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Case Number 125,2024

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 **PUBLIC [REDACTED] VERSION AS FILED ON JULY 2, 2024**

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES & OTHER AUTHORITIES

GLOSSARY

Abbreviation	Description
Amici	Brief of The State of Nevada, ex. rel. Francisco v. Aguilar, Secretary of The State of Nevada, In His Official Capacity, as Amicus Curiae Supporting Appellant and Reversal (Trans. ID 73343048)
Companies	TripAdvisor and Liberty TripAdvisor
Conversions	The redomestications of TripAdvisor and Liberty TripAdvisor from Delaware to Nevada
Defendants	The Director Defendants and the Companies
Director Defendants	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
DOB	Appellants' Opening Brief (Trans. ID 73083969)
Liberty TripAdvisor	Liberty TripAdvisor Holdings Inc.
Opinion or Op.	Opinion Denying Motion to Dismiss Except as to Plaintiffs' Request for Injunctive Relief, issued Feb. 20, 2024 (Trans. ID 72074686)
Plaintiffs	Dennis Palkon and Herbert Williamson
TripAdvisor	TripAdvisor Inc.

NATURE OF PROCEEDING

This is an interlocutory appeal of the Court of Chancery's Opinion denying Defendants' motion to dismiss. The Opinion held that it was reasonably conceivable—based largely on Defendants' own statements—that materially reducing minority stockholders' litigation rights by converting the Companies from Delaware corporations to Nevada corporations provides the Companies' common controller (Greg Maffei) a material non-ratable benefit. The Conversions were not approved by an independent special committee and were overwhelmingly *rejected* by minority stockholders. Entire fairness therefore applies. The Court of Chancery, however, denied Plaintiffs' request for injunctive relief, finding that the Companies were free to redomesticate.

The Opinion is not specific to Nevada. The Opinion makes clear that the outcome would be the same if a Delaware corporation converted to a Delaware LLC with laws that are materially more favorable for corporate fiduciaries (particularly controllers) and harmful for stockholders. Indeed, it is uncontested by Defendants on this motion that Nevada law is more favorable for Defendants than Delaware law. Nevada law (i) eliminates substantive inspection rights; (ii) presumptively applies the business judgment rule in conflicted controller transactions; and (iii) limits

liability for breach of the duty of loyalty to "intentional misconduct, fraud, or a knowing violation of law."

The Opinion is narrow. The Court of Chancery did not hold that entire fairness applies to every redomestication, to every redomestication to Nevada, or even to every redomestication to Nevada *by a controlled company*. To the contrary, the Opinion offers controllers seeking to redomesticate to Nevada a path to achieving business judgment review. The problem for Defendants is that following that path would require them to obtain majority approval from minority stockholders. And obtaining that approval would require Defendants to offer minority investors fair consideration for the rights they would lose. Instead, Defendants ask this Court to change the rules.

In *In re Match Group, Inc. Derivative Litigation*, this Court reaffirmed that "where a controlling stockholder transacts with the controlled corporation and receives a non-ratable benefit, the presumptive standard of review is entire fairness."[1] Applying the same standard to all conflicted controller transactions is

[1] --- A.3d ---, 2024 WL 1449815, at *7 (Del. Apr. 4, 2024). Because Nevada law goes even further than the *Match* defendants advocated, the *amicus* briefs filed in *Match* regarding the importance of preserving entire fairness review of conflicted controller transactions function as *amicus* briefs here with even greater force.

essential. "If a lower standard of review applies to one type of transaction…, then controllers will use that route to move value."[2]

Reversal would create a roadmap for controllers to evade *Match*'s protections and extract value from minority stockholders without being subject to entire fairness review. If Defendants' argument were adopted, a controller could:

- Cause the corporation to reincorporate in Nevada with a Nevada forum-selection clause (notwithstanding the objection of minority stockholders);
- Squeeze out minority stockholders through an unfair process at an unfair price (or otherwise tunnel value);
- Defeat any challenge brought in Delaware or under Delaware law by invoking the internal affairs doctrine and the Nevada forum-selection clause;[3] and
- Defeat any challenge brought under Nevada law by invoking the business judgment rule.[4]

If that path is open, Delaware's "promise[]" to investors that "equity will provide the important default protections it always has" is an empty one.[5] The "fiduciary

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[2] *In re Ezcorp Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245, at *23 (Del. Ch. Jan. 25, 2016).

[3] *See Sylebra Cap. P'rs Master Fund, Ltd. v. Perelman*, 2020 WL 5989473 (Del. Ch. Oct. 9, 2020).

[4] *Guzman v. Johnson*, 483 P.3d 531, 537 (Nev. 2021) ("[T]he inherent fairness standard cannot be utilized to rebut the business judgment rule[.]").

[5] *Delman v. GigAcquisitions3, LLC*, 288 A.3d 692, 715 (Del. Ch. 2023) (quoting *Auriga Cap. Corp. v. Gatz Props.*, 40 A.3d 839, 856 (Del. Ch. 2012)).

accountability" that is a "key component[] of Delaware's corporate brand" would be a nullity.[6]

The gravamen of Defendants' argument for this Court to judicially sanction that roadmap for controllers to move value is that while exculpation of "pending or threatened litigation" can constitute a non-ratable benefit, exculpation of a controller for *future* duty of loyalty breaches cannot (the "retrospective/prospective paradigm"). (DOB 3.) Put differently, because the controller has not yet monetized the benefit it is receiving—and theoretically may never do so—the Court should pretend no benefit was received. Defendants' retrospective/prospective paradigm finds no support in Delaware law and would lead to absurd results.

The Court of Chancery has repeatedly sustained claims challenging business decisions that transfer economic value to a controller even where the controller does not immediately monetize the benefit. *See infra* Argument § I.C.2. Imagine a transaction that increases a controller's right to the share of future dividends. The value of the controller's shares increases—and the transaction thereby immediately transfers economic value to the controller—even though the controller has not monetized the benefit. It cannot reasonably be disputed that the Court would (and

[6] *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 578 (Del. Ch. 2023).

should) apply entire fairness at the time of the transaction, not at some future date. So too here.

It is axiomatic that the value of control is a function, in part, of the controller's ability to extract private benefits of control. The Complaint well-pleads that the Conversions increase Maffei's ability to extract private benefits of control, thereby increasing the value of Maffei's control, and reallocating economic value from minority stockholders to Maffei. The fact that Maffei has not yet monetized the benefit—either by selling his stake or engaging in a conflicted controller transaction—is irrelevant.

Defendants' retrospective/prospective paradigm also produces absurd results. Imagine a controller who announces that he is redomesticating to a near no-liability regime to facilitate his expropriation of value from the corporation in the future (but also announces that he has no *current* plans to expropriate value). Stockholders overwhelmingly vote against, but the controller effects the redomestication anyway. Under the Opinion's holding, stockholders could sue for the expected or actual loss in value of being forced to redomesticate to a near no-liability regime. But applying Defendants' retrospective/prospective paradigm, the business judgment rule applies and the controller is free to expropriate value post-redomestication.

"Value ultimately depends on legal rights, because 'the market will only value rights that the law would protect, and, thus, the price of an asset is inescapably dependent on the legal entitlements of the holder of that asset.'" Op. 46 (citation omitted). Investors in controlled Delaware corporations commit capital against the backdrop of Delaware law, which promises to protect stockholders from controller overreach. Permitting controllers to reduce the rights investors enjoy by changing their legal entitlements—(i) in the face of overwhelming minority stockholder opposition and (ii) without consideration (or the controller even having to prove entire fairness)—"would create a gap in the protections offered by Delaware law." Op. 6. That "gap would have knock on effects, and investors would demand greater returns *ex ante* to compensate for the increased risk. The cost of capital for Delaware corporations would go up." *Id.* The value of controlled Delaware corporations would go down. There is no basis to depart so dramatically from the status quo.

The Opinion should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. Insulating a controlling stockholder from liability for future breaches of the duty of loyalty provides the controller a material non-ratable benefit at the expense of the corporation and its minority stockholders. That is true regardless of whether there presently exists pending or threatened litigation because limiting the restraints imposed by the duty of loyalty enables the controller to extract greater private benefits of control. That ability, in turn, increases the value of control, providing the controller an *immediate* benefit that is concrete, not speculative.

2. Denied. The availability or unavailability of *MFW* cleansing is not a basis for relieving a controlling stockholder of its obligation to prove the fairness of a business decision that provides the controller a material non-ratable benefit. One can imagine myriad examples where cleansing a conflicted controller transaction pursuant to *MFW* is difficult. Nevertheless, *Match* reaffirms that *all* conflicted controller transactions are presumptively subject to entire fairness review.

MFW cleansing is available here in any event. The Court of Chancery did not hold that directors are *per se* conflicted as to a redomestication to Nevada; it held that *these* defendant-directors are conflicted based on internal documents and their own statements that they were redomesticating to provide themselves greater litigation protections. And even if the Court of Chancery had held that directors are

per se conflicted as to a redomestication to Nevada, *MFW* cleansing is available if (i) directors serving on the special committee submit resignations that become effective if the redomestication is approved or (ii) the board appoints new directors solely for the purpose of considering the redomestication, as boards sometimes do in the SLC context.

3. Denied. This case does not require a Delaware court to "issue decisions ascribing value to the choices made by the legislatures in other jurisdictions as compared to Delaware." (DOB 4.) This case requires a Delaware court to determine whether (rightly or wrongly)—as publicly confirmed by a jurisdiction's legislators and by independent legal scholars—another jurisdiction's laws are more favorable for controlling stockholders. If a controller causes a corporation to redomesticate to a more favorable jurisdiction for controllers—despite an emphatic rejection by minority stockholders—and thereby shifts economic value to itself at their expense, no principle of comity relieves the controller of its obligation to compensate minority stockholders for that reallocation of value. Nor can Defendants avoid their burden to establish entire fairness by claiming that calculating damages would be hard. Uncertainty in calculating damages is construed against a controller; it is not a basis to excuse the controller's burden to prove entire fairness.

STATEMENT OF FACTS

A. Delaware Courts Have Held Maffei Accountable for Fiduciary Misconduct

Defendants concede that Maffei controls TripAdvisor and Liberty TripAdvisor. (DOB 5.) Maffei has a long history of extracting non-ratable benefits in conflicted transactions. The Court of Chancery has repeatedly sustained claims against him in actions that have collectively resolved for more than $300 million,[7] including:

- *Sciabacucchi v. Liberty Broadband Corp.*: Maffei and other dual fiduciaries used their effective veto right over transactions to extract a massive side benefit.[8] After the Court of Chancery denied defendants' motions to dismiss and motions for summary judgment, the action settled for $87.5 million. (A58¶75.)

- *Hollywood Firefighters' Pension Fund v. GCI Liberty, Inc.*: Maffei—and his business partner John Malone—caused two commonly controlled companies to merge, consolidating their voting control over the *pro forma* company and stripping stockholders of voting power.[9] The action settled for $110 million and an agreement to reduce Maffei's and Malone's collective voting power from approximately 61% to approximately 47%. (A58¶75.)

- *Fishel v. Liberty Media Corp.* ("*Sirius*"): Maffei (and others) caused Sirius XM to repurchase stock to benefit Sirius XM's controlling stockholder,

[7] *See, e.g.*, A30¶5, A57-59¶75. Citations to ¶_ or ¶¶_ refer to the Complaint (A24-A78).

[8] 2017 WL 2352152, at *20-24 (Del. Ch. May 31, 2017).

[9] Second Amended Verified Class Action Complaint (Public Version) at 2-3, *Hollywood Firefighters' Pension Fund v. GCI Liberty, Inc.*, C.A. No. 2020-0880-SG (Del. Ch.).

Liberty Media, and eventually enable Liberty Media to effectuate a merger not subject to entire fairness review.[10] The Court denied defendants' motion to dismiss, and the action settled for $36 million.[11]

- *Tornetta v. Maffei*: The Court denied defendants' motions to dismiss based on, *inter alia*, "glaring," "blatantly false," and "inexplicable" disclosure violations.[12] The action settled shortly before trial for $23.5 million.[13]

- *Atallah v. Malone*: Maffei orchestrated a scheme whereby (i) he made a "sham offer" to acquire Malone's shares, triggering a call right; then (ii) Malone and Maffei encouraged the board to exercise the call right, forcing the company to renegotiate Maffei's employment contract to avoid change-in-control benefits.[14] The Court denied Maffei's motion to dismiss.[15]

Maffei's history makes it nearly certain that he will exploit his control of the Companies. This action will determine whether stockholders facing that impending exploitation have recourse.

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[10] C.A. No. 2021-0820-KSJM, at 4-7 (Del. Ch. Nov. 1, 2022) (TRANSCRIPT) ("*Sirius*").

[11] Corrected Stipulation and Agreement of Settlement, Compromise and Release (Trans. ID 71800000), C.A. No. 2021-0820-KSJM (Del. Ch. Jan. 12, 2024).

[12] C.A. No. 2019-0649-AGB, at 18, 24, 27 (Del. Ch. Feb. 23, 2021) (TRANSCRIPT).

[13] Stipulation and Agreement of Settlement, Compromise and Release (Trans. ID 71025849), C.A. No. 2019-0649-KSJM (Del. Ch. Oct 5, 2023).

[14] 2023 WL 4628774, at *1 (Del. Ch. July 19, 2023).

[15] *Id.*

B. Nevada Is Materially More Favorable for Fiduciaries (and Less Favorable for Minority Stockholders) Than Delaware

Sophisticated observers agree that Nevada has effectively eliminated legal constraints on fiduciary misconduct.[16] Nevada legislators deliberately[17] crafted Nevada's corporate law to provide a "no-liability corporate safe [haven]."[18] "Nevada has reformed its laws to free officers and directors from virtually any liability arising from the operation and supervision of their companies."[19] "Nevada's exculpation for … conflicted activity may have far-reaching implications, as the difference in how a challenge to an allegedly conflicted transaction might play out in Nevada courts versus Delaware courts is stark."[20]

Three features functionally prevent Nevada's corporate law from policing fiduciary self-dealing.

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[16] *See* Pierluigi Matera, *Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?*, 27 Fordham J. Corp. & Fin. L. 73, 100 (2022) ("Nevada intended to carve out and become the leader of a specific segment of the corporate charters market: namely, that of firms with a preference for a no-liability regime concerning directors and officers.").

[17] *See* Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 Harv. Bus. L. Rev. 131, 168-69 (2018).

[18] Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 Va. L. Rev. 935, 938 (2012).

[19] *Id.*

[20] Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law*, at 25 (Mar. 4, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4746878.

First, Delaware law prohibits corporations from shielding fiduciaries from liability for duty of loyalty breaches in their charters and bylaws.[21] Nevada law contains no such prohibition,[22] and the Companies' proposed Nevada charters would exculpate Defendants to the fullest extent permitted by Nevada law. (A51¶67(a).)

Second, a recent amendment to Nevada's corporate code[23] "foreclose[d] the inherent fairness standard that previously allowed a shareholder to automatically rebut the business judgment rule" in conflicted transactions.[24] Thus, the "*sole avenue* to hold directors and officers individually liable for damages" is overcoming the business judgment rule.[25]

Third, DGCL §220 provides Delaware stockholders with books-and-records inspection rights when they credibly suspect mismanagement.[26] Because the "surface of events … in most instances, will itself be well-crafted and

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[21] *CCSB Fin. Corp. v. Totta*, 302 A.3d 387, 400 (Del. 2023) ("Section 102(b)(7) ... specifically prohibits a charter provision that directly or indirectly limits director liability for breaches of the duty of loyalty.").

[22] Nev. Rev. Stat. § 78.138.

[23] Nev. Rev. Stat. § 78.138(3), (7).

[24] *Guzman*, 483 P.3d at 534.

[25] *Id.* at 537 (cleaned up).

[26] *AmerisourceBergen Corp. v. Lebanon Cnty. Emps.' Ret. Fund*, 243 A.3d 417, 426 (Del. 2020).

unobjectionable[,]"[27] §220 is usually public stockholders' sole mechanism to uncover fiduciary wrongdoing.[28] Nevada law's inspection rights are useless for this purpose. Only stockholders who own—or are authorized by—at least 15% of outstanding shares may inspect the company's financial records, and only if the corporation neither (i) furnishes a detailed, annual financial statement nor (ii) filed during the preceding twelve months certain reports required under applicable securities laws.[29] Because this exception applies to neither Company (nor most other public companies), no stockholder of either Company would have these inspection rights.

As Professor Lipton explains: "Nevada is where you incorporate if you want to do frauds."[30] Indeed, "Nevada lawmakers, over the years, explicitly considered Delaware's corporate law and designed their own statutes to deviate from what

[27] *In re Fort Howard Corp. S'holders Litig.*, 1988 WL 83147, at *12 (Del. Ch. Aug. 8, 1988).

[28] James D. Cox et al., *The Paradox of Delaware's "Tools at Hand" Doctrine: An Empirical Investigation*, 75 Bus. Law. 2123, 2127 (2020).

[29] Nev. Rev. Stat. § 78.257(7). Stockholders holding 5% of outstanding shares and/or who have been stockholders of record for at least six months may inspect the company's charter, bylaws, and stock ledger. Nev. Rev. Stat. § 78.105(2).

[30] Ann Lipton (@AnnMLipton), Twitter (Apr. 10, 2023, 5:48 PM), https://twitter.com/AnnMLipton/status/1645544410665435137.

Delaware offers toward less accountability."[31] For example, in 1999, the Nevada legislature amended its corporate code "with a clear purpose to explicitly reject two landmark Delaware cases—*Unocal* and *Revlon*."[32]

When adopting these laws, Nevada legislators warned their colleagues:

- "We might as well hang out a shingle, 'Sleaze balls and rip off artists welcome here.'"[33]
- "Corporate officers and directors who could, if they chose domicile in Nevada, commit virtually any act and get away with it[.]"[34]
- "Scoundrels can move here[.]"[35]
- "Nevada has sold its soul[.]"[36]

Thus, "[a]doption of Nevada's corporate law is associated with some of the most serious restatements involving real corporate governance and data manipulation problems"[37] and "Nevada firms ... [have] a higher risk of committing

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[31] Barzuza, *Nevada v. Delaware*, at 16.

[32] *Id.* at 17.

[33] Statement of Nevada Senator Dina Titus, *Hearing on S.B. 577 before the S. Comm. on Judiciary*, 71st Sess., available at https://www.leg.state.nv.us/Session/71st2001/Journal/Senate/Final/sj111.html.

[34] Statement of Nevada Senator Bob Coffin, *Hearing on S.B. 577 before the S. Comm. on Judiciary*, 71st Sess., available at https://www.leg.state.nv.us/Session/71st2001/Journal/Senate/Final/sj111.html.

[35] *Id.*

[36] Statement of Nevada Senator Dina Titus, *supra* note 33.

[37] Barzuza, *Inefficient Tailoring*, at 173 (alteration in original).

accounting fraud, than their non-Nevada peers."[38] Indeed, Nevada corporations were nearly twice as likely to issue a restatement,[39] and "among firms that issue restatements, Nevada firms are more likely to be associated with serious corporate governance and data manipulation problems."[40] Another study's "findings demonstrate a cost to shareholders [of Nevada-incorporated firms] in the form of increased agency costs[.]"[41]

The problem is particularly acute for controlled companies. Comparative law scholars have studied the effects on firm value of so-called "bad law" corporate-governance regimes, often found in developing nations, which are characterized by weak minority stockholder protections and opportunities for controllers to extract sizeable private benefits of control.[42] Nevada shares those characteristics with bad law regimes.[43]

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[38] Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 Rev. Fin. Stud. 3593, 3613 (2014).

[39] Michal Barzuza, *Market Segmentation*, 98 Va. L. Rev. at 989.

[40] Jordan Siegel & Yanbo Wang, *Cross-Border Reverse Mergers,* Harv. Bus. Sch. Strategy Unit, Working Paper No. 12-089, at 26 (2013).

[41] Dain C. Donelson & Christopher G. Yust, *Litigation Risk and Agency Costs: Evidence from Nevada Corporate Law*, 57 J.L. & Econ. 747, 750 (2014).

[42] Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 Harv. L. Rev. 1641, 1648, 1655-56 (2006).

[43] Barzuza & Smith, *What Happens in Nevada?*, 27 Rev. Fin. Stud. at 3599.

Under the American corporate governance regime, "a wide variety of corporate conduct [is] traditionally left to state regulation,"[44] (and, specifically, the state of incorporation).[45] In turn, the states have left enforcement to private plaintiffs.[46] If plaintiffs cannot hold fiduciaries accountable, no one can. Under Nevada's regime, the combination of universal business-judgment protections and an unusable books-and-records provision make it nearly impossible for any private plaintiff to bring suit. As Professor Barzuza explained, Nevada "poses insurmountable obstacles to shareholder litigation that function to diminish important pillars of Delaware corporate law."[47]

C. Maffei and His Management Teams Pushed the Conversions to Benefit Themselves

At a November 3, 2022 meeting—just days after the Chancellor rejected Maffei's attempt to avoid entire-fairness review in *Sirius*—the TripAdvisor Board

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[44] *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476-79 (1977) (holding that the federal securities laws do not reach breaches of fiduciary duty, absent deception, misrepresentation, or non-disclosure).

[45] *Juul Labs, Inc. v. Grove*, 238 A.3d 904, 913-916 (Del. Ch. 2020).

[46] *Sciabacucchi v. Liberty Broadband Corp.*, C.A. No. 11418-VCG, at 12-13 (Del. Ch. June 22, 2023) (TRANSCRIPT) ("[T]his is an example of how our system, if it's going to work, must work; that is, an entrepreneurial plaintiffs' bar, skillfully probing the transaction on behalf of the stockholders. In lieu of any civil Attorney General or similar system as they have in some foreign jurisdictions, we rely on the plaintiffs' bar to do this at significant risk.").

[47] Michal Barzuza, *The New Market for Corporate Law*, at 1.

discussed "reincorporating from Delaware to Nevada." (A41¶49.) Materials from the meeting stated [redacted] (*Id.* (emphasis added).)

Minutes from the TripAdvisor Board's February 1, 2023 meeting reflect that TripAdvisor's Chief Legal Officer, [redacted] (A41-42¶50.) "The presentation included a comparison of Delaware and Nevada law and explained that under Nevada law, a director or officer can be liable 'only when the plaintiff affirmatively rebuts the business judgment presumption *and* demonstrates that the fiduciary breach involved intentional misconduct, fraud, or a knowing violation of law.'" (Op. 8 (citation omitted).) The materials further explained that [redacted] (A42-

43¶51 (emphasis added).) The presentation warned that, [redacted] (*Id.* (emphasis added).)

Shortly before the Liberty TripAdvisor Board's March 7, 2023 meeting, (A43-44¶52), management circulated materials regarding a proposed reincorporation stating:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

On March 23, 2023, the TripAdvisor Board met to approve the TripAdvisor Conversion. (A45¶55.) The management presentation from that meeting again

[redacted] (A45-46¶¶55-56.) After discussion, the TripAdvisor Board substantively approved the TripAdvisor Conversion. (A46¶56.)

On April 5, 2023, the Liberty TripAdvisor Board approved the Liberty TripAdvisor Conversion. (A46¶57.)

D. Public Stockholders Overwhelmingly Rejected the Conversions

The Director Defendants solicited stockholder support for the Conversions via Proxies which freely admitted that the Conversions' primary purpose was to insulate the Director Defendants from future stockholder litigation.

Under "Reasons for the Redomestication," the TripAdvisor Proxy stated:

- "[T]he Redomestication will provide potentially greater protection for unmeritorious litigation for directors and officers of the Company." (A59¶78.)
- "The Redomestication will result in the elimination of any liability of an officer or director for a breach of the duty of loyalty unless arising from intentional misconduct, fraud, or a knowing violation of law." (A59-60¶79.)
- "[W]e believe that in general, Nevada law provides greater protection to our directors, officers, and the Company than Delaware law." (*Id.*)

The Liberty TripAdvisor Proxy's explanation for the Conversion largely mirrored TripAdvisor's. (A60¶80.)

The only non-self-interested purported justifications that the Proxies provided for the Conversions were purported annual tax savings of approximately $250,000

per company. (A60-61¶81.) Such savings are plainly immaterial for TripAdvisor and Liberty TripAdvisor, which had market capitalizations of over $2.6 *billion* and $132 million, respectively, and could be achieved by reincorporating in numerous other states that do not insulate fiduciaries from liability for duty of loyalty breaches. (*Id.*)

On June 6, 2023, stockholders voted on the Conversions. (A63-64¶86.) Defendants misleadingly assert that "a majority of each Company's outstanding voting power approved that Company's Conversion at its respective annual meeting." (DOB 10.) Assuming Maffei and Liberty TripAdvisor voted all their shares in favor of the Conversions, only ***5.4%*** of minority TripAdvisor and ***30.4%*** of minority Liberty TripAdvisor stockholders voted in favor. (A63-64¶86.)

E. The Decision Below and the Late-Breaking News

On February 20, 2024, the trial court denied Defendants' motion to dismiss, except as to Plaintiffs' request for injunctive relief. (*See generally* Opinion.) The trial court held that it was reasonably conceivable that the Conversions would be subject to entire fairness review because the Complaint adequately alleges that Nevada law is materially more favorable for Defendants than Delaware law and that Defendants effectuated the Conversions to insulate themselves from fiduciary liability. (Op. 32.)

In their briefing below, Defendants argued that "because Plaintiffs have not identified any proposed, pending, or contemplated controller transaction that might be subject to heightened scrutiny in Delaware but not Nevada, Plaintiffs cannot satisfy their burden to show that Maffei has an interest in the transaction that would require entire fairness review." (A118.) They argued the same at oral argument. (B065-68.) Then, Maffei and Liberty TripAdvisor disclosed that they were exploring a potential transaction and that TripAdvisor had formed a special committee to consider strategic alternatives. (A333-44.) On May 8, 2024, after this Court granted interlocutory appeal, 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.) TripAdvisor further disclosed that the special committee "will continue to evaluate proposed alternatives as appropriate." (*Id.*; *see also* A351-55.) It is unclear whether the contemplated transaction would implicate entire fairness under Delaware law and whether Maffei postponed transaction discussions until after this Court rules.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT ENTIRE FAIRNESS APPLIES TO THE CONVERSIONS

A. Question Presented.

Whether Maffei and the other Defendants receive a non-ratable benefit by causing the Conversions to insulate themselves from liability for breaches of the duty of loyalty. (A88-90, 104-19; Op. 19-33.)

B. Scope of Review.

This Court's review of a trial court's grant of a motion to dismiss is *de novo*. *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 757 n.7 (Del. 2018).

C. Merits of the Argument.

"When a business decision confers a non-ratable benefit on a controlling stockholder," absent some cleansing mechanism, "the standard of review for that decision is entire fairness, with the burden of proof resting on the defendants."[48] Defendants concede that Maffei controls the Companies and do not argue that the

[48] *Frederick Hsu Living Tr. v. Oak Hill Cap. P'rs III, L.P.*, 2020 WL 2111476, at *33 (Del. Ch. May 4, 2020); *see also Match*, 2024 WL 1449815, at *8 ("And where a controlling stockholder transacts with the controlled corporation and receives a non-ratable benefit, the presumptive standard of review is entire fairness.").

Conversions were cleansed. Thus, the sole question is whether the Conversions provide a non-ratable benefit to Maffei (or the other Defendants).[49]

1. Duty of Loyalty Exculpation Is a Material Non-Ratable Benefit to Maffei

A controlling stockholder receives a non-ratable benefit where it obtains a "unique benefit by extracting something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders."[50] The Court of Chancery has repeatedly recognized that a fiduciary receives a material non-ratable benefit when a transaction reduces or eliminates the fiduciary's risk of liability. (Op. 19 n.26 (collecting cases).) Many of those cases involved the extinguishment of existing liability, and some involved threatened or potential liability. (Op. 19-20, n. 26, 31 (collecting cases).)

Limiting or eliminating Maffei's risk of future liability for disloyal self-dealing is a material non-ratable benefit. "Real-world actors have no difficulty understanding that litigation risk can exist even though the specific events have not happened yet." (Op. 21.) As the trial court explained, insurance is a canonical example. (Op. 21-22.) The trillion-dollar insurance industry proves that mitigating

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[49] Defendants focus their argument on the directors, but whether the Conversions confer a non-ratable benefit on controller Maffei is outcome determinative.

[50] *IRA Trust v. Crane*, 2017 WL 7053964, at *6 (Del. Ch. Dec. 11, 2017) (citation omitted).

potential future losses is valuable.[51] The value of insurance to an insured is a function of the insurance's scope. Narrowing that scope benefits the insurers and harms the insured. (Op. 21-22.) Broadening the scope of a controller's immunity from liability benefits the controller and harms minority stockholders in the same way. (Op. 22.)

The insurance analogy is incomplete. It does not capture the material benefit to Maffei of increasing his ability to extract private benefits of control (and, in turn, the value of his control). The flip side of limiting or eliminating Maffei's risk of future liability for disloyal self-dealing is that Maffei can use his control to engage in more self-dealing in the future, extracting greater private benefits of control than he can against the backdrop of Delaware law. The Conversions thus provide Maffei a material asset that is additive to the greater downside protection he also receives.

The conclusion that the Conversions provide Maffei—more so than virtually any other controller—a material non-ratable benefit is bolstered by his recidivism. Maffei's lengthy history of fiduciary misconduct makes the limitation of liability for

[51] Defendants misconstrue the Court of Chancery's insurance discussion. They claim that by the Court's logic, every board decision to use corporate funds to procure insurance should be subject to entire fairness review. (DOB 23-24.) The fundamental difference is that insurance benefits stockholders and the company. Duty of loyalty exculpation benefits fiduciaries at the expense of stockholders and the company. *See infra* Argument § I.C.2.

future breaches of the duty of loyalty particularly valuable to him.[52] Stockholders have brought several meritorious fiduciary duty claims against Maffei in Delaware courts. Negotiating in the shadow of Delaware's fiduciary law, Maffei and his co-defendants have agreed to pay (or caused their insurers to pay) hundreds of millions of dollars, in aggregate, to resolve those claims. Escaping judicial oversight is self-evidently valuable for any controller, but especially one with Maffei's history of engaging in conflicted controller transactions.

Importantly, Plaintiffs are not merely speculating that Maffei's history of being held accountable in Delaware is driving the Conversions. Defendants admitted it. As the Court of Chancery correctly held, the Complaint well-pleads that the benefit to Maffei and his co-Defendants was material because: (i) Defendants "focused on the ability of the conversions to reduce or eliminate litigation risk"; (ii) "[t]he board materials discussed those issues and called out past cases"; and (iii) "the proxy statements told the stockholders that the directors were recommending the conversions to reduce or eliminate litigation risk." (Op. 32.) The Complaint thus well-pleads that obtaining litigation protection is the very purpose

[52] The sharp discrepancy between Maffei's voting and economic interest also creates a heightened risk of tunneling. (A49¶65 (collecting cases).)

of the Conversions, not merely a consequence of them.[53] And given Defendants' admissions that the Conversions are being effectuated to benefit themselves, it follows logically that the business judgment rule cannot apply because duty of loyalty exculpation skewed Defendants' ability to impartially consider whether the Conversions are in the Companies' best interests.[54]

Finally, the minority stockholder vote supports the conclusion that the Conversions provide Defendants a non-ratable benefit. If "an informed vote *in favor* of a conflicted transaction is evidence of fairness,[55] an informed vote *against* a conflicted transaction supports," at minimum, a reasonably conceivable inference

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[53] In that regard, *Williams v. Geier*, 671 A.2d 1368 (Del. 1996), is instructive. Cases have interpreted *Geier* to distinguish between *pro rata* transactions in which the benefit to the controller was incidental to the transaction (which does not implicate entire fairness) and transactions where the benefit to the controller is integral to the transaction (which does). *Sirius*, C.A. No. 2021-0820-KSJM, Tr. at 34-46; *Crane*, 2017 WL 7053964, at *8; *In re Google Inc. Class C S'holder Litig.*, C.A. No. 7469-CS, at 95-96 (Del. Ch. Oct. 28, 2013) (TRANSCRIPT). *A fortiori*, the non-*pro rata* Conversions that provide a benefit to the controller that is integral to the Conversions trigger entire fairness review.

[54] *See, e.g.*, *In re RJR Nabisco, Inc. S'holder Litig.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989) ("Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation. But if he were to be shown to have done so, how can the protection of the business judgment rule be available to him?"); *see also Sirius*, C.A. No. 2021-0820-KSJM, Tr. at 28 ("The key is that the fiduciary receives something different than the stockholders as a whole that skews the fiduciary's ability to evaluate the merits of the transaction.").

[55] *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 715 (Del. 2023) ("We find no error with the Vice Chancellor's determination to give the vote some weight.").

that the transaction involves material unfairness.[56] Only ***5.4%*** of TripAdvisor's minority stockholders voted in favor of the Conversions because the Conversions transfer value to Defendants. The stockholder vote, consequential in all aspects of Delaware law, should not be ignored here.

2. Defendants' Retrospective/Prospective Paradigm Contravenes Delaware Law

Defendants conceded below that, "[i]f a corporation were to convert to a limited liability company and *eliminate* fiduciary duties, it is conceivable that stockholders might have claims for breach of fiduciary duty against directors who make that decision because they receive a material, non-ratable benefit." (Notice of Appeal Ex. B at 9 n.2 (Trans. ID 72571828).)

Perhaps recognizing the fatality of that concession, Defendants pivot to advocating a bright-line rule.[57] They assert that whereas *retrospective* exculpation can trigger entire fairness review, *prospective* exculpation cannot absent a "pending or contemplated lawsuit" because that benefit has not been monetized and is

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[56] Op. at 42; *see also id.* at 42-43 ("The assertion in *Williams* that the minority stockholders' rejection of a transaction should not carry any weight in the fairness analysis is no longer persuasive in light of the increased emphasis that Delaware law places on stockholder votes.").

[57] *But see, e.g.*, *Park Emps.' & Ret. Bd. Emps.' Annuity & Benefit Fund of Chi. v. Smith*, 2016 WL 3223395, at *10 (Del. Ch. May 31, 2016) ("[A] court of equity generally does not favor bright-line rules, instead using its discretion to make decisions on a case-by-case basis.").

therefore speculative. (DOB at 3, 14.) Defendants' bright-line rule finds no support in logic or Delaware law.

The Court of Chancery has repeatedly sustained claims premised on a controller's receipt of a benefit that the controller does not immediately monetize, including: (i) creeping takeovers, where the benefit is not enjoyed unless and until the controller monetizes its absolute control;[58] (ii) perpetuation of control, where the benefit is not enjoyed unless and until the controller otherwise would have relinquished control;[59] (iii) share repurchases that increase a controller's ownership above 80%, where the benefit of tax-free dividends is not enjoyed unless and until the corporation issues dividends;[60] and (iv) share repurchases that increase a controller's ownership above 90%, where the benefit of being able to squeeze out

[58] *See, e.g.*, *Google*, C.A. No. 7469-CS, Tr. at 95-96; *La. Mun. Police Emps. Ret. Sys. v. Fertitta*, 2009 WL 2263406 (Del. Ch. July 28, 2009).

[59] *See, e.g.*, *Kormos v. Playtika Holding UK II Ltd.*, C.A. No. 2023-0396-SG, at 16-17 (Del. Ch. Jan. 18, 2024) (TRANSCRIPT) (sustaining breach of fiduciary duty claim arising from controller's perpetuation of control); *see also, e.g.*, *In re Viacom Inc. S'holders Litig.*, 2020 WL 7711128, at *16-17 (Del. Ch. Dec. 29, 2020) (sustaining breach of fiduciary duty claim arising from controller's consolidation of control); *Crane*, 2017 WL 7053964, at *9 (deeming controller's perpetuation of control a non-ratable benefit that triggers entire fairness review).

[60] *See, e.g.*, *Sirius*, C.A. No. 2021-0820-KSJM.

minority stockholders without being subject to fiduciary duties is not enjoyed unless and until the controller squeezes out the minority.[61]

In each such case, the controller receives an immediate benefit (a right) that can be monetized in the future. Nevertheless, entire fairness applies when the right is received, not when it is monetized, even though it is arguably "speculative whether the [controller] would personally benefit at all." (DOB 14.) The same result is warranted here. Notably, unlike in those cases, the wait-and-see approach will not work because upon the Companies' reincorporation in Nevada, any challenge to a future conflicted controller transaction will be decided by Nevada courts applying more Defendant-friendly Nevada law.

The trial court's hypotheticals illustrate the illogic of Defendants' paradigm. (*See* Op. 21-24.) Revisiting the insurance example, imagine that the insurer unilaterally narrows the scope of the policy. The decreased likelihood of coverage reduces the policy's value, providing the insurer an immediate benefit at the expense of the insured regardless of whether the insured has made—or ever will make—a claim. (Op. 22.) "The insurance example maps onto this case." (*Id.*) "If the law changes such that recovery becomes more difficult, then the right to pursue the recovery has less value." (*Id.*) That has knock-on effects. The insured will not be

[61] *Id.*

willing to pay as much for the policy in the future knowing that the insurer can unilaterally narrow the scope of insurance. So too here.

Another of the trial court's apt hypotheticals considered a transaction that entitles shares held by directors to a greater portion of future dividends. (Op. 23.) That transaction immediately reallocates economic value—*i.e.*, directors' shares become more valuable, stockholders' shares become less valuable—but under Defendants' paradigm, the transaction only triggers entire fairness if it occurred *after* the board declared a dividend. (*Id.*) That is wrong. The reallocation of economic value "is a non-ratable benefit to the insiders, even though the benefit will manifest itself tangibly from future-potential dividends rather than an existing-potential dividend." (Op. 24.)[62]

The same is true here. The Complaint well-pleads that the Conversions enable Maffei to extract greater private benefits of control, thus immediately increasing the value of his control upon the Conversions. That provides Maffei the "immediate, concrete benefit" that Defendants concede triggers entire fairness review, DOB 21,

[62] The options market hypothetical is also apt. (*See* Op. 24.) Under Defendants' framing, a gift to the controller of call options with a strike price equal to the market price would not trigger entire fairness because the controller is not receiving an immediate benefit. Yet, those options undisputedly have value regardless of whether they are immediately exercised or exercisable at a profit. (*Id.*)

even though the benefit will not tangibly manifest until Maffei sells his control stake or engages in a conflicted controller transaction.[63]

Defendants ignore the cases that apply entire fairness before the controller has monetized the benefit and ignore the immediate concrete benefit that Maffei is receiving. Instead, they claim that "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." (DOB 15.) None of the cases Defendants cite support that proposition.

Defendants correctly observe that *Harris v. Harris*, 2023 WL 115541 (Del. Ch. Jan. 6, 2023), and *In re Riverstone National, Inc. Stockholder Litigation*, 2016 WL 4045411 (Del. Ch. July 28, 2016), held that extinguishing existing and threatened litigation provides a fiduciary a material non-ratable benefit. (DOB 17-19.) Neither, however, addresses whether extinguishing *future* liability (the question presented by this case) confers a benefit.

[63] For the same reason (among others), Defendants' discussion of the inapposite doctrines of standing, federal Declaratory Judgment Act, and Delaware's Declaratory Judgment Act is unavailing. (DOB 21-23.) The benefit to Maffei is concrete and immediate, not speculative.

Defendants claim that "[c]ases 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." (DOB 21 (citing *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 963 (Del. Ch. 2013)).) *Boilermakers* was a facial challenge, *i.e.*, the question was whether the challenged bylaw could operate validly in *any* circumstance.[64] Hypothetical and imagined scenarios of instances in which the bylaw would not operate validly were therefore irrelevant.

Bamford v. Penfold, 2022 WL 2278867 (Del. Ch. June 24, 2022), and *Orloff v. Shulman*, 2005 WL 3272355 (Del. Ch. Nov. 23, 2005), do not, as Defendants contend, "illustrate the distinction" between prospective and retrospective exculpation. (DOB 15.) *Bamford* involved a challenge to the adoption of an "impressively broad exculpatory provision" by the controller of a closely held LLC.[65] The Court of Chancery found that the controller's adoption of that provision—which shielded him from liability for loyalty and care breaches, prospectively and retrospectively—was "a self-interested decision that can be

[64] 73 A.3d at 940.

[65] 2022 WL 2278867, at *33.

reviewed in equity."[66] Defendants selectively quote *Bamford* for the proposition that "[f]iduciaries who control an entity can adopt prospective protection provisions, including exculpatory provisions," DOB 17, but omit the critical qualifying language that follows: "particularly if the provisions *do not implicate the duty of loyalty*." *Bamford* thus distinguishes between care and loyalty exculpation, confirming that, under Delaware law, liability for breaches of the duty of loyalty cannot be abrogated retrospectively or prospectively.[67]

Orloff concerned a challenge to the adoption of a 102(b)(7) provision that stockholders approved after a books-and-records action was filed.[68] The court found that the plaintiff failed to allege facts supporting a reasonable inference that the directors were interested in the bylaw amendment, *i.e.*, that the complaint failed to allege that prospective duty of care exculpation provided directors a material benefit.[69] *Orloff* says nothing about the materiality of prospective duty of loyalty exculpation.

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[66] *Id.* at *34.

[67] *Id.* (emphasis added); *see also id.* ("By definition, a provision under Section 102(b)(7) cannot protect directors from claims that implicate the duty of loyalty. Nor can it eliminate liability retrospectively.").

[68] 2005 WL 3272355, at *6, 13.

[69] *Id.*; Op. 27-29.

The critical distinction between loyalty and care exculpation reflects Delaware's policy choices. Delaware made a policy determination that exculpating directors for care violations serves stockholders' best interests. *See Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996) ("[I]t is in the shareholders' economic interest to offer sufficient protection to directors from liability for negligence, etc., to allow directors to conclude that, as a practical matter, there is no risk that, if they act in good faith and meet minimal proceduralist standards of attention, they can face liability as a result of a business loss."). It follows logically that adopting a 102(b)(7) provision is not presumptively self-interested and does not provide a material non-ratable benefit in the absence of existing liability "because the directors' interest in obtaining care-based exculpation align with the stockholders' interests in providing it." (DOB Ex. B 21.) The same logic applies with equal force to D&O insurance, indemnification, and advancement.

Delaware, however, made the opposite policy determination with respect to duty of loyalty exculpation. Duty of loyalty exculpation is "inconsistent with the public policy of this State to hold fiduciaries accountable for breaches of the duty of loyalty." *CCSB*, 302 A.3d at 401. And for good reason: unlike duty of care exculpation, duty of loyalty exculpation enables a fiduciary ***to extract value for itself at the expense of stockholders and the corporation***. Therefore, unlike care

exculpation, loyalty exculpation presumptively provides a fiduciary a material non-ratable benefit at stockholders' expense. The recipient of that benefit—like any other non-ratable benefit—should be required to compensate minority stockholders for the benefit received at their expense.[70]

3. The Availability of *MFW* Cleansing Does Not Impact the Standard of Review

Defendants contend that even if entire fairness otherwise would apply, it should not apply here because *MFW* "protections cannot practically be applied or satisfied in the conversion context." (DOB 25.) Defendants cite no support for the novel proposition that controllers' practical ability (or inability) to avail themselves of the *MFW* affirmative defense impacts the standard of review, because there is none. Rather, in *MFW*, this Court emphasized that, "the business judgment standard of review will be applied *if and only if* ... the controller conditions the procession of

[70] Defendants assert that "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," DOB 20, but that is hardly surprising because Delaware law prohibits loyalty exculpation. The cases that have come closest to addressing this issue have suggested that loyalty exculpation would invoke entire fairness review. *See Bamford*, 2022 WL 2278867, at *33-34 (distinguishing between ability to prospectively exculpate for care breaches and loyalty breaches); *Sylebra*, 2020 WL 5989473, at *9 n.95 (stating that stockholder plaintiff could have brought a claim prior to the company's redomestication to Nevada "to enjoin the Reincorporation Merger as the product of a controlling stockholder's unlawful self-interest.").

the transaction on the approval of both a Special Committee and a majority of the minority stockholders."[71] And in *Match*—where defendants and transactional lawyers complained of the practical inability of achieving *MFW* compliance in certain circumstances—this Court implicitly rejected the argument Defendants advance here, reaffirming that "[t]he standard of review did not depend on the nature of the transaction."[72]

Regardless, there are multiple ways for a controller to comply with *MFW* in a redomestication to Nevada. *First*, the trial court did not hold that directors in all redomestications to Nevada (or otherwise) are conflicted. The trial court held that the Complaint adequately pleads that the TripAdvisor and Liberty TripAdvisor directors were conflicted based on Defendants' internal materials and proxy disclosures, which support a pleading-stage inference that Defendants are effectuating the Conversions for the purpose of reducing litigation risk. (Op. 32.) The Opinion thus left open the possibility that independent directors on the

[71] *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014); *see also Tesla Motors, Inc. S'holder Litig.*, 298 A.3d at 700 ("The *requirement of fairness is unflinching in its demand* that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness") (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983)).

[72] 2024 WL 1449815, at *11.

redomesticating board could simulate arm's-length bargaining in connection with a redomestication to Nevada.

Second, even assuming that all directors who will benefit from the redomestication to Nevada are conflicted, that does not foreclose *MFW* compliance. As the trial court explained, (i) members of the existing redomesticating board who are serving on the special committee could "submit resignations that would become effective if the conversion were approved" or (ii) "a board could add directors [solely] to consider the conversion." (DOB Ex. B 10-11.) Defendants assert that these are not "practical or tenable solution[s]," but nowhere explain why appointing directors for the purpose of considering a redomestication is untenable while appointing new and/or temporary directors to serve on an SLC is commonplace.[73]

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[73] *See, e.g., In re WeWork Litig.*, 250 A.3d 976, 990 (Del. Ch. 2020) (adding two directors to serve on SLC); *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 466 (Del. Ch. 2013) ("On May 23, 2007, the board formed the SLC. Its two members ... were newly appointed independent directors"); *Sutherland v. Sutherland*, 2010 WL 1838968, at *3 (Del. Ch. May 3, 2010) ("the Defendants amended the Companies' bylaws to increase their respective boards from three members to four; they then appointed Bryan Jeffrey to each board, and designated him as a one-person special litigation committee ...."); *In re InfoUSA, Inc. S'holders Litig.*, 2008 WL 762482, at *1 (Del. Ch. Mar. 17, 2008) ("The SLC is a five-member committee that includes two directors the Court previously determined were disinterested and three newly appointed members of the Company's board"); *Carlton Invs. v. TLC Beatrice Int'l Hldgs., Inc.*, 1997 WL 305829, at *1 (Del. Ch. May 30, 1997) ("the board of directors ... unanimously voted to add two new directors and to constitute them as the SLC ...."); *see also* Frank M. Placenti and Gregory Varallo, *Calling the Cavalry: Special Purpose Directors in Times of Boardroom Stress*, Harvard Law School

In all events, having created the scenario calling for entire fairness review, Defendants should not be heard to complain about their inability to escape it.

4. Policy Reasons Favor Applying Entire Fairness to the Redomestications

In *Match*, this Court rejected arguments to carve-out certain conflicted controller transactions from the general rule that all conflicted controller transactions are presumptively subject to entire fairness review. "If a lower standard of review applies to one type of transaction…, then controllers will use that route to move value."[74] Defendants (and amici) advance a series of misguided policy arguments that effectively ask this Court to reconsider its *Match* decision, and thereby create a route for controllers to tunnel value. Policy considerations weigh in favor of affirmance, not against it.

a. Damages Calculation

Defendants contend that the Court should relieve Maffei of his obligation to prove entire fairness because calculating damages could be hard and an event study

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Forum on Corp. Governance (2019), https://corpgov.law.harvard.edu/2019/06/17/calling-the-cavalry-special-purpose-directors-in-times-of-boardroom-stress/.

[74] *Ezcorp*, 2016 WL 301245, at *23.

would be insufficiently precise. (DOB 26, 30.)[75] But they again cite no case that supports the propositions they advocate, because there are none. On the contrary, Defendants' position turns settled law on its head. *Maffei* bears the burden to prove that the Conversions are entirely fair. If he cannot—including because he failed even to attempt to run a fair process or pay a fair price—the "court's 'powers are complete to fashion any form of equitable and monetary relief as may be appropriate.'"[76] "As long as there is a basis for an estimate of damages, and the plaintiff has suffered harm, mathematical certainty is not required."[77]

Taken to its logical extreme, Defendants' argument would excuse wrongdoers of liability in all sorts of circumstances. What is the value of obtaining absolute control? What is the value of perpetuating control? What is the value of increased voting rights? What is the value of avoiding taxes on future dividends? What is the value of being able to squeeze out minority stockholders without being subject to fiduciary duties? None of those benefits lend themselves to straightforward damages

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[75] Ironically, that argument supports an injunction. *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 264 (Del. Ch. 2013) ("Irreparable harm also exists because damages would be difficult to calculate.").

[76] *In re Dole Food Co. S'holder Litig.*, 2015 WL 5052214, at *44 (Del. Ch. Aug. 27, 2015) (citation omitted).

[77] *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 814 (Del. Ch. 2011).

analyses, yet all of them have implicated entire fairness review.[78] According to Defendants, however, those cases were all wrongly decided because calculating damages was too difficult. That is not correct.

Moreover, the Conversions are the functional equivalent of a direct, forward stock-for-stock merger between a Delaware corporation and a Nevada corporation. If the Companies were not public, stockholders would have appraisal rights. (Op. 40.) The Court would be required to—and could—perform an appraisal. The Court can likewise assess entire fairness here by, *e.g.*, testing the fairness of the process, relying on empirical studies valuing control of Delaware and Nevada corporations (A56-57¶¶73-74), relying on empirical studies proving a Nevada discount (A56-57¶73), looking to stock price reaction to effectuation of the Conversions (*see* DOB Ex. B 9), and/or any other methodology that provides a basis for estimating damages.[79]

[78] *See supra* Argument § I.C.2. Many other cases have applied the entire fairness test outside of a cash out merger. (*See* Op. at 37-39 (collecting cases).)

[79] Defendants and amici conjure hypotheticals about how the trial court might treat a redomestication to a different state with different laws than Nevada. (DOB 29; Amici 13-14.) While the obvious answer is that the trial court would do the same thing it did here—assess the adequacy of the complaint's allegations—this Court need not concern itself with hypothetical, imagined scenarios not implicated here.

b. Comity

In their opening brief below, Defendants argued that "this motion does not ask this Court to evaluate Nevada's legislative choices." (A107.) Now, Defendants contend that, "[n]o Delaware court should be evaluating the Nevada legislature's choices about how corporations in that state are governed." (DOB 27.) Amici make similar arguments. (Amici 13-14, 19-21.) As Defendants conceded below, this case does not require that. This case requires the Court to assess whether it is reasonably conceivable that the Conversions shift economic value from minority stockholders to the controller. (*See* A107.)

If so, then Delaware law requires that the controller compensate minority stockholders for that shift in economic value. The same would be true if the Conversions were structured as a stock-for-stock merger or if the Companies were converting to Delaware LLCs with identical corporate laws to Nevada. "The allegations about the substance of the post-conversion legal framework generate the result, not whether it was created by Nevada legislators or Delaware lawyers." (DOB Ex. B 26.) Having created the scenario "calling for substantive fairness

review,"[80] Defendants cannot hide behind unspecified principles of comity to avoid substantive fairness review.[81]

c. Amici

Amici misapprehends the Opinion and invents a non-existent risk.

Amici argues that the Opinion failed adequately to grapple with substantive Nevada law, and that its holding depended on accepting as true Plaintiffs' purported mischaracterizations of Nevada law. (Amici 4.) Not so. Defendants conceded for purposes of the motion to dismiss that Nevada substantive law was more favorable to them than Delaware law. (A107.) Defendants wrote that Plaintiffs' characterizations of Nevada law were "not relevant to the pending motion," (*id.*) and reiterate that concession on appeal. (DOB 13.) Amici seeks to argue an issue that was not raised below, and provides no support for its ability to do so. Amici ignores further that the Opinion found Nevada law substantively more favorable for fiduciaries based not solely upon Plaintiffs' allegations, but upon Defendants' real time statements that Nevada law is more favorable for fiduciaries and that Defendants were redomesticating for that reason. (*Compare* Amici 4 *with* Op. 32.)

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[80] *Ezcorp*, 2016 WL 301245, at *23.

[81] As Defendants' own authority states, comity is typically relevant where a plaintiff sues in a Delaware court even though Delaware has "no connection to the litigation" and the law of another state is "at stake." *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1052 (Del. 2015). That has no application here.

Amici's position that Nevada law is not more favorable for fiduciaries defies reality. Amici conspicuously ignores the benefits to controlling stockholders afforded by Nevada law. They briefly acknowledge the Nevada Supreme Court's *Guzman v. Johnson* decision (Amici 11), but fail to explain its import.[82] *Guzman* involved a challenge to a squeeze-out merger of RLJ Entertainment, Inc. by its controlling stockholder, AMC Networks, Inc. ("AMC").[83] The squeeze out was not conditioned on a stockholder vote, but the claim against AMC was nevertheless dismissed at the pleading stage.[84] In *Match*, different amici explained at great length the material harm to minority stockholders and Delaware corporations of permitting a single cleansing mechanism to shift the standard of review to business judgment.[85] Those arguments apply with greater force to Nevada law, which presumptively applies the business judgment rule in all conflicted controller transactions.[86]

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[82] 483 P.3d 531.

[83] *Id.* at 534-35.

[84] *Id.* at 539.

[85] *See, e.g.*, Corrected Brief of Amicus Curiae Alpha Venture Capital Management, LLC in Support of Appellants, *In re Match Gp., Inc. Deriv. Litig.*, Consol. C.A. No. 368,2022 (Del. Sept. 7, 2023); Corrected Amicus Curiae Brief of Professor Charles M. Elson in Support of Appellants, *In re Match Gp., Inc. Derivative Litig.*, Consol. C.A. No. 368,2022 (Del. Sept. 7, 2023); Brief of Amicus Curiae Academics in Support of Appellants, *In re Match Grp., Inc. Derivative Litig.*, Consol. C.A. No. 368,2022 (Del. Sept. 5, 2023).

[86] Amici argues that Nevada's duty of loyalty exculpation is narrow because it does not permit exculpation for "intentional misconduct," and most instances of self-

Amici also ignores that the Opinion is a pleading-stage ruling. Defendants—supported by amici—will have the opportunity to attempt to prove that Delaware and Nevada law are substantively identical (or sufficiently similar such that the failure to compensate minority stockholders for their lost litigation rights falls within the range of reasonableness). "If that is true, then they will win." (Ex. B 26.) That fact undercuts amici's "exit tax" argument.[87] Amici's argument proceeds from the assumption that the Opinion applies to all redomestications, when in fact it applies only to a (i) controlled company's redomestication (ii) to Nevada (iii) where Defendants *admit* they are redomesticating to benefit themselves and (iv) Defendants fail to follow the *MFW* roadmap to cleanse the process. If Defendants in this case prove that Delaware and Nevada law are substantively identical—or that there is no benefit to Maffei from redomesticating—then even that narrow path to challenging a redomestication will likely be foreclosed.

Amici's real gripe seems to be that they oppose stockholder litigation. They analogize this challenge of a conflicted controller redomestication to ubiquitous

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dealing are intentional. (Amici 9.) The issue is not intent, the issue is pleading "misconduct" without the benefit of books and records.

[87] Amici note three other public companies that are seeking to redomesticate from Delaware to Nevada. None has faced any stockholder litigation over that decision. Nor has Tesla faced litigation challenging the fairness of its redomestication to Texas.

disclosure-only settlements despite the total lack of doctrinal resemblance. Delaware law is inconsistent with amici's position. Holding controlling stockholders liable for tunneling value is not a "tax." Rather, in *Match*, this Court reaffirmed the importance Delaware ascribes to preventing controlling stockholders from imposing agency costs by diverting value from minority stockholders. The Court accordingly held that "[i]f the controlling stockholder wants to secure the benefits of business judgment review, it must follow all *MFW*'s requirements."[88] The result should be the same here.

CONCLUSION

Controlled corporations present unique agency cost risks, and controllers often take advantage of any available avenue to tunnel value. Reversal would create a road map for controllers to tunnel value, and thereby drastically upend investors' *ex ante* expectations. Affirmance would uphold investors' expectations that Delaware law will protect their investments from controller overreach. The Opinion should be affirmed.

[88] 2024 WL 1449815, at *1.

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