IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: ACS SHAREHOLDERS LITIGATION	:	C.A. No. 4940-VCP

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO PROCEED IN ONE JURISDICTION

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PRELIMINARY STATEMENT

Defendants in *City of St. Clair Shores Police & Fire Retirement System v. Affiliated Computer Services, Inc.*, et al. (No. CC-09-07377-C), *Delgato v. Deason*, et al. (No. 09-13476), *International Union of Operating Engineers Local 825 Pension Fund v. Affiliated Computer Services, Inc.*, et al. (No. 09-13836), *Levy v. Affiliated Computer Services, Inc.*, et al. (No. CC-09-07393-C), *Rahe v. Affiliated Computer Services, Inc.*, et al. (No. 09-13786), *Steward Large Cap Enhanced Index Fund v. Affiliated Computer Services, Inc.*, et al. (No. CC-09-07402-C), *York County Employees' Retirement Board v. Affiliated Computer Services, Inc.*, et al. (No. 09-13775) (the "Texas Actions," appended hereto as Exhibits 1-7), consolidated in the County Court at Law No. 3, Dallas County, Texas, and *New Orleans Employees' Retirement System v. Deason*, et al. (C.A. No. 4940-VCP) and *Sheet Metal Workers Local 28 v. Affiliated Computer Services, Inc.*, et al. (C.A. No. 4933-VCP) (appended hereto as Exhibits 8-9), consolidated as *In re ACS Shareholder Litigation* (C.A. No. 4940-VCP) in the Court of Chancery in the State of Delaware (the "Delaware Action," and, together with the above-captioned Texas Actions, the "Actions"), respectfully submit this Memorandum in Support of Defendants' Motion to Proceed in One Jurisdiction (the "Motion"), which is being filed concurrently in both the Delaware and Texas Actions.

The Actions in both courts all seek to raise claims arising under Delaware corporate law in connection with the recent decision of Affiliated Computer Services, Inc. ("ACS") and its board of directors to enter into a merger agreement with Xerox Corporation ("Xerox"). All of the Actions are raised on behalf of the identical putative class of ACS shareholders against a substantially identical group of defendants and raise substantively identical claims arising out of the exact same facts. Defendants respectfully submit that they

should only have to defend against these claims in a single forum, thereby avoiding the substantial risk of inconsistent results, the significant costs and burdens of duplicative discovery and a waste of judicial resources.

The relief defendants seek is simple, efficient and forum neutral: an order that would have the effect of requiring the purported representatives of the plaintiff class to prosecute their claims in a single court, subject to the controlling rulings of a single judge. The laws of both Texas and Delaware grant courts wide discretion to dismiss or stay actions to prevent the burdens that necessarily result from identical lawsuits proceeding in two jurisdictions simultaneously. These burdens would be unavoidable and extraordinary in these circumstances. The Actions concern a multibillion dollar merger proposal that will impact tens of thousands of shareholders and would provide ACS shareholders with a substantial premium to the undisturbed market price of ACS Class A shares. The lawsuits surrounding this merger proposal will be accelerated and intensive. They will involve significant pre-trial motion practice and substantial discovery—including extensive document production, depositions and likely expert disclosures. Given these facts, the interests of all litigants—including defendants and the class of ACS shareholders that all plaintiffs purport to represent—and the judicial system weigh heavily against permitting identical complex lawsuits to proceed in two jurisdictions simultaneously.

Given plaintiffs' likely claims and proposed relief, there will be a substantial risk of inconsistent judgments should multiple courts hear parallel litigations concerning the same facts and claims. Indeed, those courts could issue conflicting permanent or temporary injunctions, which would require defendants to take inconsistent actions and would likely cause substantial market confusion regarding the status of the proposed merger. The Delaware Court before which the Delaware Action has been consolidated has recognized this risk of inconsistent

judgments, and has accordingly certified a class of all ACS shareholders—a class identical to the class that plaintiffs in the Texas Actions purport to represent—and found that doing so was appropriate to avoid a "risk of inconsistent or varying adjudications." (10/21/09 DE Hr'g Tr. at 8:22-9:1, appended hereto as Ex. 10.)

As is discussed below, defendants believe that, based on current law in both jurisdictions, Delaware is the appropriate forum to hear this dispute. It is conceded by all parties that Delaware law applies to both the Texas and Delaware Actions, all of which concern the Delaware-law fiduciary duties of ACS's directors. *See* Tex. Bus. Corp. Act Art. 802; *infra* II(A). Delaware courts have special expertise in matters of Delaware corporate law, and have a strong interest in the clear and consistent application of the legal principles that they have developed. Additionally, the Delaware Supreme Court—which makes itself available for direct appeals on an expedited basis to litigants in Delaware fiduciary duty cases of this kind—is the only court with authority to issue final rulings on otherwise unresolved issues of Delaware corporate law. Further, no plaintiff has alleged that it is located in Texas, and each plaintiff is in fact represented by non-Texas counsel. No plaintiff appears to have any substantial interest in litigating in Texas rather than Delaware. For these reasons, defendants submit that Delaware presents the more efficient forum for the Actions.

However, defendants wish to note that they make this motion only to facilitate an orderly and efficient resolution of the claims that have been brought against them in connection with the proposed ACS-Xerox transaction. Defendants' overriding interest is in not being subject to duplicative litigation against the same shareholder class regarding the same transaction in two courts. Defendants will litigate all claims in either Texas or Delaware, and will raise no objection to the appearance of the Texas plaintiffs in the Delaware Action or the Delaware

plaintiffs in the Texas Actions. Nor would defendants oppose the formation of a single leadership structure among plaintiffs' counsel that includes both Texas and Delaware plaintiffs, as the plaintiffs' failure to coordinate with one another only inhibits the efficient administration of the shareholder litigation challenging the proposed transaction.

Defendants respectfully submit that a single court should administer these identical litigations. Accordingly, defendants request the aid of both courts in achieving that outcome.

STATEMENT OF FACTS

ACS is a Delaware corporation headquartered in Dallas, Texas. (*City of St. Clair Shores* Compl. ¶ 14, *York County* Compl. ¶ 5.) Xerox is a New York corporation headquartered in Norwalk, Connecticut. (*City of St. Clair Shores* Compl. ¶ 15, *York County* Compl. ¶ 6.) On September 28, 2009, ACS and Xerox announced publicly that their respective boards had agreed to a merger of ACS with a wholly-owned Delaware subsidiary of Xerox, pending the approval of ACS and Xerox shareholders. The consideration being offered in the transaction represented a market premium of nearly 34% to ACS shareholders as of the day of announcement.

A. The Delaware Action.

In the days following the announcement of the transaction, two lawsuits were filed by ACS shareholders in the Delaware Court of Chancery challenging the merger, and seven nearly identical lawsuits were filed in various Dallas County District and County Courts. The first four lawsuits (the two Delaware Actions and two of the Texas Actions) were filed within 24 hours of each other.[1] Although plaintiffs in both the Texas and Delaware Actions have served

[1] The near-simultaneous filing of these four lawsuits in different jurisdictions is notable. Numerous courts, including the Delaware Chancery Court, have recognized that lawsuits filed within days of each other – particularly representative lawsuits like purported class actions – are typically treated as contemporaneously filed, thereby eliminating any reliance on the first-filed

duplicative discovery requests and seek duplicative relief, the Delaware Action has progressed substantially to date. On unopposed motion, Vice Chancellor Parsons ordered the consolidation of the Delaware Action on October 7, 2009, and appointed lead plaintiffs and co-lead counsel. (*See* 10/7/09 DE Order, appended hereto as Ex. 11.) One of the lead plaintiffs in the consolidated Delaware Action holds over 1 million ACS shares—substantially more than any other plaintiff in these Actions. On October 7, the Delaware Court also entered a scheduling order establishing a discovery protocol for the Delaware Action and setting a date certain for a preliminary injunction hearing. (*See id.*) The parties to the Delaware Action have propounded document requests and interrogatories upon one another (*see* DE Pls.' Document Requests & Interrogatories, appended hereto as Exs. 12-17), and defendants have commenced a rolling document production.

On October 19, plaintiffs in the Delaware Action moved to certify a class of all holders of ACS Class A common stock as of September 27, 2009. On October 21, the Delaware Court certified that class, ruling that "the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class." (10/21/09 DE Hr'g Tr. at 8:23-9:4.) The Delaware Court also noted that the Texas and Delaware Actions all concern the "operations of a Delaware corporation

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rule of dominant jurisdiction. *See, e.g.*, *In re Bear Stearns Cos. S'holder Litig.*, C.A. No. 3643-VCP, 2008 Del. Ch. LEXIS 46, at *17-18 (Del. Ch. Apr. 9, 2008) (holding cases filed three days apart as "contemporaneous filings"); *County of York Employees Ret. Plan v. Merrill Lynch & Co.*, C.A. No. 4066-VCN, 2008 Del. Ch. LEXIS 162, at *7-8 (Del. Ch. Oct. 28, 2008) (holding cases filed three days apart as "contemporaneous filings" and stating that "[a]ctions filed close in time to each other are considered simultaneously filed in order to avoid encouraging a race to the courthouse"); *Capitol Records, Inc. v. Optical Recording Corp.*, 810 F. Supp. 1350, 1355 (S.D.N.Y. 1992) (stating that "the date of filing is less important when the competing actions are filed within a short period of time").

and a transaction involving a Delaware corporation of significant magnitude, here in the billions of dollars" (*id.* at 10:1-3) and raise "important issues of Delaware law." (*Id.* at 10:4-5.)

B. The Texas Actions.

On October 13, the *City of St. Clair Shores* plaintiff and the *York County* plaintiff filed separate submissions to different District and County courts in Texas. These plaintiffs sought to have their respective lawyers appointed lead counsel, and both plaintiffs sought to consolidate all related actions in their respective courts. On October 22, the York County plaintiff filed a motion in the Dallas County District Court to certify a class of all record and beneficial holders of ACS Class A common stock as of September 27, 2009. On October 23, the County Court at Law No. 3 for Dallas County ordered that the Texas Actions be consolidated, appointed lead counsel for those Actions and set a date certain for a temporary injunction hearing. However, no discovery has occurred in the Texas Actions and no class has been certified.

C. Plaintiffs In The Delaware And Texas Actions Assert Identical Claims.

The Delaware and Texas Actions arise from identical facts, assert substantially identical claims, and seek the same basic relief on behalf of the same purported class of ACS shareholders. Thus, for example, the pleadings:

- arise out of the proposed merger between ACS and Xerox, *compare Sheet Metal Workers* Compl. ¶ 1, *New Orleans* Compl. ¶ 1, *City of St. Clair Shores* Compl. ¶ 2, *Delgato* Compl. ¶ 2, *Int'l Union of Operating Engineers* Compl. ¶ 3, *Levy* Compl. ¶ 1, *Rahe* Compl. ¶ 1, *Steward Large Cap Fund* Compl. ¶ 2, *York County* Compl. ¶ 1;

- were filed by purported ACS stockholders, *compare Sheet Metal Workers* Compl. ¶ 5, *New Orleans* Compl. ¶ 11, *City of St. Clair Shores* Compl. ¶ 13, *Delgato* Compl. ¶ 7, *Int'l Union of Operating Engineers* Compl. ¶ 8, *Levy* Compl. ¶ 4, *Rahe* Compl. ¶ 5, *Steward Large Cap Fund* Compl. ¶ 13, *York County* Compl. ¶ 4;

- bring claims on behalf of a putative class consisting of all public shareholders of ACS, other than those related to or affiliated with defendants, *compare Sheet Metal Workers* Compl. ¶ 22, *New Orleans* Compl. ¶ 71, *City of St. Clair Shores* Compl. ¶ 36, *Delgato* Compl. ¶ 19, *Int'l Union of Operating Engineers* Compl. ¶ 25, *Levy* Compl. ¶ 12, *Rahe* Compl. ¶ 22, *Steward Large Cap Fund* Compl. ¶ 36, *York County* Compl. ¶ 16;

- allege that ACS's directors breached their fiduciary duties in connection with the merger, *compare Sheet Metal Workers* Compl. ¶ 79, *New Orleans* Compl. ¶ 83, *City of St. Clair Shores* Compl. ¶ 46, *Delgato* Compl. ¶ 37, *Int'l Union of Operating Engineers* Compl. ¶ 96, *Levy* Compl. ¶ 30, *Rahe* Compl. ¶ 62, *Steward Large Cap Fund* Compl. ¶ 46, *York County* Compl. ¶ 71;

- allege that the consideration for the proposed merger is inadequate, *compare Sheet Metal Workers* Compl. ¶ 58, *New Orleans* Compl. ¶ 9, *City of St. Clair Shores* Compl. ¶ 35, *Delgato* Compl. ¶ 34, *Int'l Union of Operating Engineers* Compl. ¶ 73, *Levy* Compl. ¶ 22, *Rahe* Compl. ¶ 44, *Steward Large Cap Fund* Compl. ¶ 33, *York County* Compl. ¶ 44;

- allege that certain provisions of the merger agreement deter third-party bids, *compare Sheet Metal Workers* Compl. ¶ 55, *New Orleans* Compl. ¶ 57, *City of St. Clair Shores* Compl. ¶ 7, *Delgato* Compl. ¶ 32, *Int'l Union of Operating Engineers* Compl. ¶ 70, *Levy* Compl. ¶ 23, *Rahe* Compl. ¶ 43, *Steward Large Cap Fund* Compl. ¶ 7, *York County* Compl. ¶ 44;

- seek to enjoin the proposed merger, *compare Sheet Metal Workers* Compl. ¶ 4, *New Orleans* Compl. ¶ 10, *City of St. Clair Shores* Compl. ¶ 10, *Delgato* Compl. ¶ 6, *Int'l Union of Operating Engineers* Compl. ¶ 94, *Levy* Compl. ¶ 1, *Rahe* Compl. ¶ 4, *Steward Large Cap Fund* Compl. ¶ 10, *York County* Compl. ¶ 3.

Since the Actions were filed, defendants have communicated to plaintiffs in both the Texas and Delaware Actions that the interests of the litigants, the putative class and judicial economy all require that these identical claims be litigated in one jurisdiction and be subject to the controlling authority of a single court. Plaintiffs have not agreed to coordinate their actions and proceed in a single forum but have instead insisted on prosecuting duplicative actions in Texas and Delaware.

ARGUMENT

I. THE ACTIONS SHOULD PROCEED IN ONE FORUM ONLY.

Defendants should have to defend against plaintiffs' allegations in one court, not two. There is no justification in law, logic or policy for burdening two courts with identical challenges to a multibillion dollar merger, pressed by identical putative classes of plaintiffs against identical defendants. Yet that is the result that plaintiffs seek. In order to avoid this plainly problematic outcome, defendants seek a determination – made collectively by the two courts – as to which court should oversee these identical cases.

A. Both The Texas And Delaware Courts Have The Authority To Dismiss Or Stay The Texas And Delaware Actions.

There is no question that each of the courts involved here has the authority to dismiss or stay cases before it. In Texas, "[t]he power to temporarily stay a lawsuit 'is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *In re Messervey Trust*, No. 04-00-00700-CV, 2001 Tex. App. LEXIS 430, at *8 (Tex. App.—San Antonio Jan. 24, 2001, no pet.) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (not designated for publication)); *see also In re State Farm Mut. Auto. Ins. Co.*, 192 S.W.3d 897, 901 (Tex. App.—Tyler 2006, orig. proceeding) (stating that "it is generally appropriate for courts to apply the principle of comity where another court has exercised jurisdiction over the matter and where the states agree about the public policy at issue"). A Texas court, therefore, may stay an action "based on considerations of docket control, comity, or inconsistent rulings." *In re Messervey Trust*, 2001 Tex. App. LEXIS 430, at *8.

Delaware courts strongly disfavor staying litigation involving the fiduciary duties of Delaware directors absent compelling circumstances. *See, e.g., In re Topps Co. S'holders*

Litig., 924 A.2d 951, 953 (Del. Ch. 2007) (denying stay of putative shareholder class action, despite earlier-filed actions in New York, in recognition of Delaware's paramount interest in developing and applying its own corporate law); *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 118 (Del. Ch. 2009) (denying stay of putative shareholder class action, despite earlier-filed action in New York, because case raised "important issues regarding the standards governing directors and officers of Delaware corporations, and Delaware has an ongoing interest in applying our law to director conduct"); 10/21/09 DE Hr'g Tr. At 10:10-12 (stating in this case that an action involving the fiduciary duties of Delaware directors with respect to a proposed merger "rarely happens, and requires a showing of overwhelming hardship"). However, Delaware courts do have the authority to stay duplicative actions in recognition of the superiority of a single, unified proceeding. *See In re Bear Stearns Cos.*, 2008 Del. Ch. LEXIS 46, at *3 (staying a shareholder's challenge to a proposed merger in favor of proceedings in New York state court).

B. Either The Texas Actions Or The Delaware Action Should Be Stayed.

One of the Texas or Delaware courts should invoke its inherent authority and permit the Action to proceed efficiently in the other jurisdiction. The only alternative is dueling duplicative litigations in which no court has complete authority to supervise the conduct of the parties or ensure adequate protection of the putative shareholder class. Such an outcome is a recipe for waste, unfairness, inconsistency and embarrassment. Allowing parallel proceedings to go forward would impose needless and onerous burdens on both courts and the parties—a result both jurisdictions explicitly disfavor. *See, e.g.*, *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 246 (Tex. 1988) (stating "[i]t has long been the policy of the courts and the legislature of this state to avoid a multiplicity of lawsuits"); *Perry v. Del Rio*, 66 S.W.3d 239, 252 (Tex. 2001) (stating that "obvious reasons for abatement" include "conservation of judicial resources,

avoidance of delay . . . and the necessity for an orderly procedure in the trial of contested issues" and because "it is impossible that two courts can, at the same time, possess the power to make a final determination of the same controversy between the same parties"); *Rosen v. Wind River Sys., Inc.*, C.A. No. 4674-VCP, 2009 Del. Ch. LEXIS 114, at *27 (Del. Ch. June 26, 2009) (stating that Delaware courts "generally eschew[] decisions that would require parties . . . to litigate nearly identical actions simultaneously in two distant forums"); *Adirondack GP, Inc. v. Am. Power Corp.*, C.A. No. 15060, 1996 Del. Ch. LEXIS 143, at *21 (Del. Ch. Nov. 13, 1996) (staying Delaware litigation in favor of similar Pennsylvania litigation and stating "[i]f the same factual disputes must be resolved in both cases, allowing both to go forward carries the attendant risk of inconsistent verdicts and would be a waste of both this Court's and the Pennsylvania court's resources").

Similarly, absent the relief sought here, defendants will face duplicative written discovery and deposition requests, briefing schedules, case management deadlines, and court appearances before judges in two separate jurisdictions. The interests of judicial economy will also be harmed by saddling two courts with identical litigations concerning a multibillion dollar transaction. These common sense reasons counsel that "absent extraordinary justification for potentially competing classes, the pendency of multiple class actions alleging substantially the same claims on behalf of the same putative class against the same defendants should be avoided." Joseph M. McLaughlin, *McLaughlin on Class Actions* § 5.62 (5th ed. 2008); *see also Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 404 (Tex. 2000) (stating that judicial economy and efficiency are among the "primary purposes of class-action suits"); *Citgo Ref. & Mktg., Inc. v. Garza*, 187 S.W.3d 45, 67 (Tex. App.—2006, writ abated) (stating that "[a] principal purpose of the class action device is efficiency and economy of litigation. When properly used, a class

action saves the court's and the parties' resources by allowing class-wide issues to be tried in an economical fashion").

The dismissal or stay of either the Texas Actions or the Delaware Action is equally necessary to eliminate the risk of inconsistent rulings as to the relief sought by plaintiffs. The risk of inconsistency is particularly acute here, where all the Actions seek injunctive relief. Courts in the two jurisdictions could issue conflicting preliminary/temporary or permanent injunctions, requiring defendants to take inconsistent actions. Specifically, all the Actions seek to enjoin the proposed merger. (*Compare Sheet Metal Workers* Compl. ¶ 4, *New Orleans* Compl. ¶ 10, *City of St. Clair Shores* Compl. ¶ 10, *Delgato* Compl. ¶ 6, *Int'l Union of Operating Engineers* Compl. ¶ 94, *Levy* Compl. ¶ 1, *Rahe* Compl. ¶ 4, *Steward Large Cap Fund* Compl. ¶10, *York County* Compl. ¶ 3.) If one court holds that the merger may be consummated under Delaware law while the other enjoins it, or if one court enjoins certain provisions of the Merger Agreement and another court enjoins different provisions, defendants would be required to take inconsistent actions. At least one plaintiff in these Actions has acknowledged this issue explicitly, stating "[i]f [different courts] grant different or inconsistent injunctive relief concerning the Merger Agreement, defendants will be put in a position where to abide by the order of one court they may have to violate the order of another." (*York County* Plaintiff's 10/22/09 Motion for Class Certification at 13, appended hereto as Ex. 18.)

Indeed, each of the Actions pleads expressly that "[t]he prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct" for defendants. (*City of St. Clair Shores* Compl. ¶ 42; *see also Sheet Metal Workers* Compl. ¶ 27, *New Orleans* Compl. ¶ 72(c), *Delgato* Compl. ¶ 25, *Int'l*

Union of Operating Engineers Compl. ¶ 32, *Levy* Compl. ¶ 12, *Rahe* Compl. ¶ 27, *Steward Large Cap Fund* Compl. ¶ 36, *York County* Compl. ¶ 16.) Each plaintiff thus concedes that the prosecution of separate actions creates a serious risk of conflicting rulings and should be avoided. The Delaware Court in this case has already certified a class of ACS shareholders in part because "prosecutions of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class." (10/21/09 DE Hr'g Tr. at 8:23-9:4.) The Delaware Court also found that "adjudications with respect to individual members of the class might, as a practical matter, be dispositive of the interest of other members not parties to that particular action or otherwise impede their ability to protect their interest." (*Id.* at 9:6-10.)

Even though the *York County* plaintiff filed a motion to certify a purported class in Texas, citing the same principles of inconsistent adjudication recognized by the Delaware Chancery Court, all Texas plaintiffs have stated their opposition to certification prior to a temporary injunction hearing. While the Texas plaintiffs have not fully disclosed their ACS shareholdings, it is likely that even as a whole, those holdings are dwarfed by the Delaware plaintiff holding more than a million shares. Indeed, the fact that the Texas plaintiffs desire to rush to a temporary injunction hearing without a class certification hearing is indicative of the potentially inconsistent adjudications and schedules that they actually seek, as the Delaware Court's schedule sets out a more deliberate and fully briefed procedure culminating in an injunction hearing in January.

A stay of one Action in favor of unified adjudication in the other will eliminate the risk of different courts imposing incompatible standards of conduct on defendants. At the

same time, there is no risk that any plaintiff will be left without judicial protection, as the putative classes are identical and any relief obtained in one forum will accrue to the benefit of all plaintiffs. Similarly, defendants will raise no objection if the plaintiffs in one forum should wish to join in a consolidated action in the other.

Neither court should defer to plaintiffs' choice of forum. Plaintiffs in both the Texas and Delaware Actions purport to represent a nationwide class of ACS shareholders. Courts give little deference to plaintiffs' choice of forum in such class actions. *See, e.g.*, *In re Topps*, 924 A.2d at 956-57 (holding that "[i]n the representative action context . . . [a] first-filing plaintiff has no legitimacy to 'call forum' for all the other stockholders of a corporation, as if their rights turned on a schoolboy playground convention. What is most important is not that the filing plaintiff get her way, but that the stockholders she seeks to represent have their legitimate expectations upheld"); *Goldstein v. Radioshack Corp.*, No. 6:06-CV-285, 2007 U.S. Dist. LEXIS 32278, at *5 (E.D. Tex. May 1, 2007) (stating that a plaintiff's "choice of forum is given less weight when the case is a class action").

In any event, none of the Actions even alleges the residency of any named plaintiff, and it is implausible for plaintiffs to claim harm from being forced to litigate their claims in a different forum than the one they selected originally, given that almost all of the Texas plaintiffs have previously brought shareholder actions in the Delaware Court of Chancery (*see, e.g.*, *City of St. Clair Shores Police & Fire Retirement Sys. v. Crane*, et al., C.A. No. 4193-VCL (Del. Ch. 2009); *City of St. Clair Shores Police & Fire Retirement Sys. v. Bryson*, et al., C.A. No. 3140903 (Del. Ch. 2004); *Levy v. Deason*, et al., C.A. No. 2816 (Del. Ch. 2007); *Levy v. Flores*, et al., C.A. No. 2736285 (Del. Ch. 2003); *Levy v. Pasquale*, et al., C.A. No. 19926-NC (Del. Ch. 2002); *County of York Employees Retirement Plan v. Merrill Lynch & Co.*,

et al., C.A. No. 4066-VCN (Del. Ch. 2008), appended hereto as Exs. 19-24), and the Delaware plaintiffs appear to be based in Louisiana and New York. Further, all plaintiffs are represented by counsel from outside Texas and Delaware with ample experience litigating around the country. On the other hand, one thing that can be said with confidence about any purported class of ACS shareholders is that each member of such a class has chosen to invest in a Delaware corporation, whose directors are bound by substantive Delaware corporation law and are statutorily required to submit to the personal jurisdiction of Delaware courts.

As the *Topps* court held, any interest that a shareholder may claim to have in bringing a putative shareholder class action outside the state of incorporation must give way before the interests of the shareholder class:

> In a representative action such as this one, the desire of an individual plaintiff to litigate in a forum other than the state of incorporation has no legal or equitable force . . . . The paramount interest is ensuring that the interests of the stockholders in the fair and consistent enforcement of their rights under the law governing the corporation are protected.

In re Topps, 924 A.2d at 953. Accordingly, both courts should evaluate the question of forum and organization so as to give effect to the interests and reasonable expectations of ACS and its shareholders, without regard to the unexplained and conflicting choices these named plaintiffs and their counsel have made as to forum.

II. PREVAILING LAW FAVORS THE DELAWARE FORUM.

A. Delaware Courts Have A Substantial Interest In Hearing These Actions.

ACS is a Delaware corporation. Therefore, Delaware law unquestionably governs plaintiffs' claims in these Actions. *See In re Citigroup*, 964 A.2d at 118 (where company is incorporated in Delaware, "fiduciary duties owed by its officers and directors are governed by Delaware law"); *Pride Int'l, Inc. v. Bragg*, 259 S.W.3d 839, 848-49 (Tex. App.—Houston [1st

Dist.] 2008, no pet.) (holding that Delaware law applied to fiduciary duty claims against directors and officers of Delaware corporations); Tex. Bus. Corp. Act art. 8.02 (stating that the law of the state of incorporation applies to "the internal affairs of the foreign corporation, including but not limited to the rights, powers, and duties of its board of directors and shareholders and matters relating to its shares"). Texas courts recognize that it is preferable for an action to be adjudicated in the jurisdiction whose substantive law applies, as each jurisdiction has a strong interest in the enforcement and authoritative development of its own law. *See Coca-Cola Co. v. Hamar Bottling Co.*, 218 S.W.3d 671, 686-88 (Tex. 2006) (holding that Texas courts should not entertain claims under Arkansas, Louisiana and Oklahoma antitrust law because such claims impact the public policy and economies of those other states, and are therefore more properly heard in those states' courts). Indeed, it "has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise . . . [a] corporation organized under the laws of another state but will leave controversies as to such matters to the court of the state of the domicile." *Rogers v. Guar. Trust Co. of N.Y.*, 288 U.S. 123, 130 (1933).

Delaware courts have a particularly strong interest in handling disputes addressing Delaware corporate law, because Delaware's interest in "promoting an efficient and predictable corporation law can be undercut if other states do not show comity by deferring to [Delaware courts]." *In re Topps*, 924 A.2d at 958. That interest is particularly strong where, as here, the litigation at issue implicates key principles of Delaware public policy. *First*, Delaware courts have a "significant and substantial interest in overseeing the conduct of those owing fiduciary duties to shareholders of Delaware corporations." *Ryan v. Gifford*, 918 A.2d 341, 349 (Del. Ch. 2007) (citation omitted); *see also In re Citigroup*, 964 A.2d at 118 (refusing to dismiss Delaware

action despite a previously filed New York action because litigation raised "important issues regarding the standards governing directors and officers of Delaware corporations"). This case implicates this principle directly, as all plaintiffs allege that the ACS directors breached their fiduciary duties under Delaware law.

Second, Delaware courts' interest in overseeing such suits is increased substantially "when the question is whether to enjoin a merger transaction [because] [i]t is a very delicate corporate law exercise to determine whether to enjoin a premium-paying merger affecting thousands of stockholders at the instance of stockholders holding a small fraction of the company's shares." *In re Topps*, 924 A.2d at 963; *see also Rosen*, 2009 Del. Ch. LEXIS 114, at *24-27 (keeping action in Delaware despite previously filed California action and holding that although the action "may not involve, on its face, cutting edge or terribly novel issues of Delaware corporate law, it does implicate important aspects of Delaware law in that it involves the application of fiduciary duty law to corporate officers and directors in the context of an $884 million tender offer"). This case, which revolves around the terms and conditions of the multibillion dollar ACS/Xerox merger, plainly implicates this principle.[2] Indeed, the Delaware

[2] The *Rosen* decision is particularly instructive here, as the Delaware Court detailed its effort to coordinate two identical shareholder claims filed in different jurisdictions, both of which sought to enjoin a pending acquisition. That decision detailed the Delaware Court's efforts to coordinate those litigations, stating:

> The [Delaware] Court also generally eschews decisions that would require parties, such as Defendants here, to litigate nearly identical actions simultaneously in two distant forums. To this end, I contacted Judge Steven Brick of the Alameda Superior Court, who is handling the Consolidated California Action, to discuss how best to proceed. Given these specific circumstances, both Judge Brick and I agreed that only one of our two courts should hear a preliminary injunction motion regarding the Proposed Transaction. Neither Judge Brick nor I saw any need for two actions to proceed on different coasts, concerning the same transaction. Because the only currently pending motion to dismiss or stay is before me, we

Court before which the Delaware Actions have been consolidated made that plain by stating that it would be "reluctant . . . to stand aside" where, as here, a case concerned the "operations of a Delaware corporation and a transaction involving a Delaware corporation of significant magnitude, here in the billions of dollars, and raising what at least are colorable and important issues of Delaware law." (10/21/09 DE Hr'g Tr. at 10:1-5.)

Third, Delaware courts have exhibited a particular interest in adjudicating unresolved issues of Delaware corporate law. *See Ryan*, 918 A.2d at 350 (holding that "Delaware has an overwhelming interest in resolving questions of first impression under Delaware law"). Depending on how plaintiffs proceed, this case may implicate an unresolved issue of Delaware law. Specifically, plaintiffs allege that ACS's directors have an obligation to "maximize shareholder value in the transaction," which is an apparent reference to the standard announced by the Delaware Supreme Court in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). But whether *Revlon* even applies in the circumstances of a part-cash, part-stock transaction such as this may present an important unresolved question of Delaware law. *Revlon* itself holds that the "maximize shareholder value" standard applies in all-cash transactions. *Id.* at 182. The Delaware Supreme Court has also held that *Revlon* does not apply to all-stock transactions. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995). However, the Delaware Supreme Court "has not set out a black line rule explaining what percentage of the consideration can be cash without triggering *Revlon*". *In re*

> agreed that I should decide that motion first and determine whether or not this dispute should go forward here. Judge Brick further indicated that if I decided this case should move forward here, he would expect to stay the California Actions before him.

Rosen, 2009 Del. Ch. LEXIS 114, at * 27.

Lukens Inc. S'holder Litig., 757 A.2d 720, 732 n.25 (Del. Ch. 1999), *aff'd sub nom., Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000); *see also In re NYMEX S'holder Litig.*, C.A. Nos. 3621-VCN, 3835-VCN, 2009 Del. Ch. LEXIS 176, at *19 (Del. Ch. Sept. 30, 2009) (same). This is precisely the sort of question that should be submitted to the Court of Chancery in the first instance, ensuring the right of appeal to the Delaware Supreme Court. *See In re Topps*, 924 A.2d at 954 (holding that "opportunity for prompt definitive guidance [on unresolved issues of Delaware law] is obviously unavailable in the courts of another state"). Indeed, only the Delaware Courts would offer the parties an entirely effective right of appeal, as only the Delaware Supreme Court can issue a definitive ruling on such unresolved issues of Delaware law.

B. Delaware Courts Are Specifically Designed To Adjudicate Cases Like These In An Efficient Manner.

In addition to possessing a substantial interest in adjudicating these Actions, Delaware courts also offer an efficient forum that is well structured to litigate these Actions to a single, determinative outcome. As a result of "the economies of scale created by the high volume of corporate litigation in Delaware," the Court of Chancery has gained an institutional expertise in the application of Delaware corporate law. William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law. 351, 354 (1992); *see also Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 948 (7th Cir. 1994) (stating that "[b]usinesses incorporate in Delaware in order to take advantage of that state's corporation law, and its judicial expertise concerning corporate governance"); Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. 469, 484 (1987) (stating that "[p]robably the greatest benefit that Delaware offers corporations is a highly developed case law that provides not only a useful set of precedents, but also a substantial degree

of certainty about legal outcomes"); Stephen A. Radin, *"Sinners Who Find Religion": Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing*, 25 Tex. Rev. Litig. 209, 251 (2005) (characterizing the Delaware Court of Chancery as "the Mother Court of corporate law and the state whose rich abundance of corporate law guides courts throughout the country due to the special expertise and body of case law developed in the Delaware Chancery Court and the Delaware Supreme Court") (internal quotations omitted). Indeed, as Chief Justice Rehnquist once explained, the hallmark of the Delaware Court of Chancery is "[j]udicial efficiency and expertise" in matters of Delaware corporate law. *See* Rehnquist, *supra*, at 354.

Although the Texas Courts have jurisdiction to hear these Actions, the Delaware Court of Chancery presents unusual advantages because of the unique structure of Delaware corporate law and the Delaware judicial system. As the Court of Chancery explained recently in *In re Topps Shareholder Litigation*:

> Venerable authority recognizes that a chartering state's interest in promoting an efficient and predicable corporation law can be undercut if other states do not show comity by deferring to the courts of the chartering state when a case is presented that involves the application of the chartering state's corporation law. That recognition is easily understandable as it applies to Delaware's corporate law, which has a broadly enabling statute that gives directors wide leeway to manage the corporation, but subject to fiduciary duty review by a court of equity comprised of five judges dedicated in large measure to that specific purpose and further by an appellate court only a direct appeal away. . . The important coherence-generating benefits created by our judiciary's handling of corporate disputes are endangered if our state's compelling public policy interest in deciding these disputes is not recognized and decisions are instead routinely made by a variety of state and federal judges who only deal episodically with our law.

924 A.2d at 958-59. The Delaware Courts offer subject matter expertise with respect to issues of directors' fiduciary duties under Delaware law and provide a readily accessible and uniquely

authoritative appellate court to resolve such issues with finality. These considerations all suggest that, regardless of the Texas Courts' competence to adjudicate these cases, the Texas Actions should be stayed, the Delaware Action should proceed, and plaintiffs and their counsel should be directed to organize cooperatively in the Delaware Action. However, defendants request only a resolution between the courts as to which court is more appropriate to exercise jurisdiction.

CONCLUSION

For the foregoing reasons, defendants respectfully request that (1) the Texas Courts stay the consolidated Texas Actions in favor of the Delaware Action; and (2) the Delaware Court determine to exercise jurisdiction and proceed with the Delaware Action.

In the alternative, defendants respectfully request that (1) the Delaware Court dismiss or stay the Delaware Action in favor of the Texas Actions; and (2) the Texas Court determine to exercise jurisdiction and proceed with the Texas Actions and direct the plaintiffs in the Texas Actions to present the Court a proposed organizational order.

Dated: October 26, 2009

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