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IN THE
Supreme Court of the State of Delaware

LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM, *et al*., Plaintiffs Below, Appellees, v. DAVID PYOTT, *et al*., Defendants Below, Appellants.	C.A. NO. 380, 2012 ON APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 5795-VCL

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* curiae briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

This is one such case. As detailed below, the issues on appeal are of crucial importance to all public corporations chartered in Delaware, which constitute the majority of publicly traded corporations in the United States. These corporations are keenly interested in fair, predictable, and efficient judicial administration. When a corporation is in the news, it can expect multiple securities actions, often in multiple fora; multiple derivative actions, often in multiple fora; multiple demands by stockholders for board action; and multiple demands for books and records, often followed by even more derivative suits. While corporations and their directors must of course be held to account, such duplicative litigation serves no legitimate public purpose. Once there has been one final judicial determination of an issue, such as dismissal of a shareholder derivative suit for failing to plead demand futility, that determination should be given preclusive effect. Little is served by requiring (or indeed encouraging, as under the Court of Chancery's approach) multiple jurisdictions to adjudicate this same issue.

Pursuant to Delaware Supreme Court Rule 28(b), the Chamber contemporaneously has filed a motion for leave to file this *amicus curiae* brief. Defendants-Appellants have consented to the Chamber's filing of this *amicus curiae* brief; Plaintiffs-Appellees have informed the Chamber that they take no position on whether the Court should permit the filing of this brief.

SUMMARY OF ARGUMENT

The Court of Chancery adopted a counterproductive approach to a growing problem. In seeking to mitigate the epidemic of multi-forum derivative litigation that corporations increasingly confront, the court below held that the preclusive effect of the dismissal of a derivative complaint involving a Delaware corporation under Rule 23.1 should be decided under Delaware law and that, under Delaware law, such dismissals have no preclusive effect.

The Court of Chancery's cure is worse than the disease: its approach would expose most corporations in the United States to more, not less, multi-forum litigation. The Court of Chancery's approach could be held to apply to all derivative suits faced by Delaware corporations in any forum. And if adopted, the Court of Chancery's approach would leave corporations exposed to multiple suits based on the same set of allegations, even after a final judgment rejecting allegations of demand futility. The first final judicial determination should settle the same set of allegations once and for all—if the first Court holds that demand is required, the corporation's board thereafter should be free to exercise the power granted to it under Delaware law to manage the affairs of the corporation, including whether and in what circumstances to bring litigation on behalf of the corporation.

The Court of Chancery's approach instead would leave corporations guessing whether a final resolution of a derivative suit really is final; that is, whether it has determined, once and for all, who has authority to address the claims on behalf of the corporation. Such inconclusiveness serves no one—not corporations, not boards of directors, not investors—all of whom value certainty, efficiency, and predictability. And repeated relitigation of the same issue serves no legitimate purpose. The Court of Chancery's novel approach to the problem of multi-forum litigation—though well-intentioned—therefore should be reversed.

ARGUMENT

I. THIS CASE IS IMPORTANT TO MOST PUBLIC CORPORATIONS.

The Court's decision in this case will have ramifications far beyond its effect on Allergan, Inc. Public corporations in the United States overwhelmingly are chartered in Delaware. According to the Delaware Division of Corporations, "more than half of all U.S. publicly traded companies" are incorporated in Delaware, including "63% of the Fortune 500." Jeffrey W. Bullock, *2011 Annual Report*, Delaware Div. of Corps. 1 (2011), available at http://corp.delaware.gov/2011CorpAR.pdf. In 2011, 86% of the corporations that held initial public offerings in the United States were incorporated in Delaware. *See id.* at 2.

For better or worse, many of these corporations will, at some time or another, face a shareholder derivative lawsuit. Shareholder derivative suits are now among the most common type of lawsuit involving corporations, outnumbering class actions. *See* Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 Iowa L. Rev. 49, 52 (2011). Although counts vary, one study found approximately 220 new derivative suits filed in federal courts and the Delaware Court of Chancery (including multiple suits involving the same corporation) over a 12-month period in 2005 and 2006 alone. *See* Jessica M. Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 Wm. & Mary L. Rev. 1749, 1756-58, 1761-62 (2010). This number does not even include suits filed in other states' courts. *Id.* at 1762. That was half a dozen years ago; nothing suggests that the number is decreasing.

If adopted, the approach of the Court of Chancery could eviscerate the preclusive effect given to any Rule 23.1 determination involving any corporation whose internal affairs are governed by Delaware substantive law, regardless of the federal or state forum of adjudication. That is so because the Court of Chancery's approach, which gives an expansive interpretation to Delaware's "internal affairs doctrine," makes two aspects of the preclusiveness of a Rule 23.1 determination—privity and adequacy—turn on Delaware law. In the court's words, "[w]hether a stockholder in a Delaware corporation can sue derivatively after another stockholder attempted to plead demand futility should be governed uniformly by Delaware law." *Louisiana Mun. Police Employees' Ret. Sys. v. Pyott*, 46 A.3d 313, 327 (Del. Ch. 2012). The court so held, even while acknowledging that final judgments generally are accorded the preclusive effect they would be given in the jurisdiction in which they were rendered. *Id.* at 324 & n.2; *see Iowa-Wis. Bridge Co. v. Phoenix Fin. Corp.*, 25 A.2d 383, 391 (Del. 1942).

The context giving rise to the Court of Chancery's ruling is hardly unique. The problem the court was trying to address—the issue of corporations being exposed to derivative lawsuits in multiple fora—increasingly burdens corporations and their boards, and ultimately their investors. It is now the norm instead of the exception for shareholder derivative suits to be accompanied by other derivative suits (not to mention shareholder class actions or other types of lawsuits) involving the same corporation in another forum. *See* Erickson, 97 Iowa L. Rev. at 54. "[N]early two-thirds of the public company derivative suits" that were the subject of a recent study "involved more than one federal derivative suit, and more than one-quarter involved four or more federal derivative suits. More than half of the federal derivative suits in the study were accompanied by a parallel derivative suit filed in state court." *Id*. at 65.

The problem is not a single derivative lawsuit *per se*, of course. But while the ability of shareholders to bring such a lawsuit may serve as a check on the power of a corporation's board of directors, the increasing prevalence of multiple derivative suits—filed in multiple fora involving the same alleged wrongs—serves no one's interests. *See generally* Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can it be Fixed?*, 37 Del. J. Corp. L. 1, 27-33 (2012). Then-Chancellor Chandler recently summarized the problems associated with multi-forum litigation; although he was speaking of multi-forum securities class actions, the problems he cites arise with multi-forum derivative suits, as well:

> The potential problems, as one can imagine, are numerous. Defense counsel is forced to litigate the same case—often identical claims—in multiple courts. Judicial resources are wasted as judges in two or more jurisdictions review the same documents and at times are asked to decide the exact same motions. Worse still, if a case does not settle or consolidate in one forum, there is the possibility that two judges would apply the law differently or otherwise reach different outcomes, which would then leave the law in a confused state and pose full faith and credit problems for all involved.

In re Allion Healthcare Inc. S'holders Litig., C.A. No. 5022-CC, 2011 Del. Ch. LEXIS 48, at *12-*13 (Del. Ch. Mar. 29, 2011).

Indeed, the problem is even more untenable in the derivative suit context. At least in the context of a putative class action, different individuals bringing the same claim against the same corporation are asserting their own respective injuries. Here, all the "plaintiffs" are suing on behalf of the same, sole real party in interest—the corporation.

In short, most corporations in the United States are chartered in Delaware; many will face derivative litigation at some point in the life of the corporation; and the odds are high that derivative litigation involving them will proceed in multiple fora. It therefore is no exaggeration to say that most of the corporations in this country share a special interest in whether this Court corrects the Court of Chancery's well-intentioned—but ultimately misguided—attempt to manage the bane of multi-forum derivative litigation.

II. THE FIRST FINAL RESOLUTION OF THE DEMAND ISSUE SHOULD BE CONCLUSIVE.

The first final adjudication of the demand issue ought to be given preclusive effect in other fora, state and federal. Finality is particularly important in the context of the demand futility issue, which determines the fundamental corporate governance question whether the corporate board or the shareholders will control how the corporation responds to allegations of wrongdoing. The ruling below does not serve that end.

A. Issue Preclusion Serves Important Public Policy Considerations.

As the Court of Chancery recognized (but refused to follow), "[a] growing body of precedent holds that a Rule 23.1 dismissal has preclusive effect on other derivative complaints." *Louisiana Mun. Police Employees' Ret. Sys.*, 46 A.3d at 323. That "growing body of precedent" rests, in large part, on the interest in giving defendants some measure of repose. "[I]f this were not the rule, shareholder plaintiffs could indefinitely relitigate the demand futility question in an unlimited number of state and federal courts, a result the preclusion doctrine specifically is aimed at avoiding." *Henik ex rel. LaBranche & Co., Inc. v. LaBranche*, 433 F. Supp. 2d 372, 380-81 (S.D.N.Y. 2006). As the First Circuit recently explained in according preclusive effect to a Rule 23.1 dismissal, "the defendants have already been put to the trouble of litigating the very question at issue"—"whether demand on the board of directors would have been futile"—"and the policy of repose strongly militates in favor of preclusion." *In re Sonus Networks, Inc., S'holder Derivative Litig.*, 499 F.3d 47, 64 (1st Cir. 2007).

Collateral estoppel (or issue preclusion), like *res judicata*, rests on a number of sound public policy considerations. *See, e.g.,* Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions,* 2009 B.Y.U. L. Rev. 1079, 1097 (2009).

First, preclusion is meant to ensure the finality of a court's resolution of an issue, an essential means of ensuring fairness to litigants before, during, and after litigation. Enforcing final, conclusive judgments informs litigants which issues and claims they must pursue in their initial lawsuit before those matters are foreclosed forever. *See* Walter W. Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 San Diego L. Rev. 509, 514 (1998). Clear preclusion rules thereby "provide a degree of predictability which allow parties to structure their litigation conduct with some assurance as to when that conduct will and will not foreclose presentation of issues in a subsequent proceeding." *Id*. The finality of a judgment is essential to the parties after

litigation has concluded: relitigating a case increases the risk of inconsistent judgments, rendering the actual end of the dispute unclear. *See* Allan D. Vestal, *Rationale of Preclusion*, 9 St. Louis U. L.J. 29, 33 (1965). Honoring the finality of a judgment, on the other hand, helps prevent harassment of defendants, who otherwise may face continual lawsuits until a court rules against them. *See id*. at 39.

Second, preclusion serves the interests of the courts, as well as those of the litigants. Preclusion is meant to preserve the integrity of judicial determinations, ensuring that judicial decisions in earlier cases are not undercut by decisions in later cases. *See id*.; *see also* Robert Ziff, Note, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement,* 77 Cornell L. Rev. 905, 913 (1992) ("Litigants have little reason to go to court to seek a favorable judgment if they fear betrayal of their trust in the judgment.").

Finally, preclusion serves the interests of judicial economy—an important consideration for society as a whole. Widespread practices such as the use of summary procedures, attempts to shorten trials, and attempts to remove cases from dockets without trial all reflect the extent to which courts' dockets are overloaded. *See* Vestal, 9 St. Louis U. L.J. at 32. These concerns are reflected in the Court of Chancery Rules, including Rule 15's limitation on multiple amendments of pleadings. Del. Ct. Ch. R. 15(aaa); *accord* Del. Ct. Ch. R. 1 (providing that the Court of Chancery Rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every proceeding"). Courts in derivative cases also often entertain "one forum" motions, in which parties faced with litigation in two or more venues ask the courts to decide which court will proceed while the remaining courts stay their hands. *See, e.g.*, *In re Allion Healthcare Inc. S'holders Litig.*, 2011 Del. Ch. LEXIS 48, at *12-*13. But as evidenced by Allergan's unsuccessful attempt here to have the California federal court stay its hand in favor of the Court of Chancery (*see* A596), such measures are not a complete solution. Sound public policy calls for litigation to end at some definitive point, so that the courts will be used in the most efficient manner. *See* Vestal, 9 St. Louis U. L.J. at 31. "Without such steps the courts would be overwhelmed by the mass of litigation . . . . When one considers such facts, it becomes crystal clear that society has a vital interest in seeing that cases are tried just once." *Id.* at 32.

Accordingly, the first final resolution of the demand issue should be conclusive. Duplicative litigation simply wastes the time and resources of the parties, the courts, and the public. Multiple resolutions of the same question by different fora may lead to different answers, but there is no reason to favor the demand futility answer reached the second, third, or fourth time over the first final resolution. And there are many good reasons not to do so.

B. The Public Policy Considerations Animating Issue Preclusion Are Uniquely Important in the Demand Context.

This principle is particularly important in the context presented here: the issue of demand futility determines an important question of corporate governance that, once litigated, should be final.

Under Delaware law, the responsibility of managing a corporation lies with its board of directors. *See* Del. Code Ann. tit. 8 § 141(a) (2011). This responsibility includes deciding whether and how to pursue the corporation's rights when allegations of wrongdoing surface. *See Daily Income Fund v. Fox*, 464 U.S. 523, 530 (1984) ("[A] basic principle of corporate governance [is] that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders.").

A derivative action is a direct challenge to the board's power to manage a corporation's litigation choices. By seeking to compel a corporation to sue those who may be liable to it, a shareholder's derivative suit necessarily "impinges on the managerial freedom of directors." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by Brehm v. Eisner,* 746 A.2d 244 (Del. 2000).

The demand requirement seeks to respect the board's managerial freedom, and to tolerate shareholders' usurpation of the board's power only when necessary. To proceed with a derivative action, therefore, a shareholder plaintiff must make a demand on the corporation—that is, through its board of directors—to bring suit for the alleged wrongdoing, before the shareholders themselves are permitted to sue. Alternatively, demand is not required if, and *only* if, the shareholder plaintiff can plead particular facts that, if true, would establish that a demand would have been futile. *See* Del. Ch. Ct. R. 23.1; *see, e.g., Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993); *Aronson*, 473 A.2d at 816.

The demand requirement therefore is of fundamental importance in derivative litigation. Its dominant purpose is to honor the directors' prerogative over corporate decisions and "reinforce allocations of substantive power over transactions within the corporation." *See* Deborah A. DeMott, *Demand in Derivative Actions: Problems of Interpretation and Function*, 19 U.C. Davis L. Rev. 461, 485 (1986); *see also* Stephen H. Ellick, Note, *Harmonizing the Procedures for Initiating and Terminating Derivative Litigation: a Modification of Delaware Law*, 60 Geo. Wash. L. Rev. 1888, 1890 (1992) ("By striving to achieve the proper balance between allowing shareholders to enforce breaches of managerial duties that result from the insulation of management and permitting managers freedom to run the corporation, the demand requirement reflects the basic concerns and goals of derivative litigation.").

Courts consistently have recognized the demand requirement's key role in balancing powers between a corporation's shareholders and its board of directors:

> Because the contours of the demand requirement—when it is required, and when excused—determine who has the power to control corporate litigation, we have little trouble concluding that this aspect of state law relates to the allocation of governing powers within the corporation. The purpose of requiring a precomplaint demand is to protect the directors' prerogative to take over the litigation or to oppose it. . . . Thus, the demand requirement implements "the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders."

Kamen v. Kemper Fin. Servs., 500 U.S. 90, 101 (1991) (citations omitted); *see also Aronson*, 473 A.2d at 812 ("In our view the entire question of demand futility is inextricably bound to issues of business judgment and the standards of that doctrine's applicability. The business judgment rule is an acknowledgment of the managerial prerogatives of Delaware directors under Section 141(a).").

Because of the demand requirement's fundamental purpose, the preclusive effect of one court's determination of demand futility has a direct impact on the directors' role in managing any litigation. As the demand requirement itself recognizes, directors have a right—and a need—to know who can pursue allegations of wrongdoing on the corporation's behalf—the entire board, a special litigation committee of the board, or shareholder plaintiffs on behalf of the corporation. Under the Court of Chancery's rule, future rulings by one court would put directors in a quandary: Are they now free to await a demand? Should they form a special litigation committee? Should they wait to see if the Board, or some subset of its members, is disqualified from responding to a real or hypothetical demand based on potential rulings in other courts? Or, the board may decide not to pursue the allegations: boards have to decide how to deploy a corporation's limited resources with the interests of the entire corporation in mind. A shareholder suing on behalf of the corporation is not so constrained. A board's decision not to take action is just as important as its decision to do so. A Rule 23.1 dismissal validates a board's decision to focus the corporation's resources elsewhere.

C. The Court of Chancery's Approach Frustrates the Public Policy Considerations Animating Preclusion Rules.

By allowing the demand issue to be relitigated even after a final determination in another forum, the Court of Chancery's approach frustrates the policies that animate preclusion principles. And its reasoning does not support its result.

The Court of Chancery first reasoned that where different shareholders file their own derivative suits in different fora, the shareholders are not in privity until a court denies a Rule 23.1 motion—that is, until a court holds that the shareholder has satisfied the demand futility requirement and therefore represents the corporation for the remainder of the lawsuit. *Louisiana Mun. Police Employees' Ret. Sys.*, 46 A.3d at 334. Under this reasoning, no dismissal of a shareholder derivative suit based upon Rule 23.1 can have preclusive effect, except as to the shareholders actually named as plaintiffs in the suit. This is true regardless of the diligence the plaintiffs conduct before bringing their suit: under the Court of Chancery's view of privity, the dismissal of even the most diligent plaintiff's derivative suit for failure to satisfy demand futility means that that plaintiff did not represent the corporation. *Id.* at 329 ("Under these controlling Delaware precedents, until the derivative action passes the Rule 23.1 stage, the stockholder does not have authority to assert the corporation's claims and is not suing in the name of the corporation.").

Thus, under that approach, the dismissal of the plaintiff's suit has no preclusive effect on subsequent efforts by other shareholders to bring the exact same lawsuit, based on the exact same demand futility allegations. Under the Court of Chancery's view of privity, therefore, the number of duplicative derivative suits that could be faced by a corporation is limited only by the number of the corporation's shareholders. Each suit, in effect, would be subject to *de novo* review of the demand futility issue. Each shareholder would be guaranteed a fresh shot at pleading demand futility, encouraging the very multiplicity of lawsuits that Delaware long has sought to prevent.

"As an independent basis" for its ruling, the Court of Chancery also reasoned that the plaintiffs in the California derivative suit did not adequately represent Allergan's shareholders because they failed to conduct the diligence that the court below and other Delaware courts have urged shareholders to conduct before bringing a derivative suit. *See id.* at 335. Although this reasoning at least has the virtue of suggesting some limit to the number of derivative suits that a corporation could face—alluding to the possibility that if a shareholder plaintiff does represent adequately the corporation's shareholders, a Rule 23.1 dismissal of the plaintiff's suit might have preclusive effect—the rule suffers from a lack of clarity. It offers a corporation's directors no clear view of

whether they are free to control the corporation's litigation choices. Under the Court of Chancery's reasoning, directors would need to consider the extent of the investigation a shareholder plaintiff conducted—based on indeterminate principles—to assess whether the dismissal of a shareholder plaintiff's derivative suit will have preclusive effect. In the end, however, this "independent basis" provides little comfort, as not even a finding of adequate representation would overcome the Court of Chancery's conclusion regarding lack of privity.

Nor is it reassuring that, under the Court of Chancery's approach, "the earlier decision remains persuasive authority and could operate as *stare decisis*." *Id.* at 335. Indeed, the Court of Chancery's ruling itself proves how easily judges can depart from a well-reasoned prior ruling to arrive at an entirely different result of their own. In the California federal suit involving Allergan, the plaintiffs had at their disposal all of the books and records that the Delaware plaintiffs in this case received from Allergan. *Id.* at 322. With the benefit of the same resources, the California plaintiffs' amended complaint was not materially different from that of the Delaware plaintiffs. The Court of Chancery acknowledged this. *Id.* at 322. Yet the Court of Chancery simply afforded the Delaware plaintiffs' complaint different inferences than did the California court, and thereby reached the opposite conclusion on whether demand was futile.

Thus, that the California decision was "persuasive authority and could operate as *stare decisis*" apparently gave little pause to the Court of Chancery, which proceeded to reconsider the demand futility issue anew. If adopted, therefore, the Court of Chancery's approach to the preclusive effect of Rule 23.1 dismissals would exacerbate the problem with multi-forum litigation: it would ensure that derivative plaintiffs can persist in suing a corporation on the same set of facts until they find a court that will rule that they have successfully pleaded demand futility, or until the corporation is forced to settle to bring an end to the litigation.

While the Court of Chancery's effort to control multi-forum litigation should be commended, its solution is worse than the problem. The law from which the Court of Chancery departed had the virtue of assuring corporations that once one court dismissed a shareholder suit for failure to satisfy the demand requirement, the corporation could rest assured that other attempts to litigate the same issue would be rejected. Under the Court of Chancery's new rule, corporations and their directors would have no assurance that the demand issue, once adjudicated, will be binding on all shareholders; indeed, the Court of Chancery's approach would ensure the opposite. If adopted, it would leave directors doubting whether they control their corporations' litigation decisions, even after successfully obtaining a final ruling that making a demand on the directors would not have been futile.

This result runs counter to the public policy considerations animating both issue preclusion rules in general and the demand requirement in particular. The demand requirement is meant to ensure that directors control a corporation's litigation decisions in all but the most exceptional cases. And issue preclusion rules are meant to give repose to parties who succeed in resolving issues raised against them. By undermining the considerations supporting both policies, the approach adopted by the Court of Chancery, while well-intentioned, ultimately is counterproductive.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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