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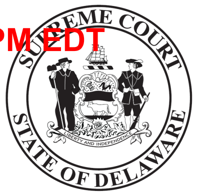

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREGORY B. MAFFEI, ALBERT E. ROSENTHALER, MATT GOLDBERG, JAY C. HOAG, BETSY MORGAN, GREG O'HARA, JEREMY PHILIPS, TRYNKA SHINEMAN BLAKE, JANE JIE SUN, ROBERT S. WIESENTHAL, LARRY E. ROMRELL, J. DAVID WARGO, MICHAEL J. MALONE, CHRIS MUELLER, and **CHRISTY HAUBEGGER**,	C.A. No. 125, 2024
Appellants/ Defendants-Below,	On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2023-0449-JTL
and	
TRIPADVISOR, INC. and **LIBERTY TRIPADVISOR HOLDINGS, INC.**,	
Appellants/Nominal Defendants-Below,	
v.	
DENNIS PALKON and **HERBERT WILLIAMSON**,	
Appellees/ Plaintiffs-Below.	

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

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INTEREST OF *AMICUS CURIAE*

As fellow laboratories of democracy, the State of Nevada ("*Amicus*")[1] and the State of Delaware have much in common. The Silver State's legislature, like the First State's, has devoted significant resources to optimizing its corporate code. Nevada's courts, like Delaware's, take seriously their responsibility to corporate constituents. Neither State is static: statutory and judicial innovations emerge regularly in both jurisdictions. And critics—from academics to elected officials—sometimes offer impassioned denunciations of decisions made in both States.

Delaware dominates the market for large, public-company incorporations. In denying Appellant's application for interlocutory review, the trial court brushed aside concerns that "thousands of Delaware corporations will be considering" redomestication, attributing any worries to "practitioner-driven stormlets." (Op. Br., Ex. B at 12.) While no one expects a stampede, since April three additional publicly traded companies have announced planned redomestications to Nevada. (*See* Cannae Holdings, Inc., Proxy Statement (Schedule 14A) (Apr. 26, 2024) ("Cannae Proxy"), Fidelity National Financial, Inc., Proxy Statement (Schedule 14A) (Apr. 26, 2024) ("Fidelity Proxy"), PAM Transportation Services., Inc., Current Report (Form 8-K) (Apr. 24, 2024) ("PAM Proxy"), all available at https://www.sec.gov.)

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[1] *Amicus* means the State of Nevada, *ex rel*. Francisco V. Aguilar, Secretary of State of Nevada, in his official capacity.

The decision in this case will have implications not only for the parties, but for the broader market for competition in corporate charters.

While both state's laws are largely similar, Delaware and Nevada have not reached identical policy decisions. It would be surprising if they did, and the differences lead to healthy competition. But that competition must be ***healthy***. In finding that redomestication to Nevada offers a "non-ratable" benefit to directors, the trial court gave "credit" to inflammatory and inaccurate allegations instead of referring to Nevada's statute. Respectfully, this Court should address Nevada's laws as they are, not as portrayed in one-sided academic literature.

Moreover, unless reversed, the decision below will foster repeat "exit tax" litigation similar to the disclosure-based merger tax lawsuits that were once common in the Court of Chancery and that still plague Delaware corporations in federal courts. But whereas Delaware's earlier struggles with M&A litigation mostly raised internal concerns, this new and troublesome strain of lawsuits will infect the otherwise healthy competition that should exist between sister states.

Amicus appreciates the Court's decision to accept this appeal for interlocutory review and offers this submission in support of Appellant, reversal, and the respectful competition that should exist between co-equal sovereigns.

SUMMARY OF ARGUMENT

I. Redomestication from Delaware to Nevada does not constitute a non-ratable benefit for corporate directors. Colorful accusations by law professors about a "race to the bottom" deserve no more credence concerning Nevada today than they did when academics hurled the same accusations at Delaware. Nevada's policy choices are intended to benefit corporations and their stockholders, not directors. The trial court could have, and should have, analyzed Nevada law itself rather than uncritically crediting allegations in Plaintiff's complaint.

II. Application of the entire fairness standard in this circumstance risks creating a state "exit tax" regime, where plaintiffs sue almost every corporation that attempts to leave Delaware. The trial court's solution—"cleansing" using a special committee and a stockholder vote—will not prevent meritless lawsuits or solve the problems created by the opinion below. If upheld, the consequences will be disadvantageous for Delaware because: (a) corporations may be reluctant to incorporate in the First State if they think they may have difficulty redomesticating later; (b) other states may similarly choose to raise barriers to redomestication, including moves to Delaware; and (c) the current situation risks prompting a federal response.

ARGUMENT

I. PLAINTIFF'S INFLAMMATORY AND INACCURATE ALLEGATIONS CONCERNING NEVADA LAW LEADS TO ERROR CONCERNING A NON-RATABLE BENEFIT

The opinion found it "reasonable to infer . . . that the conversions will confer a material benefit on the fiduciary defendants who approved them." (Op. at 32.) In reaching this conclusion, the trial court believed it must "credit the complaint's allegations" concerning the "protections" offered in Nevada. (*Id*. at 3.) The complaint, in turn, relied in part upon "the work of distinguished legal scholars" and "statements by Nevada policy makers." (*Id*. at 1.) But the opinion, perhaps recognizing the inflammatory nature of these statements, does not repeat them.

As Appellants note, the opinion violates principles of comity by calling for Delaware courts to quantify the supposed "harm" that a move from Delaware might theoretically inflict. (Op. Br. at 27 (citing Op. at 50).) With our now 50 state laboratories of democracy, the selection of one state's laws over the others should be made by the stockholder-owners without consequences arising from a judge opining that one state's laws are better than another's. But if Delaware courts engage in that analysis (and they should not), they should take judicial notice of Nevada law as it is (as permitted by Rule of Evidence 202), rather than rely upon fiery rhetoric from professors and legislators. Viewed properly, the opinion's "non-ratable benefit" disappears.

A. Plaintiff's "Race-to-the-Bottom" Allegations Should Not Be Uncritically Accepted By Delaware Courts

Plaintiff's complaint painted a lurid impression of Nevada law. While these comments might be suitable for an academic salon or the rough-and-tumble of a legislative floor, they are ill-suited to a courtroom:

- "[Nevada] has 'raced to the bottom' and modified its corporate code to effectively eliminate stockholders' ability to protect themselves in court through a 'no-liability regime.'" (Am. Compl. ¶66, A24-A78 (quoting Pierluigi Matera, *Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?*, 27 FORDHAM J. CORP. & FIN. L. 73, 100 (2022));
- "Nevada has reformed its laws to free officers and directors from virtually any liability arising from the operation and supervision of their companies." (*Id*. (quoting Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 938 (2012)) (emphasis added));
- "Simply put—and as [Nevada State] Senator Coffin predicted—'Nevada corporate law attracts scoundrels[.]'" (*Id*. ¶72 (quoting Dain C. Donelson & Christopher D. Yust, *Litigation Risk and Agency Costs: Evidence From Nevada Corporate Law*, 57 J. L. & ECON. 747, 754 (2014));

- "[A]s the prominent corporate law professor, Ann Lipton, recently commented: 'I tell my students, Nevada is where you incorporate if you want to do frauds.'" (*Id.* ¶66 (quoting Ann Lipton, Tweet (Apr. 10, 2023)); and
- "The Nevada legislature has every right to distinguish Nevada's corporate law from that of Delaware . . . by appealing to fiduciaries who prefer a no-liability regime." (Am. Compl. ¶ 12.)

These characterizations misrepresent Nevada's law and the motivation of its legislators. But they should ring familiar in Delaware. Academics have long accused the First State of racing to the bottom.[2] And a Delaware state legislator recently tweeted that "[a]ny lover of democracy, transparency, and the rule of law should be grossed out" over the process leading to recent proposed amendments to the Delaware General Corporation Law.[3]

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[2] *See, e.g.*, William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L. J. 663 (1974) ("Delaware is both the sponsor and the victim of a system contributing to the deterioration of corporation standards. This unhappy state of affairs, stemming in great part from the movement toward the least common denominator, Delaware, seems to be developing on both the legislative and judicial fronts.").

[3] *See, e.g.*, Del. Rep. Madinah Wilson-Anton, Tweet (May 24, 2024), https://x.com/MadinahForDE/status/1794144974969155670 (*et. seq.*) ("I can imagine that those very private equity firms are literally paying their staff to get this bill passed. It may sound inflammatory, but it is true.").

The point is not whether these criticisms have merit. It is that courts should not credit such descriptions when the law itself is available for review. The truth is less dramatic.

B. Neither Nevada Nor Delaware Are "Liability Free" Jurisdictions

The similarities between Delaware and Nevada vastly outweigh their differences. As a respected national law firm recently summarized, comparing Delaware, Nevada, and Texas:

> Each of these states requires corporate directors to comply with certain enumerated fiduciary duties, broadly fashioned to ensure that their decisions align with the corporation's interests.
>
> In all three states, these fiduciary duties include the duty of care, which requires each director to take an active role in the decision-making process and to make informed decisions, and the duty of loyalty, which requires that each act in the best interests of the corporation.[4]

The description of Nevada as a "no liability" regime, while colorful, remains academic exaggeration. Even Professor Michal Barzuza, a critic on whom Plaintiff relies, implicitly concedes as much in her recent paper describing a derivative lawsuit against the directors of Wynn Resorts, Ltd., that survived a motion to dismiss in Nevada state court based on allegations concerning a pattern of sexual harassment

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[4] John Lawrence, Danny David and Nathan Thibon, *Comparing Corporate Law in Delaware, Texas and Nevada*, LAW360 EXPERT ANALYSIS (Apr. 10, 2024), https://www.law360.com/articles/1820901/comparing-corporate-law-in-delaware-texas-and-nevada.

and misconduct by the CEO. *See* Michal Barzuza*, Nevada v. Delaware: The New Market for Corporate Law*, Working Paper 761/2024, at 32-33 (last revised Mar. 26, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4746878. The case later settled for a $41 million cash payment and corporate governance reforms.[5] Compare that result to a similar Delaware lawsuit, *In re McDonald's Corporation Stockholder Derivative Litigation*, where the Court of Chancery dismissed allegations against directors while preserving claims against corporate officers. *See McDonald's*, 291 A.3d 652 (Del. Ch. 2023); *McDonalds*, 289 A.3d 343 (Del. Ch. 2023). While there are certainly factual differences between the two cases, Nevada is no more a "no-liability" regime for directors than Delaware. Both seek to hold wrongdoers accountable.

C. Nevada's Policy Decisions Do Not Provide "Non-Ratable" Benefits To Directors

Of course, Nevada law and Delaware law are not identical—nor should they be. The proxy statements of redomesticating companies provide detailed comparisons of the corporate law of both jurisdictions. (*See* Cannae Proxy at 41-57; Fidelity Proxy at 41-58). But Plaintiff's complaint highlighted three specific factors, none of which create non-ratable benefits for directors.

[5] *See* Final Judgment and Order of Dismissal, *In re Wynn Resorts, Ltd. Deriv. Litig.*, No. A-18-769630-B, at 6 (Nev. Dist. Ct. Mar. 9, 2020).

<u>Exculpation</u>: Plaintiff claims that Nevada law contains no prohibition against exculpating officers or directors for breaches of the duty of loyalty. (Am. Compl. ¶67.) This troubled the trial court, which held that exculpation for breaches of the duty of loyalty are inconsistent with Delaware's public policy. (Op. at 21.) But the Nevada statute itself tells a different story.

Nevada allows, by default, exculpation for directors and officers from damages unless:

(a) the business judgment rule is rebutted and

(b) it is proven that:

  (1) the defendant's act or failure to act constituted a breach of fiduciary duty and

  (2) that breach involved intentional misconduct, fraud, or knowing violation of the law.

N.R.S. 78.138(7). In other words, while Nevada's statute does not separate breaches of the duty of care from the duty of loyalty, it does not permit exculpation for acts of "intentional misconduct" in either case. Of course, most violations of the duty of loyalty, such as self-dealing, are intentional. Plaintiff's claim that Nevada law contains no prohibition against exculpation of the duty of loyalty as a whole is an exaggeration. (Am. Compl. ¶ 67.)

The trial court considered duty of care claims exculpated under Section 102(b)(7) to be less troubling than Nevada's statute because care claims "generally do not present a meaningful risk of liability." (Op. Br., Ex. B at 20.) But it is hard to imagine that *unintentional* breaches of the duty of loyalty do either, in Delaware or Nevada. In Delaware, unintentional violations of the duty of loyalty often arise in contexts where injunctive relief is available. *See, e..g.*, *Pell v. Kill*, 135 A.3d 764, 790, 794 (Del. Ch. 2016) (enjoining directors from reducing number of seats to benefit incumbent board members). Exculpation for damages does not prevent that result. Unfortunately, rather than address the statute itself, the trial court credited Plaintiff's dramatic assessment of Nevada law.

Inspection Rights: Plaintiff alleged that Nevada's inspection rights are "substantially more limited" than under Delaware law. (Am. Compl. ¶67.) The facts are more complex. Delaware's relatively liberal inspection statute reflects a litigation-centric model encouraging stockholders to police director behavior through lawsuits. But this right is not costless, particularly as the Court of Chancery has, in recent years, ordered more thorough and searching requests for records under 8 *Del. C.* § 220. *See, e.g.*, *Hightower v. SharpSpring, Inc.*, 2022 WL 3970155, at *10 (Del. Ch. Aug. 31, 2022) (ordering production of documents likely to be located in emails of key custodians). Firms have recognized the "substantial legal fees and

costs in responding to such demands," and the resulting "time and distraction" imposed on management teams. (Fidelity Proxy at 35.)

Nevada's statute limits books-and-records requests based upon both the scope of information that can be requested and the amount of stock that must be held by a requesting stockholder. N.R.S. 78.257. But it also contains stockholder protections lacking in Delaware's Section 220. For example, a stockholder who sues to enforce inspection rights is *entitled* to attorney's fees if he prevails—but liable for such fees if he does not. N.R.S. 78.257(6). In effect, Nevada requires individual stockholders to internalize the benefit or cost they incur in making demands for inspection. But that benefits the *corporation*, not directors.

No "Inherent Fairness" Standard: Plaintiff's most vigorous attack is reserved for N.R.S. 78.138 and the subsequent opinion in *Guzman v. Johnson*, 483 P.3d 531, 534 (Nev. 2021), which foreclosed the use of an "inherent fairness" standard of review. (Am. Compl. ¶¶67-70.) But *Guzman*, and the statute it enforces, does not establish a "no liability" regime for director conduct. It merely reflects the standard of review used in evaluating whether damages may be assessed against directors and officers.

Again, this recognizes that a regime focused on stockholder litigation is not always efficient or value-accretive to stockholders. As discussed below, Delaware's "entire fairness" standard can, in certain circumstances, encourage systemic

litigation of questionable merit. And even one-off litigation can impose significant deadweight costs on Delaware corporations. Consider *In re Tesla Motors, Inc. Stockholder Litigation*, where entire fairness review permitted a case to survive a motion to dismiss and summary judgment. 298 A.3d 667, 691-92 (Del. 2023). Every director except Elon Musk settled before trial for $60 million, even though the directors were later exonerated at trial. *Id*. at 679-80. For diversified investors, the payment was a wash, amounting to a transfer of D&O insurance payments from one pocket to another (minus plaintiff's attorneys' fees).[6] Yet the corporation—and non-suing stockholders—absorbed millions of dollars in trial and appellate costs, and extensive distraction from senior directors and managers, because an ultimately unsuccessful lawsuit survived a motion to dismiss due to entire fairness review.

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[6] The Court of Chancery has observed this effect of insurance-based resolutions on diversified stockholders:

> If insurance covers the fee, then in the short run the release is free. In the long run, stockholders pay via returns dragged down by higher insurance premiums and the other costs of a litigation model in which outcomes become decoupled from the merits of the underlying claims. If insurance is not available, the acquiring company pays, and in the long run stockholders again foot the bill.

Brinckerhoff v. Texas E. Products Pipeline Co., LLC, 986 A.2d 370, 385 (Del. Ch. 2010).

The point is not that Delaware is wrong, or Nevada right, in its choice of a standard of review or where it places burdens of proof. It is that policy decisions reflect each states' view of the benefits, costs, and burdens of litigation on its corporations. Those policy decisions are made with a view towards the benefit of all stockholders, and each state's corporations.

D. **Each State Benefits From Respecting Other State's Policy Choices**

Delaware, as much as Nevada, relies upon its sister states to respect its own policy choices. Delaware's statute permitting forum selection provisions is an obvious example. The opinion treats such provisions as self-evidently beneficial, a reflection of "what outcomes should be." (Op. at 31.) But other states may not agree. For example, the California Supreme Court is considering a challenge to a Delaware forum selection clause where enforcement would eliminate a California litigant's right to a jury trial. *See EpicentRx, Inc. v. Superior Court*, 95 Cal.App.5th 890 (Cal. App. 2023), *review granted* 539 P.3d 118 (Cal. 2023).

Like Delaware, Nevada authorizes forum selection provisions in a corporation's articles or bylaws. N.R.S. 78.046. Nevada believes its law, like Delaware's, should be enforced by sister states. But the opinion weakens that position. If a judicial standard of review is a stockholder's "litigation right," the right to a jury trial is no less meaningful. Indeed, California deems it an "inviolate right" that may only be waived "as prescribed by statute." *EpicentRx*, 95

Cal.App.5th at 904 (citing Cal. Const. art I, § 16). When a California corporation redomesticates to Delaware, should its minority stockholders be entitled to the equivalent of entire fairness review because they are giving up a "litigation right"? The trial court's opinion correctly identifies why forum selection provisions are good *policy*—but its legal reasoning could lead other courts to call Delaware's forum-selection laws into question.

In sum, Nevada and Delaware both hold wrongdoers accountable for their deeds, although they employ different means. Both states have adopted their laws for the benefit of corporations and their stockholders, not to provide "non-ratable" benefits to corporate directors.

II. THE OPINION RISKS CREATING AN "EXIT TAX"

Appellants correctly anticipate that the use of *MFW*-style procedures to deal with this situation will prove unworkable. (Op. Br. at 24-26 (discussing *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) and *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018)).) In fact, the risk is greater: if sustained, the opinion below presents the possibility of an "exit tax," similar to the disclosure-based "merger tax" that continues to afflict Delaware corporations. Not only would this harm stockholders, but the response from other states or the federal government may prove detrimental to firms across the country.

A. Misaligned Procedural Incentives Can Lead to Wasteful Litigation

The opinion's application of entire fairness review to redomestication decisions invites the same sue-on-every-decision phenomenon that occasionally emerges in Delaware. The most famous example—the "merger tax"—evolved because stockholder plaintiffs were able to pressure companies to settle for peppercorn disclosures and an attorneys' fee following almost every major merger announcement. *See In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 891-99 (Del. Ch. 2016). These cases have not disappeared: the same attorneys merely began filing federal lawsuits against Delaware corporations after the Court of Chancery expressed disapproval. *See Anderson v. Magellan Health, Inc.*, 298 A.3d 734, 748 (Del. 2023) (recognizing "the continued merger tax of deal litigation").

Entire fairness review can also lead to systemic pressure to bring a greater-than-optimal level of lawsuits. For example, after this Court held that directors' decisions to set their pay were subject to entire fairness review absent approval by fully-informed, uncoerced stockholders, *see In re Investors Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1225 (Del. 2017), director compensation litigation became "hardy perennial" in Delaware. *Knight v. Miller*, 2022 WL 1233370, at *1 (Del. Ch. Apr. 27, 2022). Stockholder lawsuits survive motions to dismiss, even when a claim is not "particularly strong," if a plaintiff merely alleges "'some facts' implying a lack of entire fairness. . . ." *Stein v. Blankfein*, 2019 WL 2323790, at *8 (Del. Ch. May 31, 2019) (internal quotation omitted); *see also Knight*, 2022 WL 1233370, at *10 (declining to dismiss complaint under entire fairness where allegations were "not overwhelming, but . . . sufficient").

The result resembles the litigation criticized in *Trulia*. Following *Investors Bancorp*, Equilar Inc. published a list of the 10 highest director retainers in its annual survey.[7] Of the five Delaware corporations on the list, three settled lawsuits following *Investors Bancorp*,[8] one had already settled an earlier lawsuit (and was no

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[7] *See* Courtney Yu, *The Highest Paid Boards*, Harvard Law School Forum on Corporate Governance, (Feb. 1, 2018), https://corpgov.law.harvard.edu/2018/02/01/the-highest-paid-boards/.

[8] *See Stein v. Blankfein*, 2024 WL 799386 (Del. Ch. Feb. 27, 2024) (The Goldman Sachs Group, Inc.); *In re Salesforce.com, Inc. Derivative Litigation*, C.A. No. 2018-0922-AGB (Del. Ch. Dec. 17, 2019) (Trans.) (Salesforce.com, Inc.); *Police and Fire*

longer the highest-paid in its cohort),[9] and only one has not yet been sued (to *Amicus*'s knowledge).

It is certainly not the case that every merger agreement, or every decision to pay above-average director compensation, results from a breach of fiduciary duty. But generous pleading standards can lead to overlitigation of corporate claims. The opinion's imposition of entire fairness review creates the same opportunity for plaintiffs to sue on every announcement of a redomestication. Unfortunately, the "cleansing" procedure proposed by the trial court will not prevent a flood of lawsuits or an exit tax.

B. "Cleansing" Will Not Prevent Meritless Lawsuits

Appellants point to one reason *MFW* cannot provide a solution. Under the trial court's formulation, corporations seeking to leave Delaware would need to either "parachute in" a director to provide an independent vote on a special committee, or an existing director would need to resign. (Op. Br. at 25-26.) If a board believes its composition is already optimal, a departure is a detriment to the company. And even if a cadre of potential directors willing to perform short-term

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Retirement System of the City of Detroit v. Musk, C.A. No. 2020-0477-KSJM (Del. Ch. Oct. 13, 2023) (Trans.) (Tesla, Inc.).

[9] *Steinberg v. Casey*, C.A. No. 10190-CB (Del. Ch. Dec. 9, 2015) (Trans.) (Celgene Corp.).

service exist, they would lack deep knowledge of a corporation. Either process will raise the cost and complication of, and act as a barrier to, redomestication.

A stockholder vote poses similar problems. To have a cleansing effect, stockholder votes must be "fully informed." *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 312 (Del. 2018); *Khan.*, 88 A.3d at 644. But the disclosure doctrine evolved in the M&A context, where plentiful case law guides corporate planners in determining what facts are material. Even in that context, experienced Delaware jurists sometimes disagree on materiality. *See, e.g.*, *City of Sarasota Firefighters' Pen. Fund v. Inovalon Holdings, Inc.*, ___ A.3d ___, 2024 WL 1896096, at *24 (Del. May 1, 2024) (reversing dismissal of merger lawsuit, holding that proxy failed to disclose material information). Directors choosing to redomesticate lack the same guidance and will have less confidence in the predictability of existing law.

Instead, corporations are likely to follow the path of least resistance. Faced with inevitable litigation, even directors acting in good faith, after a vote they believe was fully informed, may lack confidence in the success of a motion to dismiss. Stockholder-plaintiffs will seek to capitalize off uncertainty by challenging almost every redomestication proposal, asserting various novel reasons why a given vote was "uninformed." And while an obstinate board or two may choose to fight, others will rationally agree to one last settlement on the way out the door, particularly if the plaintiff's bar seeks fees low enough to make litigation economically inefficient.

The firms that have chosen to redomesticate have cited Delaware's litigation environment as a reason for moving. (*See* Cannae Proxy at 33 ("[T]he Board believes that in recent years there has been an increased risk of opportunistic litigation for Delaware public companies, which has made Delaware a less attractive place of incorporation due to the substantial costs associated with defending against such suits. These costs are often borne by the Company's stockholders through, among other things, indemnification obligations, distraction to Company management and employees, and increased insurance premiums."); Fidelity Proxy at 33.) A new species of "sue-and-settle" will only strengthen that perception.

C. The Consequences Of An "Exit Tax" May Disadvantage Delaware

Moreover, "exit tax" litigation poses a unique interstate competition problem. Unlike merger litigation, exit tax litigation creates barriers to healthy interstate competition. In the short run, the friction created by the opinion below can be expected to discourage redomestication, even for those firms where it would be economically efficient.

In the medium- to long-term, friction can lead to sparks, even conflagrations. New and innovative corporations—particularly those with controlling stockholders—may be less willing to incorporate in "Hotel Delaware" if they are concerned they can never leave. Other states, having invested heavily in their own incorporation statutes and business courts, may adopt their own barriers to exit or

policies that inhibit the ability of corporations to redomesticate to any other state. With Delaware having served as the long-standing destination of choice for redomestication, incentivizing the creation of such barriers in other states stands to have a disproportionate negative effect on Delaware.

Again, *Amicus*'s point is not that the distinctions between Delaware and Nevada law show that one state is right, and the other state is wrong. Rather, healthy competition between states allows corporations to make their own value judgments about what corporate governance policy best serves a corporation's needs.

Worst yet, a war of all-against-all risks a federal response. After all, if American businesses are best-served by a one-size-fits-all standard of review for corporate conduct, the United States Congress can impose it on public companies. If nothing else, removal of the "Delaware carve out" in the Securities Litigation Uniform Standards Act (and inclusion of derivative lawsuits) would drive most redomestication litigation into federal court. 15 U.S.C. §77p(d)(1)(A).[10]

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[10] The U.S. Constitution may be implicated here as well. The creation of a corporate jurisprudential regime to impose onerous barriers on the free movement of a corporation from one State to another could be deemed to violate the Dormant Commerce Clause. *See, e.g., Tennessee Wine and Spirts Retailers Assoc. v. Thomas*, 588 U.S. 504 (2019); *see also* Andrew Appleby, *No Migration without Taxation: State Exit Taxes*, 60 Harvard J. on Legis. 55, 76-80 (2023) (noting that under the U.S. Supreme Court's balancing test in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970), a party subject to an "exit tax" could argue that the tax violates the Dormant Commerce Clause).

Such conflicts are not in the interest of Nevada, Delaware, or stockholders in their respective corporations. *Amicus* is grateful that this Court has heard this interlocutory appeal so that the uncertainty created by the opinion below may be minimized.

CONCLUSION

Amicus respectfully submits that the decision of the Court of Chancery should be reversed.

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