

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

CALIFORNIA STATE TEACHERS' )  
RETIREMENT SYSTEM, NEW YORK )  
CITY EMPLOYEES' RETIREMENT )  
SYSTEM, NEW YORK CITY POLICE )  
PENSION FUND, POLICE OFFICERS' )  
VARIABLE SUPPLEMENTS FUND, )  
POLICE SUPERVISOR OFFICERS' )  
VARIABLE SUPPLEMENTS FUND, NEW )  
YORK CITY FIRE DEPARTMENT )  
PENSION FUND, FIRE FIGHTERS' )  
VARIABLE SUPPLEMENTS FUND, FIRE )  
OFFICERS' VARIABLE SUPPLEMENTS )  
FUND, BOARD OF EDUCATION )  
RETIREMENT SYSTEM OF THE CITY OF )  
NEW YORK, TEACHERS' RETIREMENT )  
SYSTEM OF THE CITY OF NEW YORK, )  
NEW YORK CITY TEACHERS' )  
VARIABLE ANNUITY PROGRAM, AND )  
INDIANA ELECTRICAL WORKERS )  
PENSION TRUST FUND IBEW, )

Plaintiffs Below,  
Appellants,

v.

AIDA M. ALVAREZ, JAMES I. CASH, JR., )  
ROGER C. CORBETT, DOUGLAS N. )  
DAFT, MICHAEL T. DUKE, GREGORY B. )  
PENNER, STEVEN S. REINEMUND, JIM )  
C. WALTON, S. ROBSON WALTON, )  
LINDA S. WOLF, H. LEE SCOTT, JR., )  
CHRISTOPHER J. WILLIAMS, JAMES W. )  
BREYER, M. MICHELE BURNS, DAVID )  
D. GLASS, ROLAND A. HERNANDEZ, )  
JOHN D. OPIE, J. PAUL REASON, ARNE )  
M. SORENSON, JOSE H. VILLARREAL, )  
JOSE LUIS RODRIGUEZMACEDO )

No. 295, 2016

Appeal from the Memorandum  
Opinion, dated May 13, 2016,  
of the Court of Chancery  
of the State of Delaware,  
C.A. No. 7455-CB

RIVERA, EDUARDO CASTRO-WRIGHT, )  
THOMAS A. HYDE, THOMAS A. MARS, )  
JOHN B. MENZER, EDUARDO F. )  
SOLORZANO MORALES, AND LEE )  
STUCKY, )  
) )  
Defendants Below, )  
Appellees )  
) )  
WAL-MART STORES, INC. )  
) )  
Nominal Defendant Below, )  
Appellee. )  
) )  


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**MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING**  
**AND PRESENT ORAL ARGUMENT**

1. Appellees/Defendants-Below respectfully request the opportunity in this pending appeal to submit supplemental briefing and to present oral argument addressing Chancellor Bouchard’s opinion on remand, dated July 25, 2017. That opinion proposes a mode of federal due process analysis that has never been adopted by any court, and has not been addressed in the briefs before this Court (which did not include Justice Traynor when the matter was initially briefed and argued). If adopted, Chancellor Bouchard’s proposal would unmake more than a century of preclusion doctrine. It is respectfully submitted that such an important question should not be entertained without giving the parties the opportunity to file briefs and have oral argument. (On remand, the parties were only given the opportunity to file single, simultaneous briefs and no oral argument was held.)

2. The Court of Chancery’s opinion on remand involves issues of federal due process that are important to Delaware corporations and their directors, as well as to courts around the country that hear stockholder derivative actions (whether arising under Delaware law or otherwise). If adopted, it could result in repetitive and duplicative litigation in multiple fora over the issue of demand futility that would impose significant costs on companies (not to mention their stockholders, investors, directors, officers, and insurers), as well as significant burdens on courts.

3. The opinion on remand recommends that this Court adopt a construction of the federal due process clause that, as the Chancellor acknowledged, directly conflicts with two federal appellate decisions (*Arduini v. Hart*, 774 F.3d 622, 625 (9th Cir. 2014), and *In re Sonus Networks, Inc., Shareholder Derivative Litigation*, 499 F.3d 47, 64 (1st Cir. 2007)), and implicitly conflicts with every decision that has applied collateral estoppel to a demand futility ruling.

4. For example, the supplemental opinion below contradicts *Pyott v. Louisiana Municipal Police Employees’ Retirement System*, 74 A.3d 612, 616-18 (Del. 2013), where this Court just four years ago held that applying collateral estoppel to a demand futility ruling of a United States District Court was “compelled” by principles of “full faith and credit.” The Chancellor’s opinion also conflicts with the recent summary affirmances by this Court, *e.g. Asbestos Workers*

*Local 42 Pension Fund v. Bammann*, 132 A.3d 749 (Del. 2016) (TABLE), and *Laborers' District Council Construction Industry Pension Fund v. Bensoussan*, 2017 WL 462142 (Del.), the latter of which this Court issued *after* it remanded this matter.

5. In short, as the Chancellor acknowledged, the opinion on remand recommends a “bright-line rule” that “no court” has ever adopted. Under that rule, issue preclusion, which is grounded in principles of full faith and credit, would never apply to a prior court’s judgment that a litigation demand would not have been futile. Successive plaintiffs could always maintain duplicative stockholder derivative suits, even when a prior court had dismissed precisely the same allegations because the company’s board of directors retained the right to control the company’s claims.

6. Chancellor Bouchard stated that federal due process principles supported that sweeping result. But he did not find that any individual stockholder’s due process rights were violated by the longstanding rule to the contrary, which has recognized that stockholders bringing a derivative action seek to redress not their own rights, but the rights of the company.

7. Adopting the Chancellor’s recommendation would be a significant departure from well-established law, with nationwide implications. Before considering whether to adopt the Court of Chancery’s recommendation, this Court

should hear further from the parties to this case, which would also provide interested non-parties (*e.g.*, bar associations and business organizations) with the opportunity to seek this Court's permission to submit amicus curiae briefs.

8. Appellees/Defendants-Below therefore request that this Court approve a briefing schedule permitting the submission of supplemental briefing with respect to the Chancellor's opinion on remand and providing for oral argument upon completion of the supplemental briefing. Because the Chancellor's recommendation, if followed, would rule against the position previously espoused by Appellants/Defendants-Below, we request that such a schedule authorize the submission of opening and reply supplemental briefs by Appellants/Defendants-Below.

9. Appellants/Plaintiffs-Below oppose the relief sought in this Motion. A copy of their letter is attached hereto as Exhibit 1.

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Dated: July 31, 2017

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