10-1152-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MELVIN STEINHARDT, on behalf of himself
and all others similarly situated,

Plaintiff-Appellant,

v.

UBS SECURITIES LLC and UBS LOAN FINANCE LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of New York in Case No. 1:09-cv-01438-ARR-RER,
Hon. Allyne R. Ross

BRIEF FOR DEFENDANTS-APPELLEES

E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
212-506-5000

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Attorneys for Defendants-Appellees

CORPORATE DISCLOSURE STATEMENT

The members of UBS Securities LLC are UBS A.G. and UBS Americas Inc. (which is wholly owned by UBS A.G.). The sole member of UBS Loan Finance LLC is UBS Americas Inc. No publicly held corporation, other than UBS A.G., owns 10% of UBS Securities LLC or UBS Loan Finance LLC.

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INTRODUCTION

This case is the story of a corporate board that settled a merger dispute and the shareholders who wish it hadn't. This Court has heard the story countless times. But this one comes with two twists that doom the case from the start.

Twist 1 is that the shareholders keep suing the wrong party with the wrong cause of action. The Merger Agreement in question provided that The Finish Line, Inc. would acquire Genesco Inc. for cash. But the merger unraveled when Genesco's revenues fell off a cliff. Despite its financial straits, Genesco sued Finish Line and its investment bank to try to force the merger. After suffering litigation setbacks, the Genesco board exercised its fiduciary duty and abandoned the merger in return for a nine-figure breakup fee, much of which was distributed directly to the shareholders as a condition of the settlement.

Plaintiff-Appellant Melvin Steinhardt is a Genesco shareholder who pocketed his share of the proceeds. Now he wants more. So he has filed a lawsuit of his own, purporting to represent all shareholders. Shareholder litigation after a failed merger is not at all uncommon; shareholders frequently sue their boards, griping that some management decision or another failed to maximize value. The twist is that Steinhardt has not sued the Genesco board for negotiating a bad settlement. He has not even sued Finish Line for jilting Genesco. Instead, he has taken aim at the banks that had planned to finance the deal, Defendants-Appellees

UBS Securities LLC and UBS Loan Finance LLC (collectively, "UBS"), blaming them for scuttling the merger that his own board abandoned.

Steinhardt stretches Tennessee tort law in a way that no court ever has—and that one Tennessee court has expressly rejected in connection with the same claim brought by the same plaintiffs' lawyers against the same defendants for another Genesco shareholder. Steinhardt's premise is that the Merger Agreement between Finish Line and Genesco gave him an "existing business relationship" with Finish Line in the form of an "expectancy" that he would collect the proceeds of the sale (OB 44)—and UBS tortiously interfered with that relationship. The problem is that the Merger Agreement emphasized that it was not creating ***any*** relationship between Finish Line and Genesco's shareholders. In sidelining the shareholders from the management of the merger and merger-related negotiations, the parties to the Merger Agreement left it solely up to Genesco's board to protect any shareholders' interests. And the board did just that by suing both Finish Line and UBS and extracting a settlement that directly benefited the shareholders. If the shareholders are dissatisfied with the outcome, their recourse is a derivative suit against Genesco's board. They cannot keep filing tort claims against UBS for interference with a business relationship they never had and never would have had.

Which brings us to Twist 2, about abuse of the judicial system with serial lawsuits. This is now the third time that Genesco shareholders, represented by the same attorneys, have hauled UBS into court on the same theory. Plaintiffs' counsel brought the first putative class action with one shareholder as the named plaintiff in Tennessee state court—which proceeded to dismiss the tort claim on the merits, holding that the tort theory was invalid under Tennessee law and that the shareholders' sole recourse was not against Finish Line or UBS, but instead a derivative action against the Genesco board. Plaintiffs' counsel refiled the same lawsuit against UBS, for the same named plaintiff, in New York, where a district court dismissed it on res judicata grounds, and this Court affirmed the dismissal. Now plaintiffs' counsel have reincarnated the claim against UBS yet again, this time merely substituting a different shareholder purporting to represent that same class.

UBS settled any claim with Genesco. The shareholders' tort theory does not improve with age or with serial rejection. Res judicata prohibits plaintiffs' counsel from slapping a new name on the complaint every time they lose. There are thousands of Genesco shareholders. At some point, the game of litigation Whac-A-Mole must stop. That point is now.

ISSUES PRESENTED

1. Steinhardt claims a "business relationship" arising exclusively out of the Merger Agreement between Genesco and Finish Line. But the Merger Agreement expressly provided that Finish Line was not forming any relationship

with Genesco shareholders, including Steinhardt. Was the district court correct in dismissing Steinhardt's claim for failure to allege a business relationship?

2. This is the third lawsuit brought by the same plaintiffs' attorneys against the same defendants on behalf of the same Genesco shareholders seeking to put Genesco shareholders in the position they would have been in had the merger been completed. If this shareholder is allowed to proceed despite the previous failed attempts, the same plaintiffs' attorneys can continue to raise the same claim in a new court for each of the thousands of Genesco shareholders. Does res judicata bar this perpetual cycle of litigation?

STATEMENT OF FACTS[1]

Finish Line and Genesco Boards Reach a Merger Agreement Disclaiming Any Other Beneficiaries

Finish Line is a retailer that sells mainly athletic shoes and apparel. (A409-10.) In 2007, it was interested in ways to broaden its own footprint and enlisted UBS to explore strategic opportunities. (A410.) In April of 2007, an opportunity arose with Genesco. (A410-11.) Genesco was also a retailer focused on branded footwear and headwear. (*Id.*) Its product line and customer base complemented Finish Line's. (*Id.*) Finish Line learned that Foot Locker—its primary

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[1] Appellant's Opening Brief is cited as "OB," and the Joint Appendix is cited as "A___." "RJN" refers to UBS's Motion for Judicial Notice, filed December 1, 2010.

competitor—was trying to acquire Genesco. (A18.) Word was that Genesco had rejected Foot Locker's offer at $46 per share and was exploring strategic alternatives. (A18-19.) So Finish Line made an approach. Genesco's board was interested. (A410-11.)

The two boards negotiated intensively as Foot Locker continued to lob in competitive bids. (A19-22.) Ultimately, the two boards worked out a merger deal, which they memorialized in an Agreement and Plan of Merger (the "Merger Agreement") on June 17, 2007. (A22, A55-124.) Under the Merger Agreement, if everything went as expected, Finish Line would acquire Genesco at $54.50 per share. (A19-22.) But under the Merger Agreement's express terms, all bets were off if Genesco suffered a financial setback: Specifically, § 7.2(b) of the Merger Agreement excused Finish Line's purchase obligation if anything occurred that was "materially adverse to the business, condition (financial or otherwise), assets, liabilities or results of [Genesco's] operations," subject to certain specified exceptions. (A66-67, A110-11.) Such a clause is not worth the paper it is written on unless Finish Line and its financiers have a concomitant right to examine Genesco's books. So Genesco granted Finish Line the right to scrutinize all "books and records, financial, operating and other data," and other information about Genesco "as is reasonably necessary or appropriate." (A103.)

The parties also agreed on another common term that lies at the heart of this appeal. The term, entitled "No Third Party Beneficiaries," declared the companies' intention to structure the transaction as one between Finish Line and Genesco ***only***. (A116.) Specifically, the Merger Agreement, in § 9.5(b), prohibited any third parties—including Genesco's shareholders—from claiming "any right, benefit, or remedy of any nature whatsoever under or by reason of th[e] Agreement." (*Id*.) This provision was designed to reserve to the two companies' boards the exclusive authority to manage the merger, free from intrusion by shareholders and anyone else who might have stood to gain or lose from the merger. That is not to say that the shareholders had no role at all: Fully 72% of Genesco's shareholders voted to approve the Merger Agreement in its entirety—including its "no third-party beneficiary" clause. (A33.) Steinhardt voted yes. (*Id*.)

UBS was not a party to the Merger Agreement. As the banker, its role was to supply the funds—$1.6 billion, to be precise—that Finish Line would use to buy Genesco. UBS's role was memorialized in a separate Bank and Bridge Facilities Commitment Letter (the "Financing Agreement") executed on the same day as the Merger Agreement. (A125-66.) The Financing Agreement, like the Merger Agreement, was conditioned on Genesco's continued financial health. It absolved UBS of any obligation to fund the deal if Genesco suffered "a Material Adverse

Effect." (A129.) But it gave UBS yet another layer of protection. A so-called "Insolvency Provision" granted UBS the right to withhold its funding if Finish Line could not provide UBS with a "solvency certificate"—a representation that the combined post-merger entity would be solvent from the outset. (A165.) Also like the Merger Agreement, the Financing Agreement gave UBS a right to verify the finances for itself: It obligated Finish Line to produce to UBS any information that Finish Line was entitled to demand from Genesco. (A129, A164.)

The Merger Agreement and Financing Agreement both contained choice of law and forum selection clauses—pointing in different directions. The Merger Agreement between Finish Line and Genesco was governed by Tennessee law (Genesco is a Tennessee company) and required disputes arising out of it to be resolved in Tennessee state court. (A117.) The Financing Agreement between UBS and Finish Line was governed by New York law and required disputes arising out of it to be resolved in a court in New York. (A133.)

Genesco's Financial Collapse Derails the Merger

What Finish Line and UBS did not know when they signed the agreements was that Genesco was teetering on the brink of financial collapse. Genesco was playing hide-the-ball. On June 7, 2007, ten days before the deal was signed, UBS and Finish Line asked Genesco to convey its May earnings results when they became available. (A423.) Genesco received those results on June 11, the very day Finish Line made its first offer to purchase Genesco. (A424.) They were distressing: May earnings were 57% worse than projections delivered just the month before. (*Id*.) Genesco's comptroller initially took steps to disclose the May results to Finish Line and UBS. (*Id*.) But Genesco's chief financial officer ordered him to withhold them. (*Id*.) Genesco's senior management made the conscious decision to ignore the request unless and until it was repeated. (*Id*.) Due diligence closed shortly thereafter, and Finish Line and UBS signed the Merger and Financing Agreements oblivious to Genesco's disastrous May results. (A426.)

It took a month for Genesco to come clean, withholding the May results until July 10, more than three weeks after the parties had signed the Merger Agreement. (A414.) By then, Genesco was stuck in a downward spiral: June's performance was twice as bad as May's, off Genesco's projections by $4.7 million. (*Id*.) Genesco had earlier advised the market that it expected to yield 30 cents of earnings per share in the second quarter of 2007, but it yielded not a penny. (*Id*.) Genesco's third quarter was even worse: Genesco projected $23.6 million in earnings and missed the mark by ***$10 million***—or 42%. (A415.) By the time the dust settled at year's end, Genesco's 2007 performance was the worst in its ten-year history. (A440-41.)

Finish Line and UBS were alarmed. (A30.) Finish Line advised Genesco that it was "evaluating its options in accordance with the terms of the merger agreement." (*Id.*) UBS, for its part, detailed its concerns and demanded additional financial information from Genesco to determine whether, in fact, Genesco had suffered a material adverse effect. (A32.) Although the Financing Agreement gave UBS the right to this information, Genesco stonewalled. (A34.) It simply demurred that it had suffered "no material adverse effect." (A33.) Finish Line refused to close on the merger, and UBS refused to supply the financing without the information they needed to verify that the merged entity would be viable. (*Id.*)

Acting on Behalf of its Shareholders, Genesco Litigates to Force the Merger

Genesco vigorously pursued its shareholders' interests in litigation. The litigation proceeded in two forums—reflecting the different forum selection clauses in the Merger Agreement and the Financing Agreement.

Genesco rushed to file the first action—which the parties have called the "Tennessee Action"—in the Tennessee Chancery Court, just two days after reiterating its refusal to provide the financial information UBS and Finish Line demanded. This first case was about Finish Line's obligations to Genesco under the Merger Agreement. Genesco claimed that Finish Line breached the Merger Agreement by refusing to close, and it sought specific performance. (A36.) UBS intervened in the Tennessee Action for the limited purpose of litigating whether Genesco had suffered a material adverse effect that relieved *Finish Line* of any obligation to perform under the *Merger Agreement* (which would indirectly absolve UBS of any obligation to finance the merger). UBS also joined with Finish Line in alleging that Genesco committed fraud "by not providing material information concerning Genesco's May performance" before the execution of the Merger Agreement. (A407.) Because disputes about the Financing Agreement had to be resolved in New York, the Tennessee Action did not and could not resolve whether the conditions of that agreement were met—most notably, the condition absolving UBS of the obligation to finance the deal if Finish Line could not certify that the combined post-merger entity would be solvent.

In the Tennessee Action, UBS and Finish Line again sought access to the critical financial information Genesco refused to provide. As the Tennessee Chancery Court confirmed, those requests were far from "unreasonable and unwarranted." (OB 21.) The court held that Genesco's "77% drop in second quarter earnings from the previous year [was] sufficient on its face to trigger Genesco's obligation to respond to the request of the defendants to provide information." (A403.) Thus, the court held, the Merger and Financing Agreements ***required*** Genesco to produce its financial information, and it ordered Genesco to do so. (*Id*.)

Shortly after receiving Genesco's financial information, UBS filed a separate lawsuit in the Southern District of New York against Finish Line and Genesco (as a necessary party) to resolve *UBS's* obligations to Finish Line under the separate *Financing Agreement*. The parties have called this the "Insolvency Action" because it sought a declaration that the combined Genesco-Finish Line entity would be insolvent if the merger closed, which, in turn, would have absolved UBS of any obligation to finance the merger (whether or not Genesco had suffered any material adverse effect as defined by the Merger Agreement). (A38.) Contrary to Steinhardt's assertion (OB 15), the Financing Agreement was clear that that question—about UBS's obligation to finance the deal—could not be litigated anywhere but in New York. (A133.)

Meanwhile, the Tennessee action proceeded to trial, which confirmed that UBS's position was far from "baseless." (OB 21.) After hearing extensive testimony from all parties, the Tennessee Chancery Court found that Genesco ***had, in fact, sustained a material adverse effect*** "for several reasons." (A438.) The court nevertheless held that the change did not allow Finish Line to back out of the merger, but only because the material adverse effect was caused by "general economic conditions," which does not excuse performance under the Merger Agreement. (*Id*.) Likewise, far from suggesting that UBS's fraud allegations were "baseless" and "unfounded" (OB 21), the court characterized those claims as "difficult to analyze." (A421.) It was only after days of testimony and 16 pages of "detailed analysis of the facts and law" (*id*.) that the court ultimately concluded that Genesco, though guilty of "sharp dealings in not voluntarily providing the

May actual results" (A446), had not committed outright fraud (A419-34). The only reason the court declined to find fraud was because it believed that Finish Line and UBS should have "asked again for the May" figures. (A421.)

When all was said and done, the Tennessee Chancery Court acknowledged that it could not definitively decide whether the merger must proceed because the critical question of insolvency was not before it. (A447.) The court observed that if "the combined companies would result in an insolvent entity, the New York lawsuit by UBS will halt the merger." (*Id*.) So all the court could do was to issue a contingent order directing Finish Line to proceed with the merger—but only if the court in New York were to conclude that the merged entity would be solvent. (*Id*.) Because of this contingency, the court emphasized that its order was "not a final order." (RJN Ex. E at 1.) "[D]etermination of that [insolvency] issue," the Court emphasized, ultimately would determine the viability of specific performance, making the court's order "depend[ent] upon developments in the New York lawsuit" and hence "not ripe" for appeal. (*Id*. at 2.)

Meanwhile, the New York lawsuit was going poorly for Genesco. Finish Line's chief financial officer ultimately admitted in sworn testimony that the combined entity would be insolvent, which meant that Finish Line would not be able to "provide a solvency certificate to UBS if the merger price remains $54.50." (RJN Ex. B at 2-3.) Finish Line's counsel confirmed that they could not even make an argument, "consistent with its Rule 11 obligations," that the combined entity would be "solven[t] at [the merger price of] $54.50 per share." (RJN Ex. C at 1-2.) Far from showing that UBS "orchestrat[ed] circumstances to suggest that the post merger … entity would be insolvent" (OB 22), these were direct admissions by Finish Line that UBS was not obligated to finance the merger.

These developments led Genesco to seek to amend its Tennessee complaint to assert claims against UBS for procurement of breach of contract and for tortious interference with contract under Tennessee law (A178-79) and to try to withdraw from the New York lawsuit on the eve of trial. The district court rejected the maneuver as "forum shopping." (RJN Ex. A at 5.)

Genesco Extracts a Comprehensive Settlement That Directly Benefits Its Shareholders

The day the New York trial was to begin, the parties reached a global settlement resolving all outstanding disputes. (SPA 4; A46.) Genesco's board, exercising its business judgment to advance the best interests of the Genesco shareholders, agreed to terminate the Merger Agreement and to forgo ***all*** its claims—including its claim of tortious interference with contract—against Finish Line and UBS. (A47.) In return, Genesco extracted a handsome payout for its shareholders of $175 million in cash plus 12% of Finish Line stock. (*Id*.) Under the express terms of the settlement, Genesco distributed the Finish Line stock directly to its common shareholders, including Steinhardt. (*Id*.)

The First Genesco Shareholder Suit in Tennessee is Dismissed for Failure to State a Claim

That should have been that. With all claims against Finish Line and UBS settled and Genesco shareholders richly compensated, litigation should have ended. But plaintiffs' lawyers—the same lawyers who are prosecuting this appeal—have perpetuated the litigation with a series of successive and unsuccessful purported class actions on behalf of Genesco shareholders.

They began with a putative shareholder class action against Finish Line and UBS in the Tennessee Chancery Court. (A200-29.) They filed suit on October 9, 2007—while the Tennessee Action between Genesco and both Finish Line and UBS was pending—positioning shareholder Howard Lasker as the named plaintiff (the "Lasker Tennessee Action"). They claimed that every shareholder was the "intended third-party beneficiary to the Merger Agreement" and sought an injunction compelling the merger to go forward. (A202.) They then auditioned every conceivable claim against UBS. They accused UBS of "aiding and abetting" Finish Line's breach of the Merger Agreement. (A227.) Then, they recast their claim as "procurement of breach of contract." (A255.) Their complaint alleged that UBS had "target[ed] Genesco in hopes of escaping its obligation to finance the Merger," stopped work necessary to complete the merger and made unnecessary requests for information about Genesco's financial condition in order to prevent the merger from closing. (A218, 220-24.) They sought specific performance to force the very merger that Genesco ultimately abandoned. (A224-25.) They also sought to recover the merger premium—the difference between Genesco's share price and the price Finish Line agreed to pay. (A202-03, 224, 228.)

The Tennessee court dismissed Lasker's complaint on the ground that he had failed to state a claim under Tennessee law. (A266.) The court rejected Lasker's claim that Genesco shareholders were third-party beneficiaries, finding "no ambiguity" in the Merger Agreement's pronouncement that there were "No Third Party Beneficiaries." (*Id*.) Because there was no "contract status" for shareholders, they could not state a valid breach of contract claim against Finish Line and thus could not state a valid "procurement-of-bre[a]ch cause of action against UBS." (*Id*.) Allowing a shareholder to sue under the Merger Agreement, the court observed, would be "in derogation of th[e] bedrock principle that a corporation is governed by its Board of Directors." (A261.) But, the court emphasized, that did not deprive aggrieved shareholders of any remedy; shareholders dissatisfied with the board's actions could pursue derivative litigation against the board. Indeed, derivative litigation "seem[ed] particularly applicable in this case where we've got a merger that's stalled"; "the company should be speaking through its Board of Directors." (A260.) In light of its holding that Genesco shareholders had no relationship with Finish Line under the Merger Agreement, the court also rejected as "futile" the request to amend the complaint to assert a tortious interference claim against UBS. (A267.) Lasker appealed. (A268.)

The Second Genesco Shareholder Suit, Brought by the Same Attorneys in New York, Is Dismissed on Res Judicata Grounds

Undeterred, the same plaintiffs' lawyers proceeded to New York to file a second class action against UBS for the same named plaintiff (the "Lasker New York Action"), even as the Tennessee appeal was still pending. As Judge Sifton recognized, the Lasker New York Action "allege[d] essentially the same facts and [sought] the same relief" as the Lasker Tennessee Action. *Lasker v. UBS Sec. LLC*, 614 F. Supp. 2d 345, 355 (E.D.N.Y. 2008) ("*Lasker New York I*"). This time, they led with the claim that UBS "interfere[d] with an existing business relationship under the laws of the State of Tennessee" (A291)—the very "futile" claim that the Tennessee Chancery Court had refused to allow them to add in the Tennessee action (A267).

The court initially denied UBS's motion to dismiss for failure to state a claim. *Lasker New York I*, 614 F. Supp. 2d at 360. But then the district court dismissed the case on res judicata grounds. *Lasker v. UBS Sec. LLC*, No. 08-CV-854(CPS)(RER), 2009 WL 57137, at *10 (E.D.N.Y. Jan. 7, 2009) (*Lasker New York II*). By then, Lasker had voluntarily dismissed his Tennessee appeal and a final judgment was entered in the Lasker Tennessee Action. (A293, 295.) Accordingly, the court concluded that the Lasker Tennessee Action finally determined on the merits that Lasker could not establish any rights or relationship arising out of the Merger Agreement. *Lasker New York II*, 2009 WL 57137, at *5-6.

This Court affirmed that ruling in a summary order on December 21, 2009. This Court agreed that res judicata barred Lasker's New York claim, which in this Court's words rested on "strikingly similar allegations" to his Tennessee claim. (A792.) This Court rejected Lasker's remaining arguments as "without merit" (A793), including presumably the argument (briefed by Lasker) that shareholders had a business relationship with Finish Line.

Class Counsel Find a New Plaintiff and File an Identical Shareholder Suit, Which Is Dismissed on the Merits

Plaintiffs' counsel remained undaunted. They had a lifetime supply of plaintiffs—thousands of Genesco shareholders—from which to choose. They plucked Melvin Steinhardt from the masses and filed essentially the same class action complaint, just substituting Steinhardt's name in the caption. (A8, 14, 16-17.)

UBS moved to dismiss this third complaint on the ground that it failed to state a claim and was barred by res judicata. The district court rejected the res judicata argument (SPA 6-9), but granted UBS's motion to dismiss on the merits (SPA 18). It reasoned that Steinhardt could "not create a viable tortious interference claim based solely on the terms of a contract under which he has no rights." (SPA 13.) The court continued that "[w]ithout a relationship or right independent of those contained in the Merger Agreement, plaintiff is essentially attempting to prosecute a claim on behalf of Genesco." (*Id.*) But Genesco had "already sued to enforce its rights under the Merger Agreement" and obtained "reparation" for shareholders like Steinhardt. (SPA 13-14.)

Steinhardt now appeals.

SUMMARY OF ARGUMENT

I. Business Relationship. Steinhardt's single claim against UBS for tortious interference with a business relationship fails because he had no existing or prospective business relationship with Finish Line. The sole source of his alleged "business relationship" is the Merger Agreement. But that Agreement makes clear that Finish Line was to have no relationship with Genesco shareholders. Tennessee allows parties, at their choosing, to disclaim third-party beneficiary rights and enforces those disclaimers under all circumstances. In so doing, Tennessee follows the lead of numerous other states that have upheld "no third-party beneficiary" clauses in merger agreements by barring shareholders of the target company from suing when the merger falls apart, even under the guise of a tort claim.

Steinhardt has no other basis for alleging any business relationship with Finish Line. Certainly the mere fact that he held Genesco stock is not enough.

The tort under which Steinhardt sues exists to prevent individuals who engage in a legitimate business or profession from having that business harmed by illegal or unethical conduct. It does not provide relief for shareholders like Steinhardt who claim that they had expected a failed merger to turn their stock into cash. Steinhardt's attempt to find support in non-Tennessee case law is unavailing.

Upholding Steinhardt's claim would undermine longstanding principles of corporate law that vest sole authority in a corporation's board, and not its shareholders, to call off mergers and settle any resulting disputes. Indeed, Genesco's conduct here is emblematic of how corporate boards are in the best position to pursue relief for their shareholders. Genesco's board sued to enforce the merger and then, acting on the setbacks in the Insolvency Action, negotiated a global settlement that benefited all shareholders. This resolution is entitled to the finality it was intended to produce. Allowing contrived claims like Steinhardt's to proceed will undermine the ability of boards to settle merger disputes because their counterparts will know that the settlement will bring no peace; before the ink dries on the settlement agreement, any of the thousands of anonymous shareholders could pursue duplicative relief in tort.

II. Res Judicata. For similar reasons, Steinhardt's claim is also barred under the doctrine of res judicata. Under Tennessee law, Steinhardt is in privity with Lasker, who pursued the same claim seeking the same relief on behalf of the same class against the same defendant alleging the same wrongful conduct, with the same attorneys driving the respective lawsuits. This Court has already found that the dismissal of Lasker's Tennessee action barred Lasker's claim for tortious interference in New York. It should reach the same conclusion with respect to Steinhardt.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT STEINHARDT CANNOT ESTABLISH HIS CLAIM OF TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP BECAUSE HE HAD NO EXISTING OR PROSPECTIVE BUSINESS RELATIONSHIP WITH FINISH LINE.

A plaintiff cannot state a claim for tortious interference with a business relationship under Tennessee law unless he establishes either "[1] an existing business relationship with specific third parties or [2] a prospective relationship with an identifiable class of persons." *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002). Steinhardt alleged only an "*existing* business relationship." (A48 (emphasis added); SPA 12). But regardless, Steinhardt cannot meet either prong.

Steinhardt had no business with Finish Line and no relationship with Finish Line—and never would have either, even if the merger had been consummated. Steinhardt had never negotiated with Finish Line personnel, nor even had a discussion with them. So far as appears from the record, Steinhardt had never heard of Finish Line until he woke one morning, like thousands of other Genesco shareholders, to hear the news that his board had agreed to merge with Finish Line. But the Merger Agreement did not give him a business relationship with Finish Line—or even the hope of forming one prospectively. The agreement explicitly disclaimed any such relationship. The Merger Agreement signaled only the chance that he might, at some future date, receive cash in return for his extinguished shares—if, but only if, various contingencies were satisfied and both boards decided to proceed with the merger. But the expectation of receiving a check from an entity that is statutorily obliged to cut that check is not a business relationship of the sort that Tennessee law protects.

To find a business relationship here would radically expand the tort of tortious interference in Tennessee; gut established Tennessee contract law that gives definitive effect to a contract's stated intention to disclaim a relationship with a third party; and upend settled principles of corporate governance that empower a corporation's board of directors, not its shareholders, to manage mergers and merger litigation in the best interests of the company and all its shareholders. The district court correctly dismissed Steinhardt's complaint for failure to state a claim under Tennessee law.

A. The Merger Agreement Did Not Create an Existing Business Relationship Between Steinhardt and Finish Line, Where Finish Line Disclaimed Any Relationship With Him.

Steinhardt's central argument is that the Merger Agreement gave him "a valid, cognizable business relationship with Finish Line, which was to pay [him] $54.50 per Genesco share" in connection with "the Planned Merger." (OB 22.) The problem is that the very document Steinhardt invokes demolishes his position. Steinhardt cannot claim to have a business relationship with Finish Line arising from the Merger Agreement where that very same document reflects Finish Line's definitive renunciation of any intention to have a current or prospective business relationship with him or any other Genesco shareholder. The Merger Agreement could not have been any clearer when it declared, under the heading, "No Third-Party Beneficiaries," that the agreement was not "intended to [n]or shall confer upon ***any person other than*** [Finish Line], Merger Sub and [Genesco] … any right, benefit or remedy of any nature whatsoever under or by reason of this Agreement." (A116 (emphasis added).) Companies routinely adopt provisions like these precisely because they do not want shareholders claiming contractual rights or other expectancies springing from merger agreements. *See infra* pp. 42-46.

Tennessee courts give "dispositive weight" to such express intentions to "restrict the agreement to the parties" and to disclaim any relationship with anyone who is not a party to the contract. *Owner-Operator Indep. Drivers' Ass'n v. Concord EFS, Inc.*, 59 S.W.3d 63, 72 (Tenn. 2001). Under Tennessee law, "a person has the freedom or unfettered discretion to do business or not to do business with whomever he or she chooses for any reason that does not violate the law." *Watson's Carpet & Floor Covering, Inc. v. McCormick*, 247 S.W.3d 169, 178 (Tenn. Ct. App. 2007); *see Crumley v. Watauga Water Co.*, 41 S.W. 1058, 1059 (Tenn. 1897) (holding that "a person engaged in business may, at his election, and without good reason, refuse to deal with some other person"). Following this principle, courts "honor any expression of intent by the parties to reserve to themselves the benefits of the contract." *Owner-Operator*, 59 S.W.3d at 70; *AmSouth Erectors, LLC v. Skaggs Iron Works, Inc.*, No. W2002-01944-COA-R3-CV, 2003 WL 21878540 at *3 (Tenn. Ct. App. Aug. 5, 2003).

Steinhardt tacitly admits that this line of cases precludes him from bringing an action seeking to secure the anticipated benefits of the merger—at least under contract law. But he insists that he is nevertheless allowed to seek the same benefits under the same Merger Agreement, simply by recasting his claim as a tort claim. Tennessee law, however, prohibits such a sleight of hand. As the Tennessee Chancery Court held on identical facts, the Merger Agreement's "express intention to disclaim third-party beneficiary status" precludes shareholders from resorting to litigation to secure the benefits of the contract, regardless of whether the claim is framed in contract law or tort law. (A266.) The court understood that the Merger Agreement belongs to the corporation, not its shareholders. Shareholders like Steinhardt are not permitted to sue in tort for interference with a corporation's contract under which they have no rights. *See Koehler v. Cummings*, 380 F. Supp. 1294, 1314 (M.D. Tenn. 1971) ("The causes of action for inducing the breach of a contract right of [the corporation] … are enforceable only by [the corporation].").

The Tennessee Chancery Court's holding makes perfect sense. It would be perverse to allow Steinhardt to craft an actionable "business relationship" out of nothing but the very same contract that he cannot enforce. As one Tennessee court has explained, "it would be contrary to sound public policy to inadvertently extend a *greater* protection to relationships where the parties themselves are not bound (non-contractual) or where the existence of the relationship itself is uncertain (prospective relationships)" than to relationships that have been formalized in contract. *Watson's Carpet*, 247 S.W.3d at 177. To do so would obliterate contractual provisions that, like the Merger Agreement, declare "No Third Party Beneficiary," thereby defeating the legitimate expectations of the *real* parties to agreements by allowing outsiders to insinuate themselves into the contract under the guise of a unilateral "business relationship."

In keeping with these principles, Tennessee courts have repeatedly rejected similar attempts to circumvent the restrictions on third-party beneficiaries by recasting a contract claim as a claim of tortious interference with a business relationship. Particularly illustrative is *Strategic Capital Resources, Inc. v. Dylan Tires Industries, LLC*, 102 S.W.3d 603 (Tenn. Ct. App. 2002). There, as here, the plaintiff tried to prove a business relationship merely by pointing to a contract. But the problem there, as here, was that the plaintiff was not a party to the contract and the contract granted the plaintiff no rights. The plaintiff, therefore, could not state a claim for breach of that contract or inducing a breach of the agreement. *Id*. at 609-10. That being the case, the court held that the plaintiff was precluded from recasting its failed contract claim as a claim for tortious interference with a business relationship. *Id*. at 610 n.2. As the court explained, there was nothing "to indicate a business relationship between the parties *outside of the contracts*," and the plaintiff was not allowed to "convert those [failed contract] claims to claims for intentional interference with (*non-contractual*) business relationships." *Id*. (emphasis added).

To the same effect is *TIG Insurance Co. v. Titan Underwriting Managers, LLC*, No. M2007-01977-COA-R3-CV, 2008 WL 4853081 (Tenn. Ct. App. Nov. 7, 2008), which also rejected a tortious interference claim on the ground that the plaintiff could not show a business relationship arising out of a contract between two ***other*** parties. There, an insurance company had contracted with an agent to help enlist customers to buy policies. The insurance company terminated the contract and the agent sued, asserting that the insurer tortiously interfered with its relationships with the policyholders. *Id*. at *1-2. But the policyholders were not forming any relationship with the agent; instead, they contracted directly with the insurer. *Id*. at *4. Because the agent had no rights under the insurance contracts between the insurer and its policyholders, and would not be entering into any prospective contracts with the policyholders, it "failed to establish it had existing relationships with the specific clients with whom it claims [the insurance company] interfered." *Id*.

Steinhardt's claim of a business relationship with Finish Line is even weaker than the rejected claims in these two cases. The contract here is even more explicit in denying a relationship, and he had even less contact with Finish Line than the agent in *TIG* had with the defendant insurer's policyholders. If the plaintiffs in those cases could not "convert those [contract] claims to claims for intentional interference with (non-contractual) business relationships," *Strategic Capital*, 102 S.W.3d at 610 n.2, then neither can Steinhardt. The district court correctly captured Tennessee law when it held that Steinhardt "may not create a viable tortious interference claim based solely on the terms of a contract under which he has no rights." (SPA 13.)[2]

Steinhardt challenges this holding mainly by mischaracterizing it. He contends that the district court erred in concluding that he "had no cognizable business relationship with Finish Line" just because he "lacked standing to compel performance of the Merger Agreement." (OB 27.) He spills considerable ink proving that "Tennessee courts … have not required the pleading of an existing or

[2] Contrary to Steinhardt's assertion (OB 36), this is the law not just in Tennessee, but throughout the country, where court after court has found that shareholders are not third-party beneficiaries to corporate merger agreements. *See, e.g.*, *Riscorp, Inc. v. Norman*, 915 So. 2d 1142, 1150, 1152 (Ala. 2005) (merger with "no third-party beneficiary" clause barred shareholders from suing in tort after merger fell through because the clause meant that the shareholders had "*no legally enforceable right*" and thus lacked a "sufficient *interest* in the … merger consideration" (internal quotation marks omitted)); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 725 F. Supp. 712, 733 (S.D.N.Y. 1989) (shareholders not entitled to sue in tort as third-party beneficiaries because "[e]xplicit language in the Merger Agreement demonstrates that the parties specifically intended *not* to confer third-party beneficiary status"); *McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1091 (9th Cir. 2003) (former shareholders were not third-party beneficiaries of a merger agreement); *Grace Bros., Ltd. v. Farley Indus., Inc.*, 450 S.E.2d 814, 817 (Ga. 1994) (rejecting third-party beneficiary status for shareholders asserting tort claims where merger agreement stated it was "not intend[ed] to confer third-party beneficially status on anyone"); *Cities Serv. Co. v. Gulf Oil Corp.*, 797 P.2d 1009, 1012 (Okla Ct. App. 1990) (finding that the shareholders were "not in the legal sense third-party beneficiaries of the merger agreement" because of its "no third-party beneficiary" clause); *Matheny v. Ohio Bancorp*, No. 94-T-5022, 1994 WL 738734 at *3 (Ohio Ct. App. Dec. 30, 1994) (rejecting shareholder class action claim for damages arising out of failed merger where merger agreement expressly disclaimed third-party beneficiaries); *Brunswick Corp. v. Bush*, 829 S.W.2d 352, 356 (Tex. Ct. App. 1992) (same).

prospective contract" (OB 29)—that it is ***possible*** to prove a business relationship without proving an existing contract.

All that ink is wasted. The district court did not dismiss Steinhardt's complaint on the ground that Tennessee law requires proof that he had a contract with Finish Line. To the contrary, quoting extensively from the key Tennessee case, *Trau-Med*, the district court was clear that there need not be a contract in order to prove a business relationship. (SPA 12-13.) Rather, the district court observed that the cause of action could include *either* "prospective ***contractual*** [relations]" or "interference with a continuing business or other customary relationship ***not amounting to a formal contract***." (SPA 11-12 (quoting *Trau-Med*, 71 S.W.3d at 701 n.4 (internal quotation marks and citation omitted; emphasis altered)).) The problem with Steinhardt's claim was not just that he had no rights under the contract, but that (as in *Strategic Capital* and *TIG*) he had no business relationship *of any sort* with Finish Line. Not "existing," not "prospective," not "contractual," not "customary," not "quasi-contractual." (OB 24.) No relationship at all of any sort.

B. The Contingent Expectancy of the Proceeds of a Merger Is Not the Same as a Business Relationship with Finish Line—Existing or Prospective.

At points, Steinhardt's appellate brief casts his claim more in terms of a "prospective" relationship he would have enjoyed had the merger closed (OB 45) than an "existing" relationship he already had when the merger failed (OB 24). He argues, for example, in future-tense and conditional terms, that his "receipt of *contingent* compensation *to be paid* after completion of the Planned Merger is a valid business relationship." (*Id.* (emphasis added).) And he argues that he had a "valid *expectancy* to be paid" *if* the merger had gone through. (OB 44 (emphasis added).) This argument—which is inconsistent with what he alleged in his complaint—is wrong.[3]

Any "expectancy" Steinhardt harbored arose only from the Merger Agreement. Had there been no Merger Agreement, there would have been no "Planned Merger," no "compensation to be paid after completion" of the "Planned Merger" and, therefore, no "expectancy." So Steinhardt's theory is a cagey way of stating a claim under a contract that granted him no rights.

In any event, the fact that Steinhardt and thousands of other shareholders would have received a check in the mail in compensation for their extinguished shares *if the merger had been consummated* does not mean that they all would have had a business relationship with Finish Line—much less that they would have had the sort of business relationship that Tennessee law protects. Tennessee case

[3] Steinhardt's complaint alleges only an "*existing* business relationship" (A48 (emphasis added)), not a prospective one. As the district court pointed out, he "explicitly premised his claim" below on that prong. (SPA 12.)

law belies any such notion, *see infra* Point I.B.1., and the non-Tennessee cases Steinhardt cites do not justify a departure from established Tennessee law, *see infra* Point I.B.2.

1. The contingent prospect of receiving consideration for shares does not establish a business relationship under Tennessee law.

As the Tennessee Supreme Court long ago explained, the purpose of the tort of intentional interference with a business relationship is to protect the "right to establish and conduct a lawful business." *Hutton v. Watters*, 179 S.W. 134, 135 (Tenn. 1915). The focus is always on "redress for the harm caused by interference with one's ***business***," *Overland Indus. Lubricant Corp. v. Waynesboro*, No. 01-A-01-9412-CH00602, 1996 WL 47935 at *2 (Tenn. Ct. App. Feb. 7, 1996) (emphasis added), on remedying "malicious conduct [that] prevent[s] a third person from ***conducting business with*** the plaintiff," *Trau-Med*, 71 S.W.3d at 698 (emphasis added). The tort "always involves the protection of a ***voluntary*** relationship"—a relationship where the plaintiff and some other party wish to conduct business ***with each other***. *Watson's Carpet*, 247 S.W.3d at 185 (emphasis added). Accordingly, the cases always involve two elements that are missing here: (1) a plaintiff who is running a business; and (2) a defendant who has wrongly devastated the plaintiff's business by somehow undermining the desire of customers, agents, or other associates to do business with the plaintiff.

That was the scenario when the Tennessee Supreme Court first recognized the principles underlying the tort in *Hutton* nearly a century ago. The plaintiff was in a business: She operated a boarding house for students at a nearby school. 179 S.W. at 134. The school president had a beef with the plaintiff. So the school president launched a campaign to decimate the boarding house's business. He approached existing boarders—the boarding house's customers—and threatened that he would cut off various school benefits if they continued to patronize her establishment. *Id*. at 134-35. And he showed up at the train station to issue the same threat to incoming students, the plaintiffs' potential customers. Thus, the school president "destroyed, or practically destroyed, [the boarding house's] business" by intimidating its customers. *Id*. at 135.

The Tennessee Supreme Court confronted the same scenario when it formally adopted the tort in *Trau-Med*. The plaintiff there was running an ongoing business—a clinic. The clinic provided facilities and administrative services to doctors who treated uninsured patients—especially those who treated "indigent victims of trauma" who had "meritorious claims for personal injury." 71 S.W.3d at 695. The clinic had ongoing business relationships with local attorneys: The local attorneys sent their injured clients to the clinic for treatment, and the clinic relied on those referrals in running its business. *Id*. A big insurance company interfered directly and catastrophically with the clinic's business because it wanted to avoid paying the patients' claims: It placed the clinic on a "hit list" of clinics and threatened the attorneys who had ongoing relationships with the clinic that it would unleash "unnecessary and expensive litigation" if they continued to refer business to the clinic. *Id*. The insurance company thereby stanched the clinic's flow of patients.

That is the scenario in every Tennessee case upholding the tort of interference with business relationship. *See New Life Corp. of Am. v. Thomas Nelson, Inc.*, 932 S.W.2d 921, 922-23 (Tenn. Ct. App. 1996) (alleged interference with plaintiff's "business of selling Christmas music cassette tapes" when plaintiff's former president used plaintiff's confidential information to design marketing plans for defendant "to drive [plaintiff] out of business"); *Kan Constr. & Cleaning Corp. v. Tatum*, No. 01A01-9304-CV-00150, 1993 WL 434741 at *1-2 (Tenn. Ct. App. Oct. 27, 1993) (alleged interference with plaintiff's "business of cleaning and remodeling homes damaged by fire" through defendants' conspiring to persuade plaintiff's customers that plaintiff "engaged in poor or questionable business practices"); *Nashville Mem'l Hosp., Inc. v. Binkley*, 534 S.W.2d 318, 321 (Tenn. 1976) (alleged interference with plaintiff's "practice [of] his surgical specialty" by denying him privileges to practice in defendant's hospital). In approving the cause of action, the Tennessee Supreme Court furnished examples of the sorts of business relationships that are covered: "the prospect of obtaining employment or employees, the opportunity of selling or buying land or chattels or services, and other relations leading to potentially profitable contracts." *Trau-Med*, 71 S.W.3d at 701 n.4 (quoting Restatement (Second) of Torts § 766B, cmt. c (1979)). And the court cautioned against extending the theory beyond its origins for fear that it could "make actionable all lawful, competitive business practices" and thereby "greatly hamper free competition in the marketplace." *Id.* at 699 (quoting *Nelson v. Martin*, 958 S.W.2d 643, 646 (Tenn. 1997)). It even rejected a formulation that would have extended the cause of action not just to a "business relationship," but to any "business … expectancy." *Id.*

This case would fit the mold if Steinhardt wanted to set up a Finish Line franchise and UBS unfairly maligned him. Or if Steinhardt offered to sell a new brand of running shoes to Finish Line, and UBS threatened not to finance Finish Line deals if they carried his products. But Steinhardt's "expectancy" has nothing to do with any *business* that Steinhardt wishes to run, and he does not claim that UBS interfered with his independent relationship with an associate who wishes to do business with him. To the contrary, he claims UBS interfered with his relationship with a company (Finish Line) that made perfectly clear that it did not want to have *any* relationship with him—business or otherwise.

The conclusion does not change just because Steinhardt would have received a check for his extinguished shares if all the merger conditions had been satisfied and if the merger had closed. As an initial matter, contrary to Steinhardt's argument, Finish Line's obligation to pay for the shares would not have arisen because the "business relationship would have ripened into an enforceable contract" with thousands of individual shareholders after completion of the merger. (OB 45-46.) Nowhere does the Merger Agreement suggest that the merger would yield thousands of contracts between Finish Line and shareholders. And Steindardt cites no Tennessee statute or case suggesting that completion of the merger negotiated between two companies gives birth to thousands of individual contracts with shareholders where none previously existed.[4] Rather, as Steinhardt elsewhere acknowledges (OB 44), Finish Line's eventual obligation would have been statutory.

Contrary to Steinhardt's assertion, that statute (which he never quotes) does not create a business relationship. The statute provides that "[w]hen a merger becomes effective," the shares of the target are required to be "converted or exchanged," and the "former holders of such shares shall be entitled only to the

[4] Steinhardt cites (OB 46) only *Tooley v. Donaldson Lufkin & Jenrette*, 2003 Del. Ch. LEXIS 10 (Del. Ch. Jan. 21, 2003), *aff'd in part, rev'd in part on other gournds*, 845 A.2d 1031 (Del. 2004), which says no such thing. That case involved a tender offer directly to shareholders. *Id*. at *9-10. So in stark contrast to the Merger Agreement here—which expressly disclaimed any relationship with shareholders—in *Tooley*, from the start, the acquiring company was dealing directly with, and offering contracts directly to, the shareholders.

rights provided in the plan of merger." Tenn. Code Ann. § 48-21-108(a)(7). The point of the statute is to address the scenario where: (1) two companies proceed with a merger; (2) the target company then ceases to exist as a legal entity and its board is dissolved, *see id*. § 48-21-108(a)(1); but (3) in defiance of the merger agreement, the acquiring company absconds with the money without ever compensating the target company's shareholders for their extinguished shares. If that happens, the shareholders (lacking any relationship with the buyer) could end up without any remedy—but for this statute. On the one hand, since the shareholders are not intended third-party beneficiaries, they cannot sue the acquiring company ***under the contract*** to enforce its obligation to pay. On the other hand, since their old board no longer exists, the shareholders cannot pursue derivative claims against it to enforce their rights and the now-defunct board could not sue the acquiring company anyway. *See Denver Area Meat Cutters & Emp'rs Pension Plan ex rel. Clayton Homes, Inc. v. Clayton*, 120 S.W.3d 841, 850-51 (Tenn. Ct. App. 2003). Maybe even without the statute, the cheated shareholders would have a claim for unjust enrichment as Steinhardt argues—a "[q]uasi-contractual" claim that it would be "unjust" for "Finish Line to take control of Genesco and cancel all Genesco shareholders' interests without compensation." (OB 47.) But the statute obviates the need to make up an equitable claim that might not otherwise fit. The statute steps into the breach to provide a clear and unmistakable legal remedy.

In short, it is true that Steinhardt would have had the right to sue Finish Line (whether statutorily or in equity) ***if*** all the merger conditions had been satisfied, ***if*** the parties had continued to agree that the merger was mutually satisfactory, and ***if*** Finish Line had then illegally cheated him out of the proceeds to which he was entitled. But that right is not equivalent to an existing, or even a prospective, business relationship between two willing associates. It is a cause of action, to be leveled (in the unlikely event it becomes necessary) by the victim of a swindle against the swindler. Such an adversarial stance is the opposite of a business relationship. *See Fox v. Country Mut. Ins. Co.*, 7 P.3d 677, 690 (Or. Ct. App. 2000) (rejecting business relationship arising out of a lawsuit because "the essential purpose of the tort is to protect … voluntarily-created relationships" and "a civil lawsuit is an ***involuntary*** relationship that is ***adversarial*** in nature" which means the "integrity of an actual or putative ***mutually voluntary*** relationship is not implicated" (emphasis added)).

Steinhardt relies heavily (OB 36-37) on Judge Sifton's initial decision in *Lasker New York I*, 614 F. Supp. 2d 345 (E.D.N.Y. 2008), in the hopes of demonstrating that these facts give rise to the sort of business relationship that is protected by Tennessee law. But Judge Sifton did not even address the Merger

Agreement's explicit renunciation of any relationship between Finish Line and Genesco's shareholders nor the long line of Tennessee authority holding that contracting parties may, at their sole discretion, decline to create any relationship with third parties by virtue of their contract. Nor did Judge Sifton address any of the Tennessee cases discussed above. He ignored the Tennessee Chancery Court's ruling in the Lasker Tennessee Action that Genesco's shareholders could not claim a business relationship and did not have the benefit of *TIG*, which came down later. *See supra* pp. 25-26 (discussing *TIG*). Instead, believing that this was an issue of first impression under Tennessee law, Judge Sifton relied entirely on two non-Tennessee cases, which, for reasons explained immediately below, are inapposite and do not in any event affect Tennessee law. *See infra* pp. 38-41.[5]

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[5] Steinhardt asserts that "Finish Line admitted in open-court [sic.] … Genesco shareholders' relationship with Finish Line." (OB 44.) Steinhardt never explains how such an admission could bind UBS. But, in any event, as is confirmed by the passage Steinhardt quotes, Finish Line "admitted" only the point made immediately above—that *if the merger had proceeded*, the shareholders would have had "'a *statutory* right to get their merger proceed[s] …. They would have [an] absolute right to sue for that.'" (OB 44 (quoting A548-49) (emphasis added).) That is an admission of the legal consequences of cheating a target company's shareholders. But as Finish Line argued at length at the very hearing Steinhardt cites (A526-32), that is not the same as admitting a business relationship protected by Tennessee law.

2. Steinhardt's non-Tennessee authorities do not alter Tennessee law.

With Tennessee law starkly against him, Steinhardt invokes two non-Tennessee cases (the same two that Judge Sifton invoked). But neither provides any support for Steinhardt's claim.

Malpiede v. Townson, 780 A.2d 1075 (Del. 2001), is entirely unhelpful to Steinhardt because there the Supreme Court of Delaware *rejected* a claim of "tortious interference with business relations" by a target company's shareholders against an acquiring company. 780 A.2d at 1099-1100. The claim turned on allegations that the acquiring company misrepresented during the bidding process that it had a majority voting interest in the target company's shares. *Id.* The shareholders asserted that the misrepresentation deterred the target company's board from accepting superior bids from another suitor. The shareholders claimed they had a "reasonable probability of a business opportunity" with the other suitor by way of the "prospective opportunity to obtain a higher price for their shares." *Id*. at 1099. The court rejected the plaintiffs' claim simply because the acquiring company cured its misrepresentation before the board's final decision on which bid to accept. *Id*. That is all the *Malpiede* court held. It did not "hold[]," as Steinhardt would have it, "that a business relationship existed between the bidder and the corporate shareholder." (OB 38.) The court merely "assume[d], without deciding" that the other suitor represented a prospective opportunity on its way to upholding the dismissal of the claim. *Malpiede*, 780 A.2d at 1099.

Even if the court had made the holding Steinhardt attributes to it, it would not help Steinhardt here. Initially, the Delaware test does not require a "prospective contractual relationship" or an "existing customary or non-contractual relationship"—as Tennessee does—but only a "reasonable *probability* of" just any sort of "business opportunity." *Id.* at 1099 (emphasis added). Obviously, the latter is much easier to satisfy.

More importantly, the target company's shareholders were not suing to compel a merger agreement that their board had already decided to abandon; rather, they sued to protect a fair and active auction for their shares. As the district court here explained (SPA 16), the rights the shareholders were suing to protect were quite different from the right at issue here. The suit could easily have led to an opportunity for individual shareholders that was never available here. For example, by suing to ensure that the bidding process was free from improper interference, the shareholders could well have increased the chances that one of the bidders would structure its bid as a tender offer directly to the shareholders, or the bidding might have yielded a merger agreement under which third-party beneficiary rights were not disclaimed. *Cf. Cities Serv. Co.*, 797 P.2d at 1013 (noting that the corporation "has claims under the merger agreement while [shareholders] have claims under the tender offer”). Steinhardt does not and cannot allege that UBS interfered with the bidding for Genesco. Thus, the longstanding concerns about the sanctity of the bidding process are not present here.

Steinhardt’s reliance on *Harger v. Price*, 204 F. Supp. 2d 699 (S.D.N.Y. 2002), is equally misplaced. There, the target company was a closely held corporation with only six shareholders. The acquiring company entered into a merger agreement not just with the target company, but also directly with several of the target company’s shareholders. *Id.* at 701-03. In fact, because the target company had no board of directors, the shareholders were also the ones who negotiated the deal directly with the acquiring company. *Id*. at 703-04. The plaintiff was the sixth shareholder. He sued his five fellow shareholders, alleging that they had concealed the negotiations from him and improperly cancelled his shares to “cut [him] out of the … deal and thus to leave a smaller group among which to share the proceeds of the merger.” *Id*. at 707.

On those facts, the district court found that the plaintiff had sufficiently pled a “prospective economic advantage” between him and the acquiring company. But for the defendants’ improper conduct, the plaintiff would have participated along with his fellow shareholders in the negotiations and shared equally in the proceeds of a merger that was, in fact, consummated. As the district court here recognized

(SPA 17), the prospective advantage there was premised on the fact that, if the plaintiff had not been improperly deprived of his ownership rights in the company, he would have been an actual party and signatory to the merger agreement and would have had enforceable contract rights under that agreement. 204 F. Supp. 2d at 709. As the district court correctly explained, unlike the shareholders in *Harger*, the "Genesco shareholders did not negotiate with Finish Line and were not parties to the Merger Agreement. Hence, they had no business relationship with Finish Line with which UBS could have interfered." (SPA 17.) There is a big difference between shareholders who are integral participants in the negotiation and signatories to the deal and ordinary common stock holders who merely provide an up or down vote. *See, e.g., Brunswick Corp. v. Bush*, 829 S.W.2d 352, 353 & n.1, 356 (Tex. App. 1992) (holding that seven "Major Shareholders," who signed a separate agreement with the acquiring company in connection with the merger are treated as third-party beneficiaries with enforceable rights, but the remaining shareholders, who "were not necessary or integral participants in the merger" and merely stood to exchange their shares for a cash payment, had no rights under the merger agreement and thus could not sue for damages when the merger fell through).

C. Steinhardt's Claim Flouts Basic Principles of Corporate Law and Would Undermine Settlement of Merger Disputes.

To allow Steinhardt's tort claim to proceed would not only defy Tennessee tort law and contract law, but would flout basic principles of corporate governance. Steinhardt's claim boils down to a disagreement between him and his board. Steinhardt believes that Finish Line should have been compelled to complete the merger and pay shareholders their $54.50 per share. Genesco's board thought otherwise. Having litigated the issue as far as they saw fit—and faced with an imminent solvency trial that could have scuttled the merger with ***no compensation whatsoever***—the board determined that it was in the best interest of its shareholders to call off the merger in exchange for a financial settlement with Finish Line and UBS. The question is: Who gets to make that decision?

In Tennessee, the board has the authority to make that decision free from interference by shareholders or the plaintiffs' lawyers that often purport to represent their interests. There, as in all other states, boards have "broad management discretion" to manage and control corporations. *Lewis on behalf of Citizens Sav. Bank & Trust Co. v. Boyd*, 838 S.W.2d 215, 220 (Tenn. Ct. App. 1992); *see* Tenn. Code Ann. § 48-18-101. In particular, they have virtually unfettered authority to manage mergers and merger negotiations without shareholder interference. Tenn. Code Ann. § 48-21-102, 104(a). Shareholders have a single role in a merger transaction—an up or down vote following the board's approval of the plan of merger. *Id*. §§ 48-21-104(b), (c)(2), (e). Even after that vote, the board of directors can still abandon the merger transaction "***without action by the shareholders***." *Id*. § 48-21-106 (emphasis added).

In furtherance of their unfettered discretion, boards are entitled to structure merger discussions to ensure that shareholders cannot interfere with the management of the merger—just as the Genesco and Finish Line boards did here—by inserting clauses that explicitly deny third-party beneficiary rights. *See Boyd v. Sims*, 11 S.W. 948, 949 (Tenn. 1889) (finding it "clear that no stockholders should be permitted to interfere and control the management or frustrate the purposes of the corporation"). The purpose of such clauses is to "***avoid*** the collective action and agency problems that would result from giving shareholders standing to sue under the merger agreement." Ryan D. Thomas & Russel E. Stair, *Revisiting* Consolidated Edison—*A Second Look At The Case That Has Many Questioning Traditional Assumptions Regarding the Availability of Shareholder Damages in Public Company Mergers*, 64 Bus. Law. 329, 331-32 (2009) (emphasis added). Through such clauses, businesses involved in a merger can avoid having to "deal with hundreds of possible lawsuits all around the country from disgruntled target shareholders." 2 Lou R. King & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries & Divisions* § 15A.03 (2009). Boards insulate mergers from these sorts of interventions because boards are better positioned than individual shareholders to assess current conditions and make time-sensitive decisions as to whether any merger is—and remains—in the best interests of the company. And they are certainly better positioned than self-interested plaintiffs' lawyers to decide whether the company and its shareholders are better served by pursuing risky litigation to force a merger or accepting a handsome settlement. *See Lewis*, 838 S.W.2d at 220. The decision whether to pursue litigation to compel a merger, like all other litigation, "is necessarily reposed in the directors of a corporation." *Wallace v. Lincoln Sav. Bank*, 15 S.W. 448, 449-50 (Tenn. 1891). If the board elects not to pursue litigation, but to settle instead, "[i]t by no means follows that … any stockholder dissatisfied with such a decision [may] himself conduct the suit." *Id*.

That does not mean that a shareholder in Steinhardt's position is entirely without recourse when he disagrees with the board's judgment. Steinhardt has always had the option to file a derivative claim against Genesco's board. *See Lewis*, 838 S.W.2d at 221; Tenn. Code Ann. § 48-17-401. Because the remedy is "extraordinary," it is subject to several "threshold preconditions," *Lewis*, 838 S.W.2d at 221—preconditions that neither Steinhardt nor Lasker ever even tried to satisfy.

As the Tennessee Chancery Court recognized, allowing a shareholder to bypass ordinary procedures and bring his own lawsuit seeking further compensation for the failed merger would stand "in derogation of th[e] bedrock principle that a corporation is governed by its Board of Directors." (A260-61.) It would defy the rule that if the board elects to settle a litigation, a shareholder may not "himself conduct the suit" just because he is "dissatisfied with such a decision." *Wallace*, 15 S.W. at 449-50. And it would virtually preclude settlement of merger disputes like the one that precipitated this case, because defendants "could never know when a settlement, compromise, or adjustment was a finality, if the matter was subject to be overhauled as the suit of any discontented shareholder." *Id.* at 449-50.

That is why courts consistently block shareholders from insinuating themselves into litigations over unraveling mergers. *See, e.g.*, *Consol. Edison, Inc. v. Ne. Utils.*, 426 F.3d 524 (2d Cir. 2005) (rejecting shareholder attempt to intervene in merger breakup litigation between target and acquirer); *Bogart v. Israel Aerospace Indus., Ltd.*, No. 09 Civ. 4783 (LAP), 2010 WL 517582, at *4-5 (S.D.N.Y. Feb. 5, 2010) (shareholder lacks standing to bring claim for tortious interference with prospective economic advantage arising out of failed merger because the claim is properly viewed as derivative); *PI, Inc. v. Ogle*, No. 95 Civ. 1723 (JGK), 1997 WL 37941, at *4 (S.D.N.Y. Jan. 30, 1997) (same); *see also supra* p.26 n.2.

An action premised on interference with a business relationship is an especially inappropriate vehicle of shareholder intervention. In that context, the concern that the cause of action could "'greatly hamper free competition in the marketplace'" is especially pronounced. *Trau-Med*, 71 S.W.3d at 699 (quoting *Nelson*, 958 S.W.2d at 646). Boards need to make business decisions on behalf of *all* the company's shareholders and need the freedom to litigate and ultimately settle merger disputes with the promise of finality for all parties involved. These interests are hard enough to achieve in litigation between two boards; they are virtually impossible to achieve when subjected to the "cacophony that could arise with individual shareholders trying to enforce a [corporation's] contractual right." *Revisiting* Consolidated Edison, 64 Bus. Law. at 342 n.70 (internal quotation marks and citation omitted).

II. RES JUDICATA BARS THIS THIRD ATTEMPT BY THE SAME PLAINTIFFS' LAWYERS TO BRING THE IDENTICAL CLAIM FOR A GENESCO SHAREHOLDER.

This is now the third attempt by the same plaintiffs' lawyers to extract a duplicate award for a corporate dispute that Genesco's board already settled on behalf of its shareholders. Using what this Court itself described as "strikingly similar allegations," the same lawyers have—*three times*—asserted the *same* claim seeking the *same* relief on behalf of the *same* class of shareholders against the *same* defendant alleging the *same* wrong. This Court already determined that the lawyers' second attempt to relitigate that claim was barred by res judicata. (A788-94.) *Nothing* has changed since then—except for the name on the complaint.

This Court should dismiss Steinhardt's complaint for the same reason. Res judicata bars a repeat litigation under Tennessee law where (1) "a court of competent jurisdiction rendered the prior judgment," (2) "the prior judgment was final and on the merits," (3) "the same parties *or their privies*" were involved in both proceedings, and (4) "both proceedings involved the same cause of action." *Patton v. Estate of Upchurch*, 242 S.W.3d 781, 790 (Tenn. Ct. App. 2007) (emphasis added) (internal quotation marks omitted). This Court's res judicata holding in the *Lasker* appeal has already settled the first two elements of this test. (A792-93.) That same holding also settled the fourth element when this Court determined that the tortious interference with a business relationship claim asserted in the Lasker New York Action and repeated by Steinhardt here is the "same cause of action" for res judicata purposes as the one dismissed by the Tennessee court because it "arose out of the series of events leading up to and following the aborted merger between Genesco and Finish Line." (A793.) As the district court recognized (SPA 7 n.4), those conclusions apply with full force here, and Steinhardt cannot contest them. The only question concerns the third element—whether, on the facts of this case, Steinhardt is "in privity" with Lasker.

He clearly is.

A. Privity Depends Upon Whether the Two Parties Have the Same Interest in the Litigation.

"Privity" in Tennessee encompasses any situation where the parties share an "identity of interest" that "relates to the subject matter of the litigation." *Hutcherson v. Lauderdale Cnty.*, 326 F.3d 747, 759 (6th Cir. 2003). This simply means that the focus is not on whether the parties have a relationship with one another; it is on whether each party has a similar relationship to the litigation. *See Chance v. Gibson*, 99 S.W.3d 108, 111 (Tenn. Ct. App. 2002); *Phillips v. Gen Motors Corp.*, 669 S.W.2d 665, 669 (Tenn. Ct. App. 1984) (privity "does not embrace relationships between persons or entities, but rather … the subject matter of the litigation") (citing *Cantrell v. Burnett & Henderson Co.*, 216 S.W.2d 307 (Tenn. 1948)).

Two cases illustrate. The first is *Hutcherson v. Lauderdale County*, which involved a dispute arising out of a proposed landfill expansion that was denied under a zoning ordinance. Two plaintiffs—an individual and the company operating the landfill—challenged the denial in state court and lost. Then, the company that owned the property entered the picture and filed a federal civil rights action, along with the first two plaintiffs. The court held that the new plaintiff could not escape res judicata. Even though the new plaintiff was not a party to the prior action, "privity exist[ed] for purposes of Tennessee law" because that plaintiff "brought claims seeking the same relief" and sought to advance "the very same interest" as the parties to the state court case. 326 F.3d at 759-60.

The other case is *Cotton v. City of Memphis*, 1985 Tenn. App. LEXIS 3164 (Tenn. Ct. App. Sept. 24, 1985), which involved a finding of privity with even *less* similarity between the two plaintiffs. The case involved a company that sought to build a group home without obtaining a special use permit. *Id*. at *1-2. A neighbor brought a lawsuit seeking to enjoin the construction. *Id*. at *2-3. That case was dismissed for failure to exhaust administrative remedies. A second neighbor, in all other respects unrelated to the first, filed a separate action seeking the same relief. *Id*. at *3. The court found that the two neighbors were in privity because, as neighbors of the proposed building, they "possessed identical relationships to the subject matter of the litigation" and "each brought claims seeking the same relief." *Id*. at *6.

The district court incorrectly discounted the "relevance" of *Cotton* as "unclear" because it involved collateral estoppel, not res judicata. (SPA 8.) Tennessee cases leave no doubt that parties in privity for collateral estoppel purposes are in privity for res judicata; the analysis is one and the same. *Cotton*, 1985 Tenn. App. LEXIS 3164, at *6 ("Privity as used in the context of *res judicata* ***or*** collateral estoppel concerns not the relationship between persons, but rather the persons' relationship to the subject matter of the litigation." (emphasis added));

Tenn. ex rel. Cihlar v. Crawford, 39 S.W.3d 172, 180 (Tenn. Ct. App. 2000) ("In the context of ***both*** *res judicata* and collateral estoppel, the concept of privity relates to the subject matter of the litigation, not to the relationship between the parties themselves." (emphasis added) (internal citations omitted)); *Harris v. St. Mary's Med. Ctr., Inc.*, 726 S.W.2d 902, 905 (Tenn. 1987) (meaning of privity under res judicata or collateral estoppel is the same because collateral estoppel is merely "an extension of the principle of *res judicata*").

B. Steinhardt Is in Privity with Lasker.

Under these cases, Steinhardt and Lasker are plainly in privity. First, as in *Hutcherson* and *Cotton*, they brought claims seeking the same relief to protect the same interest. Both seek to compel UBS to pay the merger premium to ***all*** Genesco shareholders. And, as Genesco shareholders, they share a much closer relationship to the subject matter of the litigation than did the plaintiffs in *Cotton*. Both base their claims on a "relationship" with Finish Line that, if there were one at all, would unquestionably be shared equally by all Genesco shareholders. Neither Steinhardt nor Lasker alleged any unique relationship with Finish Line or any unique harm caused by UBS.

Second, and relatedly, as the district court and the Tennessee Chancery Court recognized, both suits are efforts to prosecute what is at bottom a derivative claim ***belonging to Genesco***. (SPA 13 (Steinhardt, like Lasker, is "essentially attempting to prosecute a claim on behalf of Genesco, the party to the Merger Agreement"); A260-61 (Lasker's claim was "in derogation of th[e] bedrock principle that a corporation is governed by its Board of Directors" and the proper avenue to seek relief was to "speak or act through a derivative suit").) Lasker himself admitted as much when he showed up in Tennessee Chancery Court seeking the ***exact same*** relief as Genesco—"that the Merger be consummated in accordance with its terms" (A228)—and asking the Court to join his lawsuit with Genesco's (A262). The harm the Genesco shareholders claim to have suffered—the failure of the merger—is the same harm that befell Genesco.

That claim is the very definition of a derivative claim, "a suit to right a wrong done to the corporation," as opposed to an injury "directly to [individual shareholders] *distinct* from that incurred by the corporation and arising out of a *special duty* owed to the shareholders by the wrongdoer." *Hadden v. City of Gatlinburg*, 746 S.W.2d 687, 689 (Tenn. 1988) (emphasis added); *see also PI*, 1997 WL 37941, at *4 (a shareholder's claim that the defendant tortiously interfered with a merger, "depriv[ing]" the shareholder "of the opportunity to profit from the merger," is a derivative claim that belongs to the company).

Courts in shareholder derivative actions have long held that the "corporation *and all nonparty shareholders*" are all "privies" in a suit on behalf of the corporation, *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) (emphasis added), because "the named plaintiff represented [all] their interests in the case," *In re Sonus Networks, Inc.*, 422 F. Supp. 2d 281, 291(D. Mass. 2006) (internal citations and quotation marks omitted), *aff'd in part, rev'd in part on other grounds*, 499 F.3d 47 (1st Cir. 2007). *See also Lockhart v. Moore*, 159 S.W.2d 438, 445 (Tenn. Ct. App. 1942) ("A stockholder is so in privity with, and represented by, the corporation that he is bound by a judgment against the corporation in so far as it deals with corporate rights and liabilities and affects the stockholders as a body." (citation omitted)). That privity among the company, the named plaintiff, and the remaining shareholders means that judgments in derivative actions have "preclusive effect … upon subsequent actions brought by stockholders who were not plaintiffs in the original action." *Henik v. LaBranche*, 433 F. Supp. 2d 372, 380 (S.D.N.Y. 2006); *Cramer v. Gen. Tel. & Elec. Corp.*, 582 F.2d 259, 266-67 (3d Cir. 1978) (same).

Third, "the appearance of the same attorney in both actions," of course, "creates the impression that the interests represented are identical." *Conte v. Justice*, 996 F.2d 1398, 1402 (2d Cir. 1993). The district court was correct when it observed that representation by the same attorney is not, *on its own*, "cause to impose *res judicata*." (SPA 9.) But where, as here, the same plaintiffs' lawyers represent different shareholders bringing *identical* lawsuits one after another, the complete identity of plaintiffs' counsel is a factor "of 'singular significance'" weighing heavily in favor of finding res judicata. *Pharr v. Evergreen Garden, Inc.*, 123 F. App'x 420, 424 (2d Cir. 2005) (quoting *Ruiz v. Comm'r of Dep't of Transp.*, 858 F.2d 898, 903 (2d Cir. 1988)). That is especially so because both suits purport to represent the interests of *all* shareholders; the plaintiffs are "mere figureheads, and the real reason for bringing such actions remains the [lawyers'] quest for attorney's fees." *In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 237 n.8 (S.D.N.Y. 2005) (internal quotation marks omitted); *see also Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002) (observing that counsel, not the individual plaintiff, "direct and manage these actions" and that "[e]very experienced federal judge knows that any statement[] to the contrary is sheer sophistry") (internal quotation marks omitted).

Contrary to the district court's view, due process does not require the courts to override Tennessee's rule, at least not as applied in the unique circumstances presented here. (SPA 8-9 (citing *Richards v. Jefferson Cnty.*, 517 U.S. 793, 801 (1996); *Taylor v. Sturgell*, 128 S. Ct. 2161, 2172 (2008)).) No court has ever so much as suggested that due process requires the courts to allow the same group of lawyers to file identical claims on behalf of the same group of shareholders seeking the same relief over and over again until they run out of shareholders to present as named plaintiffs. Especially where, as here, the shareholders are presenting claims that actually belong to the company—and the company has already litigated and settled those very claims—courts are not required to tolerate endless successive actions. Where such derivative claims are at issue, the true party in interest is the corporation, and the issues in both lawsuits are "the same no matter which shareholder served as nominal plaintiff." *In re Sonus Networks, Inc.*, 499 F.3d 47, 64 (1st Cir. 2007); *accord Kaplan v. Bennett*, 465 F. Supp. 555, 560 (S.D.N.Y. 1979) (in applying res judicata "the court looks to the identity of the real party in interest, the corporation, rather than to the identity of the nominal party seeking to champion the corporate claim"). "This structural fact about derivative litigation"—i.e., that the corporation, not the shareholder plaintiff, is the real party in interest—"makes irrelevant questions of 'virtual representation'" of the sort that *Taylor* addressed. Deborah A. DeMott, *Shareholder Derivative Actions* § 4:19, at 4-244 (2003). It is thus well settled that defendants in this context are entitled to invoke the ordinary res judicata rules governing derivative claims without having to demonstrate that the particular plaintiff who happens now to be pressing the duplicative claim received notice of the earlier action. *See, e.g., Cramer*, 582 F.2d at 265, 267-69 (finding that res judicata bars a derivative claim that duplicates a previous derivative claim dismissed on the merits on a 12(b)(6) motion without notice to the class, in contrast to a claim voluntarily dismissed by the plaintiff, which has no preclusive effect absent notice); *see also Yankton Sioux Tribe v. U.S. Dep't of Health & Human Servs.*, 533 F.3d 634, 640-41 (8th Cir. 2008) (applying

Taylor and holding that "lack of notice could be overcome" where subsequent plaintiff's "interests in this action derive solely from his status as an individual member" of a collective group, and earlier member of the same group had litigated identical interests to a judgment on the merits).

The only concern in a duplicative derivative case is whether the prior representation was adequate. *Cf. Taylor*, 553 U.S. at 894 (acknowledging the propriety, "in certain limited circumstances," of applying res judicata to a non-party who was "adequately represented by someone with the same interests who [wa]s a party" to the suit (quoting *Richards*, 517 U.S. at 798)). This is not a high bar; as applied to derivative claims, the adequacy standard seeks to prevent "collusion between the nominal plaintiff and the defendants." *Sonus*, 499 F.3d at 64. There is no possible allegation of inadequate representation in the Lasker cases. Lasker did not reach a collusive dismissal with UBS, but instead litigated his claims to resolution on the merits on behalf of all Genesco shareholders. And Steinhardt employed ***the exact same counsel*** to represent the Genesco shareholders' interests in this case. This is far from the sort of "extreme application[] of the doctrine of res judicata" that the Supreme Court has cautioned against. *Richards*, 517 U.S. at 797; *see also Taylor*, 553 U.S. at 900 (stating only that "adequate representation *sometimes* requires … notice" (emphasis added)).[6]

There were nearly 23 million shares of Genesco common stock outstanding in the relevant timeframe (A16), held by thousands of shareholders. If res judicata does not bar this action, there is nothing to stop the same lawyers from bringing thousands of repeat identical claims—with respect to this controversy and hundreds of others. *See Ruiz*, 858 F.2d at 902 (upholding broad application of res judicata where, in its absence, "defendants could be subject to an overwhelming number of suits arising out of the same series of transactions"). In such circumstances, "[w]hen an asserted claim is ***identical*** to one that has been previously litigated, relitigation may be barred to conserve judicial resources and to allow the prevailing party to enjoy the benefits of the victory and avoid further costs." *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 (2d Cir. 1995) (emphasis added). Given the ***complete*** identity of interest between the two

[6] *Taylor* decided what res judicata rules federal courts should apply under *federal common law* in federal-question cases. 553 U.S. at 896, 904. In doing so, the *Taylor* Court specifically noted that state law continues to control res judicata rules in diversity cases like this one. *See id*. at 896 n.4. And while any such state law rules obviously must comply with the constraints of due process, the Supreme Court nowhere suggested that its decision categorically overrode an "identity of interest" standard as applied by states like Tennessee or that it in any way upset the ordinary rules governing the application of res judicata to shareholder derivative claims.

plaintiffs—and between the plaintiffs and the company itself—UBS should not be forced to "indefinitely relitigate" these issues "in an unlimited number of state and federal courts, a result the preclusion doctrine specifically is aimed at avoiding." *Henik*, 433 F. Supp. 2d at 380.

CONCLUSION

For the foregoing reasons, this Court should affirm the dismissal of Steinhardt's complaint.

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New York, New York

Respectfully submitted,

/s/E. Joshua Rosenkranz
E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019-6142
(212) 506-5000

Counsel for Defendants-Appellees

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,390 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: December 1, 2010

/s/E. Joshua Rosenkranz
E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019-6142
(212) 506-5000

CERTIFICATE OF SERVICE

CAPTION: Melvin Steinhardt v. UBS Securities LLC

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I, E. Joshua Rosenkranz, hereby certify under penalty of perjury that on December 1, 2010, I served a pdf copy of the Brief for Defendants-Appellees by using CM/ECF system on the following parties:

David C. Katz
Joseph H. Weiss
Weiss & Lurie
551 Fifth Avenue
New York, NY 10176
(212) 682-3025

Jules Brody
Patrick Slyne
Stull, Stull & Brody
6 East 45th Street
New York, NY 10017
(212) 687-7230

Appellant's Counsel

Dated: December 1, 2010

/s/E. Joshua Rosenkranz
E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019-6142
(212) 506-5000

OHS West:261037870.4