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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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,

Plaintiffs Below,
Appellants,

v.

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

No. 295, 2016

Appeal from the Memorandum Opinion, dated May 13, 2016, of the Court of Chancery of the State of Delaware, C.A. No. 7455-CB

REASON, ARNE M. SORENSON, JOSE H. VILLARREAL, JOSE LUIS RODRIGUEZMACEDO 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.

OPENING BRIEF OF APPELLANTS / PLAINTIFFS-BELOW

Dated: July 25, 2016

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NATURE OF PROCEEDINGS

Plaintiffs-appellees (the "Delaware Plaintiffs") own over 11 million shares of nominal defendant-appellee Wal-Mart Stores, Inc. ("Wal-Mart" or the "Company"). On June 6, 2012, one of the Delaware Plaintiffs made a demand to inspect Wal-Mart's books and records relating to a bribery scheme at Wal-Mart's Mexican subsidiary, Wal-Mart de Mexico ("WalMex"). After a ruling by then-Chancellor Strine and an affirmance on appeal, the Delaware Plaintiffs obtained certain books and records from Wal-Mart in late 2014. Following a motion for contempt against Wal-Mart, the Company produced additional books and records to the Delaware Plaintiffs in late 2014 and early 2015. On May 1, 2015, after receiving Wal-Mart's post-motion production, the Delaware Plaintiffs filed their Verified Consolidated Amended Stockholder Derivative Complaint (the "Complaint").

The defendants-appellees ("Defendants") filed a motion to dismiss on collateral estoppel and demand futility grounds, claiming that a complaint, filed by stockholder plaintiffs in Arkansas federal court without seeking books and records, which was dismissed on March 31, 2015, precluded the Delaware Plaintiffs' Complaint from going forward. On May 13, 2016, the Court of Chancery dismissed the Delaware Plaintiffs' Complaint on collateral estoppel grounds due to the Arkansas dismissal decision.

SUMMARY OF ARGUMENT

1. ***Due Process Violation and No Privity.*** The Court of Chancery committed legal error in concluding that the dismissal of the Arkansas derivative action for failure to plead demand futility required the dismissal of the Delaware Plaintiffs' complaint on collateral estoppel grounds. First, the Court of Chancery violated the Delaware Plaintiffs' Due Process rights under the United States Constitution. Derivative actions with respect to a Delaware corporation are two-fold in nature, with the first phase of the litigation being strictly individual in nature. A stockholder plaintiff is not a representative plaintiff, with the power to bind the corporation or anyone else, until the stockholder adequately shows demand futility or wrongful refusal of a demand. Holding that the dismissal of a stockholder plaintiff's derivative action for failure to plead demand futility thereby precludes subsequent stockholders from bringing derivative litigation is a violation of those stockholders' Due Process rights. Second, even if the Court of Chancery did not violate Due Process, the Court nonetheless committed legal error in its analysis of the Restatement of Judgments, precedent case law, and Arkansas public policy.

2. ***Inadequate Representatives.*** The Court of Chancery erred in concluding that the Arkansas Plaintiffs were adequate representatives. The record shows that those plaintiffs' attorneys ignored the unequivocal instruction of then-Chancellor

Strine that stockholders seeking to litigate these claims must seek books and records in support of their claims or face dismissal of their complaint. The record shows that, instead of heeding this instruction, the Arkansas Plaintiffs' attorneys pressed forward with their inadequate complaint – without books and records – in a race to judgment merely for their own financial interests, rather than the interests of either Wal-Mart or Wal-Mart's other stockholders.

3. *Issue Not "Actually Litigated."* The Delaware Plaintiffs' complaint pleads demand futility under, among other things, the second prong of *Aronson v. Lewis*. The Arkansas Plaintiffs' complaint did not. The Court of Chancery erred in concluding that the *Aronson* and *Rales* standards are mere distinctions without difference and therefore the Delaware Plaintiffs' claim was "actually litigated" in the Arkansas action. The Court of Chancery's conflation of the demand futility standards was legal error here, where a substantial portion of the Delaware Plaintiffs' theory of their case is pled under *Aronson*'s second prong.

STATEMENT OF FACTS

A. THE WALMEX BRIBERY SCHEME AND INVESTIGATION

Nominal defendant Wal-Mart is a Delaware corporation headquartered in Bentonville, Arkansas. A-101. According to Wal-Mart's 2004 Annual Report, WalMex was Wal-Mart's largest foreign subsidiary, accounting for 49.6% of Wal-Mart's international discount stores, 32.3% of its international Supercenters, and 66% of all international Sam's Clubs. A-109-10.

Between 2002 and 2005, WalMex opened numerous new stores in Mexico facilitated through bribes of government officials. A-93, 110-15. Executives at WalMex paid hundreds of illegal bribes, totaling tens of millions of dollars to hasten the Company's expansion. A-92, 110-15, 135, 137-39, 142, 149-52, 159-60, 162-63. In September 2005, Sergio Cicero, a former longtime WalMex in-house attorney blew the whistle, saying he wanted to ensure the systemic bribery was made "known in Bentonville." A-94-96, 124-36.

Wal-Mart initially retained the law firm Willkie Farr Gallagher LLP ("Willkie Farr") to investigate Cicero's allegations of bribery and corruption. A-141-42. On November 2, 2005, Willkie Farr submitted a proposal to Wal-Mart, recommending a four-month long "thorough investigation" into those allegations. A-143-44. The very next day, Wal-Mart rejected Willkie Farr's proposal for a thorough investigation, and directed the Company's inadequately staffed Corporate

Investigations unit to conduct a brief, internal investigation (the "Preliminary Inquiry"), with a report due to "Bentonville management and the Chairman of the Audit Committee" by November 16, 2005. A-144-47.

The Preliminary Inquiry immediately corroborated Cicero's allegations of corruption, and found that WalMex's CEO and general counsel were aware of the illegal payments. A-149-52. On or around November 16, 2005, Roland A. Hernandez ("Hernandez"), Chairman of the Company's Audit Committee, received an update on the results of the Preliminary Inquiry. A-153-54. Internal Wal-Mart email correspondence, obtained in the Section 220 Action, shows that, upon being briefed, Hernandez was "***very, very concerned*** about the findings so far." *Id*. (emphasis added).[1] That same day, the Audit Committee held its quarterly meeting, which was attended by several senior Wal-Mart executives who were also familiar with the Preliminary Inquiry. A-154-55. Based on written Company policies and the severity of the allegations, it is reasonable to infer that Hernandez informed the full Audit Committee of the Preliminary Inquiry (*id*.) and that he informed the Wal-Mart board about the Preliminary Inquiry during its November 16-17, 2005 meeting. A-155-56.

[1] Unless otherwise noted, all instances of emphasis hereinafter are added. Notably, Wal-Mart produced the Section 220 document referenced in the text above only after Plaintiff filed a motion for contempt in the Section 220 proceeding. A-203-04.

The next month, in December 2005, Wal-Mart's internal investigators issued two written reports on the Preliminary Inquiry. A-159-61, 162-63.[2] Among the findings was the conclusion that, "there [was] ***reasonable suspicion to believe that Mexican and USA laws may have been violated***." A-159-60. The investigators recommended further "external" investigation. A-161, 163-64. Based on Wal-Mart's policies and the Audit Committee's Charter, it is reasonable to infer that the results of the investigators' work were shared with the Audit Committee and Board. A-159-60.

Instead of conducting the recommended external investigation, the investigation was handed over to the very WalMex general counsel who was implicated in the investigators' reports. A-164-65. In doing so, Wal-Mart ensured that the bribery scheme would be covered-up. The WalMex general counsel quickly concluded the internal investigation with no further digging, and submitted a report to Wal-Mart's Audit Committee for its May 2006 meeting that, on its face, was unreliable, placing the blame for the bribery scheme on the very individual who blew the whistle in the first place. A-178, 179-80.

B. THE ARKANSAS AND DELAWARE LITIGATIONS

Between April 25, 2012 and June 18, 2012, in the wake of an April 2012 article in *The New York Times* regarding the bribery scheme and cover-up, Wal-

[2] Copies of the reports referenced in the text above, which the Delaware Plaintiffs obtained through the Section 220 proceeding, may be found at A-932 to A-1068 and A-1069 to A-1094.

Mart stockholders filed derivative actions in the Court of Chancery, and in Arkansas state and federal court (which were later consolidated in federal court (the "Arkansas Action")). On May 31, 2012, the plaintiffs in the Arkansas Action (the "Arkansas Plaintiffs")[3] filed a derivative action (the "Arkansas Complaint"), which defendants moved to stay on July 6, 2012.

1. Then-Chancellor Strine Warns Wal-Mart Stockholders That Derivative Complaints Based on the New York Times Article and Linked Documents Would Be Dismissed

On July 16, 2012, then-Chancellor Strine conducted a hearing to resolve, among other things, Plaintiffs' competing leadership proposals. At the hearing, the Chancellor repeatedly instructed the Delaware Plaintiffs to pursue a books and records action.[4] In no uncertain terms, he stated:

> What I am sure of is the following. ***I don't know why the plaintiffs would ever wish to proceed -- either one of the contending groups would wish to proceed to defend either of the extant complaints.***[5]

The Chancellor also noted that "***[t]here is nothing about this case that requires expedition. There is everything about the context of this case which requires great care and pleading***."[6] Most important, then-Chancellor Strine noted

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[3] The Arkansas Plaintiffs' Wal-Mart holdings are dwarfed by the Delaware Plaintiffs'. In fact, the allegations that the Arkansas Plaintiffs even held any stock was never challenged nor proven.

[4] One of the Delaware Plaintiffs had already sought books and records at this time. A-70.

[5] A-55-56; *see* A-62 ("***You really don't want to have your motion to dismiss assessed on these complaints***…."); A-73 ("***I don't think anybody wished to stand on the existing complaints***.").

[6] A-53-54; *see* A-55-56 ("This is ***exactly*** the kind of nonexpedited case where actual stockholders, people who actually cared about the outcome, would wish to investigate by way of

that "***[i]t makes the investors of Wal-Mart best served by having the strongest possible complaint put on the record***[,]" and instructed the plaintiffs "to work together, ***get the books and records***, put the strongest possible complaint on the table…."[7] The Delaware Plaintiffs did just that. The Arkansas Plaintiffs did not.

2. The Arkansas Action Is Dismissed for Failure to Plead Demand Futility with Particularity

On March 31, 2015 – before the Delaware Plaintiffs had completed their Section 220 litigation – the district court in Arkansas dismissed the Arkansas Complaint, ruling that it failed to adequately allege demand futility with particularity. *In re Wal-Mart Stores, Inc. S'holder Derivative Litig.*, 2015 WL 1470184, at *7 (W.D. Ark. March 31, 2015). This decision was recently affirmed by the United States Court of Appeals for the Eighth Circuit. *Cottrell v. Duke*, Case No. 15-1869 (8th Cir. July 22, 2016) (attached as Ex. B hereto). The Eighth Circuit's decision notes a lack of detail in the Arkansas Plaintiffs' pleadings. *See, e.g.*, Ex. B at 4-5 ("The shareholders allege, without additional detail, the investigators' findings and suspicions were reported to the chair of Wal-Mart's audit committee, Wal-Mart's CEO, and its general counsel and, 'through these three individuals, to the entire Wal-Mart Board.'"). In contrast, the Delaware Plaintiffs employed documents obtained in the Section 220 proceeding to provide

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a books and records examination, ***take a sincere look at the books and records and file the strongest possible complaint that you could.***").

[7] A-80.

substantial detail concerning the reporting-up of the internal bribery investigation findings. This includes, for example, details of Wal-Mart policies requiring reporting-up of the bribery scheme and resulting cover-up, the Audit Committee Chairman's severe "concern" upon being briefed on the initial investigation results, the internal investigators' lengthy reports detailing evidence of the bribery scheme and raising suspicions about the individual at WalMex ultimately placed in charge of the investigation, and specific meetings of Wal-Mart's Audit Committee and Board at which it should be inferred that the bribery scheme and cover-up were discussed. A-153-56; A-171-73; A-179-84; A-203-05; A-207-26; A-239; A-907-24; A-932-1068; A-1069-94.

3. The Chancery Court Dismissed the Delaware Plaintiffs' Complaint Based on Collateral Estoppel

The Delaware Plaintiffs prosecuted their pending books and records proceeding before filing an amended complaint. The Delaware Plaintiffs vigorously pursued the books and records litigation, which took three years to resolve, including a trial and an appeal to the Delaware Supreme Court. On May 1, 2015, the Delaware Plaintiffs filed a very specific, fact-laden Complaint based on the Section 220 documents. On May 13, 2016, the Court of Chancery dismissed the Amended Complaint with prejudice based only on collateral estoppel. A-1111-70. This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN FINDING PRIVITY BETWEEN THE DELAWARE PLAINTIFFS AND ARKANSAS PLAINTIFFS

A. QUESTION PRESENTED

Did the Court of Chancery commit legal error in concluding that the Delaware Plaintiffs and Arkansas Plaintiffs were in privity, when that conclusion violated Plaintiffs' Due Process rights and incorrectly analyzed the Restatement of Judgments, case law precedent, and Arkansas public policy? This issue was preserved for appeal. A-534-35; A-541-46; A-552-58; A-784-88; A-797-820; A-876-901.

B. STANDARD OF REVIEW

Legal conclusions are reviewed *de novo* to determine whether the trial court "erred in formulating or applying legal precepts." *Rapid-Am. Corp. v. Harris*, 603 A.2d 796, 804 (Del. 1992) (citation omitted).

C. MERITS OF THE ARGUMENT

1. The Dismissal on Collateral Estoppel Grounds Violated the Delaware Plaintiffs' Due Process Rights

(a) The Arkansas Derivative Action Was Individual in Nature

In failing to survive a motion to dismiss on demand excusal grounds, the Arkansas Plaintiffs' action remained strictly individual in nature. As this Court

held over thirty years ago in *Arsonson v. Lewis*,[8] "[t]he nature of the [derivative] action is two-fold."[9] "First it is the equivalent of a suit by the shareholders to compel the corporation to sue. Second, it is a suit by the corporation, asserted by the shareholders on its behalf, against those liable to it."[10]

The two-fold nature of derivative litigation has been repeatedly confirmed by this Court.[11] Indeed, the *Aronson* decision's articulation of the two-fold nature of derivative litigation was not "a new concept" even then.[12]

> One of Delaware's greatest jurists, Chancellor Josiah Wolcott, wrote half a century before *Aronson* that: '[t]he complainants' case, being asserted by them in their derivative right as stockholders, has a double aspect. Its nature is dual. It asserts as the principal cause of action a claim belonging to the corporation to have an accounting from the defendants and a decree against them for payment to the corporation of the sum found due on such accounting. In this aspect, the cause of action is the corporation's. It does not belong to the complainants. Inasmuch however as the corporation will not sue because of the domination over it by the alleged wrongdoers who are its directors,

[8] 473 A.2d 805 (Del. 1984).

[9] *Id*. at 811.

[10] *Id*.

[11] *See Schoon v. Smith*, 953 A.2d 196, 201-02 (Del. 2008) (tracing history of derivative action and explaining its dual nature); *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990) (quoting *Aronson* for the "two-fold" nature of the derivative action); *Sternberg v. O'Neil*, 550 A.2d 1105, 1124 n. 41 (Del. 1988) ("The normal derivative suit was 'two suits in one: (1) The plaintiff brought a suit in equity against the corporation seeking an order against it; (2) to bring suit for damages or other legal injury for damages or other relief against some third party who had caused legal injury to the corporation.'") (quoting Robert C. Clark, *Corporate Law* 639-40 (1986)); *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988) (quoting *Aronson* in describing the "two-fold" nature of the derivative action); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 784 (Del. 1981) (citing "the 'two phases' of a derivative suit, the stockholder's suit to compel the corporation to sue and the corporation's suit").

[12] *Aronson*, 473 A.2d at 944, 945.

> the complainants as stockholders have a right in equity to compel the assertion of the corporation's rights to redress. **This is their individual right.** A bill filed by stockholders in their derivative right therefore has two phases—one is the equivalent of a suit to compel the corporation to sue, and the other is the suit by the corporation, asserted by the stockholders in its behalf, against those liable to it. The former belongs to the complaining stockholders; the latter to the corporation.'[13]

Thus, a key distinction between the first and second phases of a derivative action is that "the first phase of the derivative action [is one] in which the stockholder ***sues individually*** to obtain authority to assert the corporation's claim."[14] "[U]ntil the derivative action passes the Rule 23.1 stage, the named plaintiff does not have authority to sue on behalf of the corporation or anyone else."[15]

This understanding of the two-fold nature of derivative litigation with respect to Delaware corporations governed the Arkansas court's dismissal of the Arkansas Complaint.[16] As a result, the Arkansas Plaintiffs' failure to survive a

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[13] *In re EZCORP Inc. Consulting Agreement Deriv. Litig.*, 130 A.3d 934, 944-45 (Del. Ch. 2016) (Laster, V.C.) (quoting *Cantor v. Sachs*, 162 A. 73, 76 (Del. Ch. 1932)).

[14] *Id*. at 945.

[15] *Id*.; *see id*. at 943 ("As a matter of Delaware law, a stockholder whose litigation efforts are opposed by the corporation does not have authority to sue on behalf of the corporation until there has been a finding of demand excusal or wrongful refusal….") (citing *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993) (quotation omitted); *EZCORP*, 130 A.3d at 944 ("The right to bring a derivative action does not come into existence until the plaintiff shareholder has made a demand on the corporation to institute such an action or until the shareholder has demonstrated that demand would be futile.") (quoting *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988)).

[16] *See, e.g.*, *Draper v. Paul N. Gardner Defined Plan Trust*, 625 A.2d 859, 866 (Del. 1993) ("The [United States] Supreme Court held that it was the law of the state of incorporation which governed the substantive legal issues of corporate governance, including the question of pre-suit demand. The [United States Supreme] Court said: 'In our view, the function of the demand

motion to dismiss on demand excusal grounds meant that the Arkansas Plaintiffs' action remained strictly individual in nature.

(b) Due Process Requires That Dismissal of the Arkansas Plaintiffs' Individual Action Not Preclude the Delaware Plaintiffs' Action

In *EZCORP*, Vice Chancellor Laster explained that the U. S. Supreme Court has repeatedly held that binding other litigants to an adjudication in a case where they were not parties "deprive[s] them of the due process of law guaranteed by the Fourteenth Amendment." *EZCORP*, 130 A.3d at 947 (quoting *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797-98 (1996) (The general rule is that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.")); *see also Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940); *Taylor v. Sturgell*, 553 U.S. 880, 891-2 (2008) (holding that "[t]he federal common law of preclusion is, of course, subject to due process limitations" and that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process").

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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.'") (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96-97 (1991)); *Draper*, 625 A.2d at 864-65 (holding that, "[u]nder the internal affairs doctrine, the law of the state of incorporation (Delaware) would apply to matters of substantive law") (citing *Rogers v. Guaranty Trust Co. of N.Y.*, 288 U.S. 123, 130 (1933)). Even if Arkansas was somehow not required to adhere to this aspect of Delaware law, Arkansas courts nonetheless follow Delaware law in analyzing derivative actions for demand excusal.

Although the U.S. Supreme Court has recognized certain exceptions to the "non-party rule," Vice Chancellor Laster explained why none of those exceptions would apply where a derivative action is dismissed for failure to show demand futility. The Vice Chancellor cited the analogous U.S. Supreme Court decision in *Smith v. Bayer*, which held that "[n]either a proposed class action nor a rejected class action may bind nonparties."[17] *Bayer* explained that allowing a proposed or uncertified class to bind non-parties "ill-comports with any proper understanding of what a 'party' is" and that no justice was "willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified.*"[18] *Bayer* stated that "[t]he definition of the term 'party' can on no account be stretched so far as to cover a person … whom the plaintiff in a lawsuit was denied leave to represent."[19] In contrast to the Court of Chancery's Opinion here,[20] the *Bayer* Court also rejected defendant's policy-based arguments contending that all unnamed class members should be bound by the prior decision denying class certification to prevent multiple plaintiffs filing *seriatim* lawsuits, forcing the "serial relitigation of class

[17] *EZCORP*, 130 A.3d at 948 (quoting *Smith v. Bayer*, 564 U.S. 299, 315 (2011)).

[18] *Bayer*, 564 U.S. at 313 (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 16 (2002)).

[19] *Bayer*, 564 U.S. at 313-15.

[20] Op. at 42 (A-1154) (noting view of Arkansas "policy of using preclusion to ensure issues are litigated only once").

certification[.]"[21] Specifically, the Court stated "this form of argument flies in the face of the rule against nonparty preclusion."[22] As such, the U.S. Supreme Court held that a decision properly authorizing the plaintiff to represent the class was a precondition to binding unnamed class members.[23]

Applying the reasoning from *Bayer*, Vice Chancellor Laster held in *EZCORP* that, "just as the Due Process Clause prevents a judgment binding absent class members before a class has been certified, the Due Process Clause likewise prevents a judgment from binding the corporation or other stockholders in a derivative action until the action has survived a Rule 23.1 motion to dismiss, or the board of directors has given the plaintiff authority to proceed by declining to oppose the suit." *EZCORP*, 130 A.3d at 948.[24]

Although the Opinion acknowledged that the application of Arkansas law for issue preclusion was "[s]ubject to Constitutional standards of due process,"[25] the Court of Chancery performed no analysis of Plaintiffs' rights under the Due Process Clause. Instead, the Court of Chancery incorrectly found that Plaintiffs had conceded their federal common law arguments, including due process, in favor

[21] *Bayer*, 564 U.S. at at 316.

[22] *Id*.

[23] *See also Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811 (1985).

[24] *Cf. Parfi Hldg. AB v. Mirror Image Internet,* 954 A.2.d 911, 940 (Del. Ch. 2008) (Strine, V.C.) ("Although it is too often overlooked, derivative suits are a form of representative action. Indeed, they should be seen for what they are, a form of class action.").

[25] Op. at 2 (A-1114).

of applying Arkansas law.[26] To the contrary, however, at the hearing on Defendants' motion to dismiss, Plaintiffs argued:

> ***On due process, I think it's federal law. That's what governs.*** On collateral estoppel, to the extent that the Court was sitting hearing a federal question, which it was on the 14(a) claim, it's federal common law. To the extent that it was sitting hearing a diversity claim, which it was also, it's state law, ***as long as that doesn't contravene federal policy.***

A-811. The Court of Chancery also failed to acknowledge Plaintiffs' due process rights based on the analysis in the *EZCORP* decision, which was decided after the hearing, but submitted to the Court before it issued the Opinion. A-876-901.

The Court of Chancery relied on *Semtek Intern. Inc. v. Lockheed Martin Corp.*[27] in applying Arkansas law to the issue of collateral estoppel, but ignored *Semtek*'s instruction that "state law will not obtain, of course, in situations in which the state law is incompatible with federal interests" including due process.[28] *Semtek* also did not involve any type of representative litigation making it inapposite here.

The Court of Chancery also improperly relied on *Pyott II*[29] in applying the Arkansas Judgment against Plaintiffs,[30] since a judgment is not applied under the

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[26] *See* Op. at 20-21 n.34 (A-1132-33).

[27] 531 U.S. 497 (2001).

[28] *Id*. at 509.

[29] *Pyott v. La. Mun. Police Emps.' Ret. Sys.*, 74 A.3d 612 (Del. 2013).

[30] Op. at 20 (A-1132).

Full Faith and Credit Clause if it violates the Constitution's Due Process Clause.[31] In addition, the reasoning from *Pyott II* should not apply here because it was based on *Baker v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998), which held that the Full Faith and Credit Clause was not subject to public policy exceptions in the collateral estoppel context, but did not address the interaction between the Due Process Clause and the Full Faith and Credit Clause.

2. The Court of Chancery Further Erred in Finding Privity Between the Arkansas Plaintiffs and the Delaware Plaintiffs

Under Arkansas law, collateral estoppel only applies to persons who were either parties to a prior action or in privity with a party. *Ark. Dept. of Human Servs. v. Dearman*, 842 S.W.2d 449, 452 (Ark. Ct. of Appeals 1992) (en banc).[32] Further, due process limits the preclusive effect any state court may impose on absent parties. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard.").

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[31] *See Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (holding that only if due process requirements are adhered to in one state will another state be obligated to enforce the first state's judgment under the full faith and credit clause); *Hansberry*, 311 U.S. at 40; *Richards*, 517 U.S. at 804.

[32] Here, the Court of Chancery held that Arkansas law controls the collateral estoppel analysis because "the Arkansas district court's decision concerning demand futility" related to a state-law claim "brought under the district court's diversity jurisdiction." Op. at 20 (A-1132). Generally, "the claim-preclusive effect of a judgment in a federal diversity action" is determined by whatever "law that would be applied by state courts in the State in which the federal diversity court sits." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-08 (2001).

Recognizing that Arkansas law has not analyzed privity in the context of derivative litigation, the Court of Chancery found that Arkansas likely would find privity between the Arkansas Plaintiffs and Delaware Plaintiffs based upon (i) the Restatement of Judgments, (ii) decisions from other jurisdictions, and (iii) principles of public policy. Op. at 30-43 (A-1142-55). Because none of these bases support the Court's decision, and because privity is subject to due process limitations, the Court of Chancery erred in finding privity between the Arkansas and Delaware Plaintiffs.

(a) Under the Restatement of Judgments, Two Parties Will Be in Privity Only Where the First Is Authorized by Court or Contract

The Court of Chancery was correct that Arkansas courts look to the Restatement of Judgments in "determining unsettled questions of issue preclusion law," but it erroneously held that "the Restatement is inconclusive as a predictor of how an Arkansas court would decide the privity question." Op. at 31, 39 (A-1143, 1151). To the contrary, the Restatement identifies a general rule that "a judgment in an action to which a corporation is a party has no preclusive effects on a . . . stockholder." Restatement (Second) of Judgments § 59 (1982). In fact, comment c further specifies that if a derivative action is brought "by some of the stockholders . . . as representatives of all of them," then "[w]hether the judgment in such a representative suit is binding upon all stockholders or members is

determined by the rules stated in §§ 41 and 42." *Id.* at cmt. c. These sections, discussed below, address privity in representative actions and clearly show that a derivative plaintiff cannot be in privity with other stockholders unless authorized by court or contract, neither of which happened here.

Section 41 identifies five categories of persons who have authority to represent a non-party. Only one of these categories – the "representative of a class of persons similarly situated" – is analogous to a derivative plaintiff, but the Restatement expressly limits the reach of this category to actions where the representative is "designated as such with the approval of the court." Restatement § 41(1)(e). The Restatement's comments further explain that the method of designating a representative "may be adjudicative or contractual." *Id.* at cmt. a.[33] In other words, Section 41 instructs that because an adjudication or contract is required to "confer on the representative the requisite authority," one cannot obtain representative status by self-appointment. *Id.* Here, the Arkansas plaintiffs cannot be in privity with Walmart or Plaintiffs because the Arkansas plaintiffs were never conferred the necessary judicial authority to represent Walmart. Indeed, Walmart explicitly acknowledged as much when it moved for a limited stay in Arkansas,

[33] *See also id.* at cmt. e ("[T]he representative of the class derives his representative authority from his situation as a member of the affected class, coupled with judicial approval of designation …. of the representative's status as such. Because the representative's status is voluntary and non-contractual, it is subject to careful judicial scrutiny.")

arguing that "Wal-Mart remains in control of this litigation unless and until a court of competent jurisdiction confers standing on a stockholder." A-674.[34]

The Court of Chancery erroneously concluded that the Restatement is "ambiguous." Its basis was a comment to § 59 stating that a derivative action is brought "on behalf of the corporation," with no mention of whether demand futility was first established. Op. at 38 (A-1150). This conclusion fails as a matter of construction. By definition, all derivative suits are brought on behalf of corporations. Nevertheless, § 59 specifies that a derivative action is only binding on non-parties if the non-party is represented as "determined by the rules stated in §§ 41 and 42." Restatement § 59. Because Section 41 (requiring an adjudication or contract to confer authority on a representative plaintiff) and Section 42 (listing circumstances where, even if such authority is conferred, a representative may still be inadequate) clearly delineate when actions will or will not bind absentees, the court below was simply incorrect that the Restatement was "ambiguous."[35]

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[34] Restatement § 42 sets forth various exceptions to § 41, in which instances even a properly authorized representative party cannot bind a non-party, including where the representative is inadequate, as discussed more fully in Section II, *infra*. The Restatement comments that if a court finds a representative to be "not properly constituted" with respect to any of the issues in litigation, this determination "***prevents any binding effect as to those issues***." Restatement § 42, cmt. d.

[35] Among the cases the Court of Chancery relied on, several cited the Restatement but none analyzed its guidance that a representative plaintiff must obtain authority by court or contract in order to bind a non-party. *See Arduini v. Hart*, 774 F.3d 622, 634 n.11 (9th Cir. 2014) (acknowledging § 41 but failing to analyze the language requiring court approval or the comment describing authorization by court or contract); *In re MGM Mirage Deriv. Litig.*, 2014 WL 2960449, at *6 (D. Nev. June 30, 2014) (same); *In re Sonus Networks, Inc. S'holder Deriv.*

(b) The Court of Chancery Improperly Relied on Irrelevant Authority and Failed to Address Due Process as It Relates to Privity

The Court of Chancery committed reversible error because it failed to follow mandatory federal authority that, in a preclusion analysis, privity is subject to due process limitations. Instead, the Court of Chancery relied on non-Arkansas state-law cases, none of which addressed due process concerns in the context of privity.[36] *E.g.*, Op. at 32-33 (A-1144-45) (finding a "common theme" in cited cases that the corporation was the "real party in interest," and concluding that the plaintiffs were therefore "interchangeable" without evaluating plaintiffs' due process rights).

Litig., 422 F. Supp. 2d 281, 291 (D. Mass. 2006), *aff'd*, 499 F.3d 47 (1st Cir. 2007) (same); *Slocum ex rel. Nathan A. v. Joseph B.*, 588 N.Y.S.2d 930, 933 (N.Y. App. Div. 1992) (finding that New York law eschewed strict reliance on formalities such as § 41 and finding privity between mother and child based on fully litigated paternity proceeding brought by mother).

[36] *See Arduini*, 774 F.3d 622 (9th Cir. 2014) (relying on *Pyott* II to determine that privity existed between stockholders bringing successive derivative suits under Nevada law without analyzing due process concerns); *Asbestos Workers Local 42 Pension Fund v. Bammann*, 2015 WL 2455469 (Del. Ch. May 22, 2015) (applying New York law without considering due process issues before determining that privity existed between stockholders of a corporation); *Fuchs Family Trust v. Parker Drilling Co.*, 2015 WL 1036106 (Del. Ch. Mar. 4, 2015) (failing to address due process concerns before applying full faith and credit to a prior court's determination of demand futility); *Hanson v. Odyssey Healthcare, Inc.*, 2007 WL 5186795, at *3 (N.D. Tex. Sept. 21, 2007) (same); *Henrik ex rel. LaBranche & Co., Inc. v. LaBranche*, 433 F.Supp.2d 372, 377 (S.D.N.Y. 2006) (same); *In re Bed Bath & Beyond Inc. Deriv. Litig.*, 2007 WL 4165389, at *4 (D. N. J. Nov. 19, 2007) (same); *LeBoyer v. Greenspan*, 2007 WL 4287646, at *3 (C.D. Cal. June 13, 2007) (same); *Sonus Networks, Inc., S'holder Deriv. Litig.*, 499 F.3d 47, 64 (1st Cir. 2007) (only mentioning due process in regard to adequacy of representation, not authority to bring suit); *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) (same); *In re Career Educ. Corp. Deriv. Litig.*, 2007 WL 2875203, at *10 (Del. Ch. Sept. 28, 2007) (appearing to apply Illinois law without considering due process issues); *Goldman v. Northrop Corp.*, 603 F.2d 106, 109 (9th Cir. 1979) (inapposite situation where subsequent derivative action barred due to settlement of first derivative action without analyzing due process concerns).

Like the decisions of federal courts described in Section I(C)(2) above and the Restatement, some states have internalized due process's role in limiting privity, including Arkansas and Delaware.[37] Under Arkansas law, a stockholder is also not automatically entitled to represent any corporation in which he owns stock merely by filing a derivative action. On the contrary, in Arkansas a stockholder "***may be entitled*** to bring an action in a derivative suit" ***only if*** he satisfies the "more stringent procedural requirements" of Arkansas Rule of Civil Procedure 23.1. *Hames v. Cravens*, 966 S.W.2d 244, 246-47 (Ark. 1998); *see also Brandon v. Brandon Const. Co., Inc.*, 776 S.W.2d 349, 352 (Ark. 1989) (recognizing that Rule 23.1 determines whether a litigant is "disqualif[ied] from individually maintaining a derivative action"); *Deareman*, 842 S.W. 2d at 452 (recognizing that even the "necessity to reduce the volume of litigation" is no basis to impose "a constitutionally flawed rule which subverts fairness in a due process sense"). In keeping with due process, an Arkansas plaintiff must be conferred such authority by judicial process. Similarly, the right to represent a Delaware corporation or its shareholders is not automatic.[38] The Court of Chancery thus erred in concluding the Arkansas derivative action bound absentees.

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[37] The "presumption that nonparties are not bound by a judgment has been stated in many cases" and "draws from the due process right to be heard." 18A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 4449 (2d ed. 2016) (collecting cases).

[38] *See, e.g.*, *Kaplan*, 540 A.2d at 730; *EZCORP*, 130 A.3d at 945, and discussion in Section I(C)(1), *supra*.

(c) The Court of Chancery Erred in Ruling That Arkansas Public Policy Supports a Finding of Privity

The Court of Chancery also erred by ruling that the policy reasons for finding privity among subsequent derivative plaintiffs "would resonate with the courts in Arkansas" in light of that state's interest in finality of litigation and the precept that a corporation is the "real party in interest" in a derivative action. Op. at 42 (A-1154). Arkansas courts have expressly noted that the need to reduce the amount of litigation does not justify action that "subverts fairness in a due process sense." *Dearman*, 842 S.W. 2d at 452; *accord Bayer*, 594 U.S. at 317 ("[O]ur legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs.").

The Court of Chancery identified the precise public policy that would be harmed by a finding of privity here, namely "concerns about fast filers precluding future plaintiffs align with the state's policy of ensuring that parties to be precluded have received a full and fair opportunity to be heard." Op. at 42 (A-1154). The Court then concluded, however, that competing policy interests against a finding of privity are balanced by requiring "adequate representation" (which Plaintiffs argue, *infra*, did not exist here). *Id*. This conclusion is erroneous because the Due Process Clause and the Restatement both require two separate elements – the authority to act as a representative plaintiff *and* adequacy of representation. *See*

EZCORP, 130 A.3d at 948 (holding that due process prevents preclusion where derivative plaintiff lacked authority to sue without analyzing issue of adequacy); Restatement § 41 (requiring authority for the representative); *id*. at § 42 (requiring that the representative be adequate). Even assuming *arguendo* that the Arkansas Plaintiffs are deemed "adequate," that simply does not suffice to demonstrate authority for the representation.

II. THE COURT OF CHANCERY VIOLATED DUE PROCESS BY DETERMINING THE ARKANSAS PLAINTIFFS WERE ADEQUATE REPRESENTATIVES

A. QUESTION PRESENTED

Did the Court of Chancery violate Plaintiffs' Due Process rights in concluding that the Arkansas Plaintiffs were adequate representative plaintiffs? This issue was preserved for appeal. A-536-41; A-788-812.

B. STANDARD OF REVIEW

Legal conclusions are reviewed *de novo* to determine whether the trial court "erred in formulating or applying legal precepts." *Rapid-Am. Corp.*, 603 A.2d at 804 (citation omitted).

C. MERITS OF THE ARGUMENT

Due Process requires that a representative plaintiff "at all times adequately represent" the group for which he or she seeks to act. *Phillips Petroleum*, 472 U.S. at 811-812; *see also Hansbury*, 311 U.S. at 42-43 (a judgment does not bind absent parties whose interests were not adequately represented); *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999) (finding the Fourteenth Amendment's due process guarantee would be violated where a party was not adequately represented in a prior lawsuit); *Richards*, 517 U.S. at 805 ("Because petitioners received neither notice of, nor sufficient representation, in the [prior] litigation, that adjudication, as a matter of federal due process, may not bind them….").

Both the United States Supreme Court and Delaware courts look to the Restatement of Judgments for guidance regarding elements of issue preclusion. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015); *Pyott*, 74 A.3d at 618 fns. 21, 25; *South v. Baker*, 62 A.3d 1, 12-13 (Del. Ch. 2012). Under Section 42 of the Restatement and applicable federal common law, a representative plaintiff is inadequate and cannot bind an absent party where (1) the interests of the representative and the purportedly represented party were not sufficiently aligned; or (2) the representation was grossly deficient. *See Taylor*, 553 U.S. at 900-01; Restatement (Second) of Judgments § 42 cmt. f (1982).

1. The Decision Not to Seek Wal-Mart's Books and Records Rendered the Arkansas Plaintiffs Inadequate

In *Pyott II*, this Court rejected a "presumption of inadequacy without any record to support the factual premise on which the presumption was based." *Pyott*, 74 A.3d at 614. Here, however, a clear record exists to show why the Arkansas Plaintiffs are inadequate due to their failure to pursue a Section 220 action.[39] Specifically, then-Chancellor Strine repeatedly instructed the Delaware Plaintiffs to pursue a books and records action, advising in no uncertain terms that "***I don't know why the plaintiffs would ever wish to proceed***" without first securing books

[39] Plaintiffs do not assert, as the Opinion suggests, that all derivative plaintiffs who do not first avail themselves of Section 220 are inadequate in every case. Op. at 50 (A-1162). Instead, Plaintiffs argue that the Arkansas Plaintiff fall into the category of cases that this Court stated would "[u]ndoubtedly" exist, where "a fast filing stockholder is ***also*** an inadequate representative." *Pyott*, 74 A.3d at 618.

and records, and explaining that "***[t]here is nothing about this case that requires expedition. There is everything about the context of this case which requires great care and pleading***."[40] Most important, then-Chancellor Strine noted that "***[i]t makes the investors of Wal-Mart best served by having the strongest possible complaint put on the record***[,]" and instructed the plaintiffs "to work together, get the books and records, put the strongest possible complaint on the table…."[41] Counsel for the Arkansas Plaintiffs reviewed the transcript of these statements, but ignored the Chancellor's guidance. *See* A-617.

The record shows that the Arkansas Plaintiffs did not merely employ a "litigation strategy" to forego a Section 220 action. Op. at 50 n.111 (A-1161-62). Instead, they ignored clear guidance from the sitting Chancellor that the publicly-known facts were insufficient to support finding of demand futility. Under these circumstances, the Court of Chancery erred in concluding that a decision not to seek books and records was merely a matter of "imperfect legal strategy." Op. at 54 (A-1166).

Moreover, when the Arkansas Plaintiffs refused to stay their action during the pendency of the Section 220 proceeding in Delaware, Defendants repeatedly

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[40] A-53-54; *see* A-55-56 ("This is ***exactly*** the kind of nonexpedited case where actual stockholders, people who actually cared about the outcome, would wish to investigate by way of a books and records examination, ***take a sincere look at the books and records and file the strongest possible complaint that you could.***").

[41] A-80.

told the Arkansas court that they were placing "their own interests ahead of the company they seek to represent" and proceeding "in a manner that is [not] in the best interest of [that] company." A-645; *see also* A-690. This satisfies the Restatement's guidance that issue preclusion will not apply where a "representative's management of the litigation is so grossly deficient as to be apparent to the opposing party…" Restatement (Second) of Judgments § 42 at cmt. f. Furthermore, based on their own statements, Defendants cannot now deny that the Arkansas Plaintiffs' failure to "prosecute or defend the action with due diligence and reasonable prudence" rendered them inadequate representatives. *Id.* at § 42(1)(e).[42]

2. The Interests of the Arkansas Plaintiffs Did Not Align with the Interests of Other Wal-Mart Stockholders

The authority of a representative party to act on behalf of a group of persons derives from an identity of interests between the representative and the members of the group. Restatement (Second) of Judgments § 42 cmt. e (1982); *see Taylor*, 553 U.S. at 900-01 ("A party's representation of a nonparty is 'adequate' for preclusion

[42] The Court of Chancery denied Plaintiffs' attempt to further develop a record of the Arkansas Plaintiffs' inadequacy. Plaintiffs obtained the affidavits of three of the Arkansas Plaintiffs, each of whom averred that they were not informed about the litigation and had no knowledge of their counsel's decision to proceed without first inspecting Wal-Mart's books and records. A-593-94, 600-08. Plaintiffs also subpoenaed the Arkansas Plaintiffs to testify about their representation, but at a hearing on June 24, 2015, the Court of Chancery granted a motion to stay this discovery and denied Plaintiffs' motions for commission to take discovery. *See* A-502-10. These rulings contradicted this Court's teachings in *Pyott II* about the importance of developing a record to analyze the adequacy of the purported stockholder representatives.

purposes only if, at a minimum . . . the interests of the nonparty and her representative are aligned . . . ."). Here, the identity of interests between the Arkansas Plaintiffs and other Wal-Mart stockholders dissolved when the Arkansas Plaintiffs chose to proceed in Arkansas, despite the clear warning from the Chancellor that a complaint based on the publicly-known facts was incapable of surviving dismissal.

Then-Chancellor Strine made clear his view that a review of Wal-Mart's books and records would further the best interests of Wal-Mart and all its other stockholders. The Chancellor rhetorically asked Delaware Plaintiffs:

> Why would you want to file a weak complaint when you can file a strong one, when you can investigate and get the facts to file a sustainable complaint and, rather than do that you rush off to court? The question has to be asked: How does that serve the interest of the investors in the company that you supposedly represent?

A-64.

By pursuing the Arkansas Action despite the Chancellor's admonitions, the Arkansas Plaintiffs and their counsel acted to further their own economic interest in litigating in Arkansas. The moment they did so, an irreconcilable conflict arose between the Arkansas Plaintiffs and other Wal-Mart stockholders. *See Arduini*, 774 F.3d at 635 (an adequate representative stockholder must "be free from economic interests that are antagonistic to the interests of the class"); *see also Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg,

J. concurring) (the constitutional requirements of Due Process apply to both representative plaintiffs and their counsel, including any conflicts of interest by counsel). Thus, the Court of Chancery erred by concluding that, even if the decision to forgo a Section 220 demand was motivated by a personal financial interest, such interest was not inconsistent with those of other Wal-Mart stockholders, who would benefit from any recovery. Op. at 48 (A-1160).

III. THE ISSUE OF DEMAND FUTILITY UNDER *ARONSON* WAS NEVER "ACTUALLY LITIGATED" IN ARKANSAS

A. QUESTION PRESENTED

Did the Court of Chancery commit legal error in concluding that the issue of demand futility under *Aronson*, as pled by the Delaware Plaintiffs, was "actually litigated" in the Arkansas action? This issue was preserved for appeal. A-548-52; A-851-52.

B. STANDARD OF REVIEW

Legal conclusions are reviewed *de novo* to determine whether the trial court "erred in formulating or applying legal precepts." *Rapid-Am. Corp.*, 603 A.2d at 804 (citation omitted).

C. MERITS OF THE ARGUMENT

Assuming *arguendo* that Arkansas law governs, Arkansas law requires that any precluded issue must have been "actually litigated" in the prior proceeding. *Morgan v. Turner*, 368 S.W.3d 888, 895 (Ark. 2010). Here, the issue of whether the Board's actions were a valid exercise of business judgment was never actually litigated in Arkansas.

Because of the deficient Arkansas Complaint, the Arkansas Court only applied the standard set forth in *Rales v. Blasband*,[43] which applies when the board considering the demand did ***not*** make an underlying business decision in the matter

[43] 634 A.2d 927 (Del. 1993).

being challenged in the derivative suit. The Arkansas Court never applied the alternative test set forth in *Aronson v. Lewis*, under which demand will be deemed futile where a derivative plaintiff alleges a "reasonable doubt" that "the challenged transaction was otherwise the product of a valid exercise of business judgment." *Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000) (citing *Aronson*, 473 A.2d at 814, 816).[44]

Unlike the Arkansas Complaint, the Delaware Complaint makes particularized allegations of Board action that require the application of *Aronson*. The *Aronson* test applies "[w]hen a plaintiff challenges a board of directors' action or 'conscious decision to refrain from acting'"[45] and, as here, less than "a majority of the directors making the decision have been replaced…."[46] A board that "consciously failed to act after learning about evidence of illegality" "makes a conscious decision, and the decision not to act is just as much of a decision as a decision to act. [Both] are thus equally subject to review under traditional

[44] The Arkansas Court noted that, "[m]issing from the Complaint are any particularized facts that link a majority of the Director Defendants to any actual decision. Plaintiffs point to no alleged meeting, discussion, or vote where the Board allegedly made one of these decisions. This lack of such particularized facts regarding a conscious decision about how or whether to respond to the alleged misconduct indicates that an analysis under *Aronson* is inappropriate." *Wal-Mart Stores, Inc. S'holder Deriv. Litig.*, 2015 WL 1470184, at *6.

[45] *Pfeiffer v. Leedle*, 2013 WL 5988416, *4 (Del. Ch. Nov. 8, 2013).

[46] *Rales*, 634 A.2d at 934.

fiduciary duty principles…."[47] The Delaware Plaintiffs have shown particularized facts, based upon the Section 220 documents, demonstrating that, at least at the motion to dismiss stage, it must be inferred that the Audit Committee and Board knew of the bribery scheme and cover-up and consciously determined to take no action to stop the cover-up, including with respect to the transfer of control of the internal investigation to a prime suspect at WalMex. *See, e.g.*, A-153-56; A-171-73; A-179-84; A-203-05; A-207-26; A-239; A-907-24; A-932-1068; A-1069-94. The Arkansas Court could not possibly have litigated this issue because the Arkansas Complaint lacked the facts – which are present in the Delaware Complaint – to support an *Aronson* analysis. Thus, a key issue of demand futility was not litigated in Arkansas and collateral estoppel should not apply.

[47] *La. Mun. Police Emps.' Ret. Sys. v. Pyott*, 46 A.3d 313, 341 (Del. Ch. 2012), *overruled on other grounds*, 74A.3d 612 (Del. 2013); *see Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, *10 (Del. Ch. Jan. 14, 1991); *Spiegel v. Buntrock*, 571 A.2d 767, 773-74 (Del. 1990) ("[A] conscious decision by a board of directors to refrain from acting may be a valid exercise of business judgment…."); *Aronson*, 473 A.2d at 813 (same).

CONCLUSION

For the reasons stated, Plaintiffs respectfully submit that the Opinion must be reversed.

Dated: July 25, 2016

GRANT & EISENHOFER P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, a copy of the *Opening Brief of Appellants/Plaintiffs-Below* was electronically served via *File and ServeXpress* on the following:

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