the right to a fully informed vote – the harm suffered is almost always an individual, not corporate, harm."

Thus, whether considered solely as a matter of federal law or in connection with Delaware law, federal courts have uniformly held that plaintiffs who allege the deprivation of the right to an informed vote under Section 14(a) are entitled to bring their claims directly.

VI. For Decades, Delaware Courts Have Uniformly Held That State Law Claims Alleging Infringement Of The Right To An Informed Vote Are Direct

In arguing that Lead Plaintiffs' Section 14(a) claim must be pleaded derivatively, Defendants rely exclusively on Delaware cases concerning breach of fiduciary duty claims – cases that the Delaware Supreme Court itself has held are "readily distinguishable" from cases, such as this one, which are "based on federal securities law violations." *Gaffin*, 611 A.2d at 475 n.8. As explained above, Delaware courts lack jurisdiction to consider Exchange Act claims, and have carefully adhered to this jurisdictional prohibition by refusing to decide any issue implicating Section 14(a). In so doing, these Courts have recognized that Delaware law concerns only the very "narrow area" of breach of fiduciary duty claims, which Lead Plaintiffs have not asserted in this Action, and which is entirely distinct from the separate federal statutory claims at issue here.

Nevertheless, even if Lead Plaintiffs had asserted breach of fiduciary duty claims that were properly subject to Delaware's common law, Delaware courts have uniformly held that where, as here, a plaintiff alleges infringement of its right to cast a fully informed vote, its breach of fiduciary duty claim is unquestionably direct. The Delaware Supreme Court first expressly addressed this issue in *In re Tri-Star Pictures, Inc. Litigation*, 634 A.2d 319 (Del. 1993). There, the plaintiff asserted that shareholders had suffered a direct injury because a misleading proxy statement infringed upon their right to cast a fully informed vote on a merger. Rejecting defendants' argument that this breach of fiduciary duty claim was derivative, the Delaware Supreme Court held:

> Thus, by its alleged breaches of the duty of disclosure, Coca-Cola materially and adversely affected the minority class' right to cast an informed vote. Such conduct, if true, is an improper interference with the exercise of the franchise. It is a unique special harm to each uninformed shareholder for which the wrongdoer is answerable in damages.

Id. at 331-32 (emphasis added).[2]

While Defendants contend that the Delaware Supreme Court's subsequent decision in *In re J.P. Morgan*, 906 A.2d 766 establishes that Lead Plaintiffs' claim must be brought derivatively, *J.P. Morgan* expressly stated the opposite and reaffirmed *Tri-Star* in unmistakable terms. In *J.P. Morgan*, the plaintiff again alleged that its right to cast an informed vote was infringed by a materially misleading proxy used to solicit shareholder approval of a merger. *Id.* at 768. Rejecting Defendants' argument that this breach of fiduciary claim was derivative, the Delaware Supreme Court, sitting *en banc*, unanimously held that "[t]his Court has recognized, as did the Court of Chancery [below], that where it is claimed that a duty of disclosure violation impaired the stockholders' right to cast an informed vote, that claim is direct." *Id.* at 772 & n.16 (emphasis added) (citing *Tri-Star*, 634 A.2d at 330 n.12, and 332). Defendants' persistent mischaracterization of *J.P. Morgan* cannot create ambiguity in this straightforward holding of a unanimous *en banc* court.[3]

Because the Delaware Supreme Court's holdings in *Tri-Star* and *J.P. Morgan* are so clear,

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[2] Further, the Delaware Supreme Court has held that any kind of interference with a shareholder's right to vote – such as a company's improper accumulation of veto power – gives rise to a direct claim. *See Lipton v. News Int'l, PLC*, 514 A.2d 1075, 1079 (Del. 1986) ("The right to vote is a contractual right that News possesses as a shareholder of Warner which is independent of any right of Warner. The alleged interference with that right meets the requirements of … an individual action.").

[3] Contrary to Defendants' argument that the court in *J.P. Morgan* dismissed the claims as derivative (*see* Defs. Br. at 1, 11), the court held that the plaintiff had properly brought an "individual direct claim of liability for a disclosure violation," but dismissed the claim on the "quite separate" ground that the "specific complaint" in that case "pled no facts" establishing any "out-of-pocket" damages for this direct claim. 906 A.2d at 772-73 & n.17. Subsequent Delaware cases have expressly recognized this holding. *See In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 359-360 (Del. Ch. 2008) (explaining that *J.P. Morgan* held that non-disclosure claims are direct, and then "proceeded to consider what damages might be awarded for such a direct claim"). Notably, Defendants have not challenged that Lead Plaintiffs' complaint properly alleges damages or loss causation – issues which, in any event, raise questions of purely federal law. *See Borak*, 377 U.S. at 435 (where a violation of Section 14(a) is shown, "federal courts have the power to grant all necessary remedial relief"), and Section VII, *infra*.

the Delaware Court of Chancery has issued an unbroken string of decisions reaffirming the bedrock principle that the infringement of a shareholder's right to cast an informed vote gives rise to a direct breach of fiduciary duty claim under Delaware law. *See Thornton v. Bernard Techs., Inc.*, 2009 WL 426179, at *3 & nn. 26 & 27 (Del. Ch. Feb. 20, 2009) (where plaintiff alleged misleading proxy disclosures, "that claim is direct"); *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 601-02 (Del. Ch. 2007) ("Where a shareholder has been denied one of the most critical rights he or she possesses – the right to a fully informed vote – the harm suffered is almost always an individual, not corporate, harm."); *In re InfoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 1001 n.82 (Del. Ch. 2007) ("Where a disclosure claim states that a shareholder was denied the opportunity to exercise a fully informed vote, the claim is direct."); *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *12 (Del. Ch. Aug. 26, 2005) (where "[t]he gravamen of these claims is that the Managers failed to disclose material information," the claims "are direct"); *Saito v. McCall*, 2004 WL 3029876, at *5 (Del. Ch. Dec. 20, 2004) (allegations of "false or misleading proxy statement" "stated a direct claim"); *Dieterich v. Harrer*, 857 A.2d 1017, 1029 (Del. Ch. 2004) (proxy "disclosure allegations are direct claims"); *Wells Fargo & Co. v. First Interstate Bancorp*, 1996 WL 32169, at *8 (Del. Ch. Jan. 18, 1996) ("disclosure … claims are quite obviously individual as they affect the right to vote") (emphasis added).[4]

These uniform holdings overwhelmingly establish that Delaware law is "clear" and settled on this issue – as Defendants themselves concede. Defs. Br. at 7. Certifying a question in the face of this uniform precedent would be nothing more than a waste of "time, energy, and resources" that

[4] *See also Transkaryotic*, 954 A.2d at 359 ("claim for a breach of the duty of disclosure that 'impaired the stockholder's right to cast an informed vote ... is direct'"); *Khanna v. McMinn*, 2006 WL 4764028, at *28 (Del. Ch. May 9, 2006) (analyzing claims for "material omissions from [company's] Proxy Statements" as "direct"); *In re Cencom Cable Income Partners, L.P. Litig.*, 2000 WL 130629, at *4 (Del. Ch. Jan. 27, 2000) ("Inadequate disclosures bearing on individual investors' right to cast a fully informed vote constitute direct claims."); *Thorpe v. CERBCO, Inc.*, 1993 WL 35967, at *2 (Del. Ch. Jan. 26, 1993) ("The right to vote stock is the individual right of the legal owner of the stock. When the board of directors wrongfully interferes with or wrongfully impairs that right it violates individual rights of stockholders. The wrong is one suffered by all those who vote, but it is not a derivative wrong for that reason, but a direct one. It is analogous to the violation of a contract right.") (citations omitted).

would unfairly prejudice the Class. *Cohen*, 629 F. Supp. at 1423. At a bare minimum, this copious authority provides the Court more than sufficient basis to "predict" that Delaware courts would conclude that the infringement of the right to cast an informed vote gives rise to a direct claim under Delaware law. *See, e.g.*, *In re WorldCom, Inc.*, 546 F.3d 211, 218 (2d Cir. 2008) (Sotomayor, J.) (denying certification where "dicta" in a single case allowed court to predict how state courts would rule); *DiBella*, 403 F.3d at 111 (certification is appropriate only when "state law is so uncertain that [the court] can make no reasonable prediction"); *Wachovia Bank v. Cummings*, 2010 WL 466160, at *3, 5 (D. Conn. Feb. 8, 2010) (same).

VII. Defendants' Arguments Concerning The Availability Of Damages Are Meritless And Premature

Recognizing that Delaware law is clear and settled, Defendants essentially concede that even if Lead Plaintiffs had brought a breach of fiduciary duty claim under Delaware law, that claim would be direct. *See* Defs. Br. at 11. Having conceded the issue they originally sought to certify, Defendants now raise new contentions concerning Lead Plaintiffs' ability to recover damages on its direct claim, *see* Defs Br. at 11-13, and thus implicitly request certification of an entirely new question without seeking leave of Court. In support of this request, Defendants contend that: (1) Delaware law controls the question of what relief Lead Plaintiffs may seek in federal court under Section 14(a); (2) Delaware law authorizes only prospective "injunctive relief" before a merger vote occurs, and prohibits an award of damages for a consummated merger; and (3) Delaware law also prohibits a plaintiff from seeking to recover an "alleged overpayment" by the acquiring company. *Id*. at 11-13. Even assuming that Defendants should be permitted to raise these new arguments without leave of Court, they are clearly premature and wrong in any event. *See Borak*, 377 U.S. at 433-35; *Mills*, 396 U.S. at 388-89.

In *Borak*, the plaintiff brought a direct Section 14(a) claim seeking to recover "damages to a corporate stockholder with respect to a consummated merger," just as Lead Plaintiffs do here. 377

U.S. at 428. The defendant argued, as Defendants do here, that state law determined what remedies the plaintiff could seek; that the plaintiff could obtain only "prospective relief" to remedy the proxy violations before a vote occurred; and that the plaintiff could not recover damages for a consummated merger. *Id.* at 433, 434. In rejecting each of these arguments, the Court held that federal law "control[s] the appropriateness of redress" under Section 14(a) (*id.* at 434); such remedies are not "limited to prospective relief" (*id.*); and a plaintiff may seek "damages" for a "consummated merger" (*id.* at 428). The Court also concluded that damages could not be determined on the pleadings and "must await the trial on the merits." *Id*. at 435.

The Supreme Court and the Second Circuit have repeatedly affirmed these holdings. For example, in *Mills*, 396 U.S. at 386, 388-89, which also concerned a consummated merger, the Supreme Court again held that Section 14(a)'s remedies "are not to be limited to prospective relief," and that "monetary relief … of course" should be awarded in a host of various circumstances, including if the plaintiff could prove that "the merger resulted in a reduction of the earnings or earnings potential of their holdings" – exactly as Lead Plaintiffs claim here. *See also Gerstle*, 478 F.2d at 1303 (Friendly, J.) (where merger had closed, holding that "the district court correctly held Skogmo liable for damages for violating Rule 14a-9(a)," and affirming detailed damages calculation which required a trial and two reports by a special master). Thus, Defendants' arguments regarding the availability of damages under Section 14(a) fail.[5]

Defendants' related argument – that Delaware law prohibits a plaintiff from recovering an "overpayment" by the acquiring company – fails not only because federal law controls the question of remedies under Section 14(a), but also because it fundamentally misconstrues the damages that Lead Plaintiffs are seeking. Lead Plaintiffs do not challenge the exchange ratio that BoA agreed to,

[5] Further, even if Delaware law were relevant to the damages analysis, the Delaware Supreme Court has long permitted an award of damages in connection with consummated mergers. *See, e.g.*, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) (permitting an award of "monetary damages" for a merger that was "long completed").

and do not seek to recover any "overpayment" that BoA may have made. Rather, as set forth in Lead Plaintiffs' opposition to Defendants' motion to dismiss, Lead Plaintiffs contend that Defendants' misstatements and omissions in the proxy infringed their right to an informed vote and deceived them into approving a merger which directly "resulted in a reduction of the earnings or earnings potential of their holdings" – a damages theory which, as noted above, the Supreme Court expressly approved in *Mills*. *See* 396 U.S. at 388-89.

Defendants' remaining arguments similarly fail. *See* Defs. Br. at 12-13. To start, contrary to Defendants' contentions, whether Lead Plaintiffs "bought, sold, or exchanged" their shares is irrelevant under Section 14(a) because the statute has no "purchase or sale" requirement, as the U.S. Supreme Court and the Delaware Supreme Court itself have long recognized. *See S.E.C. v. Nat'l Sec., Inc.*, 393 U.S. 453, 468 (1969) ("[Section] 14 applies to all proxy solicitations, whether or not in connection with a purchase or sale."); *Arnold*, 678 A.2d at 539 ("There is no purchase or sale standing requirement…."). Thus, courts have repeatedly upheld the right of shareholders of an acquiring company to bring a direct Section 14(a) claim although they did not purchase, sell, or exchange shares in the merger. *See In re JPMorgan Chase & Co. Sec. Litig.*, 2007 WL 4531794, at *8 (N.D. Ill. Dec. 18, 2007); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1266, 1268 n.10 (N.D. Cal. 2000) (concluding that acquiring company's shareholders could bring direct Section 14(a) claim and permitting leave to replead). For the same reason, the Second Circuit and other courts have repeatedly held that a shareholder who does not buy, sell, or exchange shares in a tender offer may assert a direct claim under Section 14(e). *See, e.g.*, *Electronic Specialty*, 409 F.2d at 946 (Friendly, J.); *Plaine v. McCabe*, 797 F.2d 713, 717-18 (9th Cir. 1986); *Price/Costco*, 1995 WL 786631, at *8.

Finally, Defendants' contention that the severe reduction in the value of Lead Plaintiff's stock does not reflect a direct harm under the federal securities laws is without merit. As noted

above, the Supreme Court has long recognized that a reduction in the value of a plaintiff's holdings constitutes a direct harm entitling the plaintiff to damages. *See Mills*, 396 U.S. at 388-89. Indeed, this principle is so well-settled under the federal securities law that, if Defendants' argument were accepted, nearly every injury under the Exchange Act would be derivative – a result which has never been the case.[6]

VIII. Certification Would Not Narrow The Issues In This Litigation

Finally, certification of Defendants' proposed issue also should be rejected because it would not resolve the litigation or even narrow the issues to be decided. In addition to Lead Plaintiffs' Section 14(a) claim, Lead Plaintiffs have asserted claims under Section 10(b) of the Exchange Act. Lead Plaintiffs' Section 10(b) claims, like their Section 14(a) claim, allege that the proxy issued in connection with the BoA-Merrill merger was materially false and misleading because, *inter alia*, it failed to disclose Merrill's fourth quarter losses and the agreement allowing Merrill to pay up to $5.8 billion bonuses despite its enormous losses. Thus, even if the Court were to certify the question of whether Lead Plaintiff's Section 14(a) claim is direct, and even if the Delaware Supreme Court were to decide that the Section 14(a) claim was derivative, this Court would still need to decide for the purposes of the Section 10(b) claim whether: (1) the proxy omitted or misrepresented the above-described facts; and (2) whether these facts were material.[7] Certifying the proposed question to the Delaware Supreme Court therefore would not eliminate any of the central

[6] Neither *Halebian* nor *Calamore* are to the contrary. The statement that Defendants quote from *Halebian* (*see* Defs. Br. at 13) was made by a Massachusetts state court applying "Massachusetts law" governing breach of fiduciary duty claims – which are not at issue here. *See* 590 F.3d at 204-05. Significantly, Defendants fail to quote the portion of *Halebian* where the Second Circuit expressly recognized that Massachusetts law, like Delaware law, provides for a direct action where the "right to vote" has been infringed, and this "appears to comport with the approach of federal law." *Id.* at 205 & n.5. In *Calamore*, the claim was dismissed for failure to plead damages because the plaintiff failed to allege any out-of-pocket loss at all, and sought only to void certain stock options and a stock option plan – a type of relief that is not at issue here. *See* 2010 WL 411138, at *1-2.

[7] In contending that certification of the Section 14(a) claim would largely resolve this litigation, Defendants concede a critical distinction between Sections 14(a) and 10(b) that they previously claimed did not exist – namely, that Section 14(a), unlike Section 10(b), does not require the pleading of scienter. *Compare* Defs. Br. at 8, n.9 *with* BoA Br. in Support of Motion to Dismiss, Dkt. No. 112, at 30-31.

issues to be decided in this litigation. *See Fidelity*, 540 F.3d at 144 (denying certification where it would not "resolve the litigation"); *Wachovia*, 2010 WL 466160, at *2 (same).

Conclusion

For the reasons set forth above and in Lead Plaintiffs' prior submissions to the Court, Defendants' motion for certification should be denied.

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