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Case No. 2023-0449-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DENNIS PALKON and HERBERT WILLIAMSON,

Plaintiffs,

v.

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. WISENETHAL, LARRY E. ROMRELL, J. DAVID WARGO, MICHAEL J. MALONE, CHRIS MUELLER, and CHRISTY HAUBEGGER,

Defendants,

and

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

Nominal Defendants.

C.A. No. 2023-0449-JTL

REDACTED PUBLIC VERSION
DATED: July 18, 2023

OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs ask this Court to do something that has never been done before—prevent a corporation from leaving the state of Delaware notwithstanding its undisputed compliance with the provisions of the DGCL that allow the corporation to do so.

Section 266 of the DGCL gives corporations the right to leave Delaware and reorganize under the laws of another jurisdiction. Plaintiffs seek to limit that right, if not do away with it altogether. Specifically, Plaintiffs argue that where, as here, a corporation decides to move from Delaware to a state that potentially provides officers and directors with greater protection from future litigation based on conduct that has not yet occurred—and thus claims that do not yet exist—the Court should enjoin the move as a breach of the directors' (and, in this case, an alleged controller's) fiduciary duty. That argument is unsupported by Delaware law.

Tripadvisor and Liberty TripAdvisor (which holds an approximate 21% economic interest and 56% voting interest in Tripadvisor) have chosen to move to Nevada.[1] There is no dispute that both Companies complied with Section 266: each

[1] This brief refers to (i) Tripadvisor, Inc., as "Tripadvisor" and Liberty TripAdvisor Holdings, Inc., as "Liberty TripAdvisor" (together, the "Companies"); (ii) defendants Gregory B. Maffei, Albert E. Rosenthaler, Larry E. Romrell, J. David Wargo, Michael J. Malone, Chris Mueller, and Christy Haubegger as the "Liberty TripAdvisor Directors"; (iii) defendants Gregory B. Maffei, Matt Goldberg, Jay C.

Conversion was approved by that Company's board and the majority of the voting power of that Company's stock.

The Directors' decisions to move were valid and informed exercises of their business judgment. The Amended Complaint contains no allegation that the Boards failed to inform themselves of the pros and cons of the Conversions or to investigate the differences between Delaware and Nevada law. Nor does the Amended Complaint contain any allegations disputing the Conversions' benefits cited by the Boards—substantial monetary savings over time, reduced exposure to time consuming and expensive litigation, and the resulting ability to better attract qualified directors and officers. Delaware courts have found each of these benefits to be legitimate board considerations, and the Directors' decisions to move should be accorded business judgment rule deference. Plaintiffs nevertheless ask the Court to displace the business judgment rule in favor of entire fairness review, offering

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Hoag, Betsy Morgan, Greg O'Hara, Jeremy Philips, Trynka Shineman Blake, Jane Jie Sun, Albert E. Rosenthaler, and Robert S. Wiesenthal as the "Tripadvisor Directors" (together with the Liberty TripAdvisor Directors, the "Directors" or the "Boards"); and (iv) the Companies' pending conversions from Delaware corporations to Nevada corporations as the "Conversions." The brief cites Plaintiffs' June 20, 2023 Verified Amended Complaint as "AC," Liberty TripAdvisor's April 21, 2023 Definitive Proxy Statement as the "Liberty TripAdvisor Proxy," and Tripadvisor's April 26, 2023 Definitive Proxy, as supplemented on May 3, 2023, as the "Tripadvisor Proxy." Unless otherwise noted, all emphasis is added and all internal quotation marks and citations are omitted from quoted passages. References to "Exhibits" or "Ex." are to the exhibits to the accompanying Transmittal Affidavit of Justin T. Hymes to Opening Brief in Support of Defendants' Motion to Dismiss.

two arguments why the Directors, Tripadvisor's controlling stockholder, or Liberty TripAdvisor's alleged controlling stockholder are allegedly self-interested. Both arguments should be rejected.

First, Plaintiffs theorize that the Directors were conflicted because there *might* be future board decisions that *might* give rise to litigation claims and such claims *might* survive a motion to dismiss in Delaware, but not in Nevada. As explained below, Plaintiffs' speculation is too hypothetical and remote to constitute a unique benefit today. The Amended Complaint does not allege any existing or even inchoate litigation claim that the Conversions would extinguish. Plaintiffs' hypothesized conflict arises from the mere possibility that the Boards might take some unidentified action *in the future*—after the Companies have moved to Nevada—that could give rise to a *future* stockholder claim. But the risk of a future unknown stockholder claim is one every board faces and is not sufficient to require entire fairness review, much less prevent a corporation from electing to move to another state.

Second, Plaintiffs assert that Tripadvisor could undertake a controlling stockholder transaction in the future that would fail Delaware's entire fairness standard—or at least survive a motion to dismiss applying that standard—but be permitted under Nevada law. Again, despite having received books and records, Plaintiffs are just speculating; they can recite no factual basis to allege any such

plans in their Amended Complaint. To the contrary, Liberty TripAdvisor's alleged controlling stockholder recently represented in an SEC filing that he has no such plans. Plaintiffs' suggestion that a theoretical and unknown controlling stockholder transaction *possibly* could occur at some point in the future would apply to *any* controlled company and thus could effectively prevent such company from moving to *any* jurisdiction that does not mimic Delaware's fiduciary liability regime. That position cannot be squared with DGCL 266 or Delaware precedent. It would, in effect, require sister states to adopt Delaware corporate governance law as a prerequisite to allowing allegedly controlled Delaware corporations to reincorporate in those states. That is not—and cannot be—the law.

Plaintiffs may dislike the Nevada legislature's decision to adopt laws that, in some ways, are perceived as more protective of corporate directors and officers or more corporation-friendly than Delaware's current law. They may also dislike the decisions by Tripadvisor and Liberty TripAdvisor to move to Nevada. But because those decisions are not alleged to have been made to avoid any existing or threatened litigation or to pave a smoother path for an existing or proposed transaction and, in any event, those decisions were adopted to advance company business interests that Delaware Courts have repeatedly recognized as valid, the decisions are not a breach of fiduciary duty under Delaware law. The Amended Complaint should therefore be dismissed with prejudice.

BACKGROUND FACTS AND NATURE OF THE PROCEEDINGS

A. The Companies and Maffei

Tripadvisor, a Delaware corporation headquartered in Massachusetts, operates the world's largest travel guidance platform. (AC ¶ 20.)[2] Liberty TripAdvisor, a Delaware corporation headquartered in Colorado, holds an approximate 21% economic interest and a 56% voting interest in Tripadvisor. (*Id*. ¶¶ 21, 42.)

Defendant Gregory B. Maffei serves on the board of Tripadvisor and is the CEO and Chairman of Liberty TripAdvisor. (*Id*. ¶ 22.) When Plaintiffs filed this action, Maffei beneficially owned 43% of Liberty TripAdvisor's voting power. (*See id*. ¶ 40.) His holdings have since declined and he now owns stock representing 32.6% of Liberty TripAdvisor's voting power. (*See* Ex. 1 (Liberty TripAdvisor, Statement of Gregory B. Maffei (Schedule 13D/A) (June 2, 2023)) at 2.)[3] In June

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[2] The facts in this motion are drawn from (i) the Amended Complaint's factual allegations, accepted as true for purposes of this motion; (ii) SEC filings; and (iii) the board materials cited or otherwise incorporated by reference in the Amended Complaint under the May 1, 2023 Status Quo Stipulation and Order.

[3] Liberty TripAdvisor has a dual-class capital structure. (*See* AC ¶ 44.) Liberty TripAdvisor Series A common stock is entitled to one vote per share and Liberty TripAdvisor Series B common stock is entitled to ten votes per share. (*See id*.) As of April 30, 2023, Liberty TripAdvisor had 72,821,919 shares of Series A Common Stock and 3,737,475 shares of Series B Common Stock outstanding. (*See* Ex. 1 (Liberty TripAdvisor, Statement of Gregory B. Maffei (Schedule 13D/A) (June 2, 2023)) at 2.) Accordingly, as of April 30, 2023, Liberty TripAdvisor's outstanding

2023, before the Amended Complaint was filed, Maffei publicly certified in an SEC filing that he "does not have any present plans or proposals which relate to or would result in . . . any extraordinary corporate transaction, such as a merger, reorganization or liquidation." (Ex. 1 at 1.)

B. The Tripadvisor Directors evaluate and approve the Tripadvisor Conversion

The Tripadvisor Directors' decision to approve the Conversion was the result of an approximately five-month process. During a November 3, 2022 board meeting, the Tripadvisor Directors first discussed the potential of "reincorporating from Delaware to Nevada." (AC ¶ 49.) In connection with that meeting, the Tripadvisor directors received a management presentation explaining that [redacted] (*Id*.) Management told the Tripadvisor Directors that [redacted] (*Id*.)

shares carried a total of 110,196,669 votes. Maffei does not own any Series A common stock. (*See id*.) Maffei currently owns 3,593,255 shares of Series B common stock (*see id*.) carrying 35,932,550 votes (35,932,550/110,196,669 = 32.6%). In addition to shares currently owned, Maffei has options that are exercisable or will be exercisable in the next 30 days. If all of those options were exercised, Maffei could reach 36.1% of Liberty TripAdvisor's voting power. (*See id*.)

The Tripadvisor Directors continued the [redacted] at their February 1, 2023 board meeting, during which Tripadvisor's Chief Legal Officer [redacted] (*Id*. ¶ 50.) As shown in the presentation materials for the February 1 meeting, the Tripadvisor Directors considered several potential benefits of the proposed Conversion, including: [redacted] (Ex. 2, TRIP0000059 (discussed in AC ¶¶ 50–51).)

The Tripadvisor Directors also considered potential disadvantages of the proposed Conversion at their February 1 board meeting, including that: [redacted] (*Id*., TRIP0000060 (discussed in AC ¶¶ 50–51).) And the Tripadvisor Directors reviewed [redacted]

[redacted] (*See id.*, TRIP0000063 (discussed in AC ¶¶ 50–51).) The February 1 presentation explained further that [redacted] (*See id.*) The February 1 board presentation also included [redacted] (*See id.*, TRIP0000069–74 (discussed in AC ¶¶ 50–51).)

On March 23, 2023, the Tripadvisor Directors once again met to consider the pros and cons of the proposed Conversion. (*See* AC ¶ 55.) The presentation materials for the March 23 meeting identified, for example, the ability to [redacted] (Ex. 3, TRIP0000090 (discussed in AC ¶ 50).) As for cons, the Tripadvisor Directors considered that the [redacted]

[redacted] (AC ¶ 55; Ex. 3, TRIP0000091.) At the end of the March 23 meeting, and after having thoroughly evaluated the proposed Tripadvisor Conversion for approximately five months with [redacted] the Tripadvisor Directors unanimously approved the reincorporation to Nevada by conversion. (*See* AC ¶ 56; *see also* Ex. 3, TRIP0000083–84.) The Tripadvisor Directors subsequently approved the final drafts of the resolutions for the Conversion on April 19, 2023. (*See* AC ¶ 56 n.12.)

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

As the Tripadvisor Directors had done, the Liberty TripAdvisor Directors also studied the pros and cons of the proposed Conversion before deciding to move forward. On March 7, 2023, the Liberty TripAdvisor Directors held a board meeting at which they [redacted] (Ex. 4, LTRIP_0000034; *see also* AC ¶ 52.) During the meeting, [redacted] (*Id.*; *see also* AC ¶¶ 52–53.)

During the March 7 meeting, the Liberty TripAdvisor Directors received a comprehensive analysis of the proposed Liberty TripAdvisor Conversion. This analysis included [redacted]

[redacted] (*See* AC ¶¶ 52–54; Ex. 5.) The presentation began by informing the Liberty TripAdvisor Directors that companies have [redacted] (*See* AC ¶ 52, Ex. 5, LTRIP_0000013.) The same slide noted that [redacted] (*See id*.) The presentation noted that [redacted] (*See* AC ¶ 52, Ex. 5, LTRIP_0000014.)

The March 7 presentation also had an appendix [redacted] (*See* Ex. 5, LTRIP_0000023–31 (discussed in AC ¶ 52).) Among other things, the appendix flagged that: [redacted]

[redacted] (*See id*., LTRIP_0000023, 25, 27 (discussed in AC ¶ 52).)

The March 7 presentation [redacted]

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

(*Id*., LTRIP_0000016 (discussed in AC ¶¶ 52–53).) At the end of the March 7 meeting, [redacted] (AC ¶ 54.)

On April 4, 2023, the Liberty TripAdvisor Directors received a draft written consent with additional materials about the proposed Conversion. These materials

[4] As disclosed in Liberty TripAdvisor's 2022 Annual Report, Liberty TripAdvisor does "not have access to the cash that Tripadvisor generates unless Tripadvisor declares a dividend . . . . Other than the special dividend paid in December 2019, Tripadvisor has not historically paid any dividends . . . ." (Ex. 6, Liberty TripAdvisor, Annual Report (Form 10-K) (Feb. 17, 2023) at I-14.)

provided further details about the proposed Conversion, [redacted] (Ex. 7, LTRIP 0000036–38.) The next day, the Liberty TripAdvisor Directors approved the Conversion by unanimous written consent. (*See* AC ¶ 57.) The April 5 resolutions of the board reflect [redacted] (Ex. 8, LTRIP_0000154.)

D. Disclosed reasons for the Conversions and stockholder approval

Consistent with the Boards' approval of the Companies' Conversions, the Companies' proxy statements for the upcoming respective stockholder meetings recommended that stockholders vote for the Company's respective Conversion. (Ex. 9, Liberty TripAdvisor Proxy at 37; *see also* Ex. 10, Tripadvisor Proxy at 29.) The Companies disclosed several reasons for the Conversion that track the board materials, including:

- *Substantial savings*. "The conversion will eliminate our obligation to pay the annual Delaware franchise tax, which we expect will result in substantial savings to us over the long term. Nevada has no corporate franchise tax. We estimate that we will save approximately $250,000 per year on franchise taxes if the conversion proposal is approved."

- *Qualified management*. "[T]he conversion into a Nevada corporation may help us attract and retain qualified management by reducing the risk of lawsuits being filed against us and our directors and officers." The proxy

statements further explained the Boards' rationale for believing that a move to Nevada would better allow the Companies to attract and retain talent:

> "The increasing frequency of claims and litigation directed towards directors and officers of public companies, including in the context of 'change of control' and controlling stockholder transactions, has, in general, greatly expanded the risks facing directors and officers in exercising their duties. The amount of time and money required to respond to these claims and to defend against this type of litigation can be substantial. . . . [W]e believe Nevada is more advantageous than Delaware because Nevada has pursued a statute-focused approach that does not depend upon judicial interpretation, supplementation and revision, and is intended to be stable, predictable and more efficient, whereas much of Delaware corporate law consists of judicial decisions that migrate and develop over time."

- *Greater protection from unmeritorious litigation*. "[T]he conversion into a Nevada corporation will provide potentially greater protection from unmeritorious litigation for our directors and officers." As for greater litigation protections, the Companies made clear that "[t]here is currently no pending or, to our knowledge, asserted claim or litigation against any of our directors or officers for breach of fiduciary duty related to their actions in their capacity as a director or officer of the company."

(Ex. 9, Liberty TripAdvisor Proxy at 40; *see also* Ex. 10, Tripadvisor Proxy at 29.)

While the Tripadvisor Proxy disclosed that "the Redomestication is expected to provide corporate flexibility in connection with certain corporate transactions" (Ex. 10, Tripadvisor Proxy at 30), both Companies stated that the Conversion is "not being effected to prevent a change in control, nor [are they] in response to any present attempt known to our Board of Directors to acquire control of the company or obtain representation on our Board of Directors" (*id.*; Ex. 9, Liberty TripAdvisor

Proxy at 40). The Amended Complaint does not allege that either Board was considering or had discussed a specific control transaction.

On June 6, 2023, a majority of each Company's voting power approved that Company's Conversion at its respective annual meeting. (*See* Ex. 11, Liberty TripAdvisor, Current Report (Form 8-K) (June 7, 2023) at 2; Ex. 12, Tripadvisor, Current Report (Form 8-K) (June 12, 2023) at 2).) The Conversions will be "effected pursuant to Section 266 of the DGCL" and each share of common stock would be converted into one share of common stock of the respective Nevada entities. (Ex. 9, Liberty TripAdvisor Proxy at 38; *see also* Ex. 10, Tripadvisor Proxy at 30.) While the "jurisdiction of incorporation [of both Companies] would change from the State of Delaware to the State of Nevada," the Companies' operations and corporate activities would not change. (Ex. 9, Liberty TripAdvisor Proxy at 38; *see also* Ex. 10, Tripadvisor Proxy at 30.) Both Companies have agreed not to effectuate the Conversions "until the Court enters an order dismissing the action that is final and non-appealable or by agreement of the parties." (May 1, 2023 Status Quo Stipulation and Order (Dkt. 14) ¶ 2.)

E. This Litigation

Plaintiffs are Herbert Williamson, a purported stockholder of Liberty TripAdvisor, and Dennis Palkon, a purported stockholder of Tripadvisor. (*See* AC ¶¶ 18–19.) On April 21, 2023, Plaintiffs filed this action. On June 20—after

receiving the Companies' board materials—Plaintiffs filed the Amended Complaint. Plaintiffs allege that the Directors of each Company and Maffei as a controlling stockholder[5] breached their fiduciary duties by approving that Company's Conversion because: (i) the Directors and Maffei allegedly benefit from greater protection from potential "*future* stockholder litigation" under Nevada law (AC ¶ 77; *see also id.* ¶ 3 ("future accountability")); and (ii) there might be a controller transaction in the future that would face fewer stockholder challenges in Nevada. (*See id.* ¶¶ 63, 82; *see also id.* ¶¶ 14, 55, 83 ("speculation about future transactions").)[6]

ARGUMENT

"[A] complaint alleging breach of fiduciary duty must plead facts supporting an inference of breach, not simply a conclusion to that effect." *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007). While the Court accepts as true all "well-pled allegations [in the complaint] and draw[s] all reasonable inferences that logically flow from those allegations," it need neither "accept conclusory allegations unsupported by specific facts, nor . . . draw unreasonable inferences" in favor of the

[5] For purposes of this motion only, Defendants do not contest the allegation that Maffei is a controlling stockholder.

[6] Plaintiffs purported to assert both direct and derivative claims. Defendants do not address whether the claims are direct or derivative at this stage, because the Amended Complaint fails to state a claim in either case.

non-moving party. *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). The Court "is not required to accept every strained interpretation of the allegations proposed by the plaintiff." *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001). It instead makes only reasonable inferences from well pled facts. *See Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) ("We do not . . . draw unreasonable inferences in the plaintiffs' favor.").

I. The Companies complied with DGCL § 266.

As a threshold matter, Delaware law leaves the decision of where to incorporate to a corporation's directors and stockholders. Section 266 of the DGCL permits "[a] corporation of this State [to] . . . convert to . . . a foreign corporation." 8 *Del. C.* § 266(a). All that Section 266 requires for such a move is that (i) the board "adopt a resolution approving such conversion" and (ii) the "resolution . . . be submitted to the stockholders of the corporation" and approved by a majority of the corporation's voting power. *Id*. § 266(b). Nothing in the statute limits corporate moves to states with comparable laws and fiduciary duty standards to Delaware. Nor have Defendants located any Delaware case finding a Delaware corporation's conversion to another jurisdiction to be a fiduciary breach.

There is no dispute that Liberty TripAdvisor and Tripadvisor have complied with Section 266: Each board adopted resolutions approving the Company's Conversion and a majority of each Company's voting power approved that

Company's Conversion. (*See supra* at 9, 12, 14.) Plaintiffs' allegations about the percentage of minority stockholders that voted to approve the transactions (AC ¶¶ 8, 86) are irrelevant, because "[t]here is no requirement under the Delaware General Corporation Law that a majority of the outstanding minority shares must vote in favor of a transaction which benefits the majority." *Williams v. Geier*, 671 A.2d 1368, 1382 (Del. 1996).

Furthermore, Section 266 requires an affirmative vote of only "a majority of the outstanding shares of stock of the corporation [] entitled to vote thereon" at an annual or special meeting. 8 *Del. C.* § 266(b). This was a conscious decision of the General Assembly, which recently amended Section 266 to reduce the required vote in this context from unanimity to a bare majority. *See* S. 273, 151st Cong. § 11 (2022) (enacted). By reducing the required approval from unanimity to a bare majority for all corporations seeking to leave Delaware—controlled or otherwise—the legislature chose to allow controlled companies to move without minority support. Plaintiffs might dislike the General Assembly's choice, but that is not a basis to ignore it.

The Companies thus fully complied with Section 266 and should be allowed to complete the Conversions.

II. The Boards' decision to approve and recommend the Conversions is entitled to deference under the business judgment rule.

Plaintiffs also fail to plead a fiduciary breach by the Directors. Directors of Delaware corporations are presumed to act "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 124 (Del. Ch. 2009). Delaware has adopted the business judgment rule to "prevent[] a judge or jury from second guessing director decisions if they were the product of a rational process and the directors availed themselves of all material and reasonably available information." *Id.* "Under the business judgment rule, the burden of pleading and proof is on the party challenging the decision to allege facts to rebut the presumption." *Solomon v. Armstrong*, 747 A.2d 1098, 1111–12 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000).

Plaintiffs make multiple allegations about the Companies' dual class voting structures and Maffei's voting power, claiming that the Conversions are thus subject to entire fairness review. (*See, e.g.*, AC ¶¶ 40–45.)[7] But "[e]ntire fairness is not triggered solely because a company has a controlling stockholder." *In re Crimson*

[7] *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1244 (Del. 2012) (explaining that in entire fairness analysis, "[e]vidence of fair dealing has significant probative value to demonstrate the fairness of the price obtained. The paramount consideration, however, is whether the price was a fair one.").

Expl. Inc. S'holder Litig., 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014); *accord English v. Narang*, 2019 WL 1300855, at *6 (Del. Ch. Mar. 20, 2019) ("[C]ontrolling stockholders are not automatically subject to entire fairness review when a controlled corporation effectuates a transaction."), *aff'd, English v. Narang*, 222 A.3d 581 (Del. 2019) (TABLE). Instead, to rebut the business judgment rule, Plaintiffs must "plead facts demonstrating that a *majority* of the director defendants have a financial interest in the transaction or were dominated by a materially interested director," *Crimson Expl. Inc.*, 2014 WL 5449419, at *20, or that an alleged controlling stockholder "engage[d] in a conflicted transaction" in which "the controller stands on both sides of the deal . . . [or] gets a unique benefit by extracting something uniquely valuable to the controller," *English*, 2019 WL 1300855, at *6.

Here, the Amended Complaint (and the documents referenced therein) confirm that after considering the issues, each Board determined that converting to a Nevada corporation would be in the Company's best interests because the Conversions would result in: (i) substantial monetary savings over the long term, including from eliminating Delaware's corporate franchise tax; (ii) greater ability for the Companies to attract and retain qualified management; and (iii) greater protection to the Companies and their officers and directors from disruptive and expensive litigation. (*See supra* at 12–13.) As explained below, the Amended Complaint does not contain factual allegations supporting a reasonably conceivable

inference that the Directors or Maffei have a financial interest in the transaction or that Maffei would obtain some unique benefit from the Conversions. Plaintiffs are thus unable to rebut the business judgment rule, and the Directors' judgment on moving the Companies to Nevada should be respected. *See Brehm v. Eisner*, 746 A.2d 244, 260 (Del. 2000) ("It is the essence of the business judgment rule that a court will not apply 20/20 hindsight to second guess a board's decision.").

III. Plaintiffs fail to plead a self-interested transaction.

To rebut the business judgment rule and invoke entire fairness, Plaintiffs attempt to characterize each Company's decision to convert to a Nevada corporation as a self-interested transaction. (*See* AC ¶¶ 63, 85.) Plaintiffs proffer two theories: (i) Maffei and the other Directors might benefit from Nevada law providing them with greater protection in hypothetical future litigation; and (ii) Maffei might benefit from a future Tripadvisor transaction that could be subject to, and might fail, entire fairness review in Delaware but be permitted to proceed in Nevada. (*See id.* ¶¶ 63, 82.) Neither theory is supported by factual allegations, and neither theory is sufficient to plead a unique or nonratable benefit to Maffei as the alleged controller or to any of the other Directors. Entire fairness thus does not apply.

IV. Nevada's litigation protections do not give Maffei or the other Directors a disabling interest in the Conversions.

Plaintiffs vociferously criticize Nevada law and the Nevada legislature's decision to afford officers and directors with perceived greater litigation protections than Delaware. Although not relevant to the pending motion, Defendants disagree with Plaintiffs' characterizations of Nevada law.[8] And this Court has previously recognized that Nevada courts are appropriate fora for fiduciary duty suits. *See Sylebra Cap. Partners Master Fund, Ltd. v. Perelman*, 2020 WL 5989473, at *12 (Del. Ch. Oct. 9, 2020).

In any event, this motion does not ask this Court to evaluate Nevada's legislative choices: The question presented here is whether Nevada's allegedly greater protection from litigation for Maffei and the other Directors constitutes a unique benefit to them sufficient to render the Conversions self-interested transactions. It does not.

[8] Plaintiffs allege, for example, that Nevada is a "no-liability regime." (AC ¶ 12.) But Nevada permits stockholders to pursue both derivative and direct claims for fiduciary-duty breaches. *See Parametric Sound Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 417, 423 (Nev. 2017) (discussing circumstances when direct and derivative fiduciary breach claims can be brought under Nevada law). Principles of comity alone mandate that Nevada's legislative choices for the administration of its corporate law should be respected, just as Delaware's should be, and render Plaintiffs' critique of Nevada law unavailing.

Delaware courts have found directors to be interested only when approving a transaction that extinguishes *existing* potential liability. While Delaware courts have not considered the issue in the context of a corporation moving to another state, they have done so in analogous contexts. For example, when evaluating directors' approval of exculpation provisions, Delaware courts have distinguished between exculpation provisions that prospectively reduce litigation risks from future conduct and provisions that seek to eliminate existing potential liability for conduct that has already occurred. The decisions in *Orloff v. Shulman*, 2005 WL 3272355 (Del. Ch. Nov. 23, 2005), and *Bamford v. Penfold, L.P.*, 2022 WL 2278867 (Del. Ch. June 24, 2022), *reargument granted in part*, 2022 WL 3283869 (Del. Ch. Aug. 10, 2022), illustrate the distinction.

In *Orloff*, the Court rejected the plaintiffs' allegations that the director defendants had breached their fiduciary duties by adopting an exculpation provision to insulate directors from liability. *See* 2005 WL 3272355, at *13. The *Orloff* plaintiffs argued that the directors were "on both sides of the transaction" (*id.*) by "self-interestedly protecting themselves against litigation that they knew would soon name them as defendants." *Id.* at *6. The plaintiffs based this argument on their allegation that the "directors knew they were in imminent danger of being sued" because there were pending books and records demands to investigate potential fiduciary-duty breaches. *Id.* at *13. Because litigation had not yet been filed,

however, the Court rejected plaintiffs' claims, observing that "[t]he court has at least twice before rejected claims of this kind, noting that they are but variations on the directors suing themselves and participating in the wrongs refrain." *Id*. (citing *Decker v. Clausen*, 1989 WL 133617 (Del. Ch. Nov. 6, 1989), and *Caruana v. Saligman*, 1990 WL 212304 (Del. Ch. Dec. 21, 1990)). Put differently, directors are not deemed interested in a transaction merely because they may have a generalized incentive to limit their exposure to hypothetical future liability. *Id*.; *accord Sutherland v. Sutherland*, 2010 WL 1838968, at *12, 14–15 (Del. Ch. May 3, 2010) (holding directors adopting exculpatory provisions that could shield directors from future litigation were not self-interested).

In *Bamford*, by contrast, this Court applied entire fairness to a decision to adopt an exculpation provision to extinguish liability for claims "based on [a controller's] past conduct." 2022 WL 2278867, at *35. The Court recognized that "[f]iduciaries who control an entity can adopt prospective protective provisions, including exculpatory provisions," to limit future liability. *Id.* at *34 (citing *Orloff*). But a provision eliminating all liability both "prospectively *and retrospectively*" "was not equitable" and thus provided a unique concrete benefit to the fiduciary. *Id*. The decision to approve the exculpatory provision in *Bamford* was thus self-dealing by the controller and subject to entire fairness. *See id*. at *35.

Here, Plaintiffs do not allege that any pending or threatened litigation against the Directors would be snuffed out by the Conversions or that any past bad acts would be insulated from liability. Plaintiffs recognize as much, alleging that the Conversions are designed to "insulate the Director Defendants from *future* stockholder litigation." (AC ¶ 77.) But the distinction between *Orloff* and *Bamford* makes clear that allegations about protection from potential *future* litigation are insufficient to plead a self-interested transaction. The same distinction—existing potential liability versus hypothetical future liability—has been drawn in other contexts. *See, e.g., Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 961–62 (Del. Ch. 2013) (dismissing claims challenging board's adoption of forum-selection clause that "could somehow preclude a plaintiff from bringing" claims in the future: "the court declines to wade deeper into imagined situations involving multiple 'ifs'"); *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *12-13 (Del. Ch. May 30, 2008) (applying business judgment rule to board's decision to adopt advancement provision because there was no "particular proceeding" against directors when they approved provision).

This Court's decision in *Sylebra* provides yet another example. In that case, defendant Scientific Games moved from Delaware to Nevada after telling stockholders that "the move to Nevada was justified because Delaware law does not afford the same substantive rights and protections under Nevada law." 2020 WL

5989473, at *6. Approximately twenty months later, minority stockholder Sylebra sued the company's directors and controlling stockholder for breaches of fiduciary duty and DGCL violations. *See id.* at *1, *6. Sylebra argued, among other things, that the move to Nevada and the adoption of a Nevada forum-selection clause were implemented by the defendants to potentially shield them from liability for a future forced redemption transaction if the transaction was judged by the more favorable Nevada forum. *See id*. at *12. This Court rejected Sylebra's claims, finding Nevada courts competent to hear the claims and entitled to deference and comity. *Id.* at *9, *12. This Court found that putting itself above Nevada courts was particularly inappropriate given that Sylebra sought to challenge a potential transaction occurring "on a future date, when any resulting injury would occur in Nevada, not Delaware." *Id*. at *9.

As Plaintiffs do here, the plaintiff in *Sylebra* argued that Nevada law was insufficient to protect its interests as a minority stockholder. This Court quickly rejected that Delaware-supremacy argument:

> The best Sylebra can muster is an allegation that Nevada state courts are accustomed to "only holding fiduciaries accountable for intentional misconduct, fraud or a knowing violation of the law." That generalized (and unsupported) characterization of the Nevada courts' orientation is a far cry from raising a legitimate question regarding the integrity or competency of the Nevada courts to provide Sylebra "its day in court."

Id. at *12. The Court was unmoved by Sylebra's concern that the defendants "intend[ed] to deem Sylebra unqualified to own stock in Scientific Games and then force it to redeem its Scientific Games shares at an unfair price." *Id.* "That scheme, assuming it is in progress as alleged, has not come to fruition. When (or if) it does, the fiduciaries involved will owe duties to a Nevada corporation and its stockholders. . . . Nevada courts are now, and will be, available to Sylebra to adjudicate its claims . . . ." *Id.* The Court accordingly dismissed Sylebra's complaint. Here, Plaintiffs cannot even allege facts to evidence the supposedly unfair future transaction or allege that it is "in progress," much less that it has "come to fruition" or caused them any injury. Plaintiffs' claim to protection of a Delaware court applying Delaware law is therefore far weaker than the plaintiff's claim in *Sylebra*.

This Court's decisions in *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), further buttress the conclusion that the Conversions are not self-interested transactions because both cases reiterate the distinction between actions that extinguish existing potential liability versus theorized future litigation.

In *Harris*, the Court addressed the implications of a Delaware corporation's merger with and into a New Jersey corporation (the "Outbound Merger") for the specific purpose of "extinguishing the minority stockholders' standing to assert derivative claims." 2023 WL 115541, at *14. In that case, the majority stockholder

had begun planning the Outbound Merger "immediately" after the minority stockholders' counsel threatened litigation. *See id*. at *1, *14. And within 11 days of receiving a Section 220 document demand—and after refusing to produce any documents in response—the majority stockholder unilaterally approved the Outbound Merger. *See id*. at *6. On these facts, the Court found that the Outbound Merger provided a unique benefit to the controlling stockholder—extinguishing potential liability for specified past bad acts—and was thus subject to entire fairness. *See id*. at *14–15.

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

Here, in contrast to *Harris* and *Riverstone*, Plaintiffs do not allege facts suggesting that the Conversions are designed to stymie current, or even threatened, liability, let alone that Maffei or the other Directors are aware of any current or threatened liability or that it would be material to Maffei or the other Directors. Plaintiffs instead speculate about the Conversions' potential effect only on "future accountability"—*i.e.*, potential litigation about conduct that is not alleged to have yet been undertaken. (AC ¶ 3.) The Conversions therefore are not self-interested transactions like the mergers in *Harris* or *Riverstone* that were designed to extinguish very real (and significant) exposure to liability from prior acts.

Plaintiffs' claims cannot, as a matter of law, proceed based on "hypothetical and imagined future" litigation. *Boilermakers*, 73 A.3d at 963 (courts must focus on "real-world concerns when they arise in real-world and extant disputes" when evaluating breach of fiduciary duty claims). And accepting Plaintiffs' contention that the Companies cannot move to Nevada because Nevada law gives Maffei and the Directors greater protection in certain circumstances from litigation would effectively mean that no Delaware corporation could ever move to Nevada (or any other state that has supposedly less stockholder-friendly laws than Delaware)

because directors and controllers *always* face the possibility of future litigation based on future conduct.[9]

V. Plaintiffs' speculation about a potential future transaction is insufficient to plead self-interest today by Maffei.

Plaintiffs' second attempt to rebut the business judgment rule is the related argument that moving to Nevada might facilitate a future controlling stockholder transaction they do not like. (*See* AC ¶ 82.) But that attempt is even weaker than their litigation-based theory because the Complaint contains no factual allegations yielding a reasonable inference that such a transaction is on the table. "[D]rawing reasonable inferences in [Plaintiffs'] favor, as is required under the Rule 12(b)(6) analysis, does not give this court license to conjure up a reality on behalf of the plaintiff that the plaintiff has failed to establish." *Morgan v. Cash*, 2010 WL 2803746, at *7 (Del. Ch. July 16, 2010) (Plaintiffs' "speculation must be rejected.").

The Amended Complaint's lack of allegations about a specific transaction makes sense because the board materials produced to Plaintiffs contain no mention of a future controller transaction. Indeed, the two statements Plaintiffs pull from the board materials confirm that Plaintiffs' fear of a controller transaction is not

[9] Plaintiffs' allegations about settlements involving other companies in which Maffei invested (AC ¶¶ 75–76) are unavailing. Defendants choose to settle litigation for myriad reasons, including the costs of having to defend against expensive litigation and the resulting distractions to management and the business. The fact of a settlement says nothing about the ultimate merits of any claim.

supported by factual allegations giving rise to a reasonable inference. First, Plaintiffs cite a statement from a Tripadvisor board presentation discussing [redacted] (AC ¶¶ 14, 55; Ex.3, TRIP0000091.) But Tripadvisor's prediction of possible speculation, while prescient, does not render Plaintiffs' allegations anything more than what they are—speculation.

Second, Plaintiffs note that a Liberty TripAdvisor board presentation points to the possibility that, if there is [redacted] (AC ¶ 53.) But lawyers describing the landscape of potential future litigation does not yield an inference that litigation will occur, much less that the conduct that might give rise to the litigation will occur.

Unable to glean anything useful from the board materials, Plaintiffs turn to a difference between the Companies' proxy statements. Plaintiffs note that the Tripadvisor Proxy states that "the Redomestication is expected to provide corporate flexibility in connection with certain corporate transactions" (Ex. 10, Tripadvisor Proxy at 30), while the Liberty TripAdvisor Proxy does not. (AC ¶ 82.) Plaintiffs

allege that this discrepancy shows that the language is "deliberate" and therefore "telegraph[s] an impending transaction." (*Id.*) But stating an "expectation" of corporate flexibility for an unidentified, hypothetical future transaction given differences in Nevada and Delaware corporate law does not create a reasonable inference that a transaction that would be subject to entire fairness review is currently being considered. And—although omitted from the Amended Complaint—Maffei has publicly certified in an SEC filing that he is not in fact currently considering a transaction. (*See* Ex. 1 (Liberty TripAdvisor, Statement of Gregory B. Maffei (Schedule 13D/A) (June 2, 2023)) at 2.)

Once again, Plaintiffs' theory proves too much, because there is always the *possibility* of a transaction in the future. The Court's decision in *Ford v. VMware, Inc.* is instructive. There, the plaintiff alleged that a controlling stockholder had breached its fiduciary duties by issuing a tracking stock that created tax risks for the minority stockholders. *See* 2017 WL 1684089, at *17–18 (Del. Ch. May 2, 2017). The Court rejected the plaintiff's theory because the "hypothetical possibility" that the controlling stockholder might force the minority stockholders to bear the tax consequences of the deal in some "future transaction" that was "neither contemplated nor threatened" was insufficient. *Id*. at *18.

Plaintiffs' conclusory allegations as to a future controller transaction here fail for the same reason. Plaintiffs have not alleged that a controller transaction is

"contemplated []or threatened" and offer nothing more than the "hypothetical possibility" that a future transaction "might constitute an act of self-dealing by [Maffei]." *Id*. Simply put, 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.

Indeed, if Liberty TripAdvisor and Tripadvisor cannot move to Nevada on the facts here, it would appear that no Delaware corporation—controlled or otherwise—could ever do so. Under Plaintiffs' theory, the possibility of a potential future transaction that could result in litigation and potential director liability would be sufficient to render the directors self-interested in deciding to convert to a corporation governed by the laws of another jurisdiction that might have more robust litigation protections than Delaware. And because it is always possible that a transaction could occur in the future that could result in stockholder lawsuits and potential director liability, any such move by a Delaware corporation could confer a benefit, thereby empowering a stockholder plaintiff to enjoin any such redomestication. No Delaware case supports such a sweeping restriction on the right to convert under Section 266 of the DGCL or directors' ability to approve such conversions, and this Court simply "cannot grant the extraordinary relief of

enjoining [the Conversions] on the basis of hypothetical future events." *AB Value Partners, LP v. Kreisler Mfg. Corp.*, 2014 WL 7150465, at *7 (Del. Ch. Dec. 16, 2014); *accord Boilermakers*, 73 A.3d at 963 ("The wisdom of declining to opine on hypothetical situations that might or might not come to pass is evident.").

VI. Plaintiffs fail to allege any basis to enjoin the Conversions.

Having failed to plead any self-interested transaction, Plaintiffs offer no basis for the Court to question the Boards' business judgment or to take the extraordinary and unprecedented measure of enjoining the Conversions.

In a last-ditch effort, Plaintiffs attempt to impugn the Directors' weighing as a positive of the Nevada move the Companies' abilities under Nevada law to provide the Directors with "greater protection for unmeritorious litigation." (*See* AC ¶¶ 77–80.) Plaintiffs suggest that there is something inherently wrong with a director deciding to convert to another jurisdiction to take advantage of such laws. (*See id*.) But this is inconsistent with Delaware law, which recognizes that limiting directors' and officers' potential exposure to liability is a valid and important business interest and benefits corporations, including by "promot[ing] stockholder interests by ensuring that directors do not become overly risk-averse," *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 87 (Del. Ch. 2014), *decision clarified on denial of reargument*, 2014 WL 1094173 (Del. Ch. Mar. 19, 2014), and "attract[ing] better directors to serve on the board," *Goodwin v. Live Ent., Inc.*, 1999 WL 64265, at *24

n.17 (Del. Ch. Jan. 25, 1999), *aff'd*, 741 A.2d 16 (Del. 1999). As Chancellor Allen has explained: "it 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." *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996). These same interests apply to the Boards' decisions to convert to Nevada entities to take advantage of the greater protections from litigation that Nevada offers directors and officers.

Indeed, Plaintiffs could level the same attack just as easily on a corporation choosing to move to Delaware, because in some ways Delaware offers more protections to fiduciaries than other states. For example, the Delaware legislature recently amended Section 102(b)(7) to allow Delaware corporations to extend exculpation protections to officers (in addition to directors), but most other states do not permit corporations to exculpate officers. *See, e.g.*, Cal. Corp. Code § 204(a)(10) (allowing California corporation to adopt "[p]rovisions eliminating or limiting the personal liability of *a director* for monetary damages," but "no such provision shall eliminate or limit the liability of an officer for any act or omission as an officer, notwithstanding that the officer is also a director"); Colo. Rev. Stat. Ann. § 7-102-102(2)(d) (allowing Colorado corporations to adopt exculpation provisions

"eliminating or limiting the liability of *a director* to the corporation or its shareholders").[10]

Yet this Court has rejected fiduciary breach claims based on directors moving to Delaware. *See, e.g.*, *Coates v. Netro Corp.*, 2002 WL 31112340, at *4–5 (Del. Ch. Sept. 11, 2002) (rejecting argument that directors of California corporation breached fiduciary duties by approving corporate redomestication in Delaware, which offered directors greater protection from liability than California). The attack has no greater force in the other direction: Nevada is entitled to its legislative choices, and directors and stockholders of Delaware corporations are entitled to choose the regime they find preferable, as expressly recognized by the General Assembly and permitted under the DGCL.

CONCLUSION

The Amended Complaint does not plead facts sufficient to show that the Boards' decisions to convert the Companies into Nevada corporations are not a valid

[10] Similarly, even though cumulative voting helps minority stockholders secure representation on the board, Delaware corporations do not have to adopt it. *See eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 38 (Del. Ch. 2010). Other states, by contrast, require cumulative voting for the election of directors. *See, e.g.*, Cal. Corp. Code § 708(a) ("Except as provided in Sections 301.5 and 708.5, every shareholder complying with subdivision (b) and entitled to vote at any election of directors may cumulate such shareholder's votes . . . ."); Ariz. Rev. Stat. Ann. § 10-728(B) ("At each election for directors, shareholders are entitled to cumulate their votes . . . .").

exercise of the Directors' business judgment. Plaintiffs' unsupported assertions about what might happen in the future are insufficient to overcome the business judgment rule's presumption that the Directors acted properly. The Amended Complaint thus fails to state a claim for breach of fiduciary duty against Maffei or the other Directors and should be dismissed with prejudice.

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