

Professor Bainbridge's DExit Exegesis

Article By:

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A year ago, Phil Shawe, the Chief Executive Officer of TransPerfect, penned a piece for *The Nevada Independent* explaining the company's reincorporation from Delaware to Nevada:

Like most major companies, I initially incorporated TransPerfect in Delaware, only to quickly learn its outmoded approach to the law was not in the best interests of my company or employees. Instead, benches like the Delaware Chancery foster ugly, protracted court clashes solely to enrich the state's legal class.

Mr. Shawe's opinion is likely colored by his litigation experiences in the Delaware courts, including a decision by the Delaware Supreme Court upholding the appointment of a custodian to sell Transperfect. *See, e.g., In re TransPerfect Glob., Inc.*, 2019 WL 5260362, at *1 (Del. Ch. Oct. 17, 2019), *appeal dismissed sub nom. TransPerfect Glob., Inc. v. Pincus*, 224 A.3d 203 (Del. 2019) (TABLE), and *cert. denied*, 2019 WL 6130807 (Del. Ch. Nov. 18, 2019); *In re TransPerfect Glob., Inc.*, 2018 WL 904160 (Del. Ch. Feb. 15, 2018), *aff'd sub nom. Elting v. Shawe*, 185 A.3d 694 (Del. 2018) (TABLE); *In re TransPerfect Glob., Inc.*, 2017 WL 3499921 (Del. Ch. Aug. 4, 2017); *In re Shawe & Elting LLC*, 2016 WL 3951339 (Del. Ch. July 20, 2016), *aff'd sub nom. Shawe v. Elting*, 157 A.3d 142 (Del. 2017); *In re TransPerfect Glob., Inc.*, 2016 WL 3477217 (Del. Ch. June 20, 2016, revised June 21, 2016); *Shawe v. Elting*, 2015 WL 5167835 (Del. Ch. Sept. 2, 2015); *In re Shawe & Elting LLC*, 2015 WL 4874733 (Del. Ch. Aug. 13, 2015), *aff'd sub nom. Shawe v. Elting*, 157 A.3d 152 (Del. 2017).

Transperfect is not the only company to have fled Delaware for Nevada and there is an ongoing debate about whether Delaware is at risk of losing substantial business to Nevada (aka "DExit"). Recently, Professor [Stephen Bainbridge](#) posted a [draft](#) of his article "DExit Drivers Is Delaware Dominance Threatened?" In this article, he concludes:

First, almost all reasons given for reincorporation seem implausible. If DExit becomes more frequent, plaintiff lawyers should scrutinize these disclosures, particularly focusing on enhanced liability protections for controllers, directors, and officers, suggesting possible conflicts of interest requiring entire fairness review.

Second, the number of reincorporations from Delaware remains minimal compared to the vast number of new incorporations Delaware attracts annually. Given the strong inertia behind the

initial incorporation decision and the weak drivers for DExit, it is unlikely to become widespread soon.

Professor Bainbridge's argument leans heavily on inertia, the tendency of things to remain as they are. Although the number of companies reincorporating is relatively small, each company increases the momentum for change. Each reincorporation also adds to the experience base of practitioners which may overcome professional resistance to change.

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