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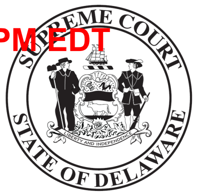

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREGORY B. MAFFEI, ALBERT E. ROSENTHALER, MATT GOLDBERG, JAY C. HOAG, BETSY MORGAN, GREG O'HARA, JEREMY PHILIPS, TRYNKA SHINEMAN BLAKE, JANE JIE SUN, ROBERT S. WIESENTHAL, LARRY E. ROMRELL, J. DAVID WARGO, MICHAEL J. MALONE, CHRIS MUELLER, and CHRISTY HAUBEGGER,

Defendants-Below/Appellants,

and

TRIPADVISOR, INC. and LIBERTY TRIPADVISOR HOLDINGS, INC.,

Nominal Defendants-Below/Appellants,

v.

DENNIS PALKON and HERBERT WILLIAMSON,

Plaintiffs-Below/Appellees.

No. 125,2024

Court below: Court of Chancery of the State of Delaware

C.A. No. 2023-0449-JTL

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NATURE OF PROCEEDINGS

In early 2023, the boards of Tripadvisor, Inc., and Liberty TripAdvisor Holdings, Inc.—both allegedly controlled corporations—decided that it would be in the best interests of the "Companies" and their stockholders to convert from Delaware corporations to Nevada ones. In seeking stockholder approval of the "Conversions," the Companies disclosed several reasons for their decisions, including that the Nevada legislature has mandated more fiduciary-favorable standards for liability than Delaware provides.

Stockholder plaintiffs filed this lawsuit in April 2023, seeking an injunction to block the Conversions. The Companies agreed not to effectuate the Conversions absent agreement by the parties or order of the court and to provide Plaintiffs with discovery, including board materials concerning the Conversions. Plaintiffs filed their Amended Complaint in June 2023, and Defendants moved to dismiss.

On February 20, the Court of Chancery issued a memorandum opinion partially denying the motion to dismiss. (Ex. A. ("Op").) The court held that entire fairness applies to the Conversions because they confer a material, non-ratable benefit on the Companies' fiduciaries in the form of a more fiduciary-favorable standard for liability in stockholder litigation. The court reached this conclusion despite there being no litigation pending or threatened against any of the fiduciaries when the Conversions were approved. In the court's view, the mere prospect that

some future conduct could lead to some future litigation that might be easier for the fiduciaries to defend in Nevada was enough to plead a material, non-ratable benefit and require Defendants to prove that the Companies were exiting Delaware on "fair terms."

On March 1, Defendants sought interlocutory appeal of the denial of their motion to dismiss. The Court of Chancery denied the application on March 21 (Exs. B, C), but this Court granted it on April 16 (Dkt. 5 ("Order").)

SUMMARY OF ARGUMENT

1. The Court of Chancery incorrectly held that converting from a Delaware corporation to a Nevada corporation and therefore obtaining a more fiduciary-favorable liability framework in the absence of pending or threatened litigation against any fiduciary constitutes a material, non-ratable benefit to fiduciaries requiring entire fairness review. The Court of Chancery's holding cannot be squared with cases recognizing the significant distinction between the risk of litigation that has already been filed or threatened and the risk of hypothetical litigation based on future conduct. Likewise, the Court of Chancery's decision elides the distinction between the elimination of litigation risk and the mitigation of litigation risk because claims against a fiduciary might be harder to plead or prove. The speculative benefits afforded to fiduciaries from risk mitigation do not constitute material benefits requiring entire fairness review.

2. The Court of Chancery's suggestion that *MFW* gives Delaware corporations a pathway to obtaining business judgment review of a move to a more fiduciary-favorable liability jurisdiction is not viable. By the Court of Chancery's own reasoning, no director would ever be disinterested for purposes of making the conversion decision unless he or she committed to leave the board upon the conversion. And the court's suggestion that companies simply find new directors to

serve on a special committee to make the decision and then leave the board, or have existing directors make the decision but commit to resigning after the move, would unduly complicate a statutory right for Delaware corporations and put a significant corporate decision in the hands of fiduciaries who would, by definition, lack meaningful experience with the corporation or have one foot out the door, or both.

3. The Court of Chancery's decision would require Delaware courts to issue decisions ascribing value to the choices made by the legislatures in other jurisdictions as compared to Delaware. Although the Court of Chancery stressed that it did not necessarily intend to find Delaware law better than Nevada law, that would be the inescapable conclusion were the court to award Plaintiffs "damages" from having their equity converted from a Delaware entity to a Nevada entity. As the court explained, the trial would be "to quantify the extent of the harm, if any, that moving from Delaware to Nevada imposes on the unaffiliated stockholders." (Op. at 50.) Comity precludes a court from deciding whether Nevada law is worse for stockholders than Delaware law. Moreover, there are no recognized methodologies for isolating the "value" of being a Delaware corporation versus being a Nevada corporation. And the trial court's suggestion that it could use the stock price as a proxy is fraught with shortcomings.

STATEMENT OF FACTS

The following facts are drawn from: (i) the Amended Complaint's factual allegations, accepted as true at this stage of the proceeding; (ii) SEC filings; and (iii) the board materials produced by Defendants that are cited or otherwise incorporated by reference in the Amended Complaint.

A. The Companies and Maffei.

Tripadvisor, Inc., is a Delaware corporation headquartered in Massachusetts that operates the world's largest travel guidance platform. (A34.) Liberty TripAdvisor Holdings, Inc., is a Delaware corporation headquartered in Colorado that holds an approximate 21% economic interest and a 56% voting interest in Tripadvisor. (*Id.*, A38-39.)

Defendant Gregory B. Maffei serves on the board of Tripadvisor and is the CEO and Chairman of Liberty TripAdvisor. (A35.) For the sake of their motion to dismiss (and this appeal), Defendants do not dispute the allegation that Maffei controls the Companies.

Shortly before the Amended Complaint was filed, Maffei publicly certified in an SEC filing that he "does not have any present plans or proposals which relate to or would result in . . . any extraordinary corporate transaction, such as a merger, reorganization or liquidation." (A134.) In February 2024, after oral argument on

the motion to dismiss but before the Court of Chancery issued its decision, Maffei and Liberty TripAdvisor disclosed that they were exploring a potential transaction that would take the Companies private, and Tripadvisor simultaneously announced that the Tripadvisor Board had formed a special committee to evaluate proposals resulting from such discussions, or other alternatives. (A333-44.) On May 8, 2024, Tripadvisor announced that "[t]he Special Committee has determined that at this time, there is no transaction with a third party that is in the best interests of the Company and its stockholders." (A361.) Maffei and Liberty TripAdvisor simultaneously announced that Liberty TripAdvisor was continuing to review strategic alternatives, and Tripadvisor disclosed that the special committee "will continue to evaluate proposed alternatives as appropriate." (*Id.*; *see also* A351-55.)

B. The Tripadvisor directors evaluate and approve the Tripadvisor Conversion.

The Tripadvisor directors first discussed "reincorporating from Delaware to Nevada" in November 2022. (A41.) They received a management presentation explaining that

(*Id.*) Management further noted that

(*Id.*)

At their February 1, 2023 board meeting, the Tripadvisor directors considered (A41-42.)

(A143 (discussed in A41-43).)

The Tripadvisor directors also considered

(A144 (discussed in A41-43).) And the Tripadvisor directors reviewed

(*See* A147 (discussed in A41-43).) The February

1 board materials further explained that [redacted]

(*See id*. (emphasis in original).)

On March 23, 2023, the Tripadvisor directors met again to consider the proposed conversion and unanimously approved the reincorporation to Nevada by conversion. (*See* A45-46.)

C. The Liberty TripAdvisor directors evaluate and approve the Liberty TripAdvisor Conversion.

As the Tripadvisor directors had done, the Liberty TripAdvisor directors [redacted] (A179; *see also* A43-44.) At their March 7, 2023 meeting, [redacted] (*Id.*; *see also* A43-44.)

During that meeting, the Liberty TripAdvisor directors received an analysis of the proposed Liberty TripAdvisor conversion. [redacted]

(A187 (discussed in A43-44).)

(*See* A194, A196, A198 (discussed in A43-44).)

On April 4, 2023, the Liberty TripAdvisor directors received a draft written consent with additional materials about the proposed conversion. These materials provided further details about the proposed conversion, including

[redacted] (A207-09.) The next day, the Liberty TripAdvisor directors approved the Conversion by unanimous written consent. (*See* A46.)

D. Disclosed reasons for the Conversions and stockholder approval.

Consistent with the Boards' approval of the Conversions, the Companies' proxy statements for their respective stockholder meetings recommended that stockholders vote for each Company's respective Conversion. (A233; *see also* A263.) The Companies each disclosed several reasons for the Conversions that track the board materials, including (i) substantial tax savings, (ii) the ability to "attract and retain qualified management by reducing the risk of lawsuits," and (iii) "[g]reater protection from unmeritorious litigation." (A236; *see also* A263.) Both Companies stated that the Conversions are "not being effected to prevent a change in control, nor [are they] in response to any present attempt known to our Board of Directors to acquire control of the company or obtain representation on our Board of Directors." (A264; A236).

On June 6, 2023, a majority of each Company's outstanding voting power approved that Company's Conversion at its respective annual meeting. (*See* A283; A289.) The Conversions would be "effected pursuant to Section 266 of the DGCL" and each share of common stock would be converted into one share of the

corresponding class or series of common stock of the respective Nevada entities. (A234; *see also* A264.) While the "jurisdiction of incorporation [of both Companies] would change from the State of Delaware to the State of Nevada," the Companies' operations and corporate activities would not change. (*Id.*)

E. This Litigation.

Plaintiffs are Herbert Williamson, a purported stockholder of Liberty TripAdvisor, and Dennis Palkon, a purported stockholder of Tripadvisor. (*See* A34.) Plaintiffs allege that the directors of each Company, and Maffei as the controlling stockholder, breached their fiduciary duties by approving that Company's Conversion because: (i) the directors and Maffei allegedly benefit from greater protection from potential "future stockholder litigation" under Nevada law (A59; *see also* A27-28; and (ii) there might be a controller transaction in the future that would face fewer stockholder challenges in Nevada. (*See* A48, A61-62; *see also* A32, A45, A62.)

Plaintiffs initially moved for expedition and a preliminary injunction. To moot the preliminary injunction request, the parties entered into a status quo order whereby the Companies agreed not to effectuate the Conversions until the Court of Chancery enters an order dismissing the action that is final and non-appealable. The status quo order remains in place.

Defendants moved to dismiss, arguing that the business judgment rule applied to the Conversions. The Court of Chancery denied that aspect of the motion, holding that it was reasonably conceivable that the Conversions conferred material, non-ratable benefits on the Companies' fiduciaries in the form of greater litigation protections offered by Nevada law than Delaware law provides. (Op. at 2, 19-33.) The Court of Chancery dismissed Plaintiffs' request for an injunction, however, finding that monetary damages were sufficient to remedy the alleged harm. (*Id.* at 47-52.)

The Companies sought leave to take an interlocutory appeal, which the Court of Chancery denied. (Ex. B.) This Court then accepted the Companies' interlocutory appeal, concluding that "[c]ertainty regarding the standard of review applicable to a decision to reincorporate in another jurisdiction would be beneficial, the Interlocutory Opinion involves a question of law regarding reincorporation in another jurisdiction that was decided for the first time in this state, interlocutory review may terminate the litigation, and the likely benefits of interlocutory review outweigh the probable costs." (Order ¶ 7.)

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN HOLDING THAT ENTIRE FAIRNESS REVIEW APPLIES TO THE CONVERSIONS

A. Question Presented

What standard of review applies to a board of directors' decision, adopted on a litigation-clear day, to convert to an entity created in a state that the directors believe offers greater litigation protections for fiduciaries, among other benefits? This issue was preserved. (A88-90, 104-19.)

B. Standard and Scope of Review

"[T]he standard of review applicable to a decision to reincorporate in another jurisdiction" is a "question of law." (Order ¶ 7.) "This Court reviews questions of law *de novo*." *Wilmington Tr., Nat'l Ass'n v. Sun Life Assurance Co. of Canada*, 294 A.3d 1062, 1071 (Del. 2023).

C. Merits of Argument

1. A board's decision to adopt a more fiduciary-favorable liability framework on a litigation-clear day should not be subject to entire fairness review.

The business judgment rule is the default standard of review for decisions made by disinterested and independent directors. *See, e.g.*, *In re Match Grp., Inc.*

Deriv. Litig., -- A.3d --, 2024 WL 1449815, at *7 (Del. Apr. 4, 2024).[1] The business judgment rule "is a 'presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.'" *Id.* (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). "If the business judgment standard of review applies, a court will not second guess the decisions of disinterested and independent directors." *Id.*

The business judgment rule applies here because where there is no pending or contemplated lawsuit, it is speculative whether the directors would personally benefit at all. For starters, no conduct might ever occur that prompts stockholder litigation, so no such lawsuit might ever be brought. And even if such a lawsuit eventually comes, the current directors might no longer be directors; depending on the claims, there might be no practical difference between the applicable laws in

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[1] The presence of a controlling stockholder here does not change the analysis or the applicability of the business judgment rule. "Entire fairness is not triggered solely because a company has a controlling stockholder." *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014). "Entire fairness is the standard of review in transactions between a controlled corporation and a controlling stockholder [only] when the controlling stockholder receives a non-ratable benefit." *Match Grp.*, 2024 WL 1449815, at *10. For all the reasons discussed below, the decision to convert to a more fiduciary-favorable framework, on a litigation-clear day, does not constitute a material, non-ratable benefit to fiduciaries under Delaware law.

each state; and, of course, the laws in both Delaware and the other jurisdiction could change at any time to become more or less stockholder or fiduciary-favorable.

Importantly, the decision by the boards here, on a litigation-clear day, to convert to Nevada corporations and obtain a more fiduciary-favorable liability framework is no different than board decisions, on a litigation-clear day, to implement Delaware law provisions that can reduce litigation exposure for corporate fiduciaries. And Delaware courts routinely review and uphold those decisions under the business judgment rule.

For example, when evaluating directors' adoption of Section 102(b)(7) exculpation provisions, Delaware courts have distinguished between exculpation provisions that prospectively reduce litigation risks from future conduct, on the one hand, and provisions that seek to eliminate potential liability for conduct that has already occurred, on the other. The decisions in *Orloff v. Shulman*, 2005 WL 3272355 (Del. Ch. Nov. 23, 2005), and *Bamford v. Penfold, L.P.*, 2022 WL 2278867 (Del. Ch. June 24, 2022), *reargument granted in part*, 2022 WL 3283869 (Del. Ch. Aug. 10, 2022), *aff'd sub nom., Manheim v. San*, -- A.3d -- (Del. Apr. 22, 2024), illustrate the distinction.

In *Orloff*, the court rejected the plaintiffs' allegations that the director defendants had breached their fiduciary duties by adopting a Section 102(b)(7)

exculpation provision to insulate directors from future liability. *See* 2005 WL 3272355, at *13. The *Orloff* plaintiffs argued that the directors were "on both sides of the transaction" because they were "self-interestedly protecting themselves against litigation that they knew would soon name them as defendants." *Id*. at *6, 12-13. The plaintiffs based this argument on their allegation that the "directors knew they were in imminent danger of being sued" because there were pending books and records demands to investigate potential fiduciary-duty breaches. *Id*. at *13. Because litigation had not yet been filed, however, the court rejected plaintiffs' claims, observing that "[t]he court has at least twice before rejected claims of this kind, noting that they are but variations on the directors suing themselves and participating in the wrongs refrain." *Id*. (citing *Decker v. Clausen*, 1989 WL 133617 (Del. Ch. Nov. 6, 1989), and *Caruana v. Saligman*, 1990 WL 212304 (Del. Ch. Dec. 21, 1990)).

In other words, *Orloff* recognized that directors are not deemed interested in a transaction merely because they might have a generalized incentive to limit their exposure to hypothetical future liability. *Id*.; *accord Sutherland v. Sutherland*, 2010 WL 1838968, at *12, 14–15 (Del. Ch. May 3, 2010) (holding directors adopting exculpatory provisions that would shield directors from future litigation were not self-interested); *see also Coates v. Netro Corp.*, 2002 WL 31112340, at *4-5 (Del.

Ch. Sept. 11, 2002) (rejecting argument that directors' decision to relocate in state with "greater [litigation] protections" indicated self-interested conduct).

In *Bamford*, by contrast, the court applied entire fairness to a controller's decision to adopt an exculpation provision where the controller "faced claims for breach of the duty of loyalty based on his past conduct" and "sought to cut off that threat." 2022 WL 2278867, at *35. The court recognized that "[f]iduciaries who control an entity can adopt prospective protective provisions, including exculpatory provisions," to limit future liability. *Id.* at *34 (citing *Orloff*). But a provision eliminating all liability both "prospectively *and retrospectively*" provided a material benefit to the fiduciary. *Id*. (emphasis added). The decision to approve the exculpatory provision in *Bamford* was thus self-dealing by the controller and subject to entire fairness. *See id*. at *35.

The decisions in *Harris v. Harris*, 2023 WL 115541 (Del. Ch. Jan. 6, 2023)—on which the Court of Chancery relied heavily below—and *In re Riverstone National, Inc. Stockholder Litigation*, 2016 WL 4045411 (Del. Ch. July 28, 2016), confirm the appropriateness and functionality of the distinction between transactions that extinguish actual or imminent litigation, on the one hand, and transactions that provide protections against hypothetical or speculative future litigation, on the other.

In *Harris*, the court addressed the implications of a Delaware corporation's merger with and into a New Jersey corporation (the "Outbound Merger") for the specific purpose of "extinguishing the minority stockholders' standing to assert derivative claims." 2023 WL 115541, at *14. In that case, the majority stockholder, who had engaged in fraud pre-merger, had begun planning the Outbound Merger "immediately" after the minority stockholders' counsel threatened litigation. *See id*. at *1, *14. And within 11 days of receiving a Section 220 demand—and after refusing to produce any documents in response—the majority stockholder unilaterally approved the Outbound Merger. *See id*. at *6. On these facts, the court found that the Outbound Merger provided a unique benefit to the controlling stockholder—extinguishing liability for specified past bad acts that were the subject of imminent litigation—warranting entire fairness review. *See id*. at *14–15.[2]

The court reached a similar conclusion in *Riverstone*, where directors were alleged to have approved a merger to forestall an anticipated derivative suit against

[2] The material, non-ratable benefit to the controller in *Harris* was not the laws of another state (*see* Op. at 19-20), but rather the fact that the would-be plaintiffs in *Harris* lost standing to bring derivative claims under the continuous ownership requirement. *See* 2023 WL 115541, at *11. In any event, *Harris* shows that a controlling stockholder obtains a material, non-ratable benefit when it engages in a transaction for the sole purpose of extinguishing derivative claims about to be brought. Neither *Harris* nor any other case holds that a more director-favorable legal framework constitutes such a material, non-ratable benefit when no stockholder litigation is pending or threatened.

them based on their usurpation of a corporate opportunity. *See* 2016 WL 4045411, at *14. As in *Harris*, the *Riverstone* plaintiffs pled specific allegations showing that the Riverstone directors were "aware of the existence" of impending fiduciary breach claims against them before they executed a merger agreement. *Id.* The *Riverstone* plaintiffs also "pled particularized facts sufficient to find that the potential liability" of extinguished derivative claims "was material" to the directors. *Id.* The court thus held that the merger approval was self-interested because the directors secured a unique benefit—extinguishing "viable" and "material" claims they "were aware that they faced" at the time of the merger. *See id.* at *15.

Here, in contrast to *Harris* and *Riverstone*, Plaintiffs do not allege that the Conversions were designed to extinguish pending, or even threatened, litigation. There is therefore no basis to conclude that the Conversions confer material, non-ratable benefits on the fiduciaries like the mergers in *Harris* or *Riverstone* that were designed to extinguish very real (and significant) exposure to liability for specified actions already taken.

This key distinction—existing potential liability versus hypothetical future liability—has been drawn in other fiduciary-litigation contexts. *See, e.g.*, *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 961–62 (Del. Ch. 2013) (dismissing claims challenging board's adoption of forum-selection clause

that "could somehow preclude a plaintiff from bringing" claims in the future and noting that "the court declines to wade deeper into imagined situations involving multiple 'ifs'"); *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *12-13 (Del. Ch. May 30, 2008) (applying business judgment rule to board's decision to adopt advancement provision because there was no "particular proceeding" against directors when they approved provision). Indeed, neither plaintiffs nor the court below identified a single case holding that protections against hypothetical future litigation standing alone qualify as a material, non-ratable benefit sufficient to invoke entire fairness review.

In addressing the foregoing authority holding that the possible impact of a decision on hypothetical future litigation is not a material, non-ratable benefit to the decision-making fiduciary, the Court of Chancery suggested that those cases turned on materiality. (*See* Op. at 25.) But changing the unit of measurement does not change the outcome: these cases support the proposition that the dividing line of materiality falls somewhere between the termination of a known pending or threatened lawsuit, as in *Harris*, and the "imagined situations involving multiple ifs," as in this case or *Chevron*. Here, as in *Chevron*, there was no pending or threatened litigation at the time of the directors' decisions to approve the Conversions, and any future personal consequences were speculative. As such, there is no basis to

conclude that "a director cannot be expected to exercise his or her independent business judgment without being influenced by the . . . personal consequences resulting from" the decision to convert to an entity with a more fiduciary-favorable liability framework. *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993).

The *Harris* case relied on by the Court of Chancery highlights the point. Again, *Harris* involved a director and controlling stockholder who, having engaged in fraudulent practices and been tipped off that a stockholder derivative action was on the horizon, undertook a reincorporation merger designed to eviscerate stockholder standing to pursue the forthcoming derivative claim. *See* 2023 WL 115541, at *14-15. That merger plainly tempted the director/controlling stockholder with an immediate, concrete benefit—extinguishing a facially meritorious claim that was about to be brought. By contrast here, there is no allegation that the fiduciaries were aware of any impending stockholder suit. Cases like *Boilermakers* confirm the distinction between the sorts of "real-world and extant disputes" that can trigger entire fairness review under established precedent and the "hypothetical and imagined future" litigation that cannot. *Id.* at 963.

The Court of Chancery called this distinction "arbitrary" and "hard to follow." (Op. at 21, 24.) But it is one courts routinely draw in other circumstances. Take, for example, the doctrine of standing under both Article III of the U.S. Constitution

and the Delaware Constitution: the harm necessary to establish a plaintiff's standing must be "both concrete and actual or imminent" rather than "hypothetical []or conjectural." *Emps. Ins. Co. of Wausau v. First State Orthopaedics, P.A.*, -- A.3d --, 2024 WL 74148, at *7 (Del. Jan. 8, 2024, revised Jan. 17, 2024). Or consider the federal Declaratory Judgment Act, which can only be invoked if there is "sufficient immediacy and reality" to the dispute; courts assess "whether the declaratory relief sought relates to a dispute where the alleged liability has already accrued or the threatened risk occurred, or rather whether the feared legal consequence remains a mere possibility, or even probability of some contingency that may or may not come to pass." *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 406–07 (S.D.N.Y. 2002) (citing *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580–81 (1985), *aff'd*, 356 F.3d 357 (2d Cir. 2003)). Delaware's Declaratory Judgment Act is similar. *See Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973) (defining "actual controversy" for purposes of act). Examples of other lines drawn between speculative and non-speculative litigation abound. *See, e.g.*, *Reese v. Klair*, 1985 WL 21127, at *7 (Del. Ch. Feb. 20, 1985) (permitting claim of attorney work product protection when there is "threatened or anticipated litigation," while "remote possibility of litigation is not sufficient"); *Bhattacharya v. Murray*, 2022 WL 875032, at *2 (W.D. Va. Mar. 23, 2022) ("[T]he receipt of a demand letter,

a request for evidence preservation, a threat of litigation, or a decision to pursue a claim will all trigger the duty to preserve evidence," but not "[v]ague and ambiguous statements alluding to possible or hypothetical litigation.").

The Court of Chancery's discussion of insurance does not support a different conclusion. The court suggested that the existence of insurance shows that unknown litigation risk is real, such that reducing it constitutes a benefit, no matter how hypothetical. (Op. at 21-23.) But that does not answer the question of whether reducing such a risk is a sufficiently material benefit to fiduciaries to automatically foreclose business judgment deference. And the trial court's insurance analysis affirmatively supports Defendants' position that merely reducing hypothetical litigation risk is not a material, non-ratable benefit to fiduciaries. The Court of Chancery explained that a liability insurance policy holds value because it "mitigate[s] risk for future potential liabilities," and "[o]btaining coverage for future potential liabilities is a benefit, and insureds pay premiums to get it." (*Id.*) The court then reasoned that a move to Nevada "to mitigate risks for future potential liability" likewise constitutes a valuable benefit—*i.e.*, a material, non-ratable benefit to fiduciaries. But if merely mitigating future litigation risk constitutes a material, non-ratable benefit, then every board decision to use company funds to procure an officers' and directors' Side A policy—the sole purpose of which is to protect

fiduciaries from liability—would be subject to entire fairness. Yet no court has ever considered the purchase of that commonplace (indeed, almost universally procured) insurance as a material, non-ratable benefit.

The same would go for a board's decision to adopt Section 102(b)(7) exculpation or enhanced indemnification rights on a litigation-clear day. But as discussed above, Delaware courts have already considered that question and held that adopting such rights can be subject to entire fairness only when their purpose is to foreclose actual or imminent claims, not when there are no such actual or imminent claims. *Compare Orloff*, 2005 WL 3272355, at *13, *with Bamford*, 2022 WL 2278867, at *35.

This Court should apply the same rule here and reverse the decision below.

2. *MFW* does not afford a solution even if a fiduciary-favorable change to the liability framework on a litigation-clear day constitutes a material, non-ratable benefit to directors.

According to the Court of Chancery, a move to a jurisdiction with "greater" fiduciary protections requires paying a fair price because minority stockholders will lose a stick in their bundle of litigation rights. (Op. at 2, 40-41, 44-47.) Fiduciaries seeking to relocate are, under the trial court's decision, therefore required to defend the "fair value" of minority stockholders' "lost rights" (Op. at 6) or else rely on *MFW* protections to shift the standard of review from entire fairness to business judgment.

(*Id.* at 4.) The well-known *MFW* protections are: (1) negotiation and approval by a well-functioning special committee comprised entirely of independent directors; and (2) a majority-of-the-minority vote in favor. *See Match Grp.*, 2024 WL 1449815, at *19-20; *Kahn v. M&F Wordlwide Corp.*, 88 A.3d 635 (Del. 2014); *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018). But those protections cannot practically be applied or satisfied in the conversion context.

Under the Court of Chancery's analysis, *MFW*'s disinterested committee requirement cannot be satisfied because the change to a more fiduciary-favorable liability framework provides a material, non-ratable benefit to all directors. Thus, no director who would continue on with the corporation could ever be disinterested enough to serve on an *MFW* committee and make the decision. The Court of Chancery suggested that corporations could simply ask potential special committee directors—existing or new—to commit to resigning after the decision. (*See* Ex. B at 10-11.) But that is not a practical or tenable solution. Qualified corporate directors are not a dime a dozen or readily available for discrete assignments. Finding individuals to take on the role and responsibility, not to mention add value for stockholders, is no easy task. And asking individuals who have no history or experience with the company to parachute in to make a significant business decision, or asking long-serving directors, who know the company well and can add

significant value and wisdom going forward, to commit to stepping off the board so they can make the business decision is unduly complicated and not necessarily in stockholders' best interests.

The impracticality of implementing the twin *MFW* protections to avoid entire fairness review confirms that entire fairness is the wrong standard of judicial review to apply to a fiduciary business decision to convert from a Delaware corporation to a corporation governed by the laws of another jurisdiction, unless there is some concrete reason—such as pending litigation that would be extinguished—to do so.

3. Strong policy reasons weigh decisively against depriving directors of business judgment protection when deciding, on a litigation-clear day, to convert to an entity with a more fiduciary-favorable liability framework.

There are strong policy reasons to avoid unnecessarily expanding entire fairness review to a corporate conversion on a litigation-clear day. Courts are ill-equipped to quantify the pros and cons of one state's fiduciary-liability framework versus another's and, therefore, to second-guess the judgments of corporate directors as to how best to weigh and balance those considerations for any particular corporation and its stockholders. Allowing these claims to be litigated based on hypothetical benefits raises concerns both as to how such a judicial assessment of differences in legal framework could be made, consistent with the principles of

comity, and how the supposed "harm" could be measured through entire fairness review.

The Court of Chancery's decision raises comity concerns because it calls for the court "to quantify the extent of the harm, if any, that moving from Delaware to Nevada imposes on the unaffiliated stockholders." (Op. at 50.) This "harm," the trial court suggests, comes from Plaintiffs' allegation that it is more difficult for stockholders to prevail in fiduciary litigation in Nevada than in Delaware. But the trial court's suggestion that it can evaluate another state's law to determine "harm" to stockholders is inconsistent with principles of comity. *See, e.g.*, *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1052 (Del. 2015) ("Each sovereign is entitled to conduct its own cost-benefit analysis to determine appropriate balance between compensating victims and fostering commercial activity in its borders."). No Delaware court should be evaluating the Nevada legislature's choices about how corporations in that state are governed. *See Sylebra Cap. Partners Master Fund, Ltd. v. Perelman*, 2020 WL 5989473, at * (Del. Ch. Oct. 9, 2020) (holding that Nevada's fiduciary protections do not raise "a legitimate question regarding the integrity or competency of the Nevada courts to provide [litigants their] day in court"). Yet that is what measuring the "harm" to stockholders of moving to Nevada would entail.

Nor is applying entire fairness review practical in these circumstances. While the price of most assets can be determined by applying traditional valuation tools, *see, e.g.*, *Citron v. E.I. Du Point de Nemours & Co.*, 584 A.2d 490, 505-10 (Del. Ch. 1990), the impact of a different legal regime cannot be priced in the way the entire fairness doctrine requires. In certain circumstances, Nevada law might make it more difficult for a stockholder action to survive a motion to dismiss—*e.g.*, no automatic burden shifting for controller transactions and particular pleading requirements to state a claim for breach of fiduciary duty. *See Guzman v. Johnson*, 483 P.3d 531, 536 (Nev. 2021) (requiring plaintiff stockholders to rebut business judgment rule, even in controller transaction, and show "intentional misconduct, fraud, or knowing violation of the law" (citing NRS 78.138(7))). But the flip side is reduced litigation burdens on the corporation and an enhanced ability to attract talent, both of which inure to the benefit of the corporation and thus increase equity value for all stockholders. These considerations must also be part of the fair-price calculus. But how is a court supposed to determine whether stockholders' allegedly diminished litigation rights (that might not ever be implicated) are more or less valuable than the company's expectation that it will enjoy value-enhancing benefits over the medium and long term?

And it is even more complicated than that: Legal rights are not monolithic. Different states impose different packages of fiduciary protections and other corporate laws that would need to be weighed and balanced against one another. To take another simplified example, a state might restrict one type of fiduciary litigation while allowing for punitive damages (or a jury trial) in another. One version might be better for minority stockholders in some circumstances but not others. Again, it is not for one state's courts to divine which legal regime is more or less valuable to minority stockholders, particularly for unknown, hypothetical future claims. And of course, the rules applicable in any given jurisdiction are not immutable—a state's highest court or legislature can change them.

The Court of Chancery acknowledged the "challenge" it faced in "quantify[ing] the extent of the harm, if any, that moving from Delaware to Nevada imposes on the unaffiliated stockholders" and acknowledged that it would be "hard" to value the Companies operating under Nevada law versus Delaware law. (Op. at 50.) The court suggested that the publicly traded stock price might serve as a proxy for the differences in legal frameworks, while also noting that "scholarly literature calls into question the ability of investors to price governance structures." (*Id.* at 50-51.) While economists often conduct event studies in an effort to discern the price impact of public announcements on stock prices, the practice is not necessarily

conclusive, and many macro- and microeconomic factors can influence public markets and individual stock prices at any given time.[3] The proposed use of market prices also has no application in the context of private companies and, at best, would be but one factor for the court to consider in an entire fairness analysis designed to value the "give" and the "get" between Delaware's corporate fiduciary framework and the framework of another jurisdiction like Nevada. A court is ill-suited and ill-equipped to make such determinations, and fiduciaries of Delaware corporations should not have to risk exposure to unknown damages any time that they seek to reincorporate in another state.

[3] It bears noting that Plaintiffs did not plead that either Company's stock price fell upon its announcement of a potential conversion or upon its announcement that stockholders had approved the Conversion.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court reverse the judgment below.

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