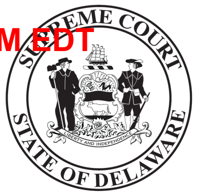
EFiled: Jul 08 2024 01:54PM EDT
Filing ID 73566886
Case Number 125,2024



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 Efiled: July 8, 2024 Public Version

APPELLANTS' REPLY BRIEF

OF COUNSEL:

Matthew W. Close
Jonathan B. Waxman
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, California 90071
(213) 430-6000

Abby F. Rudzin
Asher Rivner
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, New York 10036
(212) 326-2000

POTTER ANDERSON & CORROON LLP
Kevin R. Shannon (No. 3137)
J. Matthew Belger (No. 5707)
Jaclyn C. Levy (No. 5631)
Christopher D. Renaud (No. 6457)
Justin T. Hymes (No. 6671)
Hercules Plaza, 6th Floor
1313 N. Market Street
Wilmington, Delaware 19801
(302) 984-6000

Attorneys for Defendants-Below/Appellants Gregory B. Maffei, Albert E. Rosenthaler, Larry E. Romrell, J. David Wargo, Michael J. Malone, Chris Mueller, and Christy Haubegger and Nominal Defendant-Below/Appellant Liberty TripAdvisor Holdings, Inc.

OF COUNSEL:

John A. Neuwirth
Evert J. Christensen, Jr. (No. 4996)
Stefania D. Venezia
WEIL, GOTSHAL
& MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

ROSS ARONSTAM & MORITZ LLP
Bradley R. Aronstam (No. 5129)
S. Michael Sirkin (No. 5389)
Hercules Building
1313 N. Market Street, Suite 1001
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Defendants-Below/Appellants Matt Goldberg, Jay C. Hoag, Betsy L. Morgan, Greg O'Hara, Jeremy Philips, Trynka Shineman Blake, Jane Jie Sun, and Robert S. Wiesenthal, and Nominal Defendant-Below/Appellant Tripadvisor, Inc.

Dated: July 2, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. ENTIRE FAIRNESS DOES NOT APPLY TO THE BOARDS' DECISIONS TO ADOPT A MORE FIDUCIARY-FAVORABLE LITIGATION FRAMEWORK ON A LITIGATION-CLEAR DAY. 3

A. Reducing potential litigation risk for future conduct does not confer a material, non-ratable benefit. 3

B. Plaintiffs' Answering Brief confirms that Plaintiffs allege nothing more than speculation about non-ratable benefits from potential future transactions. 6

C. Plaintiffs' discussion of transactions providing immediate material benefits to controllers highlights why entire fairness does not apply to the Conversions 8

D. Plaintiffs cannot create a Maffei-specific rule based on settlements of other cases 11

II. THE COURT OF CHANCERY'S REFERENCE TO *MFW* AS AN ESCAPE VALVE IS UNAVAILING 13

III. THE COMPARISON OF LEGAL REGIMES NECESSARY FOR A FAIR-PRICE INQUIRY ON A LITIGATION-CLEAR DAY CONFLICTS WITH DELAWARE POLICIES. 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Bamford v. Penfold, L.P.,
2022 WL 2278867 (Del. Ch. June 24, 2002)....................3, 4

Boilermakers Loc., 154 Ret. Fund v. Chevron Corp.,
73 A.3d 934 (Del. Ch. 2013) 7

Fishel v. Liberty Media Corporation,
C.A. No. 2021-0820-KSJM (Del. Ch. Nov. 1, 2022)
(TRANSCRIPT) 9

Ford v. VMware, Inc.,
2017 WL 1684089 (Del. Ch. May 2, 2017)....................8

In re Google Inc. Class C S'holder Litig.,
2013 WL 5565623 (Del. Ch. Oct. 4, 2013) 10

In re Google Inc. Class C Shareholder Litigation,
C.A. No. 7469-CS (Del. Ch. Oct. 28, 2013) (TRANSCRIPT) 10

Griffith v. Stein,
283 A.3d 1124 (Del. 2022) 11

IRA Trust FBO Bobbie Ahmed v. Crane,
2017 WL 7053964 (Del. Ch. Dec. 11, 2017, revised Jan. 26, 2018) 9

Harris v. Harris,
2023 WL 115541 (Del. Ch. Jan. 6, 2023)....................3

Louisiana Municipal Police Employees' Retirement System v. Fertitta,
2009 WL 2263406 (Del. Ch. July 28, 2009) 9

Kormos v. Playtika Holding UK II Limited,
C.A. No. 2023-0396-SG (Del. Ch. Jan. 18, 2024) (TRANSCRIPT) 8

La. Mun. Police Emps' Ret. Sys. v. Lennar Corp.,
2012 WL 4760881 (Del. Ch. Oct. 5, 2012) 12

Orloff v. Shulman,
2005 WL 327355 (Del. Ch. Nov. 23, 2005) 3, 4

In re Riverstone National, Inc. Stockholder Litigation,
2016 WL 4045411 (Del. Ch. July 28, 2016) 4

RSUI Indemnity Co. v. Murdock,
248 A.3d 887 (Del. 2021) 5, 6

In re Viacom Inc. Stockholders Litigation,
2020 WL 7711128 (Del. Ch. Dec. 29, 2020, revised Dec. 30, 2020) 9

White v. Panic,
783 A.2d 543 (Del. 2001) 12

PRELIMINARY STATEMENT

The Court of Chancery erred when it held at the pleading stage that redomesticating to Nevada on a litigation-clear day is sufficient to plead a material, non-ratable benefit to Maffei or other directors because Nevada law takes a more fiduciary-friendly approach to stockholder litigation. Delaware law has long permitted corporations to reduce directors' litigation risk (through exculpation, indemnification, and "Side A" insurance) and evaluates a director's decision to do so under the business judgment rule, so long as the decision does not limit pending or threatened litigation. Delaware does so as a matter of law, because the mere reduction in litigation risk is not a material, non-ratable benefit to the directors. There is no reason to treat the decision to redomesticate to Nevada differently, and the speculation about collateral benefits to a putative controlling stockholder does not change the analysis. The hypothetical and contingent impact of Nevada law on unknown corporate actions that might (or might not) happen in the future is too speculative to constitute a material, non-ratable benefit warranting entire fairness review. The Court of Chancery should therefore have applied the business judgment rule and granted Defendants' motion to dismiss.

Here, Plaintiffs attempt to plead a material, non-ratable benefit only by speculating about what acts the Companies' fiduciaries might take in the future. They argue that the Conversions provide a material, non-ratable benefit to Maffei

because he might someday, after the Conversions, cause the Companies to engage in a transaction that Delaware law would prohibit and Nevada law would permit. But that only confirms it is the hypothetical future transaction—not the Conversions—that would provide the alleged material, non-ratable benefit. Plaintiffs have not identified a single case in which a Delaware court applied entire fairness to a litigation-clear-day decision to reduce fiduciaries' litigation risk for future conduct because, as a matter of law, a reduction in hypothetical future litigation risk, without more, is not material.

Plaintiffs repeat the Court of Chancery's assertion that the availability of *MFW* somehow means that applying entire fairness to redomestication decisions would not effectively make it impossible for any controlled company to redomesticate without first trying a "damages" case. But Plaintiffs do not explain how *MFW* is practicably workable in this context. It is not.

Nor do Plaintiffs meaningfully address the strong policy reasons—explained in Defendants' Opening Brief and in the State of Nevada's Amicus Brief—not to expand entire fairness review to the decision to redomesticate on a litigation-clear day based on how other states structure their corporate law.

The Court should reverse the decision below.

ARGUMENT

I. ENTIRE FAIRNESS DOES NOT APPLY TO THE BOARDS' DECISIONS TO ADOPT A MORE FIDUCIARY-FAVORABLE LITIGATION FRAMEWORK ON A LITIGATION-CLEAR DAY.

Plaintiffs agree that this appeal presents a single dispositive question for the Court: Do Maffei and the other directors receive a material, non-ratable benefit from the Conversions? (Ans. Br. at 22.) As demonstrated in the Defendants' Opening Brief, the answer to that question is no. (Opening Br. at 13–24.)

A. Reducing potential litigation risk for future conduct does not confer a material, non-ratable benefit.

The Court of Chancery incorrectly held that a fiduciary approving corporate action that possibly would reduce potential future liability exposure on a litigation-clear day obtains a material, non-ratable benefit. In evaluating a decision to reduce corporate fiduciaries' potential litigation exposure—whether by exculpation, indemnification, or insurance—Delaware courts have drawn a distinction between board decisions to: (i) *reduce* litigation risk for *future* actions, to which the business judgement rule applies (*id.* at 15–17 (discussing *Orloff v. Shulman*, 2005 WL 327355 (Del. Ch. Nov. 23, 2005), and *Bamford v. Penfold, L.P.*, 2022 WL 2278867 (Del. Ch. June 24, 2002)); and (ii) *eliminate* pending, threatened, or potential litigation exposure for *past or current* conduct, to which the entire fairness standard applies (Opening Br. at 17–19 (discussing *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)). The reason for this distinction is that, absent pending litigation or an imminent litigation threat, the potential benefit to the fiduciary from the reduced liability risk is too speculative and contingent to be material. (*See* Opening Br. at 14–15, 20–21.) Hypotheticals, "what ifs," and theoretical possibilities do not warrant exacting judicial review of board action. This reasoning applies to reducing the potential litigation risk of controllers just as well as it does to directors. The potential benefit to a controller from reduced future litigation risk is just as speculative as the potential benefit to a director from exculpation or insurance.

Plaintiffs attempt to distinguish *Orloff* and *Bamford* by arguing that redomesticating to Nevada would provide the directors with exculpation from any potential liability for breach of the duty of loyalty. (Ans. Br. at 32–35.) But as the State of Nevada explained in its amicus brief, while Nevada's exculpation statute uses different language than Delaware's, Nevada still prohibits exculpation for virtually all duty-of-loyalty breaches, because Nevada "does not permit exculpation for acts of 'intentional misconduct.'" (*See* Dkt. 14 ("Nevada Amicus Br.") at 9–10.) Plaintiffs cannot state a claim by mischaracterizing Nevada law.

Even if Nevada does somehow narrow the scope of duty-of-loyalty liability for some breaches, there still would be no basis here to apply entire fairness to fiduciaries' decisions to move the corporations to Nevada. There is no meaningful difference between such exculpation and the corporation purchasing significant "Side A" insurance covering directors for duty-of-loyalty breaches. As both the Court of Chancery Opinion and Plaintiffs' Answering Brief recognize, purchasing insurance policies covering duty-of-loyalty breaches accomplishes the same result of protecting directors from liability for a duty-of-loyalty breach—albeit with the corporation bearing the expense of the insurance premium. (*See* Op. at 21–23; Ans. Br. at 23–24.) Plaintiffs' assertion that insurance primarily benefits the company and stockholders while duty-of-loyalty exculpation benefits fiduciaries is too facile. (Ans. Br. at 24 n.51.) Insurance that protects a fiduciary's wallet is obviously a benefit *to the fiduciary*. *See RSUI Indemnity Co. v. Murdock*, 248 A.3d 887, 900 (Del. 2021) ("D&O policies" are designed to "protect [fiduciaries] even where indemnification is unavailable."). Of course, an insurance policy might benefit a corporation and its stockholders by providing an additional source of recovery. (*See* Opening Br. Ex. B at 20–21.) But insurance also benefits the corporation and its stockholders by "minimizing the downside risks of serving as a director or officer" and thus "enhanc[ing] the ability of Delaware corporations to attract talented people

to fill those roles." *RSUI*, 248 A.3d at 900. This is one of the Companies' stated reasons for moving to Nevada, which supports this policy goal with its more fiduciary-friendly litigation regime. (*See* Opening Br. at 7; Nevada Amicus Br. at 11–2, 15–17.)

B. Plaintiffs' Answering Brief confirms that Plaintiffs allege nothing more than speculation about non-ratable benefits from potential future transactions.

Plaintiffs only speculate about future conduct and do not allege a material, non-ratable benefit to either Maffei or the other directors from the Conversions. In bulleted paragraphs on page 3, Plaintiffs resort to an imagined chain of events to explain their material, non-ratable benefit: (i) the Companies redomesticate to Nevada; (ii) the Companies then engage in unfair transactions to "[s]queeze out the minority stockholders" or "tunnel value" to Maffei; and (iii) Maffei and the other directors then defeat litigation challenging the post-redomestication transactions under Nevada law. (Ans. Br. at 3.) In short, Plaintiffs argue that Maffei might receive benefits in the future from pursuing a transaction that Delaware law would not permit but Nevada law would. (*Id.* at 24 (describing pro rata benefit as ability for Maffei to extract greater private benefits in the future under Nevada law).)[1] The

---

[1] Plaintiffs ignore that the Court of Chancery did not rule based on a non-existent transaction. The Court of Chancery held that *all* fiduciaries were conflicted because *all* receive the same material, non-ratable benefit from redomesticating to Nevada,

alleged material, non-ratable benefit to Maffei thus is not from the Conversions, but from Plaintiffs' speculation about what might come afterward. And Plaintiffs have not alleged facts suggesting that Maffei or the directors are planning to have the Companies pursue a transaction that would not pass muster under Delaware law but would under Nevada law. Plaintiffs' failure comes despite receiving board materials concerning the Conversions and potential strategic transactions before filing the Amended Complaint. (AR2 at ¶ 4.)

The Court must evaluate the actual board decisions before it, not Plaintiffs' speculation about future transactions that have not even been discussed, much less proposed, by the board of directors. (Opening Br. at 20–21.) This makes sense. Creative plaintiffs' counsel can always imagine some hypothetical future scenario where a controller or the directors might receive a material unique benefit. (*Id.* at 19–20 (citing *Boilermakers Loc., 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 961–62 (Del. Ch. 2013).)[2] Applying entire fairness based on speculation about

---

reduced litigation exposure. (*See* Op. at 2 ("The reduction in the unaffiliated stockholders' litigation rights inures to the benefit of the stockholder controller *and the directors*. That means the conversion confers a non-ratable benefit on the stockholder controller *and the directors*, triggering entire fairness.") (emphasis added).) Plaintiffs' decision to distance themselves from the Court of Chancery's reasoning is telling.

[2] Plaintiffs attempt to distinguish *Boilermakers* as involving a "facial challenge" to a bylaw, but do not explain how this fact is relevant. *Boilermakers* holds that Plaintiffs cannot challenge a board action based on "imagined situations involving

future board decisions would dramatically erode Delaware's business judgment rule by invoking entire fairness review whenever stockholders can imagine a scenario where board decisions in the future might deliver a material, non-ratable benefit to a controller without *MFW* protections. The Boards' decisions to redomesticate to Nevada are the only actions challenged in this case. Those decisions should be reviewed under the traditional business judgment rule.

C. Plaintiffs' discussion of transactions providing immediate material benefits to controllers highlights why entire fairness does not apply to the Conversions.

Plaintiffs have not come forward with a single case in which a Delaware court applied entire fairness to a fiduciary's decision to reduce his, her, or its potential litigation risk for future conduct. Instead, Plaintiffs cite to cases where Delaware courts applied entire fairness to other types of transactions that delivered an *immediate* benefit to the controller. None of these cases, however, found a material, non-ratable benefit based on speculation about future events.

- *Kormos v. Playtika Holding UK II Limited*, C.A. No. 2023-0396-SG (Del. Ch. Jan. 18, 2024) (TRANSCRIPT), involved a self-tender transaction that was

---

multiple 'ifs.'" 73 A.3d at 961–62. There is nothing about its analysis suggesting that it does not apply equally to a fiduciary breach claim premised on multiple "ifs" and hypothetical future scenarios. *See Ford v. VMware, Inc.*, 2017 WL 1684089, at *17–18 (Del. Ch. May 2, 2017) (dismissing fiduciary breach claim against controller because "hypothetical possibility" of controlling stockholder benefit in some "future transaction" that was "neither contemplated nor threatened" was insufficient to plead non-ratable benefit).

designed to satisfy the controlling stockholders' urgent "need for liquidity while maintaining its control over Playtika." Tr. at 15. The transaction accomplished this through a "safety valve mechanism" under which the company disclosed the percentage of tendered shares and the controller was then able to withdraw previously tendered shares as necessary to maintain control. *Id.* at 8–9. The ability for the controller "to manipulate its tender to maintain control, while still addressing its liquidity needs" was the alleged material, non-ratable benefit. *Id.* at 17.

- *IRA Trust FBO Bobbie Ahmed v. Crane* involved a controller who "was on the cusp of losing its control position" and a transaction "admittedly was done to perpetuate that control." 2017 WL 7053964, at *9 (Del. Ch. Dec. 11, 2017, revised Jan. 26, 2018).

- *Fishel v. Liberty Media Corporation* ("*Sirius*"), C.A. No. 2021-0820-KSJM (Del. Ch. Nov. 1, 2022) (TRANSCRIPT), alleged that the directors approved a $2 billion upsize to a share repurchase program to allow the controller to achieve tax savings under an *already executed* tax sharing agreement and enable the controller to cross the 90% ownership threshold needed for a short-form merger. Tr. at 4–5, 9–10.

- *In re Viacom Inc. Stockholders Litigation* concerned a merger between two companies—Viacom and CBS—both controlled by Shari Redstone. The complaint alleged facts creating an inference that Redstone caused Viacom to reduce its value in the merger by $1 billion to achieve her goal of consolidated control over both companies and obtain her preferred governance format for the merged company. 2020 WL 7711128, at *7–18 (Del. Ch. Dec. 29, 2020, revised Dec. 30, 2020).

- *Louisiana Municipal Police Employees' Retirement System v. Fertitta* involved the board's alleged (i) failure to invoke a poison pill to block the controller's creeping takeover and (ii) termination of a merger agreement to relieve the controller of his obligation to pay the company a $15 million reverse termination fee. 2009 WL 2263406, at *7–9 (Del. Ch. July 28, 2009).

In each of these cases, the controller allegedly received a material economic benefit from the board decision itself—even if the benefit was not immediately monetized.

By contrast, Plaintiffs' material, non-ratable benefit theory for the Conversions requires speculation about unknown separate future transactions.

Plaintiffs' citation to the court describing the material, non-ratable benefit theory from a settlement hearing in *In re Google Inc. Class C Shareholder Litigation*, C.A. No. 7469-CS (Del. Ch. Oct. 28, 2013) (TRANSCRIPT), is even more off base. There was no motion to dismiss in *Google*, and the court never ruled on whether plaintiffs had sufficiently pleaded a material, non-ratable benefit or if entire fairness applied. (*See* Pl's Br. in Support of Application for Final Approval of Proposed Settlement at 20, *In re Google Inc. Class C S'holder Litig.*, 2013 WL 5565623 (Del. Ch. Oct. 4, 2013) ("The threshold issue not resolved in this litigation was the applicable standard of review.").) Thus, while the plaintiffs had alleged that Google's planned recapitalization and issuance of non-voting stock provided a material, non-ratable benefit by allowing Google to continue issuing stock to pay employees or acquire companies without diluting the founders' control, the court never endorsed that theory.

Plaintiffs' discussion of stock options and the rights to receive dividends (Ans. Br. at 30) is misplaced because options and dividend rights deliver *immediate* value to the recipient. They are concrete economic benefits that can be monetized immediately, even if the holder does not do so. By contrast, neither Maffei nor any

other director achieves here any concrete value from moving to a state with a more fiduciary-friendly litigation framework beyond the benefits shared more generally by the Companies.

D. Plaintiffs cannot create a Maffei-specific rule based on settlements of other cases.

This case is no different just because Maffei is named as a defendant. Plaintiffs attack Maffei's character, arguing that a material, non-ratable benefit exists here because he is a recidivist fiduciary-duty breacher. (*Id.* at 24–25.) While Plaintiffs reference denials of motions to dismiss based on the entire fairness standard of review and the settlements of several lawsuits in which Maffei was named as a defendant, none of those lawsuits ultimately found a stockholder's claims against Maffei to be meritorious on the evidence. (*Id.* at 9–10, 25.) In short, Plaintiffs cannot identify a single case in which any court adjudged Maffei to have breached his fiduciary duties. And Plaintiffs' efforts to draw an inference of wrongdoing from settlements conflicts with Delaware's policy choice to "favor[] settlement of litigation." *Griffith v. Stein on behalf of Goldman Sachs Gp., Inc.*, 283 A.3d 1124, 1133 (Del. 2022).

Given the expense of litigating through discovery and trial, and the existence of D&O insurance, it is hardly surprising that other cases against Maffei and his co-directors have settled. Among other reasons, settling reduces both the time that

management teams need to spend overseeing and participating in litigation and the corporations' litigation expense. A settlement does not reflect merit to the plaintiffs' claims; it reflects that *both sides* were willing to compromise to avoid their perceived litigation costs and risk of an adverse judgment. It is why settlement agreements—including all those that Plaintiffs cite—typically involve no admission of liability. Delaware courts have consistently "rejected the argument that past lawsuits against a company constitute credible evidence of similar ongoing malfeasance." *La. Mun. Police Emps' Ret. Sys. v. Lennar Corp.*, 2012 WL 4760881, at *3–4 (Del. Ch. Oct. 5, 2012) (holding that settlements "without any admission of wrongdoing . . . do not provide a credible basis" of any current wrongdoing); *see also White v. Panic*, 783 A.2d 543, 553 (Del. 2001) (refusing to infer actual misconduct from settlements in which defendants did not admit wrongdoing because such settlements "are consistent with a desire to be rid of strike suits and to avoid the cost of protracted litigation").

II. THE COURT OF CHANCERY'S REFERENCE TO *MFW* AS AN ESCAPE VALVE IS UNAVAILING.

The Court of Chancery cited *MFW* to counter the argument that applying entire fairness to a redomestication decision would always prevent a controlled company from relocating without paying an exit tax. (Op. at 4.) Plaintiffs repeat the point, arguing that affirming the decision would not mandate entire fairness review for every redomestication because "the Opinion offers controllers seeking to redomesticate to Nevada a path to achieving business judgment review." (Ans. Br. at 2.) As explained in Defendants' Opening Brief, *MFW* is not a viable path in this context. (*See* Opening Br. at 24–26.)

Plaintiffs argue that a controller could satisfy *MFW* because a committee of independent directors "could simulate arms'-length bargaining in connection with a redomestication to Nevada." (Ans. Br. at 36–37.) But the Court of Chancery reasoned that *directors* would receive a material, non-ratable benefit from Nevada's fiduciary-duty law, rendering them incapable of forming a satisfactory *MFW* special committee. (Op. at 2 ("The reduction in the unaffiliated stockholders' litigation rights inures to the benefit of . . . the directors. That means the conversion confers a non-ratable benefit on . . . the directors . . . .").)

Plaintiffs also suggest that new directors could be appointed to serve on the committee, as SLC members sometimes are. (Ans. Br. at 37.) But new SLC

directors are usually added to the board as full members, with their tenure not dependent on the SLC's conclusion, and their remit is a narrow assessment of past conduct. Here, under the Court of Chancery's view, a director—existing or new—has a conflict on a decision reducing future litigation liability unless he or she will not be on the board in the future. Delaware law, however, should not encourage companies to select directors with no historic understanding of the company and no stake in its future to make decisions about what jurisdiction best suits the company's needs.

III. THE COMPARISON OF LEGAL REGIMES NECESSARY FOR A FAIR-PRICE INQUIRY ON A LITIGATION-CLEAR DAY CONFLICTS WITH DELAWARE POLICIES.

Plaintiffs do not meaningfully address the strong policy reasons to avoid expanding entire fairness review to a corporate conversion on a litigation-clear day. To determine the fairness of the "price" of relocation, a Delaware court would be required to value Nevada's legal regime—in Plaintiffs' words, to quantify "a Nevada discount." (*Id.* at 40.) Principles of comity counsel against courts doing so, as amply explained by the State of Nevada. And here, not only would a Delaware court be required to second-guess Nevada's legislative choices, but Plaintiffs urge this Court to reject the State of Nevada's interpretation *of its own law*. (*See id*. at 42–45 (disputing Nevada's explanations of its law in its amicus brief).)[3]

Plaintiffs try to avoid the obvious logic that a court awarding compensation to them necessarily implies that they are being harmed by moving to Nevada—*i.e.*, its law is harmful to stockholders relative to Delaware's—by referring to intra-Delaware corporate transactions in which the result is reduced liability risk for

[3] Plaintiffs erroneously suggest that Defendants somehow waived this argument when they stated that their motion to dismiss did "not ask th[e] Court to evaluate Nevada's legislative choices." (*Id*. at 41 (citing A107).) But Defendants then—and now—believe that it is inappropriate for a Delaware court to do so. There is no inconsistency in Defendants' position.

fiduciaries. But there are no comity considerations for internal Delaware corporate transactions, assuming any such claim could have merit.

As Defendants also explained in their Opening Brief, there are practical impediments to applying entire fairness review because fairly "pricing" the difference in fluid legal regimes is impossible. (*See* Opening Br. at 28–29.) Plaintiffs offer little response, turning to cases about calculating damages. (*See* Ans. Br. at 38–40.) Putting a dollar value on a suite of litigation rights—from pleading requirements, to discovery obligations, to substantive burdens of proof and persuasion—is qualitatively different than the examples offered by Plaintiffs. Although it might be "difficult" to determine "the value of perpetuating control" (*Id.* at 39.), for example, that is a single variable that can be isolated and priced.

Not so for the value of litigation rules, which are context dependent and can change at any time. For example, the "value" of Delaware law's broader inspection rights under DGCL § 220 depends on the nature of the books and records request, because Nevada's law protects corporations from compliance costs (especially when the inspection is sought by the smallest stockholder with only a trivial interest) by limiting the documents that need to be produced and requiring the loser to pay in any action to enforce inspection rights. (*See* Nevada Amicus Br. at 10–11.) Similarly, stockholders suing in Nevada might have the right to a jury trial for fiduciary-breach

claims, while in Delaware they do not. The "value" of Nevada's potential jury trial right varies depending on plaintiffs' view of their case.

There is also no guarantee that the Delaware legislature will not adopt a law similar to Nevada's, or that Nevada's legislature will not amend its statutes to follow Delaware's common law. And this Court could modify Delaware's current common law entire fairness standard at any time. These future judicial and legislative determinations necessarily impact any effort to monetize the "Nevada discount" that Plaintiffs seek in this case (Ans. Br. at 40.), particularly where the alleged material, non-ratable benefit is based only on some future hypothetical transaction.

Finally, Plaintiffs' reference to a "stock-for-stock merger between a [non-public] Delaware corporation and a Nevada corporation" does not help their case. (Ans. Br. at 40.) Delaware's appraisal jurisprudence does not provide an established framework for valuing the "Nevada discount" that Plaintiffs seek here, as the Court of Chancery implicitly acknowledged when it turned to public stock price fluctuations as the likely source of damages evidence—a proposal that Plaintiffs hardly defend. (Op. at 50–51; *see also* Opening Br. at 29–30; Ans. Br. at 40). Plaintiffs' inability to explain how their legal rule would work on the ground is yet another reason to doubt its appropriateness.

CONCLUSION

For the reasons set forth above and in the Opening Brief, Defendants respectfully request that this Court reverse the judgment below.

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

Matthew W. Close
Jonathan B. Waxman
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, California 90071
(213) 430-6000

Abby F. Rudzin
Asher Rivner
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, New York 10036
(212) 326-2000

By: */s/ Kevin R. Shannon*
Kevin R. Shannon (No. 3137)
J. Matthew Belger (No. 5707)
Jaclyn C. Levy (No. 5631)
Christopher D. Renaud (No. 6457)
Justin T. Hymes (No. 6671)
Hercules Plaza, 6th Floor
1313 N. Market Street
Wilmington, Delaware 19801
(302) 984-6000

Attorneys for Defendants-Below/Appellants Gregory B. Maffei, Albert E. Rosenthaler, Larry E. Romrell, J. David Wargo, Michael J. Malone, Chris Mueller, and Christy Haubegger and Nominal Defendant-Below/Appellant Liberty TripAdvisor Holdings, Inc.

ROSS ARONSTAM & MORITZ LLP

OF COUNSEL:

John A. Neuwirth
Evert J. Christensen, Jr. (No. 4996)
Stefania D. Venezia
WEIL, GOTSHAL
& MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Dated: July 2, 2024

By: */s/ Bradley R. Aronstam*
Bradley R. Aronstam (No. 5129)
S. Michael Sirkin (No. 5389)
Hercules Building
1313 N. Market Street, Suite 1001
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Defendants-Below/Appellants Matt Goldberg, Jay C. Hoag, Betsy L. Morgan, Greg O'Hara, Jeremy Philips, Trynka Shineman Blake, Jane Jie Sun, and Robert S. Wiesenthal, and Nominal Defendant-Below/Appellant Tripadvisor, Inc.