EFiled: Apr 28 2014 03:19PM EDT
Transaction ID 55361226
Case No. 8514-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

VTB BANK,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 8514-VCN**
	:	
NAVITRON PROJECTS CORP. and DEVELOPMENT MAX, LLC, a Delaware limited liability company,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER

Date Submitted: January 10, 2014
Date Decided: April 28, 2014

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NOBLE, Vice Chancellor

Plaintiff VTB Bank ("VTB") filed this action against Defendants Navitron Projects Corp. ("Navitron") and Development Max, LLC ("Development Max," and together with Navitron, the "Defendants") alleging, among other claims, that the equitable appointment of a receiver for Development Max is warranted due to its "fraud, gross mismanagement and/or positive misconduct."[1] In the Complaint, VTB denominates five causes of action: (i) appointment of a receiver; (ii) intentional fraudulent transfers; (iii) constructive fraudulent transfers; (iv) unjust enrichment; and (v) constructive trust.[2] The Defendants moved to dismiss the Complaint under Court of Chancery Rule 12(b) for lack of personal jurisdiction and insufficiency of service of process as to Navitron, for failure to state a claim, for failure to plead fraud with particularity, and on *forum non conveniens* grounds.

The Court concludes that it lacks personal jurisdiction over Navitron. The Court also concludes that Development Max cannot be said to face overwhelming hardship if required to defend against VTB's cognizable claims in this forum. Finally, the Court defers ruling on the other aspects of the motion to dismiss.

[1] Verified Compl. (the "Complaint" or "Compl.") ¶ 30.
[2] *Id.* ¶¶ 29-56.

I. BACKGROUND[3]

A. *The Parties*

VTB is a Ukrainian bank and company located in Ukraine.[4] Navitron is a Panamanian corporation and was, during the period at issue in this action, the managing member[5] of Development Max, a Delaware limited liability company.[6] Although Development Max was formed in 1999, Navitron did not become its

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[3] The Complaint is the source of the relevant facts, which are presumed to be true. *See Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

VTB argues that, pursuant to Rule 12(b), the Court must convert the motion to dismiss into one for summary judgment under Rule 56 because the Defendants submitted a significant quantity of documents beyond those integral to or incorporated into the Complaint. Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss ("Pl.'s Answering Br.") 3-7. The Defendants deny that any conversion is warranted. Reply Br. of Defs. Navitron Projects Corp. and Development Max, LLC in Further Supp. of their Mot. to Dismiss ("Defs.' Reply Br.") 2-4.

The Court may consider jurisdictional affidavits when deciding a motion to dismiss for lack of personal jurisdiction. *See Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000). So too may the Court consider similar materials when hearing a motion to dismiss on *forum non conveniens* grounds. *See Tex. Instruments Inc. v. Cyrix Corp.*, 1994 WL 96983, at *1 (Del. Ch. Mar. 22, 1994).

Accordingly, the Court may consider certain materials submitted by the Defendants for these limited purposes. To the extent the Defendants improperly submitted extraneous matters, the Court will exclude them *sua sponte* from its analysis of the pending motion to dismiss. *See In re Gardner Denver, Inc. S'holders Litig.*, 2014 WL 715705, at *4 (Del. Ch. Feb. 21, 2014).

[4] Compl. ¶ 6. VTB is a subsidiary of a financial institution whose majority stockholder is the Russian Federation. Bialyi Aff. ¶ 19.

[5] Compl. ¶ 8. According to an affidavit submitted by the Defendants, Navitron was no longer the managing member of Development Max when VTB filed the Complaint on April 30, 2013. Zika Decl. ¶¶ 5-6, Ex. 14. For present purposes, the Court assumes, as pled in the Complaint, that Navitron was Development Max's managing member during the events alleged.

[6] Compl. ¶ 7. Development Max sought to redomicile in the Republic of the Seychelles in 2012. Bialyi Aff. ¶ 22; Zika Decl. Ex. 3. Counsel for the Defendants was unable to identify the jurisdiction under whose laws Development Max currently exists without qualifying his answer as being based on the documentation submitted to the Court. Tr. of Oral Arg. Defs.' Mot. to Dismiss ("Tr. of Oral Arg.") 10, 43-44. But, according to the same counsel, Development Max is still listed with the Delaware Secretary of State, albeit as an inactive Delaware entity. *Id.* Because these jurisdictional statements do not authoritatively contradict VTB's allegations, the Court assumes, again as alleged in the Complaint, that Development Max still exists under the laws of Delaware.

managing member until 2008.[7] Before then, the managing members of Development Max were Dmitriy Sviatash ("Sviatash") and Vasiliy Poliakov.[8]

B. *VTB's Loans to the AIS Group*

As of February 2006, the Defendants were co-owners of AutoInvestStroy LLC, which VTB describes as the "umbrella entity" for a corporate family it calls the "AIS Group." The Defendants also "owned and controlled the majority of companies which were part of the AIS Group."[9] The AIS Group sold and serviced cars through a network of regional centers, many of which were owned by Development Max, throughout Ukraine.[10]

In 2008, VTB entered into separate, 364-day credit line agreements (the "Loans") with two entities of the AIS Group (the "AIS Borrowers"). The Loans would allow the AIS Group to purchase cars and sell them to Ukrainian consumers at its regional sale centers.[11] As a condition of the Loans, VTB required the AIS Group to execute suretyship agreements and pledge both real and personal property as collateral (the "Collateral").[12] By January 2009, the AIS Borrowers had borrowed approximately $63 million under the Loans.[13]

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[7] Compl. ¶ 11. VTB did not plead the principal places of business of the Defendants.
[8] *Id.* ¶¶ 1, 11.
[9] *Id.* ¶ 12.
[10] *Id.* ¶ 13. VTB alleges that the AIS Group was one of the largest car sale and service networks in Ukraine, with approximately ten percent market share. *Id.*
[11] *Id.* ¶ 20.
[12] *Id.* ¶¶ 15-16.
[13] *Id.* ¶¶ 17, 19.

C. *The Loans are Not Repaid, and the Collateral is Transferred to the Defendants*

VTB alleges that the AIS Group transferred the cars it purchased with the proceeds of the Loans "through its network of shell companies using a series of fraudulent transfers." After the cars were sold to consumers in Ukraine, most of the sale proceeds "remained with Development Max and/or were funneled through shell companies back to Development Max and Navitron."[14]

In February and March 2009, Sviatash met with representatives of VTB to discuss "restructuring of the debt" and "prepar[ing] a repayment plan for the loans." The meetings do not appear to have resulted in any firm plans. Apparently, "VTB did not hear from Sviatash or the AIS Group" again.[15]

Soon thereafter, the AIS Borrowers failed to make payments when the Loans were due in 2009.[16] VTB then initiated litigation in Ukraine to foreclose on the Collateral, but it claims that the AIS Group "intentionally delayed the court proceedings" by "failing to appear on many occasions."[17] In the meantime, the Defendants purportedly "relied upon forged and fictitious documents to facilitate the transfer of the Collateral" to separate entities that VTB believes to be under the Defendants' ownership or control.[18] VTB insists the transfers of the Collateral

[14] *Id.* ¶ 20.
[15] *Id.* ¶ 21.
[16] *Id.* ¶ 22.
[17] *Id.* ¶ 23.
[18] *Id.* ¶ 24.

subject to its suretyship liens must have used forged documents because, under Ukrainian law, "property subject to a lien may only be transferred if a notary certifies there are no liens on the assets or the lien holder consents to the transfer," and VTB did not give its consent.[19]

VTB contends that the fraudulently transferred Collateral "resided" with the Defendants, who were also unjustly enriched by retaining the proceeds of the Loans.[20] As a result of the transfers, VTB is allegedly unable to foreclose on the Collateral and has consequently suffered damages of approximately $60 million.[21] VTB also asserts, upon information and belief, that the Defendants have renamed certain AIS Group entities in order "to repeat their fraudulent conduct of transferring funds and assets to the detriment of creditors."[22]

Of note, it is not alleged that the formation of Development Max in 1999 was in contemplation or in furtherance of the fraudulent scheme, which is not alleged to have begun until at least 2008. In other words, although VTB insists that Development Max engaged in fraudulent transfers, the Complaint does not allege that the formation of Development Max as a Delaware limited liability company was for fraudulent purposes.

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[19] *Id.* ¶ 25.
[20] *Id.* ¶¶ 27, 45.
[21] *Id.* ¶¶ 2-3, 27.
[22] *Id.* ¶ 28.

II. ANALYSIS

A. *Personal Jurisdiction over Navitron*

Navitron moved to dismiss VTB's claims for, among other reasons, lack of personal jurisdiction under Court of Chancery Rule 12(b)(2). The Court should determine whether it has personal jurisdiction over Navitron before addressing the other grounds for dismissal.[23]

As the plaintiff, VTB bears the burden of showing by affirmative proof—that is, by more than conclusory assertions[24]—that the Court may exercise personal jurisdiction over Navitron, a nonresident defendant.[25] If this jurisdictional question is raised without the benefit of an evidentiary hearing, as it was here, then VTB must "point to sufficient evidence in the record to support a *prima facie* case that jurisdictional facts exist."[26] Specifically, VTB must establish two elements for the Court to exercise jurisdiction over Navitron: "(1) a statutory basis for service of process; and (2) the requisite 'minimum contacts' with the forum to satisfy constitutional due process."[27] For jurisdictional purposes, the Court may look beyond the pleadings to affidavits and "any discovery of record."[28]

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[23] *See Branson v. Exide Elecs. Corp.*, 625 A.2d 267, 268-69 (Del. 1993).
[24] *See Mobile Diagnostic Gp. Hldgs., LLC v. Suer*, 972 A.2d 799, 802 (Del. Ch. 2009).
[25] *See Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326-27 (Del. Ch. 2003).
[26] *Hartsel v. Vanguard Gp., Inc.*, 2011 WL 2421003, at *7 (Del. Ch. June 15, 2011).
[27] *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *6 (Del. Ch. May 7, 2008), *aff'd*, 984 A.2d 124 (Del. 2009) (TABLE).
[28] *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007).

In the Complaint, VTB alleges that the Court has personal jurisdiction over Navitron pursuant to 10 *Del. C.* § 3104 and 6 *Del. C.* § 18-109.[29] The Court addresses each statutory basis in turn.

1. The Long-Arm Statute

Delaware's long-arm statute, 10 *Del. C.* § 3104, provides for personal jurisdiction over nonresidents who engage in certain enumerated acts that relate to the State of Delaware.[30] Navitron contends that long-arm jurisdiction is unavailable because its only contact with Delaware, as alleged in the Complaint, is

[29] Compl. ¶ 10.

[30] The statute, 10 *Del. C.* § 3104(c), provides:

> (c) As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:
>
> > (1) Transacts any business or performs any character of work or service in the State;
> >
> > (2) Contracts to supply services or things in this State;
> >
> > (3) Causes tortious injury in the State by an act or omission in this State;
> >
> > (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
> >
> > (5) Has an interest in, uses or possesses real property in the State; or
> >
> > (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

that it is the managing member of Development Max.[31] In its answering brief, VTB did not cite once to 10 *Del. C.* § 3104. Instead, the only apparent reference to the long-arm statute was a brief quotation of this Court's discussion of the statute's constitutional due process limitations, not its list of enumerated acts authorizing jurisdiction.[32] At oral argument, even after Navitron repeatedly asserted that VTB had waived this jurisdictional basis, VTB still did not defend its merits.[33]

A party's failure to address in its responsive brief an opposing party's asserted grounds for dismissal, coupled with its failure to cure that omission at the corresponding oral argument, can lead to the Court's deeming the underlying issue waived.[34] By not briefing or arguing the merits of personal jurisdiction over Navitron pursuant to 10 *Del. C.* § 3104, VTB waived that issue.[35]

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[31] Opening Br. of Defs. Navitron Projects Corp. and Development Max, LLC in Supp. of their Mot. to Dismiss ("Defs.' Opening Br.") 31-32 (citing Compl. ¶ 10).

[32] Pl.'s Answering Br. 25 ("When nonresidents agree to serve as directors or managers of Delaware entities, it is only reasonable that they anticipate that . . . they will be subject to personal jurisdiction in Delaware courts.") (quoting *Albert v. Alex Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *16 n.79 (Del. Ch. Aug. 26, 2005) (citing *Assist Stock Mgmt., L.L.C. v. Rosheim*, 753 A.2d 974, 975 (Del. Ch. 2000))).

[33] Tr. of Oral Arg. 9-11, 13, 44.

[34] *See generally Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."); *see also Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 2982247, at *11 (Del. Ch. Oct. 9, 2007) ("[T]he plaintiffs failed to brief their claim that the Individual Defendants aided and abetted the General Partner's breach of its oversight duties. The plaintiffs have waived this claim by failing to brief it in their opposition to the motion to dismiss, and the claim will be dismissed.")

[35] Were the issue not waived, VTB has nonetheless failed to establish a *prima facie* case for the Court to exercise personal jurisdiction over Navitron pursuant to Delaware's long-arm statute. According to an uncontroverted declaration submitted by the Defendants, Navitron did not have any contacts with Delaware outside of its position as managing member of Development Max. Zika Decl. ¶¶ 7-19. "Merely participating in the management of a Delaware entity—with no allegation of 'extensive and continuing contacts with Delaware'—does not subject a party to this

2. The Limited Liability Company Act

Delaware's Limited Liability Company Act (the "LLC Act") authorizes service of process on the managers of Delaware limited liability companies in actions "involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability company or any member of the limited liability company.[36] Under the LLC Act, a manager is a "person who is named as a manager of a limited liability company in, or designated as a manager of a limited liability company pursuant to, a limited liability company agreement."[37]

Under one interpretation, the disjunctive "or" in the phrase "involving or relating to the business . . . *or* a violation by the manager" in 6 *Del. C.* § 18-109(a) could imply a statutory basis for the Court to assert personal jurisdiction over a manager in any action that "involves or relates" to the limited liability company's

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Court's long-arm jurisdiction." *Fla. R & D Fund Investors, LLC v. Fla. BOCA/Deerfield R & D Investors, LLC*, 2013 WL 4734834, at *6 (Del. Ch. Aug. 30, 2013) (quoting *Metro. Life Ins. Co. v. Tremont Gp. Hldgs. Inc.*, 2012 WL 6632681, at *5 (Del. Ch. Dec. 20, 2012)). Particularly because VTB alleges fraudulent conduct starting in 2008, well after Development Max was formed in 1999, no reasonable inference from the pleadings or the record could support the position that Navitron's conduct—merely being the managing member of a Delaware limited liability company with no other contact with Delaware—had an effect "in this State." *See, e.g.*, *Red Sail Easter Ltd. P'rs, L.P. v. Radio City Music Hall Prods., Inc.*, 1991 WL 129174, at *3-4 (Del. Ch. July 10, 1991).

[36] 6 *Del. C.* § 18-109(a).

[37] 6 *Del. C.* § 18-101(10). The Court does not address whether Navitron would qualify as a manager under 6 *Del. C.* § 18-109(a)(ii) for participating materially in the management of Development Max because VTB did not raise that issue.

business.[38] But, this Court has not subscribed to such a broad reading of this "implied consent" statute because doing so could lead to its unconstitutional application. For a plaintiff to invoke 6 *Del. C.* § 18-109(a) in a manner consistent with constitutional due process, the action should be similar to one in which "the allegations against [the manager] focus centrally on his rights, duties and obligations as a manager of a Delaware LLC."[39] Stated differently, the LLC Act's implied consent provision does not establish a statutory basis for personal jurisdiction over a manager where the claims do not relate to the "rights, duties and responsibilities" that the manager owes to the company or to the manager's involvement in the company's "internal business affairs" or "day-to-day operations."[40]

Navitron contends that VTB has failed to make a *prima facie* showing of personal jurisdiction based on this statute because the allegations in the Complaint do not relate to its managerial relationship with Development Max, let alone its involvement in Development Max's business affairs.[41] Instead, according to Navitron, the claims are based on purported duties that it owed to VTB.[42] In opposition, VTB argues that the Court may exercise jurisdiction over Navitron

[38] *See Hartsel*, 2011 WL 2421003, at *9.
[39] *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *8 (Del. Ch. Dec. 1, 2009) (quoting *Assist Stock Mgmt.*, 753 A.2d at 981).
[40] *Id.*; *see also Hartsel*, 2011 WL 2421003, at *9.
[41] Defs.' Opening Br. 32-34.
[42] Defs.' Reply Br. 19-20.

here on the theory that Navitron subjected itself to the Court's jurisdiction generally when it became the managing member of Development Max.[43]

The Court concludes that exercising personal jurisdiction over Navitron pursuant to 6 *Del. C.* § 18-109(a) in this action would be inconsistent with due process, and thus unconstitutional, because VTB did not assert claims related to Navitron's rights, duties, or responsibilities as a managing member of Development Max. For example, VTB has not alleged that it was harmed because of Navitron's conduct vis-à-vis Development Max; rather, VTB asserts it was harmed by the parallel conduct of Navitron and Development Max independent of their corporate structure.[44] Therefore, VTB's claims against Navitron must be dismissed under Rule 12(b)(2) for lack of personal jurisdiction.[45]

B. *The Claim for the Equitable Appointment of a Receiver*

VTB's request for a receiver implicates this Court's fundamental role in overseeing the conduct of Delaware entities. It is a request that, under the internal affairs doctrine, is governed by Delaware law.[46] This Court has the inherent equitable power to appoint a receiver for a Delaware limited liability company even where this remedy is not expressly available by statute or under the operative

[43] Pl.'s Answering Br. 25-26.
[44] *See, e.g.*, Compl. ¶¶ 20, 24, 26-27.
[45] Based on this conclusion, the Court need not address whether the claims against Navitron should be dismissed pursuant to Rule 12(b)(5) for insufficiency of service of process.
[46] *See generally McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987).

company agreement.[47] Conduct that may justify the appointment of a receiver includes "a showing of fraud, gross mismanagement, positive misconduct by corporate officers, breach of trust, or extreme circumstances showing imminent danger of great loss which cannot otherwise be prevented."[48] Where the company is solvent, a "strong showing" is necessary[49] to invoke this "extraordinary remedy"[50] that should "not be resorted to if milder measures will give the plaintiff, whether creditor or shareholder, adequate protection for his rights."[51]

In *Drob v. National Memorial Park, Inc.*, the Court described the appointment of a receiver as "a remedy of an auxiliary and incidental nature."[52] The teachings of *Drob* remain important in that this Court typically approaches the appointment of a receiver pursuant to its general equitable powers as a remedy, not as an independent cause of action. For example, in *Carlson v. Hallinan*, the Court concluded after trial that the plaintiffs had established breaches of fiduciary duty sufficient to warrant the equitable appointment of a receiver for a corporation,

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[47] *See, e.g., Ross Hldg. & Mgmt. Co. v. Advance Realty Gp., LLC*, 2010 WL 3448227, at *6 (Del. Ch. Sept. 2, 2010).
[48] *Zutrau v. Jansing*, 2013 WL 1092817, at *5 (Del. Ch. Mar. 18, 2013) (citing *Carlson v. Hallinan*, 925 A.2d 506, 543 (Del. Ch. 2006), *clarified by* 2006 WL 1510759 (Del. Ch. May 22, 2006)).
[49] *See id.* (quoting *Tansey v. Oil Producing Royalties, Inc.*, 133 A.2d 141, 146 (Del. Ch. 1957)).
[50] *Roth v. Laurus U.S. Fund., L.P.*, 2011 WL 808953, at *5 (Del. Ch. Feb. 25, 2011).
[51] *Ross Hldg.*, 2010 WL 3448227, at *6 (quoting *Maxwell v. Enter. Wall Paper Mfg. Co.*, 131 F.2d 400, 403 (3d Cir. 1942) (applying Pennsylvania law to the appointment of a receiver for a Pennsylvania corporation)).
[52] *See Drob v. Nat'l Memorial Park Inc.*, 41 A.2d 589, 597 (Del. Ch. 1945).

which they had requested as a remedy in their complaint.[53] Likewise, in *Zutrau v. Jansing*, the Court concluded at the motion to dismiss stage that there was a reasonably conceivable basis to support the plaintiffs' request for relief of a receiver for a corporation based on their allegations of breach of fiduciary duty and equitable fraud.[54]

In the Complaint, VTB listed the appointment of a receiver for Development Max as both an enumerated cause of action and a request for relief.[55] Development Max argues that VTB's receivership claim should be dismissed based on its position that the underlying fraudulent transfer claims must be dismissed for failure to state a claim under Rule 12(b)(6) or for failure to plead fraud with particularity under Rule 9(b).[56] Conversely, VTB contends that, regardless of the relevant pleading standard, it has sufficiently alleged positive misconduct and fraud to support its claim for the appointment of a receiver.[57]

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[53] *See* Amended Verified Complaint at ¶¶ 46-101, Prayer for Relief ¶ I, *Carlson*, 925 A.2d at 544 ("Pursuant to its inherent powers, the Court orders the appointment of a receiver for [defendant corporation].").

[54] *See* Second Amended and Supplemental Verified Complaint at ¶¶ 88-115, Prayer for Relief ¶ F, *Zutrau*, 2013 WL 1092817, at *6 ("Accepting Plaintiff's allegations as true and affording [her] the benefit of all reasonable inferences, her allegations of fraud and gross mismanagement are 'sufficient to state a claim that might, at some later stage, lead to the Court's appointing a custodian to the corporation.'").

[55] Compl. ¶¶ 29-34, Prayer for Relief ¶ B.

[56] Defs.' Reply Br. 26; Defs.' Opening Br. 46-47.

[57] Pl.'s Answering Br. 28-30.

This Court has recognized that a party may, on rare occasions, mistakenly plead a remedy as an enumerated cause of action.[58] In these situations, this Court has tended to permit the remedial claims to remain in the complaint, but it has generally excluded them from its analysis at the motion to dismiss stage. In effect, this Court treats remedial claims not as independent causes of action but instead "as having been included in [the] prayer for relief."[59]

VTB has pled two remedies as claims in the Complaint. A constructive trust is a remedy,[60] and VTB's claim for one is secondary to, and derivative of, its underlying unjust enrichment claim. Because the success of the constructive trust remedy turns entirely on the success of the unjust enrichment claim, the Court's analysis at this procedural stage will address only the latter, not the former.

Similarly, under *Drob*, *Carlson*, and *Zutrau*, VTB's claim for the equitable appointment of a receiver is another remedy styled as a claim.[61] VTB has not identified a decision of this Court clearly endorsing the equitable appointment of a

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[58] *See, e.g.*, *AQSR India Private, Ltd. v. Bureau Veritas Hldgs., Inc.*, 2009 WL 1707910, at *14 (Del. Ch. June 16, 2009) (identifying secondary claims for civil conspiracy, injunctive relief, an accounting, and a constructive trust).

[59] *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *25 (Del. Ch. May 5, 2010) ("So long as the underlying cause of action is well plead, requested relief styled as a claim will not be stricken from the complaint.").

[60] As the Court will describe, *infra*, Ukrainian law appears to govern VTB's unjust enrichment claim, and VTB did not submit an expert affidavit explaining that a constructive trust is a cognizable cause of action under the laws of Ukraine. Under Delaware law, a constructive trust is a remedy, not a substantive cause of action. *See, e.g.*, *Hogg v. Walker*, 622 A.2d 648, 652 (Del. 1993) ("The doctrine of constructive trust . . . is an equitable remedy of great flexibility and generality, and is viewed as 'a remedial [and] not a substantive' institution.") (citations omitted).

[61] *See Zutrau*, 2013 WL 1092817, at *6; *Carlson*, 925 A.2d at 544; *Drob*, 41 A.2d at 597.

receiver as an independent cause of action.[62] Contrary to VTB's assertions,[63] that Development Max may have overlooked this issue does not compel an unnecessary expansion of Delaware law. Therefore, whether VTB may prevail on its remedial, equitable receivership claim depends *per force* on whether it successfully proves its primary claims for fraudulent transfers.

Accordingly, although the Court does not now formally dismiss VTB's remedial claims for a constructive trust and an equitable receiver, the Court will generally not separately consider them in its analysis of whether the allegations supporting VTB's actual causes of action denominated in the Complaint—unjust enrichment and fraudulent transfers—should be dismissed based on the defenses asserted by Development Max, including its defense of *forum non conveniens*. That is not to say, however, that VTB's receiver request—one in which it invokes Delaware's strong interest in monitoring the conduct of Development Max as a

[62] The two, main cases cited by VTB in support of its position on the appointment of a receiver do not prescribe a different conclusion. In one, the Court concluded that allegations of misconduct regarding the diversion of sale proceeds supported a derivative breach of fiduciary duty claim, as well as a request for the appointment of a custodian for a solvent corporation, at the motion to dismiss stage. *See Andrae v. Andrae*, 1992 WL 43924, 18 Del. J. Corp. L. 197, 213 (Del. Ch. Mar. 3, 1992) ("Plaintiffs have also requested this Court to appoint a "receiver" for Peninsular Diesel and order an accounting. Plaintiffs have not, however, set forth any basis for this relief, leaving the Court to speculate as to their rationale."). In the other case, the Court dismissed a creditor's statutory, as opposed to equitable, claim for the appointment of a receiver for a corporation. *See Elliott Assocs., L.P. v. Bio-Response, Inc.*, 1989 WL 55070, at *4-7 (Del. Ch. May 23, 1989).

[63] Tr. of Oral Arg. 81, 92-93.

Delaware entity—has no role in the Court's ultimate conclusion on the motion to dismiss.[64]

C. *Forum Non Conveniens*

The Court may dismiss a complaint on *forum non conveniens* grounds if the defendant demonstrates that it would face "overwhelming hardship" when defending itself in this forum. The Delaware Supreme Court recently reaffirmed and clarified the appropriate *forum non conveniens* inquiry in *Martinez v. E.I. DuPont de Nemours & Co., Inc*.[65]

Where there is no prior pending action in another jurisdiction,[66] the Court's *forum non conveniens* analysis is guided by the six *Cryo-Maid*[67] factors:

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[64] It is highly unlikely that this Court would entertain a request for a receiver merely on the basis of a claim of unjust enrichment. To the extent VTB's receiver request influences the Court's subsequent analysis, it is on the basis of VTB's fraudulent transfer allegations.

[65] *See Martinez v. E.I. DuPont de Nemours & Co., Inc.*, 2014 WL 685685, — A.3d — (Del. Feb. 20, 2014).

[66] Development Max argues that the Complaint should be dismissed under *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970) in light of several earlier Ukrainian actions it contends are "functionally identical" to this action. Defs.' Opening Br. 10-16. VTB denies that any proceeding previously initiated in Ukraine includes the same or substantially the same parties or issues. Pl.'s Answering Br. 8-14.

The Court may exercise its discretion to stay or a dismiss a Delaware action pursuant to the *McWane* doctrine where "there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and same issues." *McWane*, 263 A.2d at 283. The Supreme Court has more recently recognized that it may be sufficient if the Delaware action is "substantially or functionally identical" to the prior action. *See Chadwick v. Metro Corp.*, 856 A.2d 1066 (TABLE), 2004 WL 1874652, at *2 (Del. Aug. 12, 2004) (citing *Dura Pharms., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 930 (Del. Ch. 1998)).

Based on the discussion of the Ukrainian lawsuits in the expert affidavit submitted by Development Max, Bialyi Aff. ¶¶ 39-67, the Court concludes that the parties and issues in those proceedings are not substantially or functionally identical to those in this action. Accordingly, the Court declines to stay or dismiss this action under *McWane*.

[67] *See Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964).

(1) the relative ease of access to proof;

(2) the availability of compulsory process for witnesses;

(3) the possibility of the view of the premises;

(4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction;

(5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and

(6) all other practical problems that would make the trial of the case easy, expeditious and inexpensive.[68]

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[68] *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1198-99 (Del. 1997).

The parties insist that the Court's *forum non conveniens* analysis must begin with a threshold inquiry of whether an adequate, alternate forum is available. Defs.' Opening Br. 17; Pl.'s Answering Br. 14-15. For support, they each cite to persuasive authority of the Delaware Superior Court. *See Martinez v. E.I. DuPont De Nemours & Co., Inc.*, 82 A.3d 1, 29 (Del. Super. 2012), *aff'd on other grounds*, *Martinez*, 2014 WL 685685 (citing *Lluerma v. Owens Ill. Inc.*, 2009 WL 1638629, at *8-9 (Del. Super. June 11, 2009)). During its review of Supreme Court precedent, particularly *Martinez*, the Court did not find language importing this additional element into the six, well recognized *Cryo-Maid* factors. *See, e.g.*, *Martinez*, 2014 WL 685685, at *1; *Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1046 n.10 (Del. 2010); *Candlewood Timber Gp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 994-95 (Del. 2004); *Ison v. E.I. DuPont de Nemours & Co., Inc.*, 729 A.2d 832, 837-38 (Del. 1999); *Taylor*, 689 A.2d at 1198-99. The Court thus declines to adopt that element here.

Although not necessitated in this *Cryo-Maid* analysis, the Court recognizes that Ukraine would likely be an adequate, alternate forum for VTB's cognizable claims. The Defendants represented through their counsel that both entities will consent to jurisdiction in Ukraine. Tr. of Oral Arg. 25-26; *see also Ison*, 729 A.2d at 846 ("The second important practical problem is one that has been avoided through DuPont's willingness to waive any jurisdictional or statutes of limitation defenses that it might possess in the alternate fora. This removes any doubt that the plaintiffs would be able to assert their claims in their home countries.") And, Development Max's expert affidavits state that Ukraine recognizes the legal concept of fraudulent transfer as implicated in the Complaint and that Ukrainian courts could exercise personal jurisdiction over the Defendants. Bialyi Aff. ¶¶ 33-38; First Supplemental Bialyi Aff. ¶¶ 16-31.

Development Max's expert affidavits are uncontroverted in the record. Given that VTB filed its answering brief approximately seven weeks after the Defendants filed their opening brief, the Court concludes that VTB had notice of these issues and a sufficient, albeit brief, opportunity to present its own Ukrainian law expert. VTB asserts, by a letter from its United States counsel to the Court, that the Defendants are not subject to jurisdiction in Ukraine, despite the Defendants'

These factors represent a doctrinal framework from which the Court can conclude whether the defendant would suffer "overwhelming hardship" if required to litigate here.[69] The analysis is not one in which the Court should come to a conclusion based on a tally of which, or how many, factors favor the defendant; rather, the Court must "consider the weight of those factors in the particular case and determine whether any or all of them truly cause both inconvenience and hardship."[70] Similarly, the Court should not base its conclusion on whether it is more difficult to litigate in Delaware than in another jurisdiction, for the premise of *forum non conveniens* is whether the defendant would face overwhelming hardship in a Delaware forum.[71] That said, the public policy concerns regarding deference to a plaintiff's chosen forum are not as strong where, as here, the plaintiff does not

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representation and the allegations of systemic fraud by and within the AIS Group, because they do not own real estate in Ukraine and because they do not have an officially registered office as a foreign legal entity. *See* Letter from Elizabeth A. Sloan, Esquire (Jan. 2, 2014). The Court is unwilling to rely upon such an interpretation of Ukrainian law—which could be viewed as undermining pervasive notions of international commerce and justice—absent guidance from a qualified expert.

More recently, counsel for all parties wrote to the Court regarding the effects of current events in Ukraine on their *forum non conveniens* arguments. *See* Letter from Carl D. Neff, Esquire (Mar. 6, 2014); Letter from Elizabeth A. Sloan (Feb. 27, 2014). The Court acknowledges the import of these letters. Based on the Court's ultimate conclusion, however, these matters need not be resolved at this time.

[69] *See Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'ship*, 669 A.2d 104, 107 (Del. 1995).

[70] *Id.* at 105.

[71] *See Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 781 (Del. 2001) ("[The trial court] improperly weighed the plaintiff's chosen forum versus the defendant's preferred forum, a balancing analysis not contemplated by this Court's *forum non conveniens* jurisprudence.").

reside in Delaware.[72] Guided by the Supreme Court's statements in *Martinez*, the Court approaches the overwhelming hardship standard as a "stringent" one, not a "preclusive" one.[73]

VTB contends that the *Cryo-Maid* factors, when considered both individually and collectively, do not demonstrate that Development Max would face the overwhelming hardship necessary to support dismissal on *forum non conveniens* grounds.[74] In opposition, Development Max contends that this action satisfies the stringent overwhelming hardship standard, particularly because litigating here would entail a cumbersome process for obtaining evidence, translating documents, and presenting witnesses, including Ukrainian law and real estate experts.[75] In its briefs, Development Max represents that it intends to argue, as an affirmative defense, that VTB is precluded from recovery in this action because it previously foreclosed upon certain commercial real estate in Ukraine in partial, if not full, satisfaction of the Loans. It also intends to challenge whether VTB acted in a commercially reasonable manner when doing so.[76] As appropriate, the Court evaluates the potential hardship these affirmative defenses may cause.

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[72] *See Martinez*, 2014 WL 685685, at *3 (citing *Ison*, 729 A.2d at 835).
[73] *See id.*; *see also IM2 Merchandising & Mfg., Inc. v. Tirex Corp.*, 2000 WL 1664168, at *7-8 (Del. Ch. Nov. 2, 2000).
[74] Pl.'s Answering Br. 16-25.
[75] Defs.' Reply Br. 16-18; Defs.' Opening Br. 16-29.
[76] Defs.' Opening Br. 19-20.

1. The Relative Ease of Access to Proof

It is evident from the allegations of the Complaint that the vast majority of the evidence necessary for Development Max to defend the fraudulent transfer and unjust enrichment claims would be not in Delaware but rather in Ukraine, and most likely written in Ukrainian. VTB is located in Ukraine.[77] The conduct in which Development Max engaged—its role in a purported fraudulent scheme involving the AIS Group, a family of entities that operates a Ukrainian network of car centers—took place in Ukraine.[78] In jurisdictional discovery, VTB produced twenty-three commercial documents related to the Loans; not only are all written in Ukrainian and governed by Ukraine choice of law provisions, but the Loans and several suretyship agreements also include Ukraine forum selection clauses.[79] It is thus clear that VTB and the AIS Group contemplated that their relationship would be largely (if not entirely) based in Ukraine.

Because the evidence in Ukraine is beyond the Court's subpoena power, it would be very difficult for Development Max to access the proof necessary to litigate in this Court, much more difficult than it would be in a corresponding tribunal in Ukraine. According to Development Max's unrebutted affidavit from a Ukrainian lawyer, although Ukraine is a signatory to the Hague Convention on

[77] Compl. ¶ 6.
[78] *See, e.g., id.* ¶¶ 13, 15-16, 20-28.
[79] First Supplemental Bialyi Aff. ¶¶ 10-11.

Taking of Evidence Abroad in Civil and Commercial Matters (the "Hague Convention"), it has "filed a reservation" regarding its authority to reject pre-trial discovery requests and regarding a requirement that oral examination of witnesses take place before a Ukrainian judicial officer and then be summarized by court personnel.[80] This process alone may not support a finding of overwhelming hardship, but it is evident that requiring Development Max to marshal its defense solely in reliance on the Hague Convention, subject to the reservations by Ukraine, would be a "circuitous route[] to accessing evidence."[81]

Development Max identified, with sufficient specificity,[82] a substantial number of classes of documents that would be necessary for its defenses but very difficult to access were the litigation to proceed in Delaware. These include documents related to the Loans and the purported defaults, documents related to the Collateral transfers certified by a Ukrainian notary purportedly in contravention of Ukrainian law, and documents related to VTB's foreclosure on commercial real estate, the value of that property, and VTB's potential disposition of it.[83] That Development Max submitted certain translated documents alongside its expert affidavits does not controvert the Court's conclusion that its access to proof in this

[80] Bialyi Aff. ¶¶ 84-91.
[81] *See Ison*, 729 A.2d at 843.
[82] *See Warburg, Pincus Ventures, L.P. v. Schrapper*, 774 A.2d 264, 269-71 (Del. 2001).
[83] Defs.' Opening Br. 20-21.

forum would be cumbersome, inefficient, and extremely difficult. This *Cryo-Maid* factor strongly favors Development Max.

2. The Availability of Compulsory Process for Witnesses

It is further apparent that all relevant witnesses reside outside Delaware and, in all likelihood, in Ukraine, where the alleged conduct occurred. This is not an action in which the defendant or its agents are located in Delaware.[84] Rather, it is one where important, third-party witnesses are wholly outside the forum state, and, assuming they can even be subpoenaed to testify, there are travel and translation expenses "which when taken in totality could be quite burdensome."[85]

There may be other disadvantages peculiar to at least one claim asserted in the Complaint. VTB's claim for intentional fraudulent transfers would appear to implicate witness credibility. Relying on deposition testimony to alleviate the financial burdens of travel and translation associated with live testimony creates its own hardship for Development Max in the administration of justice for this claim because the Court, as "the fact finder[,] loses the opportunity to effectively and contemporaneously evaluate the credibility of the witness."[86]

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[84] *See Ison*, 729 A.2d at 843.
[85] *See IM2 Merchandising*, 2000 WL 1664168, at *10.
[86] *Aveta, Inc. v. Colon*, 942 A.2d 603, 612 (Del. Ch. 2008); *see also In re Chambers Dev. Co., Inc. S'holders Litig.*, 1993 WL 179335, 19 Del. J. Corp. L. 242, 253-54 (Del. Ch. May 20, 1993) ("While this Court frequently allows for methods other than live testimony, *i.e.*, depositions and written interrogatories, there is no question that from a decisionmakers' perspective such methods are poor substitutes and certainly not equivalents."); *but see Petroplast Petrofisa*

Although Development Max did not identify by name which particular witnesses or what factual testimony could not be presented live in Delaware, it did demonstrate, with sufficient specificity,[87] which kinds of important, third-party witnesses are likely not subject to the Court's compulsory process. They include employees and representatives of the AIS Borrowers, employees and representatives of third parties implicated in the Ukrainian lawsuits initiated by VTB, and persons with knowledge of the nature and value of the commercial real estate that are the subjects of those lawsuits.[88] This *Cryo-Maid* factor also strongly favors Development Max.

3. The Possibility of the View of the Premises

With the availability of video recording, this factor typically does not contribute to overwhelming hardship.[89] To the extent Development Max's affirmative defense regarding double recovery requires experts to value commercial real estate in Ukraine, it slightly favors Development Max. Otherwise, this factor is neutral.

Plasticos S.A. v. Ameron Int'l Corp., 2009 WL 3465984, at *5-6 (Del. Ch. Oct. 28, 2009) (noting cases in which this Court has made contrary statements).

[87] *See Warburg, Pincus Ventures*, 774 A.2d at 269-71; *but see generally Aveta*, 942 A.2d at 609 ("The entire purpose of the *forum non conveniens* doctrine is to relieve defendants from the undue burdens of litigating in an especially inconvenient forum. That purpose would be subverted if a defendant had to endure costly, protracted proceedings in order to avail itself of the doctrine in the first place.").

[88] Defs.' Opening Br. 21-22.

[89] *See Ison*, 729 A.2d at 843; *IM2 Merchandising*, 2000 WL 1664168, at *10.

4. Whether the Controversy is Dependent upon the Application of Delaware Law

Delaware courts follow the conflict of laws principles of the Restatement and apply the laws of the jurisdiction with the "most significant relationship" to the controversy for fraudulent transfer claims[90] and for unjust enrichment claims.[91] Under the Restatement approach, the Court should consider the relevant,

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[90] *See Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991) (applying the Restatement approach to tort-based claims) (citing Restatement (Second) of Conflict of Laws § 145 (1971)).

The Restatement factors for a fraudulent transfer claim are:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Restatement (Second) of Conflict of Laws § 145(2)(a)-(d).

[91] *See Landis v. Science Mgmt. Corp.*, 1991 WL 19848, at *3 (Del. Ch. Feb. 15, 1991) (citing Restatement (Second) of Conflict of Laws § 221)).

The Restatement factors for an unjust enrichment claim are:

> (a) the place where a relationship between the parties was centered, provided that the receipt of enrichment was substantially related to the relationship,
>
> (b) the place where the benefit or enrichment was received,
>
> (c) the place where the act conferring the benefit or enrichment was done,
>
> (d) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and
>
> (e) the place where a physical thing, such as land or a chattel, which was substantially related to the enrichment, was situated at the time of the enrichment.

Restatement (Second) of Conflict of Laws § 221(2)(a)-(e).

enumerated factors and weigh them, as the circumstances demand, to determine the governing jurisdiction. Here, the only possible connection to Delaware for all of VTB's claims is that Development Max is a Delaware entity. All of Development Max's conduct and VTB's resulting injuries, as alleged in the Complaint, occurred in Ukraine, the jurisdiction where the AIS Borrowers entered into the Loans, where the AIS Group entered into the suretyship agreements providing the Collateral, and where their overall commercial relationship is centered.

Based on the limited allegations of the Complaint,[92] is evident that Ukraine, not Delaware, has the most significant relationship for the fraudulent transfer and unjust enrichment claims asserted by VTB. Hence, the Court would be asked to apply Ukrainian law. The mere application of foreign law is not dispositive of this factor in a *forum non conveniens* analysis,[93] but the Court may nonetheless weigh "a defendant's interest in having important issues of foreign law decided by the courts whose law governs the case."[94] Because VTB alleges systemic fraudulent transfers throughout a sizeable automobile retailer based in Ukraine, Development Max has a legitimate interest in having these serious claims arising under the laws

[92] The Court acknowledges that its conclusion on this conflict of laws question may need to be revisited when the record is more developed.
[93] *See Taylor v. LSI Logic Corp.*, 715 A.2d 837, 842 (Del. 1998).
[94] *Martinez*, 2014 WL 685685, at *4 (citing *IM2 Merchandising*, 2000 WL 1664168, at *10 ("A due respect for the presumed capability of the courts of other nations and states to fairly adjudicate cases, however, counsels that this consideration be accorded some worth, even when no prior action is pending in their courts.")).

of Ukraine decided before a Ukrainian tribunal. Accordingly, this *Cryo-Maid* factor too favors Development Max.

5. The Pendency of a Similar Action in Another Jurisdiction

In the Complaint, VTB acknowledges that this action is not the first that it has filed related to the Loans and the conduct of the AIS Group. It "initiated court proceedings in Ukraine, seeking to foreclose on the Collateral pledged as security by the AIS Group" in 2009.[95] Development Max contends that, of six prior Ukrainian lawsuits, at least one constitutes a pending, similar action for purposes of *Cryo-Maid*.[96] VTB rejects that contention, arguing that no prior lawsuit has been filed asserting these claims against Development Max.[97] Based on the submissions by the parties, the Court previously concluded that no similar action is pending in another jurisdiction.[98] This *Cryo-Maid* factor is neutral.

6. All Other Practical Problems That Would Make Trial of the Case Easy, Expeditious, and Inexpensive

The Delaware Supreme Court recognized in *Martinez* that this "Other Practical Considerations" factor of *Cryo-Maid* is "neither hollow in meaning nor rigid in application."[99] The Supreme Court elaborated, explaining that, in an appropriate case, a trial court "may weigh the efficient administration of justice

[95] Compl. ¶ 23.
[96] Defs.' Opening Br. 27.
[97] Pl.'s Answering Br. 23.
[98] *See supra* note 66.
[99] *Martinez*, 2014 WL 685685, at *5.

and analogous considerations under the rubric of the 'Other Practical Considerations' *Cryo-Maid* factor."[100] Depending on the circumstances, it may be proper to weigh the cost of prosecution,[101] the operative rules of civil procedure,[102] and similar public interest considerations under this factor.[103]

In *Martinez*, an Argentine plaintiff initiated an action against a Delaware corporation headquartered in Delaware for injuries suffered by the plaintiff's deceased husband after alleged exposure to asbestos during his employment at the corporation's great-great grand-subsidiary in Argentina. In concluding that dismissal on *forum non conveniens* grounds was appropriate, the trial court noted that the alleged harm occurred in Argentina, the relevant witnesses would mostly speak Spanish, the relevant documents would mostly be written in Spanish and be located in Argentina, and the plaintiff's claims implicated novel and important questions of Argentine law, a civil code system. The Supreme Court affirmed that it was within the trial court's discretion to conclude, based on these and other practical considerations drawn from the record, that maintaining an action in Delaware would be "extraordinarily expensive, cumbersome, and inconsistent with the efficient administration of justice" for the defendant.[104]

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[100] *Id.*
[101] *See Ison*, 729 A.2d at 846.
[102] *See Taylor*, 689 A.2d at 1200-01.
[103] *See Martinez*, 2014 WL 685685, at *5.
[104] *See id.*

At first blush, it appears, as in *Martinez*, that this factor favors the defendant, Development Max. There are glaring, practical difficulties to maintaining litigation in Delaware. VTB's claims arise under the laws of Ukraine, a civil code jurisdiction, not Delaware. The operative documents are most likely in Ukraine and written in Ukrainian, almost certainly not in Delaware or written in English. The fact witnesses most likely reside in Ukraine, almost certainly not Delaware. The pre-trial discovery process pursuant to the Hague Convention would be limited and cumbersome, and the delay and expense necessary to obtain witness testimony, if it is available at all, would be highly inefficient. Put simply, these significant, procedural limitations arising from litigating in Delaware would appear to undermine the Court's efficient disposition of the fraudulent transfer and unjust enrichment claims asserted against Development Max.

But, on closer examination, the Court must be mindful that a primary remedy that VTB seeks—the equitable appointment of a receiver—implicates this Court's fundamental and immutable responsibility to supervise the entities chartered and formed under Delaware law.[105] Employing a Delaware entity in

[105] Corporate law scholars and practitioners regularly note the paramount role that the Court of Chancery fulfills in overseeing the conduct of entities formed under Delaware law. *See, e.g.*, Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 Colum. L. Rev. 1749, 1752-62 (2006) (outlining the dynamic relationships among this Court and the other government actors that articulate, interpret, and apply Delaware corporate law to Delaware entities); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 Vand. L. Rev. 1573, 1602-09 (2005) (noting several, distinct features of the Delaware judiciary as both the "generator" and the "primary enforcer" of Delaware corporate law, the

fraudulent conduct can be considered an abuse of the laws of Delaware that is hard for this Court to ignore.

> Delaware has a powerful interest of its own in preventing the entities that it charters from being used as vehicles for fraud. . . . If a Delaware entity engages in fraud or is used as part of a fraudulent scheme, that entity should expect that it can be held to account in the Delaware courts.[106]

One of the principal ways in which this Court upholds the integrity of Delaware law is to be an available forum to hear claims of gross misconduct alleged to have been committed by a Delaware entity and then to be willing, in the rare case where the remedy is justified, to exercise its inherent equitable power and appoint a receiver for that entity. Delaware's public interest in having this Court oversee and rectify the conduct of Delaware entities may be so compelling in a particular case that it may militate against dismissal on *forum non conveniens* grounds even

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scope of which includes "the regulation of the internal affairs of the corporation and concerns the powers, rights, and duties of the corporation, its shareholders, officers, and directors"); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. Cin. L. Rev. 1061, 1081-88 (2000) (identifying certain advantages, such as being context-driven, responsive to new business developments, independent from political influence, and analytically transparent, that Delaware achieves by "rel[ying] heavily on its courts to develop principles of corporate law"); *see also* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 1.03, 1-5-7 (2013) (tracing the history of this Court's authority to hear cases and controversies sounding in equity as a significant factor that contributed to its role in overseeing the conduct of Delaware entities).

[106] *See NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 26 (Del. Ch. 2009); *see also Hamilton P'rs, L.P. v. Englard*, 11 A.3d 1180, 1213 (Del. Ch. 2010) (recognizing Delaware's interest in hearing a claim that "raises the specter that Delaware entities are being used to further a fraudulent scheme" and concluding, in a *forum non conveniens* analysis, that this interest "militates powerfully in favor of retaining jurisdiction").

where, as in this action, the defendant may otherwise suffer overwhelming hardship if required to litigate in Delaware.[107]

Like the other practical considerations in a Delaware trial court's *forum non conveniens* analysis, this public interest consideration should not be rigidly applied. There may be situations in which Delaware's interest in hearing a request for the equitable appointment of a receiver for a Delaware entity does not outweigh the hardship that litigating in Delaware would entail. Based on the allegations against Development Max, however, the Court cannot reach that conclusion here at this time. The allegations of Development Max's systemic and systematic fraudulent conduct, to the extent they may state reasonably conceivable claims for fraudulent transfers under Ukrainian law, may rise to a level at which they cannot be overlooked in the Court's *forum non conveniens* analysis.[108]

No one of these *Cryo-Maid* factors is dispositive of the Court's *forum non conveniens* analysis. But, after weighing the relevant private and public interest

[107] *See Hamilton P'rs*, 11 A.3d at 1218 ("If not for the prominent use of a Delaware transaction vehicle, the significant roles played by two Delaware entities in a highly suspicious transaction, and the direct involvement of Delaware fiduciaries in a well-pled loyalty breach, I would incline towards dismissing this case so that it could be re-filed in New York. But in light of Delaware's strong interest in policing against duty of loyalty violations and the misuse of its entities for fraudulent purposes, the double derivative claim on behalf of Bio Balance against the fiduciaries of a Delaware corporation should and will be adjudicated here.").

[108] The Court's weighing of this final *Cryo-Maid* factor, and thus the Court's entire *forum non conveniens* analysis, may need to be revisited upon resolution of Development Max's motion to dismiss under Rule 12(b)(6). If VTB's fraudulent transfer allegations do not state a claim that would support the equitable appointment of a receiver, even though they might support claims of fraudulent transfers, then VTB's claims may not implicate Delaware's interest in having this Court monitor the conduct of Development Max. Were that the case, then dismissal on *forum non conveniens* grounds might be appropriate.

factors implicated in this context, the Court cannot conclude that Development Max would suffer overwhelming hardship if forced to litigate the fraudulent transfer and unjust enrichment claims in Delaware. It cannot be said to cause overwhelming hardship under these circumstances to require Development Max, an entity formed under the laws of the State of Delaware and alleged to have engaged in pervasive fraudulent conduct, to defend its actions before this Court. Therefore, Development Max's motion to dismiss on *forum non conveniens* grounds must be denied.[109]

* * *

When the parties briefed Development Max's motion to dismiss under Rule 12(b)(6) and Rule 9(b), they both assumed, or at least their arguments implied, that VTB's primary claims arose under Delaware law.[110] They do not. VTB's fraudulent transfer and unjust enrichment claims are governed by Ukrainian law. The parties did not present expert affidavits or testimony on these areas of Ukrainian law, and the Court cannot resolve whether the allegations of the Complaint state a claim or whether they are subject to (or satisfy) the particularity

[109] VTB does not seek a receiver for Navitron, which is not alleged to have ever been a Delaware entity. Were personal jurisdiction available over Navitron, the Court would conclude that VTB's claims against it should be dismissed on *forum non conveniens* grounds because it would certainly face overwhelming hardship.

[110] Defs.' Reply Br. 23-25; Pl.'s Answering Br. 7, 27-30; Defs.' Opening Br. 36-46.

pleading standard without guidance from qualified, Ukrainian law experts.[111] Accordingly, the Court must defer ruling on the remaining grounds of the motion to dismiss.

III. CONCLUSION

For the foregoing reasons, Navitron's motion to dismiss VTB's claims under Rule 12(b)(2) is granted, without prejudice. Development Max's motion to dismiss VTB's claims on *forum non conveniens* grounds is denied. The Court defers ruling on the other aspects of Development Max's motion to dismiss.

The parties shall confer on a scheduling order to present those remaining issues.

IT IS SO ORDERED.

/s/ John W. Noble
Vice Chancellor

[111] After determining whether the Complaint states a claim under Ukrainian law, the Court can then determine whether those claims are subject to the Ukrainian forum selection clauses in the Loans, a position advocated by Development Max. Defs.' Reply Br. 4-11.