EXHIBIT A

MOTION OF THE COUNCIL OF INSTITUTIONAL INVESTORS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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, 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,	§	Case No. 295, 2016
Plaintiffs Below, Appellants,	§	Appeal from the Memorandum Opinion, dated May 13, 2016, of the Court of Chancery of the State of Delaware, C.A. No. 7455-CB
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. VILLAREAL, JOSE LUIS RODRIGUEZMACEDO 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.	§

BRIEF AMICUS CURIAE OF THE COUNCIL OF INSTITUTIONAL INVESTORS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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INTEREST OF AMICUS CURIAE

The Council of Institutional Investors (CII or Council) is a nonprofit association of pension funds, other employee benefit funds, state and local entities charged with investing public fund assets, endowments, and foundations with combined assets that exceed $3 trillion. Its associate members, including asset management firms, additionally have more than $20 trillion in assets under management. The Council's hundreds of members include major long-term shareowners with duties to protect the retirement assets of millions of American workers, who work to protect those assets through proxy votes, shareholder resolutions, negotiations with regulators, discussions with management, and, when necessary, litigation. The Council advocates consistently for strong corporate governance standards and regularly appears as amicus curiae in crucial cases affecting shareowner rights. *E.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398 (2014); *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011); *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

This is such a case. The issue before the Court directly implicates the interests of the Council and its members.[1] In enacting the Private Securities Litigation

[1] In the interest of full disclosure for the Court's benefit, the Council acknowledges that several of the plaintiffs are affiliated with the Council as members. However, this brief was not authored in whole or in part by counsel for

Reform Act (PSLRA), Congress recognized that institutional investors are America's largest shareholders and "have the most to gain from meritorious securities litigation." H.R. Conf. Rep. No. 104-369, at 34 (1995) (quoting testimony of Maryellen Andersen, then treasurer of the Council). Institutional investors also have the most to lose from meritless litigation that depletes shareholder wealth. *See* S. Rep. No. 104-98, at 9 (1995) ("We are . . . hurt if a system allows someone to force us to spend huge sums of money in legal costs by merely paying ten dollars and filing a meritless cookie cutter complaint against a company." (quoting Ms. Andersen)).

Both of those points are just as true of shareholder derivative litigation as they are of securities-fraud litigation like that addressed by the PSLRA. Moreover, derivative suits by shareholders against board members are an important—if last-resort—mechanism to enforce good corporate governance practices of precisely the type for which the Council regularly advocates.[2] Procedural devices, like the issue-

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any party, and no party has made a monetary contribution to the preparation or submission of the brief. The views expressed in the brief are those of the Council alone.

[2] *See, e.g.*, CII, *Statement on the Value of Corporate Governance*, http://www.cii.org/policies_other_issues#value_corp_gov ("Shareowners may employ a variety of tools and tactics, including . . . litigating . . . to encourage companies to adopt good corporate governance practices."); CII, *Policies on Corporate Governance* §1.4, http://www.cii.org/corp_gov_policies ("Corporate governance structures and practices should protect and enhance a company's accountability to its shareowners, and ensure that they are treated equally. An action should not be taken if its purpose is to reduce accountability to shareowners.").

preclusive effect potentially accorded to a prior determination of demand futility or the availability of books-and-records requests to ensure demand futility is adjudicated on a well-developed record, can dramatically limit or enhance access to a judicial forum and, correspondingly, the value of litigation as an enforcement mechanism. Accordingly, the Council has a strong interest in ensuring that the procedural devices employed in shareholder derivative litigation serve the ends of fostering meritorious derivative claims while simultaneously discouraging meritless ones.

Pursuant to Delaware Supreme Court Rule 28(b), the Council has contemporaneously filed a motion for leave to file this brief. Counsel for Plaintiffs-Appellants have consented to the granting of the Council's motion; counsel for Defendants-Appellees oppose the Council's motion.

ARGUMENT

I. THE RULE THE COURT ADOPTS HERE SHOULD INCENTIVIZE RESPONSIBLE SHAREHOLDERS WHO LITIGATE DERIVATIVE CLAIMS IN A THOROUGH AND METHODICAL MANNER, NOT A RECKLESS RACE TO THE COURTHOUSE.

United States capital markets are the deepest and most liquid anywhere in large part because they are widely and correctly perceived as the fairest and best policed in the entire world. The "institutional commitment of the United States to enforcement—administered by multiple and often competing enforcers, private and public"—weeds out disreputable potential issuers of stock, lowers the cost of capital, and yields significant valuation premiums. John C. Coffee, *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 245-46 (2007). Private enforcement, both of securities rules and corporate governance norms, through litigation and other forms of shareholder activism is thus "fundamental to the success of our securities markets." S. Rep. No. 104-98, at 8 (quoting SEC Chairman Arthur Levitt).

Institutional investors like the Council's members play a critical role in that system, bringing meritorious shareholder-litigation claims and representing broad swathes of the shareholding public in doing so. *See, e.g.*, *In re Morton's Rest. Group, Inc. Shareholders Litig.*, 74 A.3d 656, 671 (Del. Ch. 2013); Roberta Romano, *Less Is More: Making Institutional Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174, 175 (2001). And federal and

Delaware authorities alike prefer institutional plaintiffs in representative litigation on behalf of shareholders, because of their strong financial and fiduciary incentives to serve as responsible stewards of those shareholders' interests. *E.g.*, *Hirt v. U.S. Timberlands Serv. Co. LLC*, 2002 WL 1558342, at *2 (Del. Ch. July 9, 2002); 15 U.S.C. §78u-4(a)(3)(B).

Institutional investors' ability to fulfill that function, however, is put at significant risk by decisions like the order of dismissal in this case. The duty to protect the retirement savings of workers and their families is virtually incompatible with a heedless rush to litigate. But holding that the failure of any plaintiff anywhere to adequately plead demand futility precludes all other suits everywhere would force institutional investors and other responsible litigants into an unwinnable footrace against less conscientious plaintiffs to be the first to secure a ruling—whether right or wrong—on the demand-futility question. This is the so-called "fast filer" problem—careful plaintiffs are outstripped, and their potentially meritorious claims crowded out, by judgments dismissing underprepared and inadequately researched complaints.

The prior amici mischaracterize the "fast filer" problem as strictly an issue of proliferating litigation, so they can argue—with dubious-at-best logic[3]—that the rule

[3] The Chamber of Commerce, for instance, claims that issue preclusion "tames" the rush to the courthouse. Chamber Br. 11. But "a strict collateral estoppel regime will *amplify* pressures for rapid filing" and so "encourage shoddy claims that

suggested by the Chancery Court's supplemental opinion would exacerbate, rather than lessen it. But what makes this a "troubling case," as the Court rightly observed, is not that multiple parallel suits in Delaware and Arkansas were filed. Rather, it is troubling because the careful and deliberate Delaware plaintiffs—having vigorously litigated a years-long challenge under 8 DEL. C. § 220 to obtain corporate records that validate their demand-futility allegations, just as Delaware law encourages them to do—have been pipped at the post. Their well-researched and potentially valid claim to speak on the corporation's behalf has been foreclosed by the patent inadequacy of a complaint founded solely on a newspaper article. Contrary to the prior amici, the *EZCORP* rule[4] endorsed by the Chancellor *does* solve that problem: Irrespective of the failings of prior fast filers, if they never achieved representative capacity by satisfying federal Rule 23.1 or a state-law analogue, shareholders will not be precluded from exercising the rights afforded under Delaware law.

Adopting the *EZCORP* rule is virtually the only way to ensure that Delaware shareholders will retain a meaningful opportunity to follow this Court's preferred roadmap for derivative suits by pursuing a § 220 books-and-records action before attempting to plead demand futility. *See King v. Verifone Holdings, Inc.*, 12 A.3d

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undermine the governance goals of derivative litigation." George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 264-65 (2014) (emphasis added).

[4] *See In re EZCORP Inc. Consulting Agreement Derivative Litig.*, 130 A.3d 934 (Del. Ch. 2016).

1140, 1145-46 & n.23 (Del. 2011). If pursuing such a claim regularly entails a significant risk that a parallel action by less prepared plaintiffs will decide the demand-futility issue first, two things will inevitably happen. Corporations will regularly deploy scorched-earth tactics to delay resolution of § 220 actions so that parallel, less informed derivative suits elsewhere can advance to dismissal and so garner issue-preclusive status. And, confronted with the reality that § 220 actions offer only an illusion of assisting in the pleading of derivative claims, plaintiffs will shun them. If its benefits for pleading claims come only at the cost of risking those claims being foreclosed entirely, § 220 will wither on the vine.

The Court should not tolerate such a result. The framework for litigating shareholder derivative lawsuits in Delaware should reward, not punish, those who act deliberately to present meritorious claims and follow the rules and procedures available to validate them. Overwhelmingly, plaintiffs of that nature and with such resources are institutional investors like the Council's members—precisely the type of responsible stewards of shareholder and corporate interests that courts and legislatures broadly prefer as shareholder representatives generally. As the Court recognized long ago, "[n]othing"—including collateral estoppel—"requires" Delaware courts to "penaliz[e] diligent counsel" or parties that proceed "in a deliberate and thorough manner in preparing a complaint" that demonstrates the requisite demand futility. *Rales v. Blasband*, 634 A.2d 927, 934 n.10 (Del. 1993).

II. DUE PROCESS MANDATES THAT, WHEN A PLAINTIFF PLEADS BUT NEVER ACHIEVES A REPRESENTATIVE CAPACITY, PURPORTEDLY REPRESENTED NON-PARTIES ARE NOT BOUND BY JUDGMENT AS TO THAT PLAINTIFF.

The § 220 avenue to establishing facts demonstrating demand futility is so central that this Court once proposed that, if it were not followed, a court confronting a "derivative complaint brought prematurely and without prior investigation of facts that would excuse a pre-suit demand" would be justified in dismissing it "with prejudice and without leave to amend *as to the named plaintiff*." *King*, 12 A.3d at 1151 (emphasis added). The clear significance of that final phrase is the Court's entirely reasonable expectation that a different, more responsible, and better prepared plaintiff would be still able to file again in the future—not that such a dismissal would preclude all further suits by estopping relitigation of demand futility. *See id.* That expectation, however, would be defeated in all but the most extreme cases by the draconian rule that the Defendants press on the Court.

That rule—that, barring only gross deficiency, any shareholder plaintiff purporting to file suit on behalf of a corporation binds all other shareholders, no matter the plaintiff's actual representative capacity—is contrary to due process. "The definition of the term 'party' can on no account be stretched so far as to cover a person . . . whom the plaintiff in a lawsuit was denied leave to represent." *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011). And it is "a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment

in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *accord Martin v. Wilks*, 490 U.S. 755, 762 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.").

A narrow exception to *Hansberry*'s rule exists for various forms of "representative" litigation, but as *Smith* makes plain, actually acquiring representative capacity pursuant to the relevant rules is an absolute prerequisite to that exception applying. In the context of derivative litigation, Rule 23.1's demand-futility requirement marks the threshold plaintiffs must cross before achieving the status of representing the corporation (and, thus, other shareholders). *E.g.*, *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991) ("Ordinarily, it is only when demand is excused that the shareholder enjoys the right to initiate suit on behalf of his corporation in disregard of the directors' wishes."). Until that threshold is crossed, representation of other shareholders is purely "virtual," and due process does not countenance preclusion "based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed" in Rule 23.1. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008).

The rule for which Defendants and their amici advocate—that *pleading* representative capacity is sufficient, without more, to bind subsequent plaintiffs to a

judgment finding no such capacity exists—cannot be squared with those principles. Imagining its application in a related representative-litigation context demonstrates its absurd consequences: Consider a minor, injured through someone's tort, who seeks redress in a suit filed by a purported "next friend" that actually lacks the requisite connection to serve in such capacity. The dismissal of such a suit does not bar all other potential representatives from relitigating the next-friend issue in any subsequent suit. *See, e.g.*, *Safouane v. Fleck*, 226 Fed. App'x 753, 758 (9th Cir. 2007) (dismissal of minors' relatives' next-friend suit "does not have such preclusive effect, because the children were for procedural reasons never proper parties to this suit"); *Jones v. Syntex Labs., Inc.*, 1 Fed. App'x 539, 542-43 (7th Cir. 2001) (denying *res judicata* effect where mother had only purported to act ad litem on son's behalf, without required approval of state courts); *Susan R.M. ex rel. Charles L.M. v. Ne. Indep. Sch. Dist.*, 818 F.2d 455, 458 (5th Cir. 1987) (dismissing next-friend suit because father had relinquished conservatorship over his disabled daughter, but noting that State authorities retained authority to act on daughter's behalf).

These cases demonstrate, just as *Smith* does in the class-action context, that due process requires some form of judicial imprimatur, not just pleading an allegation of representative capacity, before nonparties will be bound by a judgment. *See Smith*, 564 U.S. at 313. Thus, absent judicial permission for, or at least acquiescence in, proceeding representatively, a judgment in derivative litigation has

no binding effect on other shareholders. *See, e.g.*, *Hawes v. City of Oakland*, 104 U.S. 450, 460 (1881) (requiring that, "before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation," he must "show to the satisfaction of the court" that demand has been made and refused, or is futile). And dismissal under Rule 23.1 for failure to plead demand futility, like the rejection of class certification, conclusively negates a plaintiff's claim to be acting in a representative capacity.

III. ADOPTING THE *EZCORP* RULE WILL NOT CAUSE THE SKY TO FALL, AS DEFENDANTS AND THEIR AMICI CLAIM.

The purported risk that adopting the Chancellor's suggestion will lead to a flood of copycat derivative litigation overwhelming courts is, in reality, just a phantom. Even without granting issue-preclusive effect to demand-futility rulings, significant structural barriers to repetitive relitigation remain and will ensure that the abuses that the prior amici foretell will be the exception, not the rule.

There is little real reason to think that, if demand-futility dismissals do not collaterally estop subsequent plaintiffs, there would be an explosion of me-too refilings. Irrespective of whether they compel issue preclusion as a formal matter, out-of-state rulings on demand futility will nevertheless command respect—and will animate, or even dictate, outcomes—in Delaware courts, both as a matter of comity and as a reflection of the persuasive value of their analysis. Foolhardy indeed would be the contingent-fee attorney who, confronting a Rule 23.1 dismissal elsewhere, decided to simply recaption his complaint and file it anew in Chancery Court—or vice versa. Ultimately, the principal beneficiaries of the *EZCORP* rule will be plaintiffs who, like those now before the Court, have materially developed their demand-futility allegations beyond what any previously dismissed claimants had pled, generally through the use of § 220 or another discovery-forcing mechanism—exactly the course that this Court has commended and the scenario that the prior amici want to ensure never has a chance to arise.

There are seeds of some legitimate concerns raised by the prior amici, but their arguments make mountains of molehills. To the extent that serial forum shopping by plaintiffs' counsel is a realistic possibility, for example, corporations already have tools at their disposal to mitigate the issue without implicating shareholders' fundamental due-process rights. *See* Geis, *Shareholder Derivative Litigation*, *supra*, at 297-99 (discussing potential mitigating devices). Meanwhile, the *EZCORP* rule places no substantially greater relitigation burden on defendants than is already imposed in the current system. Whether founded on collateral estoppel or on demand futility, a motion to dismiss has to be written either way, and arguing the latter ground is not inherently more complex or appreciably more onerous than arguing the former. Adopting *EZCORP*'s rule, then, will not lead to the parade of horribles the Defendants and their amici claim.

The fact that there has been no explosion of me-too securities class-action litigation following the U.S. Supreme Court's decision in *Smith v. Bayer Corp.* underscores the point. Indeed, the consequence-based arguments the prior amici now advance are a classic example of the boy crying wolf. The Chamber of Commerce, for example, recited virtually the same assertions in an amicus brief filed in *Smith* itself: "Denying preclusive effect to a denial of class certification would exacerbate the persistent abuse of the class action mechanism. . . . If plaintiffs are not subject to preclusion with regard to adverse certification decisions, they will

simply relitigate their certification claims before another judge." Br. of the Chamber of Commerce as Amicus Curiae, *Smith v. Bayer Corp.*, No. 09-1205, 2010 WL 5192276, at *10, *14 (U.S. Dec. 20, 2010). Actual data, however, refute the prior amici's concerns about the supposed consequences of denying preclusive effect to threshold rulings on plaintiffs' representative status, such as class certification and demand futility. *See* Cornerstone Research, SECURITIES CLASS ACTION FILINGS: 2016 YEAR IN REVIEW, at 5 (2017) (documenting below-average number of filings every year from 2011 to 2015). If the Chamber were right that issue preclusion is an absolute necessity to prevent an avalanche of relitigation, one would expect to find an immediate post-*Smith* jump in filings as plaintiffs' counsel sought to revive cases previously denied certification by refiling them with different plaintiffs and marginally modified class allegations. But no such increase occurred—indeed, in the year after *Smith* was decided, filings *declined* nearly 20%. *Id.* Real-world experience thus demonstrates that the supposed "consequences of denying preclusive effect" that the prior amici predict are far from "inevitable." Roundtable Br. at 10.

CONCLUSION

For these reasons, amicus curiae the Council of Institutional Investors respectfully requests that the Court adopt the recommendation made by the Court of Chancery in its supplemental opinion, hold that due process requires affording shareholders the opportunity to litigate derivative claims when prior putative derivative claimants failed to achieve representational status by demonstrating demand futility, and reverse the Court of Chancery's memorandum opinion and order dismissing the Plaintiffs-Appellants' claim.

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