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Case Number 295,2016D

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, NEW YORK CITY POLICE PENSION FUND, POLICE OFFICERS' VARIABLE SUPPLEMENTS FUND, POLICE SUPERVISOR OFFICERS' VARIABLE SUPPLEMENTS FUND, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, FIRE FIGHTERS' VARIABLE SUPPLEMENTS FUND, FIRE OFFICERS' VARIABLE SUPPLEMENTS FUND, BOARD OF EDUCATION RETIREMENT SYSTEM OF THE CITY OF NEW YORK, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, NEW YORK CITY TEACHERS' VARIABLE ANNUITY PROGRAM, AND INDIANA ELECTRICAL WORKERS PENSION TRUST FUND IBEW,<br><br>Plaintiffs Below,<br>Appellants,<br><br>v.<br><br>AIDA M. ALVAREZ, JAMES I. CASH, JR., ROGER C. CORBETT, DOUGLAS N. DAFT, MICHAEL T. DUKE, GREGORY B. PENNER, STEVEN S. REINEMUND, JIM C. WALTON, S. ROBSON WALTON, LINDA S. WOLF, H. LEE SCOTT, JR., CHRISTOPHER J. WILLIAMS, JAMES W. BREYER, M. MICHELE BURNS, DAVID D. GLASS, ROLAND A. HERNANDEZ, JOHN D. OPIE, J. PAUL REASON, ARNE M. SORENSON, JOSE H. VILLARREAL, JOSE LUIS RODRIGUEZMACEDO | No. 295, 2016<br><br>Appeal from the Memorandum Opinion, dated May 13, 2016, of the Court of Chancery of the State of Delaware, C.A. No. 7455-CB<br><br>**PUBLIC / REDACTED VERSION**<br><br>**SEPTEMBER 2, 2016** |

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| RIVERA, EDUARDO CASTRO-WRIGHT, THOMAS A. HYDE, THOMAS A. MARS, JOHN B. MENZER, EDUARDO F. SOLORZANO MORALES, AND LEE STUCKY, | ) |
| Defendants Below, Appellees | ) |
| WAL-MART STORES, INC. | ) |
| Nominal Defendant Below, Appellee. | ) |

**CORRECTED ANSWERING BRIEF OF**
**APPELLEES/DEFENDANTS-BELOW**


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## TABLE OF CONTENTS

## TABLE OF CASES AND AUTHORITIES

Page

### Cases

**TABLE OF CASES AND AUTHORITIES**
(continued)

Page(s)

**TABLE OF CASES AND AUTHORITIES**
(continued)

Page(s)

## TABLE OF CASES AND AUTHORITIES
(continued)

Page(s)



### Statutes



### Rules



### Treatises

**TABLE OF CASES AND AUTHORITIES**
(continued)

Page(s)

## NATURE OF THE PROCEEDINGS

The Court of Chancery correctly followed this Court's unanimous *en banc* decision in *Pyott v. Louisiana Municipal Police Employees' Retirement System*, 74 A.3d 612 (Del. 2013), and an unbroken line of federal appellate decisions, *see Arduini v. Hart*, 774 F.3d 622 (9th Cir. 2014); *In re Sonus Networks, Inc., S'holder Deriv. Litig.*, 499 F.3d 47 (1st Cir. 2007), to find that under federal and non-conflicting Arkansas law, collateral estoppel bars this derivative suit. Delaware Plaintiffs, who filed suit without making demand on Wal-Mart's Board of Directors (the "Board"), are precluded because a federal court in Arkansas, in a case involving the same underlying facts, rendered a final judgment that demand would not have been futile. *In re Wal-Mart Stores, Inc. S'holder Deriv. Litig.*, 2015 WL 1470184 (W.D. Ark.) [B140-58], *aff'd*, *Cottrell v. Duke*, 2016 WL 3947811 (8th Cir.) [AOB, Ex. B].

After extensive briefing and argument (on both issue preclusion and demand futility), Chancellor Bouchard determined that (1) Delaware Plaintiffs are in privity with Arkansas Plaintiffs, and thus the Arkansas judgment precludes relitigation of demand futility; (2) Arkansas Plaintiffs were not constitutionally deficient representatives of Wal-Mart merely because they elected not to seek books and records under Section 220; and (3) the issue of demand futility was actually litigated in Arkansas. AOB, Ex. A at 2, 28-29, 42-43, 48, 52-53, 57.

## SUMMARY OF THE ARGUMENT

1. ***Privity and Due Process***. Denied. Delaware Plaintiffs are in privity with Arkansas Plaintiffs, and are therefore bound by the Arkansas judgment.

a. As this Court recognized in *Pyott*, "numerous" jurisdictions hold that "because the real plaintiff in a derivative suit is the corporation, 'differing groups of shareholders who can potentially stand in the corporation's stead are in privity for the purposes of issue preclusion.'" 74 A.3d at 616-17. This Court has since summarily affirmed a similar finding of privity. *Asbestos Workers Local 42 Pension Fund v. Bammann*, 132 A.3d 749 (Del. 2016) (TABLE), *aff'g* 2015 WL 2455469 (Del. Ch.). Arkansas federal courts have repeatedly held or presumed that "[c]ollateral estoppel prevents the issue of pre-suit demand futility from being relitigated." *Harben v. Dillard*, 2010 WL 3893980, at *6 (E.D. Ark.). The Court of Chancery correctly reached the same conclusion here.

b. The privity determination disposes of Delaware Plaintiffs' due process objection, because the Constitution does not prohibit binding a litigant to a judgment secured by another party with which it is in privity. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *Taylor v. Sturgell*, 553 U.S. 880, 894 n.8 (2008). The federal courts applying collateral estoppel to successive derivative suits have uniformly rejected the argument now made by Delaware Plaintiffs, as this Court did implicitly in *Pyott*. Application of collateral estoppel in these

circumstances is consistent with the nature of derivative litigation, protecting the corporation's rights without infringing any rights of individual stockholders.

2. ***Adequacy of Representation***. Denied. Arkansas Plaintiffs were not constitutionally inadequate simply because they chose to forgo a Section 220 production. While then-Chancellor Strine advised Delaware Plaintiffs to seek books and records under Section 220 before filing a consolidated amended complaint, Arkansas Plaintiffs decided to stand on a complaint that was based on a set of documents published by *The New York Times*. Delaware Plaintiffs do not even acknowledge that Arkansas Plaintiffs had strategic reasons to forgo a Section 220 production; rather, they insist that Arkansas Plaintiffs were constitutionally inadequate simply because they did so, and thus invoke the very same irrebuttable presumption of inadequacy that this Court rejected in *Pyott*.

3. ***Actually Litigated***. Denied. The issue of demand futility was actually litigated in Arkansas—indeed, it was the sole basis for dismissal. AOB, Ex. B at 21-22; B140-58. The Arkansas court expressly considered and declined to apply the framework in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), because there was no decision by the Board. It is irrelevant that the court applied *Rales v. Blasband*, 634 A.2d 927 (Del. 1993), rather than *Aronson*, as "minor variations in the application of what is in essence the same legal standard do not defeat preclusion." *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1307 (2015).

## COUNTER-STATEMENT OF FACTS

This action arises from a *New York Times* article alleging that, before 2006, employees of Wal-Mart's majority-owned Mexican subsidiary, Wal-Mex, used intermediaries known as *gestores* to make payments to government officials to facilitate permits and other approvals. *See* David Barstow, N.Y. TIMES, Apr. 21, 2012, at A1. The article hypothesized that the payments might have been "bribes" prohibited by the Foreign Corrupt Practices Act. It also reported that Wal-Mart conducted an investigation into the payments in 2005-2006, and that the investigation was transferred to Wal-Mex officials, who found no wrongdoing.

The article relied on and quoted from stolen Wal-Mart documents, many of which were posted on the *Times* website. Notably, these documents identify only two members of Wal-Mart's 2005-2006 Board of Directors as allegedly having knowledge of the underlying allegations: H. Lee Scott, Jr., then-CEO, and Roland Hernandez, then-Chairman of the Audit Committee. The article also suggested that Michael Duke, who was Vice Chairman of Wal-Mart International in 2005-2006 and joined the Board in 2008, knew of the allegations.

Within days after the article was published, groups of stockholders filed fifteen derivative suits asserting claims for alleged breaches of fiduciary duties owed to Wal-Mart, a Delaware company headquartered in Arkansas, by the same directors and officers. The cases were eventually consolidated into two parallel

proceedings—the instant action in the Court of Chancery and a substantively identical case in the U.S. District Court for the Western District of Arkansas.

Wal-Mart consistently sought to resolve this matter in Delaware. In the Court of Chancery, defendants filed a motion to proceed in one jurisdiction, B1-27; A-45-83, and in Arkansas they filed a motion to stay pending resolution of demand futility in Delaware. The Arkansas district court granted the stay motion, B341-53, but the stay was vacated on Arkansas Plaintiffs' appeal, *Cottrell v. Duke*, 737 F.3d 1238, 1247-48 (8th Cir. 2013). The Arkansas district court denied a renewed stay motion and ordered defendants to file their Rule 23.1 motion. B133-36.

After extensive briefing, the Arkansas district court granted defendants' motion to dismiss. B140-58. Applying Delaware law, the court held that demand would not have been futile, as there was no "particularized basis to infer that a majority of the Board had actual or constructive knowledge of the alleged misconduct, let alone that they acted improperly with scienter" in handling the allegations and the investigation. *Id.* at *7. The Eighth Circuit unanimously affirmed. AOB, Ex. B.

Rather than participating in the Arkansas action, Delaware Plaintiffs focused on a drawn-out Section 220 proceeding, which included extensive productions by Wal-Mart, cross-appeals to this Court, and a failed motion for contempt sanctions. B230-340. Then, one month *after* final judgment had been entered by the federal

court, Delaware Plaintiffs filed a consolidated amended complaint alleging state-law claims substantively identical to those rejected in Arkansas. A-84-285.

Although Delaware Plaintiffs cited a handful of documents from the Section 220 production that were not in the Arkansas complaint, the substance of their allegations was the same. Like Arkansas Plaintiffs, Delaware Plaintiffs could not allege with particularity that a majority of directors had knowledge—much less scienter—regarding the events in Mexico. They alleged only that Hernandez had some knowledge, and asked the court to infer based on general policies that Hernandez informed the full Board of whatever he knew. *E.g.*, AOB 8-9; AOB, Ex. B at 11-12.

In a 58-page opinion, Chancellor Bouchard held that the Arkansas judgment collaterally estopped Delaware Plaintiffs from relitigating demand futility, as "all four elements required under Arkansas law for issue preclusion have been established," "an Arkansas court likely would conclude . . . that issue preclusion would apply to different stockholder plaintiffs in the context of a derivative suit," and "Arkansas plaintiffs were not inadequate representatives of Wal-Mart." *Id.* at 57. He also acknowledged defendants' "legitimate arguments that the Section 220 materials, including some of the best documents (as identified by plaintiffs) . . . would not have affected the outcome of the demand futility analysis." AOB, Ex. A at 56.

# ARGUMENT

## I. Delaware Plaintiffs Are in Privity with Arkansas Plaintiffs

### A. Question Presented

Did the Chancery Court correctly conclude that Delaware and Arkansas Plaintiffs are in privity, such that the Arkansas judgment precluded relitigation of the demand futility issue in Delaware in a manner consistent with due process? This issue was preserved. A-305-08; A-314-16; A-323-34; A-709-12.

### B. Standard of Review

Review is de novo. *Smith v. Guest*, 16 A.3d 920, 933 (Del. 2011).

### C. Merits of the Argument

#### 1. Successive Derivative Plaintiffs Are Bound by a Prior Demand Futility Ruling

"'[T]he prevailing rule,'" adopted in an unbroken line of federal authorities, is that stockholder-plaintiffs are in privity on the issue of demand futility because they "are acting on behalf of the corporation . . . and the underlying issue of demand futility is the same regardless of which shareholder brings suit." *Arduini*, 774 F.3d at 634 (quoting *Sonus*, 499 F.3d at 63); *Asbestos Workers Local 42 Pension Fund v. Bammann*, 2015 WL 2455469, at *16 (Del. Ch.), *aff'd*, 132 A.3d 749 (Del. 2016) (TABLE); AOB, Ex. A at 32-34 & nn.69-71 (stockholder-plaintiffs are "effectively interchangeable").

1. In *Pyott*, this Court cited the "numerous other jurisdictions" adopting

the rule that successive stockholders are in privity for purposes of a demand-futility determination. 74 A.3d at 617 & n.18.[1] As the Court recognized, privity is not a question of Delaware law; rather, under principles of full faith and credit, the preclusive effect of a judgment is determined by reference to the law of the rendering court. 74 A.3d at 616-17 (citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-08 (2001)). The Court concluded that California federal courts, applying federal or non-conflicting California law, would find privity. *Id.* at 617. Accordingly, the successive suit was barred by collateral estoppel, notwithstanding the second stockholders' arguments (echoed nearly verbatim by Delaware Plaintiffs here) regarding the "dual nature" of the derivative suit. *Id.* Plaintiffs devote but a single paragraph to *Pyott* (AOB 16-17), and entirely ignore that this Court has since summarily affirmed a decision reaching the same conclusion under New York law. *Bammann*, 132 A.3d 749.[2]

2. Plaintiffs identify no reason that Arkansas state or federal courts would adopt a different rule than every federal appellate court to have considered privity in

[1] *See also Goldman v. Northrop Corp.*, 603 F.2d 106, 109 (9th Cir. 1979); *In re MGM Mirage Deriv. Litig.*, 2014 WL 2960449, at *6 (D. Nev.); *LeBoyer v. Greenspan*, 2007 WL 4287646, at *3 (C.D. Cal.); *In re Bed Bath & Beyond Inc. Deriv. Litig.*, 2007 WL 4165389, at *23 (D.N.J.); *Hanson v. Odyssey Healthcare, Inc.*, 2007 WL 5186795, at *5 (N.D. Tex.); *Henik v. LaBranche*, 433 F. Supp. 2d 372, 380-82 (S.D.N.Y. 2006).

[2] *Accord, e.g., Laborers' Dist. Council Constr. Indus. Pension Fund v. Bensoussan*, 2016 WL 3407708, at *11 (Del. Ch.); *In re Career Educ. Corp. Deriv. Litig.*, 2007 WL 2875203, at *10 (Del. Ch.); *Fuchs Family Trust v. Parker Drilling Co.*, 2015 WL 1036106 (Del. Ch.).

this context. As Chancellor Bouchard correctly determined, "the Arkansas Supreme Court would follow the majority rule that privity attaches to subsequent derivative stockholders." AOB, Ex. A at 35, 42-43. Arkansas follows the familiar tenets of preclusion law as articulated in federal and other states' decisions, as well as in the Restatement (Second) of Judgments. *E.g.*, *Ark. Dep't of Human Servs. v. Dearman*, 842 S.W.2d 449, 452 (Ark. Ct. App. 1992). The focus is on "fairness and common sense," as well as affording a *single* full and fair opportunity to resolve an issue. AOB, Ex. A at 30, 40-42 & nn.84-92.

The leading Arkansas authority described a privy as "a person so identified in interest with another that he represents the same legal right." *Dearman*, 842 S.W.2d at 452. Following federal and state courts, *Dearman* emphasized that this view of privity would help reduce the "deluge[]" of duplicative litigation *without* "subvert[ing] fairness in a due process sense." *Id.* Indeed, it found privity where, as here, a subsequent litigant with notice of the first action sought to relitigate the same issue on behalf of the same real party in interest. *Id.*

Arkansas courts likewise recognize that "inherent in the nature of the [derivative] suit itself [is] that it is the corporation whose rights are being redressed rather than those of the individual plaintiff." *Brandon v. Brandon Constr. Co.*, 776 S.W.2d 349, 352 (Ark. 1989). As Chancellor Bouchard noted, there is simply no "indication that [under Arkansas law] the interest of the corporation in the suit would

only be deemed to begin after demand futility is established." AOB, Ex. A at 35. Rather, Arkansas federal courts have repeatedly held or presumed that "[c]ollateral estoppel prevents the issue of pre-suit demand futility from being relitigated." *Harben*, 2010 WL 3893980, at *6; *see also* B135.

3. The federal and Arkansas authorities accord with the long-standing recognition that, in a derivative action, "[t]he stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action is *his*." *Schoon v. Smith*, 953 A.2d 196, 202 (Del. 2008). Rather, "'he is permitted to sue . . . *simply in order to set in motion the judicial machinery of the court*,'" and the "'corporation alone has a direct interest'" in the litigation. *Id.*; *accord Dana v. Morgan*, 232 F. 85, 90 (2d Cir. 1916); *Ross v. Bernhard*, 396 U.S. 531, 538 (1970). Courts have thus repeatedly held that "if the shareholder can sue on the corporation's behalf, it follows that the corporation is bound by the results of the suit in subsequent litigation, even if different shareholders prosecute the suits . . . subject to the important proviso that the shareholder must fairly and adequately represent the corporation." *Sonus*, 499 F.3d at 64; *Arduini*, 774 F.3d at 634.

Here, Wal-Mart was a party to the Arkansas proceeding and is bound by that court's judgment that pre-suit demand would not have been futile. Wal-Mart, as the "sole real party in interest," could not relitigate that issue in its own behalf; nor can Delaware Plaintiffs (or any other stockholder) stand in the Company's shoes for that

purpose—a derivative plaintiff has no greater rights than the corporation it seeks to represent. *Goldman*, 603 F.2d at 109; *cf. Sonus*, 499 F.3d at 64.

4. The Supreme Court of the United States recently reiterated that the federal courts look to the Restatement (Second) of Judgments for "the ordinary elements of issue preclusion." *B&B Hardware*, 135 S. Ct. at 1303. These elements—identicality, actuality, finality, and adequacy—are satisfied here. *E.g.*, Restatement (Second) of Judgments §§ 27, 28, 39, 41, 42(e) (1982). If the same shareholder had sued in Arkansas *and* in Delaware, collateral estoppel would bar relitigation of demand futility. The only question in this case is whether it matters that one set of stockholders secured the demand futility determination in Arkansas, while a second set seeks to relitigate the identical issue in Delaware.

Traditionally the preclusion question was answered by a "privity" analysis because a prior judgment binds parties (like Wal-Mart) *and their privies*. *E.g.*, *Parklane Hosiery*, 439 U.S. 322, 326-27 & n.7; *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Courts have consistently considered stockholders seeking judicial authority to pursue derivative suits to be in privity because of the "unique nature of derivative litigation," in which the "individual shareholder . . . is at best a nominal plaintiff." *Hanson*, 2007 WL 5186795, at *5 (citing *Ross*, 396 U.S. at 538); *see also Sonus*, 499 F.3d at 64 & n.10; *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981); *Cramer v. Gen. Tel. & Elecs. Corp.*, 582 F.2d 259, 267 (3d Cir. 1978).

In *Taylor*, the Supreme Court reframed traditional privity analysis in terms of functional categories of recognized "exceptions" to the general rule against nonparty preclusion, which parallel or encompass those set forth in the Restatement (Second) of Judgments (including § 41). 553 U.S. at 893 & nn.6 & 8. Although the Court declined to recognize a *new* theory of "virtual representation," it confirmed the traditional categories even while cautioning that its list "could be organized differently," and was not "a definitive taxonomy." *Id.* at 893 n.6.

Section 41 of the Restatement provides that "[a] person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party." The federal courts have specifically held that derivative representation is "analogous" to several categories enumerated under Restatement § 41 and discussed in *Taylor*. *Arduini*, 774 F.3d at 634, 637-38 & n.11; *accord MGM*, 2014 WL 2960449, at *5 (finding derivative plaintiffs to be among the "non-exhaustive list of the types of relationships that result in privity," even prior to a Rule 23.1 denial); *Sonus*, 499 F.3d at 64 & n.10. For this reason, *Taylor*'s concerns regarding "virtual representation" are inapposite in the derivative context. *E.g.*, *Sonus*, 499 F.3d at 64 & n.10 (the "structural fact" that "the corporation is bound by the results" in derivative litigation "'makes irrelevant questions of 'virtual representation,' that is, the representation by a party of a nonparty outside the context of a class action'").

Preclusion of subsequent stockholder-plaintiffs is a well-established instance of collateral estoppel, including in the demand futility context. *E.g.*, *Dana*, 232 F. at 90 (it cannot "at this late day be successfully challenged that every member of a corporation is so far privy in interest in a [derivative] suit . . . that he is bound by the judgment against it"); *Arduini*, 774 F.3d at 633-34 (collecting cases). Delaware Plaintiffs identified *no* appellate precedent holding that a successive stockholder was not in privity (the historical approach) or within one of the established exceptions to the rule against nonparty preclusion (the *Taylor* approach) for purposes of determining the preclusive effect of a demand futility ruling. They ask this Court to break ranks with an overwhelming body of federal authority.

It bears emphasis that the privity analysis here involves no question of Delaware law. Rather, the Delaware courts must determine the preclusive effect of the Arkansas district court's judgment pursuant to federal common law and non-conflicting Arkansas state law. *Pyott*, 74 A.3d at 616-17; *Semtek*, 531 U.S. at 507-08. Delaware Plaintiffs would have to show something in Arkansas law that is different from other states' laws with respect to privity between stockholders, *and* that this difference would not conflict with federal common law as interpreted by the many federal courts holding there is privity. This they cannot do.

### 2. Plaintiffs' "Due Process" Argument Ignores a Century of American Jurisprudence

Delaware Plaintiffs argue that "the Court of Chancery commit[ted] legal error

in concluding that the Delaware Plaintiffs and the Arkansas Plaintiffs were in privity" because "that conclusion violated Plaintiffs' Due Process rights." AOB 10. But "privity" is a synonym for procedural fairness. *Taylor*, 553 U.S. at 894 n.8. If two entities are in privity and there was adequate representation, there can be no constitutional violation; privies are bound as if they are the *same entity*. *E.g.*, *Parklane Hosiery*, 439 U.S. at 327 n.7; *Hansberry*, 311 U.S. at 40; *Fuchs Family*, 2015 WL 1036106, at *5; Restatement (Second) of Judgments § 41(1).

1. Delaware Plaintiffs' "due process" argument is cribbed from dicta in *In re EZCorp Inc. Consulting Agreement Derivative Litigation*, 130 A.3d 934 (Del. Ch. 2016), which in turn repeats nearly verbatim the Chancery Court decision in *Pyott*. *Compare EZCorp*, 130 A.3d at 943-49, *with La. Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 327-335 (Del. Ch. 2012), *rev'd*, 74 A.3d 612. In *Pyott*, this Court recognized that collateral estoppel is based on the law of the rendering court, not Delaware law. Thus, as in *Pyott*, even if *EZCorp* were correct as a matter of Delaware policy—a question not presented here—it does not accurately reflect federal law or the non-conflicting law of other states, including Arkansas.

*EZCorp* turned only on Delaware law—specifically, Court of Chancery Rule 15(aaa), which allows Delaware courts to dismiss derivative suits as to the named plaintiff only. The Federal Rules of Civil Procedure (which governed the proceedings in the Arkansas district court) contain no similar provision, nor do the

procedural rules of Arkansas or, to our knowledge, any other state. Rule 15(aaa) thus reflects a Delaware-specific policy choice, not the commands of the Due Process Clause. Even assuming the discussion in *EZCorp* accurately reflects the bases for that policy choice, the federal Constitution does not require other jurisdictions to make the same choice. Nor does it permit this Court to export Delaware's policy to the rest of the nation.

The seminal decisions applying collateral estoppel to the issue of demand futility fully understood the true nature of derivative actions. *Cf. Pyott*, 46 A.3d at 327. Indeed, several of those courts were presented with virtually identical arguments that successive stockholder-plaintiffs "are no more in privity than are the members of an uncertified class." *Hanson*, No. 3:04-cv-02751-N (N.D. Tex.), Dkt. 21 at 12-13 (Pls.' Opp. to Mot. to Dismiss); *In re Sonus Networks, Inc. S'holder Deriv. Litig.*, 2005 WL 2862376 (D. Mass.) (Pls.' Opp. to Mot. to Dismiss). In *Pyott*, the stockholder-plaintiff made *precisely* the same "due process" argument based on the categories of nonparty preclusion enumerated in *Taylor*, the "dual nature" of the derivative action, and analogies to pre-certification class actions as Delaware Plaintiffs do here. *See* 2012 WL 4684341, at *14-24 (*Pyott* Answering Brief on Interlocutory Appeal). This Court implicitly rejected that argument in *Pyott*, 74 A.3d at 617, and should reject it here again.

While Delaware Plaintiffs purport to ground their due process argument in the

"dual" or "two-fold" nature of derivative litigation (AOB 10-17), they ignore a critical aspect of that duality: The corporation is the only real party in interest and its board controls the cause of action unless and until a court—under Rule 23.1—deems it necessary to transfer the right to a stockholder in order to protect the corporation's interests. *E.g.*, *Ross*, 396 U.S. at 538; *Stone v. Ritter*, 911 A.2d 362, 367 (Del. 2006). The demand futility inquiry determines whether the corporation's board or its stockholders (collectively) will control the claims at issue.

Once the binary decision regarding demand futility has been made, it has been made. If the first court determines that demand would not have been futile, such that the board of directors remains in control of the litigation, the *corporation*'s rights have been determined, and it can assert those rights under preclusion doctrines against other stockholders who seek to seize control. *Sonus*, 499 F.3d at 64 (rejecting argument that a "state court judgment did not adjudicate the corporation's rights, but only the question of whether the state court plaintiffs should be permitted to bring suit on behalf of the corporation"). The dual nature of the derivative action does not "elevate[] a stockholder's right to sue on behalf of the corporation to the level of a stockholder's [individual] claim . . . ." *Papilsky v. Berndt*, 466 F.2d 251, 256 (2d Cir. 1972). On the contrary, the only "individual right" of a stockholder is to seek a judicial determination whether the board of directors or the stockholders will control a particular legal claim. *Cf.* AOB 11-12. Stockholders have no right to have that

determination made more than once.

Thus, application of collateral estoppel does not affect Delaware Plaintiffs' individual rights *at all*, let alone violate their due process rights. Giving full faith and credit to the Arkansas judgment does not deprive Delaware Plaintiffs of *any* life, liberty, or property interest cognizable under the federal Constitution. Their only interest in this litigation derives from their status as Wal-Mart stockholders, in which respect they are identically situated to Arkansas Plaintiffs:

> [T]he demonstration of standing to sue derivatively does not require any showing of the characteristics specific to the individual shareholder who seeks standing, aside from the obvious demonstration that the plaintiff was a shareholder during the relevant period. . . . [T]he standing analysis for one shareholder will not differ from the standing analysis for another shareholder.

*Henik*, 433 F. Supp. 2d at 381; *Hanson*, 2007 WL 5186795, at *5 (same); *accord*, *e.g.*, *Arduini*, 499 F.3d at 633-34 (rejecting Chancery Court opinion in *Pyott*); *Sonus*, 499 F.3d at 64; *MGM*, 2014 WL 2960449, at *6.

Delaware Plaintiffs' argument to the contrary, which effectively treats demand futility as a matter of individual standing, *see* AOB 10-24, has no empirical support and ignores that "'the demand doctrine[,] in delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation[,] clearly is a matter of 'substance,' not 'procedure.'" *LeBoyer*, 2007 WL 4287646, at *3 (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991)). The Arkansas courts determined that the Board, not the stockholders, should control the

Company's claims; Delaware Plaintiffs have no "right" to relitigate that determination.

2. At bottom, Delaware Plaintiffs' due process argument conflates derivative actions and class actions. AOB 13-15; *see EZCorp*, 130 A.3d at 948. But these two species of representative actions present distinct due process concerns and, accordingly, are governed by separate rules and precedents. In a class action, due process concerns are at their apex, as the court may adjudicate individual rights of absent persons, without their participation and potentially with no notice, through the class representatives. *E.g.*, *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 799 (1996). In a derivative action, the represented entity is the *company*, which is not absent at all; it is a necessary party. *E.g.*, *Ross*, 396 U.S. at 538; *Dana*, 232 F. at 90; *Sonus*, 499 F.3d at 64 & n.10; *Arduini*, 774 F.3d at 637-38 & n.11. The judgment in a derivative case binds no absent parties. It is this "unique nature of derivative litigation [that] logically leads to a finding of privity between all shareholder plaintiffs." *Fuchs Family*, 2015 WL 1036106, at *5; *see also*, *e.g.*, *Dana*, 232 F. at 90.

This key feature of derivative litigation also demonstrates the error in Delaware Plaintiffs' reliance on *Smith v. Bayer*, 564 U.S. 299 (2011). AOB 14-15. *Smith* holds that unnamed members of a putative class are not bound by a decision denying class certification, 564 U.S. at 315-16; it says nothing about whether

contemporaneous stockholders are bound (as the company itself is) by a judgment determining that control of the litigation should remain with the company's board rather than be transferred to stockholders.

Adopting Delaware Plaintiffs' position would create an untenable conflict, on a question of federal constitutional law, with *every* federal appellate decision to consider the question. Affirmance, in contrast, would maintain uniformity of decision on this important and recurring point.

3. Furthermore, courts have long recognized that where a stockholder plaintiff "declined to avail himself" of an opportunity to intervene in a parallel action or to "inform[] the court of anything he deemed important," he cannot avoid preclusion doctrines, including as to demand futility. *Dana*, 232 F. at 91; *Hanson*, 2007 WL 5186795, at *6; *Henik*, 433 F. Supp. 2d at 381-82; *Dearman*, 842 S.W.2d at 452. As Delaware Plaintiffs acknowledged *in this Court* in June 2014, they "face[d] a severe risk that the Arkansas decision w[ould] have collateral estoppel effect in Delaware" if the Arkansas court ruled that demand was not excused. B161. Given that looming "risk," Delaware Plaintiffs could and should have taken action to protect any interests of their own in Arkansas.

Indeed, at the outset of this case, then-Chancellor Strine warned Delaware Plaintiffs to coordinate with Arkansas Plaintiffs if they "don't want [the Arkansas court] to decide that complaint." A-77 at 33:11-34:8. Yet, Delaware Plaintiffs did

not heed this warning: They elected not to participate in the Arkansas suit as amici or intervenors, cooperate with Arkansas Plaintiffs, or support any of defendants' repeated efforts to stay the Arkansas action so the Delaware case could proceed first, apparently because of a fee dispute with Arkansas Plaintiffs. A-539-41; A-593-94. Their decision to steer clear of the Arkansas action alone forecloses any due process argument. A-323-24; A-711-12.

* * *

Ultimately, Delaware Plaintiffs' contention—that judicial approval of a stockholder in the role of corporate representative is a constitutional prerequisite to preclusion—would work in only one direction: If the first stockholder is "approved" (*i.e.*, the Rule 23.1 motion is denied), then control of the litigation would be transferred from the corporation to the stockholder; if the first stockholder is not "approved" (*i.e.*, the Rule 23.1 motion is granted), then another stockholder would be free to ask again in another court. And so on *ad infinitum*. This "heads I win, tails we keep flipping until I get heads" approach is wholly inconsistent with fundamental fairness and all stockholders' interest in preventing "dissipation" of corporate assets through duplicative litigation. *MGM*, 2014 WL 2960449, at *7; *Henik*, 433 F. Supp. 2d at 380 ("indefinite[] relitigat[ion] [of] demand futility . . . in an unlimited number of state and federal courts [is] a result the preclusion doctrine specifically is aimed at avoiding").

## II. Arkansas Plaintiffs Were Not Constitutionally Inadequate

### A. Question Presented

Did the Court of Chancery correctly conclude that Arkansas Plaintiffs were not constitutionally inadequate representatives of Wal-Mart's interests solely because they made the strategic decision not to make a books and records request under Section 220? This issue was preserved for appeal. A-314-23; A-712-19; A-751-63; A-853-55; A-865-66; B401-20.

### B. Standard of Review

Review is de novo. *Smith*, 16 A.3d at 933.

### C. Merits of the Argument

As this Court recognized in *Pyott*, the core constitutional check on the application of preclusion doctrines in this context is not the one-way ratchet now proposed by Delaware Plaintiffs, but rather the safety valve of adequacy of representation. 74 A.3d at 618 & n.21; *see also, e.g.*, *Taylor*, 553 U.S. at 901; *Arduini*, 774 F.3d at 633-34; *Sonus*, 499 F.3d at 64; *Henik*, 433 F. Supp. 2d at 381; *Career Educ.*, 2007 WL 2875203, at *10; Restatement (Second) of Judgments § 42 & Reporter's Note ("The provisions of this section are thus closely related to, if indeed they are not particularized expressions of, the requirements of due process"); AOB, Ex. A at 45. The question is not adequacy under Rule 23.1 (or 23), but rather a constitutionally disabling *in*adequacy. *Cf. Hansberry*, 311 U.S. at 45.

As Delaware Plaintiffs acknowledge (AOB 26-28), the framework for evaluating this question is the Restatement (Second) of Judgments. *E.g.*, *Estate of Goston v. Ford Motor Co.*, 898 S.W.2d 471, 473 (Ark. 1995); *Dearman*, 842 S.W.2d at 452; *see also, e.g.*, *B&B Hardware*, 135 S. Ct. at 1303; *Arduini*, 774 F.3d at 635-36; *Sonus*, 499 F.3d at 64-66; *Pyott*, 74 A.3d at 618 & nn.21 & 25. As pertinent here, inadequate representation requires a clear showing based on the intrinsic records of both lawsuits that (1) the "representative's management of the litigation [was] so grossly deficient as to be apparent to the opposing party"; or (2) the representative had a conflict of interest so egregious as to be apparent to the opposing party. Restatement (Second) of Judgments § 42 & (cmt. *f*). Delaware Plaintiffs bear the burden to demonstrate inadequate representation—of *Wal-Mart's* interests, not their own. *Arduini*, 774 F.3d at 636; *Pyott*, 74 A.3d at 618.

Delaware Plaintiffs' sole argument is that Arkansas Plaintiffs were inadequate because they proceeded to litigate in federal court—with undisputed vigor—even though "then-Chancellor Strine repeatedly instructed the Delaware Plaintiffs to pursue a books and records action," after reviewing the initial Delaware complaints in the course of addressing Delaware Plaintiffs' proposed leadership structure. AOB 26. This argument fails.

### 1. Arkansas Plaintiffs Were Not Grossly Deficient

1. As Chancellor Bouchard recognized, "[t]aken to its logical extreme,

[Delaware Plaintiffs'] argument would mean that any stockholder representative in a derivative action who did not first pursue books and records would be inadequate, or at least presumptively inadequate." AOB, Ex. A at 50-51. But *Pyott* rejected precisely such a "fast filer" presumption of inadequacy, 74 A.3d at 618, and since then, the Court of Chancery has repeatedly held that a decision not to pursue books and records did not establish inadequate representation. *E.g.*, *Bensoussan*, 2016 WL 3407708, at *12; *Fuchs Family*, 2015 WL 1036106, at *6. That is because a choice not "to develop all possible resources of proof does not make [plaintiffs'] representation legally ineffective, any more than such circumstances overcome the binding effect of a judgment on a party himself." Restatement (Second) of Judgments § 42(e) & (cmt. *f*); *Sonus*, 499 F.3d at 71; *Hanson*, 2007 WL 5186795, at *6; *see also Hansberry*, 311 U.S. at 43.

Moreover, as Chancellor Bouchard recognized, "it does not follow that plaintiffs are necessarily inadequate representatives because their counsel chose not to follow a recommended strategy in a different action, even one suggested by a preeminent corporate jurist, particularly when they are litigating in a different jurisdiction before a different judiciary." AOB, Ex. A at 51; *see also id.* at 51 n.115 (emphasizing the "complex issues of comity, efficiency, and fairness" upon which this determination rested (citing *Bammann*, 2015 WL 2455469, at *18 n.147)).

Indeed, then-Chancellor Strine "gave [his] warning[s] before the Delaware

Supreme Court decided in *Pyott* that there was no presumption of inadequacy for fast-filing plaintiffs." AOB, Ex. A at 50 n.112; *see also* A-63-64. By the time the Arkansas lawsuit proceeded to the Rule 23.1 stage, this Court had applied collateral estoppel to a federal judgment involving a stockholder-plaintiff that had not made a Section 220 demand. Arkansas Plaintiffs reasonably relied on this Court's reiteration that Section 220 is not mandatory, *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1152 (Del. 2011), in electing to defend their complaint without making such a demand (even though they were well aware that Delaware Plaintiffs were seeking books and records).

Delaware Plaintiffs simply ignore these considerations. They presuppose that the Arkansas federal court was required to relinquish its jurisdiction due to comments from the bench at an early stage of the parallel Delaware litigation (when the subject was the selection of lead counsel), or that Arkansas Plaintiffs were bound to conform their litigation conduct to those comments even though they did not appear in the Delaware action. These premises are contrary to the federal courts' rulings that, over defendants' objections, the Arkansas action should proceed. *Cottrell*, 737 F.3d at 1247-48; B136. They also ignore that our federal system contemplates parallel litigation in state and federal court, in which both litigants and judges may make differing decisions.

2. Nor is there any indication that Arkansas Plaintiffs acted unreasonably

in deciding to proceed. As Chancellor Bouchard recognized, "Arkansas Plaintiffs have been represented by more than a dozen attorneys from several different law firms," and "[n]o contention is made that [the Arkansas attorneys] are not experienced counsel." AOB, Ex. A at 51. Arkansas Plaintiffs were represented by experienced class and derivative action litigators from Emerson Poynter LLP and Scott+Scott LLP, and lead counsel Judy Scolnick successfully litigated a seminal Delaware case addressing access to books and records under Section 220. *See King*, 12 A.3d 1140. One of the Arkansas Plaintiffs is the Louisiana Municipal Employees Retirement System, which was the lead plaintiff in the *Pyott* case.

Although Delaware Plaintiffs insist that "Arkansas Plaintiffs did not merely employ a 'litigation strategy' to forego a Section 220 action" (AOB 27), Arkansas Plaintiffs explained on the public record their decision not to pursue books and records. *See*, *e.g.*, B209 ("[Books and records] is a tool that is useful when you need it . . . . In this case, we thought about it long and hard. In this case we didn't need it because we had these underlying documents."); *Cottrell v. Duke*, No. 12-3871, Entry ID 4016393, at 17 n.4 (8th Cir. 2013) ("[A] § 220 demand is not necessary where, as here, the *New York Times* exposé links to original documents [that, in Arkansas Plaintiffs' estimation,] establish[ed] the Defendants' complicity in the Walmex bribery scheme."). Delaware Plaintiffs do not even address this explanation, let alone try to show that it demonstrates gross deficiency.

Reasonable litigants and attorneys (and jurists) can certainly differ about the wisdom of pursuing a derivative complaint without first seeking books and records. Arkansas Plaintiffs made the strategic decision to forgo a Section 220 production, while Delaware Plaintiffs made the opposite decision. That difference does not render Arkansas Plaintiffs *constitutionally* inadequate representatives of Wal-Mart: Absent a ruling that the Due Process Clause *requires* stockholders to pursue a Section 220 request, the decision of Arkansas Plaintiffs may not be second-guessed by the Delaware courts.[3]

3. Moreover, Delaware Plaintiffs do not meaningfully argue that the documents obtained through Section 220 would have made any difference in the Western District of Arkansas or in the Eighth Circuit. Of course, the "logic" of the unanimously affirmed Arkansas judgment may not be challenged or examined in determining its preclusive effect. *E.g.*, *V.L. v. E.L.*, 136 S. Ct. 1017, 1020 (2016). Similarly, Arkansas Plaintiffs' conduct cannot be criticized with the benefit of hindsight. *Cf.* AOB, Ex. A at 55. Delaware Plaintiffs are, however, obligated to show a causal link between Arkansas Plaintiffs' strategic decision (to forgo Section

[3] In a footnote, Delaware Plaintiffs mention Chancellor Bouchard's ruling that they were not entitled to take discovery of Arkansas Plaintiffs on adequacy. AOB 28 n.42. In addition to having been waived, *see* Del. S. Ct. R. 14(b)(vi)(A)(3); *Lum v. State*, 101 A.3d 970, 971–72 (Del. 2014), any challenge to this ruling is misplaced. The "evidence" of Arkansas Plaintiffs' subjective thought processes sought by Delaware Plaintiffs is irrelevant to the adequacy analysis, which is an objective determination based on records of the proceedings. *See Arduini*, 774 F.3d at 635-36; *Hansberry*, 311 U.S. at 44-45; *Sonus*, 499 F.3d at 64, 66; Restatement (Second) of Judgments § 42(d)-(e) & (cmt. *f*); *see also* AOB, Ex. A at 19.

220 documents) and the alleged harm (dismissal) as a necessary—not sufficient—predicate to securing reversal on inadequacy grounds. *E.g.*, *Sonus*, 499 F.3d at 71 (finding no "grossly deficient [conduct]" because second complaint did not "add material allegations that would pass the test for pleading demand futility"); *Career Educ.*, 2007 WL 2875203, at *10 n.58 (similar).[4]

If Delaware Plaintiffs had found a "smoking gun" among the Section 220 documents, it would have been featured prominently in their opening brief to this Court. As they *admitted* at the hearing below, however, the record contains no such document. AOB, Ex. A at 56 n.123.

On appeal, Delaware Plaintiffs quote, repeatedly, from a single December 2005 email in which one officer wrote to another, [redacted] AOB 5, 9; A-204. But nothing indicates that Hernandez communicated [redacted]

[4] Chancellor Bouchard found it unnecessary to conduct this analysis because he found that Delaware Plaintiffs had failed to show that Arkansas Plaintiffs' conduct of the litigation was unreasonable; but he also indicated that Delaware Plaintiffs had failed to establish a causal nexus in any event. AOB, Ex. A at 56 ("[D]efendants have made legitimate arguments that the Section 220 materials, including some of the best documents (as identified by plaintiffs) supporting the allegations of demand futility, would not have affected the outcome of the demand futility analysis"); AOB, Ex. A at 6 n.2.

[redacted] to the rest of the Audit Committee, much less the full Board.[5] The other documents cited by Delaware Plaintiffs on appeal (AOB 8-9) are minutes, agendas, and corporate governance documents that do not reflect the substance of any conversation or decision regarding the situation in Mexico; many merely reflect the Company's risk management procedures. Not a single document establishes knowledge or bad faith on the part of any defendant, much less a majority of the demand Board

When Chancellor Bouchard pointedly asked for the three best documents from the Section 220 production, Delaware Plaintiffs were initially unable to answer and then pointed to three that did not remotely establish that any director on the demand board had knowledge of credible evidence suggesting that Wal-Mex management was involved in illegal bribes. *See* A-837, 844-46, 870-71; A-932-1068 (Halter report); B426-32 (Rodriguezmacedo report); B423-25 (Fung Memo); B401-20. Two of these documents were referenced in the *New York Times* article,

[5] The quoted document (Bates Number WM-220R-01394) is a privileged attorney-client communication. Delaware Plaintiffs' quotation from it on the public record is a violation of the Final Order and Judgment in the Section 220 action, their promises to this Court during the appeal of that case to maintain Wal-Mart's privileges, and the Confidentiality Order in this case, notwithstanding Plaintiffs' counsel's paraphrasing of this document during a hearing in the Court of Chancery. *See Ind. Elec. Workers Pension Trust Fund IBEW v. Wal-Mart Stores, Inc.*, 2013 WL 5636296, at *2 (Del. Ch.); *Ind. Elec. Workers Pension Trust Fund IBEW v. Wal-Mart Stores, Inc.*, 7779-CS, Dkt. 40 (Del. Ch.); *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW,* 614-2013, Dkt.12 at 33 n.29 (Del.). Wal-Mart has not waived the privilege as to this or any other document produced in the Section 220 action, and has demanded that Delaware Plaintiffs withdraw this unauthorized disclosure. Delaware Plaintiffs' refusal to do so demonstrates that they are not acting in the best interests of the company they seek to represent.

and are among the materials on which Arkansas Plaintiffs based their complaint. Chancellor Bouchard noted that Delaware Plaintiffs' reliance on these documents sharply undercut any suggestion that they are better positioned to plead demand futility than Arkansas Plaintiffs. AOB, Ex. A at 52-53. The third document was a formal memo that conveyed to Hernandez, [redacted] B424; AOB, Ex. A at 56 n.123. This document undermines Delaware Plaintiffs' theory of malfeasance entirely.

Delaware Plaintiffs' few additional allegations go entirely to Hernandez's knowledge. The Eighth Circuit was willing to infer the same knowledge, but went on to hold that "Hernandez learning about the suspected bribery is not enough for the shareholders" because "[t]heir suit depends on the information also being passed to the rest of the board." AOB, Ex. B at 9-12. Delaware Plaintiffs likewise do not come close to pleading facts about anything Hernandez or anyone else supposedly told *each and every* other director in 2005-06, *and* that all of those directors then made a conscious decision to condone unlawful conduct—as would be required to demonstrate demand futility as to a majority of the demand Board. B429. Nothing

in the Section 220 production supports such an allegation.[6]

Because Delaware Plaintiffs came up empty in the Section 220 action, they were left to make the same arguments concerning Hernandez—attempting to impute his supposed knowledge to other directors—as Arkansas Plaintiffs. Delaware Plaintiffs' contention that their complaint contains "substantial detail" not found in the Arkansas complaint (AOB 8-9) is unsupported by the record and belied by their request for precisely the same impermissible inferences as the Arkansas complaint. Delaware Plaintiffs are therefore in no position to charge that Arkansas Plaintiffs were "grossly deficient," and this Court could make no such finding on this record. *Sonus*, 499 F.3d at 71; *Career Educ.*, 2007 WL 2875203, at *10 n.58. Even "[t]actical mistakes or negligence on the part of the representative are not as such sufficient to render the judgment vulnerable." Restatement (Second) of Judgments § 42(e) & (cmt. *f*). While Delaware Plaintiffs litigated their case a little differently, the outcome would be no different than in Arkansas.

### 2. There Was No "Conflict of Interest"

Delaware Plaintiffs also argue that "Arkansas Plaintiffs and their counsel acted to further their own economic interest in litigating in Arkansas" and that "an

[6] Delaware Plaintiffs' insinuation that Wal-Mart committed evidentiary misconduct necessitating a motion for contempt sanctions (AOB 5 n.1) ignores that Chancellor Bouchard denied that motion, rejecting all of Delaware Plaintiffs' arguments. B230-340; B137-39. Delaware Plaintiffs did not appeal that ruling, and the judgment in the Section 220 proceeding is final and unreviewable. It is improper for them to raise the issue now.

irreconcilable conflict arose between the Arkansas Plaintiffs and other Wal-Mart stockholders." AOB 29. By that standard, Delaware Plaintiffs are equally conflicted by continuing their efforts to litigate in Delaware. A714-15. But that is not the standard; a disabling conflict of interest requires "interests . . . directly opposed to the interests of the person being represented, which in this case is Wal-Mart." AOB, Ex. A at 47; *Hansberry*, 311 U.S. at 44-45; *Town of Boothbay v. Getty Oil Co.*, 1999 WL 1319175, at *2 (1st Cir.) (citing Restatement and requiring "misaligned interests"). No such conflict exists here because "Arkansas plaintiffs, as stockholders . . . , would benefit from any recovery Wal-Mart received through a judgment or settlement in their derivative action." AOB, Ex. A at 48. Delaware Plaintiffs stood to receive (or not) the identical benefit: Their interests, as distinguished from their lawyers' interests, were identical to Arkansas Plaintiffs' interests. More importantly, they "do not allege that the Arkansas plaintiffs had an interest adverse to Wal-Mart or that they would benefit from . . . harm[ing] the company." AOB, Ex. A at 48. Thus there is no disabling conflict.

Delaware Plaintiffs also point to Wal-Mart's statements urging that the Arkansas action be stayed so that the Company would not be subject to the burdens of duplicative litigation and briefing concerning collateral estoppel—precisely the burdens imposed by Delaware Plaintiffs' own refusal to cooperate with Arkansas Plaintiffs. AOB 27-28; *see also* A-690-91 (Wal-Mart stay motion). Defendants

simply anticipated that Delaware Plaintiffs would make the arguments that they are making now. Defendants' (unsuccessful) efforts to have the demand futility issue resolved in Delaware cannot trump the full faith and credit due the Arkansas judgment. *Pyott*, 74 A.3d at 616-18; *Bensoussan*, 2016 WL 3407708, at *11.

* * *

Delaware Plaintiffs are trying to co-opt the Due Process Clause to impose a mandatory Section 220 requirement on every derivative lawsuit involving a Delaware corporation, no matter where it is filed. This Court has rejected similar efforts at least three times. *Pyott*, 74 A.3d at 618; *King*, 12 A.3d at 1152; *White v. Panic*, 783 A.2d 543, 549-50 (Del. 2001). The courts cannot make Section 220 mandatory in the absence of legislative action. Under our federal system, it is not just proper, but *expected* that cases will be decided in other courts, with varying procedures and outcomes. As *Pyott* recognized, constitutional principles of full faith and credit require Delaware courts to give effect to the judgments of those other courts. 74 A.3d at 615-17 (citing 28 U.S.C. § 1738; *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 336 (2005); *Semtek*, 531 U.S. at 507-08). Because "principles of due process are embedded in the pertinent provisions of the Restatement," AOB, Ex. A at 45 (citing Restatement (Second) of Judgments § 42 & Reporter's Note), the judgment secured by Arkansas Plaintiffs precludes relitigation of demand futility by Delaware Plaintiffs.

## III. Demand Futility Was Actually Litigated

### A. Question Presented

Did the Court of Chancery correctly hold that demand futility was "actually litigated" in Arkansas? This issue was preserved for appeal. A-305-12; A-324-34; A-705-09; A-742-45; A-852-53; A-855-61; B404-07.

### B. Standard of Review

Review is de novo. *Smith*, 16 A.3d at 933.

### C. Merits of the Argument

Delaware Plaintiffs' final argument is that the Arkansas judgment does not satisfy the "actually litigated" requirement. AOB 31-33. Under Arkansas law, "'actually litigated' means that the issue was raised in the pleadings, or otherwise, that the defendant had a full and fair opportunity to be heard, and that a decision was rendered on the issue." *Harben*, 2010 WL 3893980, at *5 (citing *Powell v. Lane*, 289 S.W.3d 440 (Ark. 2008)). Here, demand futility was expressly alleged in the Arkansas complaint, and expressly ruled on in well-reasoned opinions by both the Western District of Arkansas and the Eighth Circuit. *See* B92-100; B158; AOB, Ex. B. Indeed, given that the sole basis of dismissal and affirmance was the federal courts' conclusion that demand would not have been futile, it is difficult to comprehend how Delaware Plaintiffs can argue in good faith that demand futility was not actually litigated in Arkansas.

Delaware Plaintiffs try to confuse the analysis by arguing that "the issue of demand futility under *Aronson*" or "whether the Board's actions were a valid exercise of business judgment" was not actually litigated in Arkansas. AOB 31. But the choice between *Rales* and *Aronson* was addressed at length by the parties, and the Arkansas court specifically held that "analysis under *Aronson* is inappropriate." B150; *see also* AOB, Ex. B at 8 n.6. Moreover, "[b]ecause the *Rales* test 'folds the two-pronged *Aronson* test into one broader examination,' it is of no substantive consequence that the district court used *Rales* instead of *Aronson*." AOB, Ex. A at 29 n.62 (citing *Guttman v. Huang*, 823 A.2d 492, 501 (Del Ch. 2003)).

Delaware Plaintiffs ignore the Supreme Court's admonition that "minor variations in the application of what is in essence the same legal standard do not defeat preclusion." *B&B Hardware*, 135 S. Ct. at 1307. Such differences in analytical frameworks, even if supported by new documents, are "simply irrelevant" because the issue is "the same" for purposes of collateral estoppel where, as here, it is "based on the same underlying operative facts." *Fuchs Family*, 2015 WL 1036106, at *5; *MGM*, 2014 WL 2960449, at *6; *Bammann*, 2015 WL 2455469, at *18; *Career Educ.*, 2007 WL 2875203, at *14; *Holt v. Golden*, 880 F. Supp. 2d 199, 202 (D. Mass. 2012). Otherwise, "issue preclusion would almost never apply"—"subsequent plaintiffs could simply add more allegations (or more specific allegations) of corporate malfeasance, and then claim there was no identity of

issues." *Arduini*, 774 F.3d at 630; *Bammann*, 2015 WL 2455469, at *18.

The relevant "issue" is not the applicability of the *Aronson* (or *Rales*) framework, but rather whether "the failure to make demand on the . . . board is excused because such a demand would have been futile." *E.g.*, *Harben*, 2010 WL 3893980, at *6; *Arduini*, 774 F.3d at 629-30; *Pyott*, 74 A.3d at 617; *Bammann*, 2015 WL 2455469, at *1. As Chancellor Bouchard recognized, "the core demand futility issue" was "the same" in both Arkansas and Delaware. AOB, Ex. A at 24. The Arkansas judgment precludes relitigation of that issue by Delaware Plaintiffs.

## CONCLUSION

The Court of Chancery correctly concluded that Delaware Plaintiffs are collaterally estopped from asserting demand futility by the Arkansas judgment. The judgment of dismissal with prejudice should therefore be affirmed.

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