No. 15-169

IN THE

Supreme Court of the United States

CHRIS LUSBY TAYLOR, *et al.*,

Petitioners,

v.

BETTY YEE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS STATE CONTROLLER OF THE STATE OF CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* THE SHAREHOLDER SERVICES ASSOCIATION AND THE SECURITIES TRANSFER ASSOCIATION IN SUPPORT OF THE PETITIONERS

JENNIFER C. BORDEN
Counsel of Record
BORDEN CONSULTING GROUP, LLC
71 Commercial Street, Suite 198
Boston, Massachusetts 02109
(781) 307-1300
jborden@bcg-up.com

Counsel for Amici Curiae

261423

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

THE SHAREHOLDER SERVICES ASSOCIATION AND THE SECURITIES TRANSFER ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the Shareholder Services Association (SSA) and the Securities Transfer Association (STA) respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals submitted by the Petitioners, Chris Lusby Taylor, *et al.* (hereinafter, "Petitioners").

Counsel for the Petitioners has consented to the filing of this brief. However, counsel for the Respondents has responded to the request for consent to file this *amicus curiae* brief with a letter stating, without explanation, that Respondents do not consent to the filing of an *amicus curiae*, thereby making this motion necessary.[1]

As set forth in the "Interest of *Amici Curiae*" section of the attached brief, the STA and SSA combined have as members or clients more than 15,000 issuers of securities, and more than 100 transfer agents who are responsible for the record keeping of over 100,000,000 registered shareholders. The members of these organizations are directly involved in the escheat process, and have an interest in seeing that the escheat laws are administered

1. A letter requesting consent was timely sent to counsel of record via both e-mail and United States mail on August 27, 2015. On August 31, 2015 counsel for Respondent replied with a letter stating only, "respondents do not consent to such a filing."

so as not to create risk for their membership, while protecting the property interests of those who invest in securities. The brief will assist the Court in determining whether to grant *certiorari*, because the *amici* are well positioned to demonstrate how the Ninth Circuit's decision will impact compliance with the escheat laws nationwide, and how the current processes will continue to impact negatively compliance with federal securities regulations.

For the above reasons, the SSA and STA respectfully request that the Court grant this motion for leave to file the attached *amici curiae* brief in support of the Petitioners in the above Petition.

Respectfully submitted,

JENNIFER C. BORDEN
Counsel of Record
BORDEN CONSULTING GROUP, LLC
71 Commercial Street, Suite 198
Boston, Massachusetts 02109
(781) 307-1300
jborden@bcg-up.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES:

INTEREST OF *AMICI CURIAE*[1]

The Shareholder Services Association (SSA), a nonprofit trade association founded in 1946, supports corporate issuers in meeting their responsibilities for shareholder record keeping services. Its membership includes hundreds of public companies, as well as the professional service providers who assist them with their regulatory compliance obligations and communications with investors. Typically, each member company is represented in the SSA by the professionals at the company whose job is to attend to the shareholders, as the shareholders are the owners of the company. In furtherance of its mission the SSA: monitors emerging legal and business issues impacting its members; provides updates, education and training regarding these developments; works regularly with federal regulatory agencies such as the Securities and Exchange Commission and with central custodians of securities such as the Depository Trust & Clearing Corporation; and provides a forum allowing its members to deliver services to shareholders proficiently.

The Securities Transfer Association (STA) is the national professional association of transfer agents. Founded in 1911, its membership includes more than one hundred transfer agents who collectively maintain

1. Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

the records of more than one hundred million registered shareholders on behalf of more than fifteen thousand corporate issuers. The STA's mission is to provide representation and leadership on issues such as state and federal regulations which affect its membership and their issuer clients.

The SSA's and STA's interest in this petition is two-fold. First, their members are public companies who are the issuers of, or the transfer agents who are the record keepers for, unclaimed property such as the Petitioner's shares. As such, their members must comply with the escheat laws of each jurisdiction in the United States and beyond, or risk facing significant assessments of interest and penalties. The members frequently find themselves defending this compliance with escheat laws after the states liquidate securities without providing just compensation to shareholders. A bright line test established by this Court for when shares are escheatable will provide clarity and facilitate compliance. Second, the investors whose interests the SSA and STA members endeavor to protect are at substantial risk of losing their property rights when the states liquidate their shares without proper notice. A determination by this Court requiring proper notice prior to liquidation will preserve and protect the valuable interests of these investors.

SUMMARY OF ARGUMENT

The SSA and STA urge the Court to grant the Petitioners' petition, as it presents an opportunity for the Court to provide clear, unambiguous standards regarding the state's escheatment and liquidation of securities. This Court can put an end to liquidations without constitutionally adequate notice, and prevent further takings by ensuring that owners receive just compensation when the states liquidate securities for the states' own use. If the Ninth Circuit's decision is allowed to stand, California and other states which rely on unclaimed property as a revenue source will continue to prioritize revenue over reuniting owners with their property. This erosion of property rights violates the Takings Clause, is completely inconsistent with this Court's holdings, and contradicts the intent of unclaimed property statutes.

ARGUMENT

Escheat laws serve a valuable function when they are used to reunite lost owners or their heirs with property that has been abandoned. However, under certain circumstances, such as when the Petitioners' shares were liquidated, escheat laws actually harm property owners. This case provides the opportunity to eliminate an unconstitutional feature of escheat laws, while preserving the benefits of escheatment. Holders, entities that are in possession of the property of others,[2] are required to communicate with the owners of property if it appears that the owner has abandoned the asset. This outreach works well in many circumstances. Consider the example of the employee who changes jobs without negotiating her final paycheck. Each state's unclaimed property statute requires the employer to mail the former employee a due diligence notice which informs her of the outstanding check, offers to reissue the check, and advises that if no response is received, the check will be escheated to the

2. *See* CAL. CIV. PRO. CODE § 1501(e) (2015).

state of the employee's last known address. The owner can then claim her abandoned wages from the state. Whether the employee responds to the holder's due diligence letter or makes a claim to the state, the result is the same: the owner is reunited with her property, in exactly the value that she lost.

Critically, the concept of escheat does not work as efficiently or rationally with securities. It is unusual for an employee not to negotiate a paycheck promptly. However with stock, the issuer may not pay a dividend, or the shareholder may have elected to reinvest dividends automatically, resulting in the shareholder holding the stock for an extended period without taking action beyond her intentionally passive ownership. Conventional wisdom dictates the need to invest and save for the future, for rainy days, and for retirement: all points in time which are typically longer than a state's dormancy period. As a result, shares are often purchased with the specific intention <u>not</u> to take any action on the shares. This sound buy and hold strategy to save for the future has unfortunately led to significant loss for many shareholders in connection with current applications of escheat law.

Specifically, states and their contract auditors rely upon ambiguous escheat statutes or disingenuous interpretations of these statutes and demand shares be turned over to the states even when the shareholders are not lost and they have not abandoned the shares. The basis for demanding the remittance of shares when the owner is not lost is a vague failure of the owner to take activity regarding the shares. However, the privilege of ownership includes the right to do nothing with the shares. Doing nothing is, in fact, one means of exercising dominion and control over the shares. However, states deem such passive ownership or inactivity to be akin to abandonment, resulting in escheatment and subsequent liquidation. Unlike an employee who can easily claim an escheated paycheck, disenfranchised shareholders frequently are forced to file costly litigation naming the issuer, its transfer agent, and the state as defendants. Such litigation further complicates compliance for the *amici's* members, who are nonetheless sympathetic to the plight of the shareholders as a result of the state's decision to liquidate escheated shares.

This is precisely what happened to the Petitioners, an unfortunate result which has been and will continue to be repeated if states are allowed to utilize ambiguous standards for escheatment. The petition presents an opportunity to provide clear, unambiguous standards for the escheatment of securities and put an end to liquidations without proper notice or just compensation to the owners. The actions of California and other states which choose to liquidate securities result in impermissible takings without just compensation, as they strip the individual of ownership rights to the original security that cannot be returned.

Substantial harm to shareholders will result if the Ninth Circuit's decision stands permitting California to escheat and liquidate unclaimed property (1) without providing notice reasonably designed to inform the owner of the state's actions either before the actual transfer of custody, but more importantly, prior to the liquidation; and (2) without requiring the state to provide just compensation to the owner. The issues raised in the petition are not limited to California's Unclaimed Property

Law,[3] but rather impact corporations and shareholders nationwide and, indeed, globally because the unclaimed property laws of all states contain notice and compensation provisions similar to or less adequate than those adopted by California. Accordingly, the Ninth Circuit's decision will be relied upon by the various states as a means to ignore this Court's clear holding in *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), and the precedent on which it is based. With the Ninth Circuit's current ruling, the states are emboldened to continue to expand wrongfully the scope of when securities are abandoned without any fear of reprisal for incorrect applications of ambiguous statutes. The *amici* therefore urge this Court to clarify:

- what constitutes constitutionally adequate notice before a state may take custody of an owner's allegedly abandoned securities and before liquidation under unclaimed property laws;

- what constitutes just compensation to security owners after liquidation.

Such a decision would forestall substantial litigation across the country,[4] and would protect the valuable property interests of this country's citizen investors.

---

3. CAL. CIV. PRO. CODE § 1500 (2015).

4. In each of the following cases, the basic facts are the same. Contract auditors whose compensation was based upon the value of the property escheated identified the owners' shares as escheatable and delivered the shares to the states. The states then liquidated the shares. When the owners claimed their property, the states paid only the net proceeds of the sales, which was dramatically less

I. Certiorari is Warranted as Petitioners, and Thousands of Shareholders Like Them, Do Not Receive Adequate Notice when the State Liquidates Securities After Escheatment.

In *Taylor v. Yee* (*Taylor V*), 780 F.3d 928 (9th Cir. 2015), the Ninth Circuit focused on the changes to the California Unclaimed Property Law as a result of *Taylor v. Westly* (*Taylor II*), 488 F.3d 1197 (9th Cir. 2007). The Ninth Circuit is correct that the *Taylor II*-triggered changes should improve an owner's chance of knowing that property will be escheated. However, the decision ignores the issue of liquidation of the securities, which is the event that undeniably disturbs the owner's property interest and triggers the critical need for proper notice to the security owner.

---

than the amount that was necessary to buy back the same number of shares escheated. *See, e.g., Azure Ltd. v. I-Flow Corp.*, 210 P.3d 1110 (Cal. 2009); *Harris v. Verizon Commc'ns*, 46 Cal. Rptr. 3d 185 (2006); *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114 (Del. 2009). In many instances the loss was in the millions, money which the shareholder had counted on for retirement. In one instance, the loss was irreversible, since the mutual fund was closed to new investors by the time of the claim. *Barron v. Fid. Magellan Fund*, 784 N.E.2d 634 (Mass. App. Ct. 2003). In at least one instance, the sale was *after* the owner filed the claim with the state. *Combs v. B.A.R.D. Indus., Inc.*, 299 S.W.3d 463 (Tex. App. 2009). In one case, the complaint alleges that the state sold the shares three days after receipt, but then communicated with the shareholder for two years without acknowledging the sale. During those two years, the shares increased to a value of over $13,000,000, which was lost to the shareholders. Complaint, JLI Inv. S.A. v. Cook, Case No. 11274 (Del. Ch., July 9, 2015).

In *Taylor V*, the court deemed the pre-escheat notices sent by the State pursuant to section 1501.5(c)(1) of the California Code of Civil Procedure satisfactory under the criteria established in *Jones v. Flowers,* 547 U.S. 220 (2006). There, the court held that by requiring that both the State and the holders of the property provide pre-escheat notice "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" the amended statute passed a test of constitutional scrutiny. *Taylor V,* 780 F.3d at 933 (*quoting Jones,* 547 U.S. at 226).

However, reliance on *Jones* is entirely misplaced, since the California statute does not provide for notice by either the state or the holder of the pendency of the liquidation, which is the action that results in the taking of property. Sections 1501.5 and 1516 of the California Unclaimed Property Law, which govern the notices and mandate the language to be used in the notices sent by the holder, are silent as to the possibility of liquidation. Indeed, if California acted merely as a custodian, holding the securities in trust for the owners, and taking no action on the shares whatsoever, then perhaps notices pursuant to these sections may be constitutionally adequate. The Ninth Circuit recognized that section 1501.5(c)(1) requires the Controller to hold "the unclaimed property in trust for the owner who may claim it any time." *Taylor V*, 780 F.3d at 932-33. Yet as demonstrated by the liquidation of the Petitioner's shares without notice, the state frequently strays beyond the boundaries of this limited custodial role.

The state's unilateral act of terminating a shareholder's ownership interest in the stock of a corporation with all of the benefits inherent therein,[5] is a disturbance of the shareholder's property without the requisite notice. Rather than being held in trust, the Petitioners' property interests were converted to cash and transferred to the General Fund. When the Petitioners attempted to claim the property that had been transferred to the state, the Petitioners' ownership interests were not restored. Rather, they were offered an amount of cash which was insufficient to allow them to enjoy the same ownership interests in the companies in which they originally invested. As in *Jones*, where this Court held that the sale of a home constituted a procedural due process violation because there was no notice prior to the sale, the sale of the Petitioners' ownership interests is similarly unconstitutional, as the Petitioners had no opportunity to object prior to the sale.

II. Certiorari is Warranted as the Ninth Circuit Decision Does Not Comport with This Court's Decisions regarding Takings without Just Compensation, Particularly in Light of *Horne v. Department of Agriculture.*

The Takings Clause provides that private property shall not be taken for public use without just compensation. The government has a categorical duty to pay just compensation when it takes personal property. *Horne,* 135 S. Ct. at 2426. It is accepted "that the 'classic taking [is one] in which the government directly appropriates

5. An ownership interest in stock is "the right of a shareholder to participate in the general management of the company and to share proportionally in its net profits or earnings or in the distribution of assets on dissolution." BLACK'S LAW DICTIONARY 985 (Abridged 6th ed. 1991).

private property for its own use.'" *Id.* at 2425-26 (alteration in original) (*quoting Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 324 (2002)). The physical appropriation of personal property is perhaps the most serious form of invasion of an owner's property interest, depriving the owner of the entire bundle of rights inherent in ownership, namely "the rights to possess, use and dispose" of the property. *Id.* at 2427 (*quoting Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

When states escheat securities, they require that the shareholders' certificates be cancelled and reissued in the name of the state.[6] The state is therefore not a mere custodian of the security interests. Rather, the state terminates the owners' property interest in the corporation by rendering the owners' physical certificates useless and transferring title to the state. As a result, the shareholders have lost their property interests as they can no longer possess, use or dispose of their property.

While the state may pay the shareholder the net proceeds received from the sale of the securities[7], such payment does not constitute just compensation under the

---

6. *See e.g.*, DEL. CODE ANN. tit. 12 § 1201 (2015) (providing that securities in certificated form are to be delivered to the state as duplicate certificates in a form suitable for transfer; if the shares are in uncertificated form, the issuer shall cause the uncertificated security to be registered in the name of the State Escheator); CAL. CIV. PRO. CODE § 1532(d) (2015) (providing that the holder "shall deliver a duplicate certificate to the Controller or shall register the securities in uncertificated form in the name of the Controller").

7. CAL. CIV. PRO. CODE § 1563(b) (2015).

law, since the bundle of rights represented by the liquidated securities has been destroyed. Just compensation is "the full and perfect equivalent in money of the property taken. The owner is put in as good [a] position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). When states liquidate shares without the shareholder's authority, the proceeds received do not place the shareholder in the same position as if the property was never taken. The shareholder has lost any appreciation in value; the right to receive interest or dividends; the right to vote on management recommendations; the right to participate in corporate actions; and the right to use and dispose of the property as the owner sees fit.

Like the raisin growers in *Horne*, owners of securities that have been liquidated by the state have lost any right to control the disposition of their property due to unilateral government action without proper compensation. Further, any payment that might be received by the shareholders as a result of the liquidation is often at best nominal in comparison to what has been lost, just as the contingent interest offered by the Raisin Committee was of little value to the property owners in *Horne.* The payment of a fraction of the value of the property taken does not satisfy the government's categorical duty to pay just compensation. *Horne*, 135 S. Ct. at 2431.

State unclaimed property administrators routinely liquidate shares upon receipt, or after a brief statutory holding period, thereby guaranteeing that owners' property interests will be altered, potentially irreparably.[8]

8. Fifteen states' statutes allow the immediate liquidation

This dangerous erosion of property rights will continue so long as states are given the unfettered authority to liquidate without constitutionally adequate notice, and without a specific, legal requirement to restore the owner to as good a position as if the escheatment had not occurred.

In order to protect owners' rights, and consistent with the relief which the SSA and STA believe should be afforded as a result of the Petitioners' appeal, the *amici* have joined other interested parties in recommending that the Revised Uniform Unclaimed Property Act (RUUPA),[9] which is currently being drafted by the Uniform Law Commission (ULC), include a significant holding period prior to liquidation of securities.[10] An extended holding period between escheat and liquidation would allow time for owners to learn that their securities have been escheated and claim them, thus preserving their interests. In addition to requiring the states to hold securities for at

---

of shares. Kansas has a six-month minimum holding period. Thirteen states require the state to hold securities for one year before liquidating. California has an 18-month minimum holding period and a 20-month maximum holding period. Missouri has a two-year minimum holding period. Nineteen states have a three-year minimum holding period.

9. Revised Unif. Unclaimed Prop. Act (Proposed Official Draft 2015), http://www.uniformlaws.org/shared/docs/Unclaimed%20Property/2015AM_RevUnclaimProp_Draft.pdf.

10. "(T)he administrator may not sell or otherwise liquidate securities until (3) years have passed from receipt of the securities and the administrator has provided the owner with notice of the administrator's possession of the securities". Revised Unif. Unclaimed Prop. Act §13(f).

least three years prior to liquidation, if owners claim shares within six years after escheatment, the current draft of the RUUPA would require the states to make the owners whole, rather than simply providing the net proceeds of the sale.[11] The National Association of Unclaimed Property Administrators (NAUPA), representing the states' interests, is working with the ULC on these securities matters. As such, these provisions in the current draft of the RUUPA reflect the NAUPA representatives' support for opportunities to reunite owners with their property.

III. A Bright Line Test Addressing the Escheatment of Securities Would Reduce the Risk of Unnecessary Liquidation of Securities.

Shareholders who learn that their securities have been liquidated frequently must resort to litigation in an attempt to recover the true value of the shares they formerly owned. These actions typically name the state which liquidated the shares, the issuer who escheated the shares in compliance with the law, and the issuer's transfer agent, presumably because the transfer agent assists the issuer with compliance responsibilities such as due diligence mailings and preparing escheat reports. *See supra* note 4. Compliance is problematic since the states frequently modify their criteria for when securities should be deemed escheatable via administrative proclamation. These position modifications are often at the urging of private contractors whose compensation is contingent

---

11. "The market value of the securities shall be calculated in such a manner as to place the owner in the same . . . position as the owner would have been had the securities never been sold". Revised Unif. Unclaimed Prop. Act §13(h).

upon the value of the property they report to the states as allegedly abandoned property. As the states and their contract auditors have a financial interest in the amount of property reported to the states, their interpretations of when securities are escheatable should be subject to heightened judicial scrutiny. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (finding that petitioner is entitled to a neutral and detached judge in the first instance); *Tumey v. Ohio*, 273 U.S. 510 (1927) (holding that an individual is deprived of due process when his property is subject to the judgment of a court in which the decision maker has a pecuniary interest in the outcome).

Federal law is not silent on the issue of unclaimed securities or how potentially lost shareholders should be addressed. To the contrary, the Securities and Exchange Commission (Commission) adopted Rule 17Ad-17 in 1997 to address situations in which record keeping transfer agents have lost contact with shareholders. Lost Securityholders and Unresponsive Payees, 17 C.F.R. § 240.17Ad-17 (2015). The rule now requires transfer agents and broker-dealers to exercise reasonable care to ascertain the correct addresses of "lost security holders" and to conduct prompt outreach to security holders who have not negotiated dividend checks, known as "unresponsive payees". Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929W, 124 Stat. 1376 (2010). The rule prescribes with specificity the database searches and type of outreach that must be conducted to keep shareholders' information current. 17 C.F.R. § 240.17Ad-17. As the Commission noted at the time of the rule's enactment, loss of contact can be harmful to security holders because they no longer receive corporate communications or the interest or dividend payments to which they may be entitled. Additionally, the securities and any related dividends to which the security holders may be entitled "are often placed at risk of being deemed abandoned under operation of state escheatment laws." Lost Securityholders and Unresponsive Payees, 78 Fed. Reg. 4768, 4770 (Jan. 21, 2013) (codified at 17 C.F.R. pt. 240).

With its requirements for proactive searches and communications at precise time intervals, 17 C.F.R. § 240.17Ad-17 is designed to prevent shareholders from being deemed "lost" and to prescribe the steps transfer agents and brokers must take to identify better addresses or prompt the negotiation of checks in order to reestablish contact with the security holders and prevent the escheatment of their shares. As such, rather than focusing on reuniting lost shareholders with property that has been escheated, Congress and the Commission have exhibited a clear intent to ensure that security holders do not get lost in the first instance, thus preventing unnecessary escheatment.

State unclaimed property administrators have historically respected 17 C.F.R. § 240.17Ad-17. As such, shares would not be escheated unless and until the requirements of 17 C.F.R. § 240.17Ad-17 had been satisfied, and the state's requirements were met, such as the passage of the appropriate dormancy period. More recently, however, states and their contract auditors have demanded the escheatment of shares even where the security holder is not lost, or when the searches required by 17 C.F.R. § 240.17Ad-17 have not been performed. *See* Letter from Mark Udinski, State Escheator, Delaware Department of Revenue, to Charles Rossi, President, The Securities Transfer Association (May 10, 2012) (on file with addressee).

In this letter, Delaware's State Escheator provided his interpretation of the 2008 Act to Amend Title 12 of the Delaware Code (the Amendment), 76 Del. Laws 276 (2008) (codified as amended at DEL. CODE ANN. tit. 12 § 1198 (2008)). This revision served to shorten the dormancy period for securities property from five to three years. It also removed from the Delaware Escheats Law any reference to returned mail, which consistent with 17 C.F.R. § 240.17Ad-17 was the criterion which Delaware previously considered before designating shares as escheatable. The Delaware Escheator opined that due to the Amendment, shareholders did not need to be lost in order for their shares to be escheatable. The State Escheator provided,

> [O]ne of the effects of the Amendment was to change the circumstances that would trigger the start of a period of dormancy from a 'lost owner' or 'returned by post office' ('RPO') to 'inactivity' in the owner's account . . . the trend among the states over the last five years has been away from 'RPO' and towards 'inactivity'.

See Letter from Mark Udinski to Charles Rossi, *supra* p.15. This interpretation significantly increased the amount of shares remitted subsequently to Delaware. According to the Delaware Fiscal Notebook, after the 2012 clarification that Delaware was utilizing an inactivity standard instead of a lost standard to trigger the escheat of securities, abandoned property revenue in Delaware increased by 77.3%, from $319,500,000 in

2012 revenue, to $566,500,000 in 2013.[12] As Delaware liquidates shares upon receipt, liquidations without notice or just compensation also increased exponentially after Delaware's proclamation. DEL. CODE ANN. tit. 12 §§ 1143, 1204 (2015) (providing that the State Escheator shall sell all property delivered to the State, without reference to any holding period prior to sale).

As demonstrated via Delaware's administrative guidance, a trend has emerged where the states demand escheatment if the owner is passive and has not exhibited any activity related to the shares, even if the owner is not lost. This practice is extremely troubling, because escheatment occurs without the benefit of the 17 CFR § 240.17Ad-17 outreach which has been proven over the last two decades to protect shareholders by keeping their contact information at the transfer agent and their knowledge of their securities current. Many issuers of securities do not pay dividends[13]. For shareholders of these companies, there is no quarterly check to negotiate in order to demonstrate activity related to the shares. Therefore, a shareholder who invests in a corporation which does not pay a dividend and who puts the stock

12. State General Fund Revenue Report Fiscal Years 2014-2015, Delaware Department of Finance (last visited Sept. 5, 2015), http://finance.delaware.gov/publications/fiscal_notebook_14/Section02/sec2page30.pdf; State General Fund Revenue Report Fiscal Years 2010-2013, Delaware Department of Finance (last visited Sept. 5, 2015), http://finance.delaware.gov/publications/fiscal_notebook_14/Section02/sec2page29.pdf.

13. Some of the most successful public companies do not issue dividends, in favor of reinvesting in the company. Examples include: Berkshire Hathaway, Google, Amazon, Express Scripts, eBay, and AIG.

certificates away for safekeeping is at risk. This person receives notices regarding said shares at her home address and even votes on proxy matters. She may however be surprised to find that, despite this active shareholder involvement, the lack of action involving the underlying stock leads to the state declaring her to be passive, causing her shares to be considered escheatable three years after purchase. The fact that no activity is required of the shareholder and that she actively participates in proxy votes is of no concern to the states. The states posit that the shareholder's passiveness during the dormancy period means the shareholder has abandoned the account and it must be turned over to the state for safe keeping. The irony is that once escheated, the states will likely liquidate the shares of the inactive owner (as California did with the Petitioners' shares). The account would have been safer if it had not been escheated under the guise of reuniting the shareholder with shares that were never abandoned.

This broad interpretation of what constitutes an escheatable security, coupled with likely liquidation[14], results in statutes that harm shareholders by wresting away their securities from their current custodians. This is contrary to the goal of reuniting owners with their property as articulated by the California legislature. *Taylor V*, 780 F.3d at 933 ("It is the intent of the Legislature that property owners be reunited with their property.") (*quoting* CAL. CIV. PRO. CODE § 1501.5(c)(1) (2007)). Ironically, as the shareholder has the certificates in her

---

14. If the states did not liquidate in the manner they do currently, routine compliance would not present risk, as the shareholder would be able to claim the shares from the state who is merely acting as a custodian.

possession, she has no idea that the state has taken and sold her property. Since the shareholder had no dividend check to cash she would not be deemed an unresponsive payee. Furthermore, since the issuer knows where she lives, she is not deemed to be lost. As such, she will not receive the protections afforded by the communications mandated by 17 CFR § 240.17Ad-17 with respect to lost or unresponsive shareholders. The states' broad interpretation of when securities are escheatable serves to defeat the purpose of the federal regulations.

This Court has expressed its "unwillingness 'either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts.'" *Delaware v. New York*, 507 U.S. 490, 510 (1993), (*quoting Texas v. New Jersey,* 379 U.S. 674, 679 (1965). Although referring in *Delaware* to controversy among the states, the desire for administrative convenience is equally valid here. A bright line test of when a holder is required to escheat securities is desirable in order to promote certainty and prevent voluminous fact-sensitive litigation. The Securities and Exchange Commission has promulgated a standard which is clear and unequivocal. If that standard had been followed in the present matter, the Petitioners' shares would likely not have been escheated, they could not have been liquidated, and the courts and the parties would have been spared more than a decade of litigation. As a result of the states' reliance on a shareholder's alleged lack of activity to trigger escheatment even if the owner is not lost, issuers and their transfer agents find themselves between Scylla and Charybdis. Since the states will likely liquidate any securities that are escheated, it is absolutely imperative that states demand only those securities which have actually been abandoned. Without clarity, holders who comply with the escheat laws face the risk of litigation and accompanying negative publicity if the state does not make the shareholder whole. If the holder refuses the state's demand to escheat shares of owners who are not lost, the state will assess interest and crippling penalties against the issuer, and could also commence litigation. Holders deserve better than being placed in a no-win situation, particularly when they endeavor to protect shareholders from having their shares liquidated unnecessarily. This absurd paradox is clearly not the intent and should not be the result of statutes which are designed to protect the interests of rightful owners.

If the Court GVR's this Petition, there will be an opportunity to articulate a clear and unambiguous standard for the escheatment of securities, as well as what constitutes proper notice prior to escheatment and potential liquidation. With such guidance, states and their agents will be able to implement and enforce the laws properly. Issuers and transfer agents will be able to comply with the laws without fear of litigation. Most importantly, a clearly defined standard will restore escheatment to a scheme which actually protects the interests of rightful owners.

CONCLUSION

For all of the reasons described in this *amicus curiae* brief, the SSA and STA urge the Court to accept Petitioners' petition so that it may reverse the decision of the Ninth Circuit and provide clear standards to the states regarding (1) what constitutes constitutionally adequate notice before a state may seize and liquidate an owner's property under the state's unclaimed property laws and whether additional notice is required to be given to the securities owner after seizure and prior to liquidation of the securities, and (2) what constitutes just compensation that must be paid to owners of escheated and liquidated property. At a minimum, the *amici* agree with Petitioners that the Ninth Circuit's judgment in this case should be GVR'd to address the Takings Clause issue, particularly in light of *Horne*.

Respectfully submitted,

Jennifer C. Borden
Counsel of Record
Borden Consulting Group, LLC
71 Commercial Street, Suite 198
Boston, Massachusetts 02109
(781) 307-1300
jborden@bcg-up.com

Counsel for Amici Curiae

APPENDIX

APPENDIX — DELAWARE DIVISION OF REVENUE LETTER

STATE OF DELAWARE
DEPARTMENT OF FINANCE
DIVISION OF REVENUE
UNCLAIMED PROPERTY
CARVEL STATE BUILDING
820 N. FRENCH STREET
P.O. BOX 8749
WILMINGTON, DELAWARE 19899-8749

May 10, 2012

Charles V. Rossi, President
The Securities Transfer Association, Inc.
P.O. Box 5220
Hazlet, New Jersey 07730-5220

Re: Application and Interpretation of 12 *Del. C.* § 1198(9)a.

Dear Mr. Rossi:

On behalf of the members of The Securities Transfer Association, Inc. ("STA") you have sought clarification regarding the manner in which the State of Delaware (the "State") intends to interpret the language of Section 1198 of the Delaware Escheats Law (12 *Del. C.* §§ 1101, *et seq.*) (the "Escheats Law") as amended by 76 *Del. Laws,* c. 276,

§ 1 effective June 30, 2008 (the "Amendment"). You have expressed concern about the potential for inadvertent disenfranchisement of certain shareholders' ownership rights. I understand that your primary concern is, and has always been, the safeguarding of these securities. Perhaps I can allay your concerns and clear up some of the misconceptions you may have about our program.

Section 1198(9)a. now reads as follows:

> (9)a. "Period of dormancy" means the full and continuous period of 5 years, except a period of 15 years for traveler's checks, during which an owner has ceased, failed or neglected to exercise dominion or control over property or to assert a right of ownership or possession or to make presentment and demand for payment and satisfaction or to do any other act in relation to or concerning such property. Notwithstanding the foregoing, "period of dormancy" means the full and continuous period of 3 years with respect to intangible ownership or indebtedness in a corporation or other entity whether or not represented by a stock certificate or other certificate of membership, bonds and other securities including fractional shares, interest, dividends, cash, coupon interest, liquidation value of stocks and bonds, funds to redeem stocks and bonds, and distributions held by financial intermediaries.

In the vernacular of unclaimed property, one of the effects of the Amendment was to change the circumstances that would trigger the start of a period of dormancy from a "lost owner" or "returned by post office" ("RPO") to "inactivity" in the owner's account. As your members are undoubtedly aware, the trend among the states over the last five years has been away from "RPO" and towards "inactivity."

Under most circumstances the interpretation of Section 1198(9)a. is non-controversial; as it regards securities, if "an owner has ceased, failed or neglected to exercise dominion or control over property or to assert a right of ownership or possession or to make presentment and demand for payment and satisfaction or to do any other act in relation to or concerning such property" for a period of three years, then the property is subject to reporting and delivery to the State as of March 1st of the following year. The concern expressed by your members, as you have relayed those concerns to me, relates to the interpretation of this language in the cases of (a) foreign-addressed property, (b) accounts established for automatic electronic deposit of dividends ("ACH Accounts"), and (c) accounts established as part of a dividend reinvestment plan, including mutual fund accounts and brokerage accounts (collectively, "DRP Accounts").

For purposes of foreign-addressed property, the State interprets an executed Form W-8 BEN from the owner dated within three years of the end of any calendar year on file with the holder or its agent to be sufficient evidence of "exercise of dominion or control over property" to terminate a period of dormancy (and to begin a new period of dormancy) under Section 1198(9)a. The State understands this interpretation to be consistent with the IRS expectation that Forms W-8 BEN be distributed to owners of foreign-addressed property no less often than once every three years.

For purposes of ACH Accounts and DRP Accounts, the State interprets any of the following actions taken by the owner within three years of the end of any calendar year to be sufficient evidence of "exercise of dominion or control over property" to terminate a period of dormancy (and to begin a new period of dormancy) under Section 1198(9)a.: (a) increasing or decreasing the amount of the investment or deposit in the account; (b) corresponding in writing, either through regular mail or electronically *via* the internet or facsimile transmission; (c) initiating telephone contact about the investment or the account, appropriately documented by the holder or its agent, whether or not the owner speaks with an actual representative of the holder (as through an automated telephone response system); or (d) otherwise indicating an interest in the investment or account as evidenced by (i) a memorandum on file with holder or its agent, (ii) appropriately documented internet access of the owner's account, even if the owner makes no changes to the account, or (iii) the mailing of an IRS Form 1099 relating to the investment or account by the holder or its agent to the owner that is not returned to the holder or its agent by the United States Postal Service. In the event that an owner has more than one investment or account with a holder, the State will interpret the "exercise of dominion or control" over one investment or account with that holder to constitute activity in all accounts of the owner with respect to that holder.

In the absence of evidence of any of the actions described above, the State by regulation requires the holder or its agent to mail a "due diligence" letter to the owner's address of record for each investment or account in an effort to reestablish contact with the owner and to rebut a presumption of abandonment.

Thank you for this opportunity to address your members' concerns. I look forward to an even more open and cooperative dialogue with your members in the coming years.

Sincerely,

/s/________________________
Mark Udinski, State Escheator