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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GRAMERCY EMERGING MARKETS FUND, BALKAN VENTURES LLC, AND RILA VENTURES LLC, Plaintiffs Below, Appellants, v. ALLIED IRISH BANKS, P.L.C., AND THE BULGARIAN AMERICAN ENTERPRISE FUND, Defendants Below. Appellees.	No. 49, 2017 CASE BELOW: Court of Chancery of the State of Delaware, C.A. No. 10321-VCG

APPELLANTS' CORRECTED OPENING BRIEF ON APPEAL

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NATURE AND STAGE OF PROCEEDINGS

This appeal presents an important issue of first impression in this Court: whether (as the lower court held) Delaware corporate citizens should always lose the benefit of the "overwhelming hardship" standard for *forum non conveniens* motions simply because their suit was previously dismissed from another jurisdiction on *forum non conveniens* grounds. The instant case is a particularly poor candidate for such an inflexible rule because two Plaintiffs and one of the *Defendants* are Delaware citizens, and it is undisputed that Plaintiffs would have initially brought this action in Delaware had they known that the contract between the Defendants governing the transaction at issue contained a Delaware forum selection clause. The lower court's decision (Ex. A, "Op-") undermines Delaware's long standing policy of providing a forum for resolution of disputes between its citizens, and its reputation as a leading jurisdiction for litigating complex commercial matters.

The lower court erroneously interpreted this Court's decision in *Lisa, S.A. v. Mayorga*, 993 A.2d 1042 (Del. 2010), as creating a blanket rule that the overwhelming hardship standard can never apply to litigants that did not file their very first action in Delaware, regardless of the circumstances, and regardless of the grounds for dismissal of the original case. *Lisa* adopted no such rule and merely applied the comity (or "first-filed") doctrine established in *McWane Cast Iron Pipe*

Corp. v. McDowell Wellman Eng'g Co., 263 A.2d 281 (Del. 1970). Under that principle, a second-filed Delaware action should only be dismissed if there is a risk of duplicative litigation of a cause of action, or inconsistent judgments. Where, as here, the first-filed action has already been dismissed on *forum non conveniens* grounds, those dual purposes which underpin the comity doctrine, are inapplicable. Contrary to the lower court's view, concerns regarding "serial litigation" or "forum shopping" are irrelevant here – litigants routinely seek another forum when denied a first, and no court has ever held that such conduct should be discouraged. Accordingly, the lower court's decision lacks any supportable policy justification.

The lower court compounded its error by ignoring this Court's decision in *Candlewood Timber Group, LLC v. Pan American Energy, LLC*, 859 A.2d 989 (Del. 2004). Under *Candlewood*, because Defendants ***agreed to*** litigate all disputes concerning the transaction underlying this dispute in Delaware, they cannot prevail on their *forum non conveniens* motion, regardless of the applicable standard.

Further, although the lower court purported to apply a broad-based equitable analysis in lieu of the overwhelming hardship inquiry, it nevertheless ignored numerous fairness considerations that strongly militate against dismissal, including rampant corruption in the Bulgarian judiciary; multi-million dollar filing fees in Bulgaria; severe backlogs in the Bulgarian courts; and that the investment at issue was created and actively encouraged by the U.S. Congress. These considerations

should have caused the lower court to deny Plaintiffs' motion. They also collectively ensure that, unless the decision below is reversed, Plaintiffs will never get a fair hearing on the merits of their claims.

Finally, in an apparent effort to discourage an appeal, the lower court previewed its overwhelming hardship analysis in the event of a reversal by this Court. However, it clearly misapplied the handful of factors it chose to address.

Plaintiffs respectfully submit that this Court should find, under the circumstances of this case, that the overwhelming hardship standard applies, and that Defendants cannot meet their burden thereunder. Alternatively, the Court should hold that the Defendants' agreement to litigate all disputes relating to the transaction in Delaware compels a finding that Delaware is an appropriate forum. At a minimum, given the unforeseeable sea-change in Delaware effectuated by the lower court's opinion, its ruling should be applied prospectively only.

SUMMARY OF ARGUMENT

1. The lower court erred in holding that the overwhelming hardship standard does not apply because Plaintiffs' original Illinois action was dismissed on *forum non conveniens* grounds. Neither Delaware law nor any cognizable policy supports the lower court's ruling, particularly under the facts of this case.

2. The Delaware forum selection clause in the Defendants' contract required denial of their *forum non conveniens* motion.

3. The lower court erroneously ignored critical equitable considerations raised by Plaintiffs, which should have compelled the dismissal of Defendants' motion.

4. The lower court's preliminary analysis of the factors set forth in *General Foods Corporation v. Cryo-Maid*, 198 A.2d 681 (Del. 1964) was erroneous.

5. The lower court should have applied its decision prospectively only.

STATEMENT OF FACTS

A. The Parties

Plaintiffs Balkan Ventures LLC ("Balkan") and Rila Ventures LLC ("Rila") are both Delaware LLCs. All three Plaintiffs have their principal places of business in Connecticut, and never had any offices or employees in Bulgaria. Defendant Bulgarian-American Enterprise Fund ("BAEF") is a Delaware corporation established by Congress to promote American investment in the Bulgarian private sector. (A0027 ¶ 5, A0032 ¶¶ 24-25.) Until recently, BAEF's principal place of business was in Illinois. (*See* A2470.) Defendant Allied Irish Banks, p.l.c. ("AIB") is an Irish public company headquartered in Ireland, with additional offices in the U.S. and the U.K. (A0428 ¶ 5; A2836.) AIB's U.S. operations are centered in its New York office of 55 employees. (A0428 ¶ 7.) It has no presence in Bulgaria. Both BAEF and AIB have considerable business ties to Delaware, and the United States in general. (A2360-A2363.)

B. Formation of BAEF

Congress incorporated BAEF in Delaware in 1991 pursuant to the 1989 Support for East European Democracy Act (the "SEED Act"). (A0030-A0032 ¶¶ 18-24.) The SEED Act created "enterprise funds" with U.S. taxpayer dollars to promote private investment by Americans in Eastern Europe. (*Id.*) BAEF was headquartered in Chicago. In 1996, BAEF founded the Bulgarian-American Credit Bank ("BACB") to provide loans to small- and medium-sized businesses, thereby

furthering the U.S. policy goals underlying the SEED Act. (A0032 ¶ 25.) In the 2006 IPO of BACB, BAEF sought to reduce its stake in BACB from 65% to 53.88%; Plaintiffs acquired 3%, and subsequently increased their share to 26.9%. (A0032-A0033 ¶¶ 26-27, 30.) Plaintiffs invested in BACB in reliance on BAEF's status as a federally-backed organization incorporated and headquartered in the U.S. (A0033 ¶ 28.)

C. Defendants' Violation of Article 149(2)

Under the Bulgarian Public Offering of Securities Act ("POSA"), any investor purchasing more than 50% of a public company's voting shares must make a contemporaneous tender offer to purchase, at the same price, all outstanding shares held by minority shareholders. (A0034 ¶ 34.) Under Article 149(2), a tender offer is also required where two shareholders together holding more than 50% of a public company's voting shares have agreed to jointly exercise their voting rights. (A2445 ¶ 31, A0664.) Plaintiffs allege that Defendants entered into such a secret voting agreement to avoid POSA's tender offer requirement. (A0029 ¶ 14.) On August 28, 2008, BAEF sold 49.99% of BACB's shares (retaining 3.89%) to AIB ("the Transaction") pursuant to a written contract ("the Purchase Agreement"). (A0034 ¶ 35, A0036 ¶ 42; A2564-A2611.) Consistent with the secret voting agreement, AIB did not make the required tender offer to

Plaintiffs, and Defendants exercised joint control over BACB. (A0035-A0036 ¶¶ 38-41.)

D. The Purchase Agreement

In Section 8.12, Defendants agreed that the terms of the Purchase Agreement would be governed by Delaware law and in Section 8.13 that ***all suits "arising out of or relating to" the Purchase Agreement would be brought exclusively in the courts of Delaware*** (A2608 (emphasis added).) Sections 3.2(ii)-(iii) required as a condition to closing the Transaction that BAEF provide a copy of its Delaware Certificate of Incorporation certified by the Delaware Secretary of State, and that agency's certification of BAEF's legal existence and good standing. (A2582; A2664-A2672.) In Section 5.1(a), BAEF warranted that it was "in good standing under the laws of Delaware" and had taken all corporate acts necessary to fulfill the Purchase Agreement. (A2585.)

E. The Illinois Action

On August 26, 2011, Plaintiffs sued Defendants and BAEF CEO Frank Bauer in the U.S. District Court for the Northern District of Illinois. (*See* A0431-A0447.) The court found diversity jurisdiction lacking and dismissed the case. (A0451.) Plaintiffs promptly refiled in Illinois state court. (A0453-A0471.) During document discovery on *forum non conveniens* issues in Illinois, Plaintiffs uncovered extensive evidence of Defendants' conspiracy to avoid a POSA tender

offer that corroborated the core allegations of the Complaint. (A2357-A2359, A2617-A2621, A2642-A2650.) The state court, however, dismissed on *forum non conveniens* grounds under Illinois law, emphasizing that Illinois was not Plaintiffs' home forum, despite all defendants residing and doing business in Illinois. (A0476-A0479.) That decision was upheld on appeal under an abuse-of-discretion standard. (A0482.) A later petition to appeal to the Illinois Supreme Court was denied.

F. The Delaware Action

Plaintiffs filed this action on November 5, 2014. (A0026-A0051.) Following two rounds of briefing and hearings, the lower court dismissed on *forum non conveniens* grounds on December 30, 2016. Plaintiffs timely appealed on January 27, 2017. (A3744-A3748.)

ARGUMENT

I. THE LOWER COURT ERRED IN FAILING TO APPLY THE OVERWHELMING HARDSHIP STANDARD.

A. Question Presented

Should the lower court have applied the "overwhelming hardship" *forum non conveniens* standard under the circumstances of this case? (Op-20-30.)

B. Standard and Scope of Review

This Court reviews a trial judge's legal conclusions *de novo*. *Kahn v. Kolberg Kravis Roberts & Co., L.P.,* 23 A.3d 831, 836 (Del. 2011).

C. Merits of Argument

1. The McWane And Lisa Cases Are Inapplicable.

The lower court erred in concluding that the *Lisa* decision required it to deny application of the "overwhelming hardship" standard because of the Illinois court's previous *forum non conveniens* dismissal. *Lisa* applies the comity (or "first-filed") doctrine, a common sense principle that exists in all U.S. jurisdictions. And the case can only be properly understood against the backdrop of *McWane*, the seminal case of this Court's modern comity jurisprudence. In *McWane,* the plaintiff sued in Alabama. With the Alabama action still pending defendant sued plaintiff in Delaware, and shortly thereafter asserted the same claim via counterclaim in the Alabama action. The lower court in Delaware found that the defendant (*i.e.*, the plaintiff in the Alabama suit) failed to meet the stringent requirements for a *forum*

non conveniens dismissal. This Court reversed, noting that the case did not implicate *forum non conveniens* principles so much as the comity doctrine that had long been followed in Delaware:

> [D]iscretion should be exercised freely in favor of the stay when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues; that, as a general rule, litigation should be confined to the forum in which it is first commenced…. [T]hese concepts are impelled by considerations of comity and the necessities of an orderly and efficient administration of justice.

Id. at 283.

This Court then clearly explained the policies underlying the rule:

> We endorse the above propositions. By their application, there is avoided the wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties, and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts. Also to be avoided is the possibility of inconsistent and conflicting rulings and judgments and an unseemly race by each party to trial and judgment in the forum of its choice. Public regard for busy courts is not increased by the unbusinesslike and inefficient administration of justice such situation produces.

Id.

Lisa subsequently clarified the scope of *McWane.* There, a shareholder in the Campero Group filed a 1998 action in Florida state court against various officers and shareholders of the Campero Group alleging fraud in connection with the sale of the plaintiff's interest to them. In 2006, while the 1998 Florida action was still pending, plaintiff filed suit in the Court of Chancery, alleging that the defendants

had fraudulently transferred assets to frustrate its ability to recover in the Florida suit. Defendants moved to dismiss, but in October 2007 the Court of Chancery held the motion in abeyance pending further proceedings in Florida. The Florida court ultimately dismissed the 1998 action with prejudice (Op-27; *Lisa,* 993 A.2d at 1045, 1048), a decision later affirmed on appeal. In June 2009, the Court of Chancery dismissed the Delaware case. *Id.* at 1045-46.

This Court affirmed, noting that the 1998 Florida action was first-filed in a jurisdictionally competent court, and that the 2006 Delaware action, although not identical to the Florida case, arose out of a common nucleus of operative fact. The Court then noted that the purpose of the Chancery action had been to redress defendant's efforts to make themselves judgment proof in the Florida suit, and therefore the dismissal with prejudice of the Florida action effectively rendered the Chancery case moot: "The 1998 Florida Action was what propped up this Delaware action. Its dismissal caused that prop to collapse and warranted the dismissal of the Delaware action under *McWane*." *Id.* at 1048. In response to plaintiff's contention that *McWane* was distinguishable because the 1998 Florida action was no longer pending, this Court observed:

> To allow Lisa to proceed with this Delaware action after the dismissal with prejudice of the predicate Florida action, would ignore the binding effect of the Florida adjudication, and create the possibility of inconsistent and conflicting rulings. That is precisely the outcome *McWane*'s doctrine of comity seeks to prevent. *Id.*

Lisa, then, was a fairly straightforward application of *McWane*. In *McWane*, the first-filed case remained pending, whereas in *Lisa* it had already been resolved. But *Lisa* concluded that the fact that the 1998 Florida action was not pending was irrelevant because it had been decided on the merits, and thus the *McWane* policy disfavoring inconsistent judgments still applied. Stated differently, the Florida court was not only "capable of doing … complete justice" (*McWane*, 263 A.2d at 283) it had already done so. Indeed, because the Delaware action reiterated the dismissed fraud allegations in the 1998 Florida action (*see* Delaware Complaint in *Lisa*, 2006 WL 4781110, ¶¶ 23-26, 38-39 (Del. Ch., filed Nov. 22, 2006)), in order to resolve the case in plaintiff's favor, the Court of Chancery in *Lisa* effectively would have had to "reverse" the Florida court's dismissal of the 1998 action.[1] Notably, *Lisa*'s holding that *McWane* still applies when an earlier-filed action has been resolved on the merits was not novel. *Lisa* recognized that this Court had previously held that Delaware courts should stay or dismiss in favor of a similar earlier-filed action that was either pending, ***or had been decided***. *Lisa*, 993 A.2d at 1048 n.20 (quoting *Taylor v. LSI Logic Corp.*, 715 A.2d 837, 842 (Del. 1998)).

Lisa and *McWane* are irrelevant here because neither of the two policies underlying the "first-filed" doctrine applies. *First*, there is no risk of litigating the

[1] In fact, *Lisa* acknowledged that the dismissal of the 1998 Florida action raised issues of *res judicata* and collateral estoppel in the Chancery case, 993 A.2d at 1048 n.19.

merits of the same "cause of action" in two fora because the Illinois courts never reached the merits of Plaintiff's claims. *Second*, there is no risk of inconsistent judgments because the Illinois courts refused to adjudicate the merits of the case. The Illinois court was thus incapable of doing "prompt and ***complete*** justice." *McWane*, 263 A.2d at 283 (emphasis added).

The lower court quoted language from *Lisa* that, when read in isolation, can be interpreted to limit the application of the overwhelming hardship standard to plaintiffs that choose Delaware as their very first forum. (Op-25.) However, such a formulaic rule makes no sense in cases, such as the instant matter, that do not threaten the harms that the *McWane* doctrine seeks to avoid. *Lisa* must be read in the full context of its facts and applicable policy considerations. In rigidly applying discrete excerpts from *Lisa*, the lower court lost sight of *why* the first-filed doctrine exists. As both *McWane* and *Lisa* made clear, that principle was never intended to discourage or disadvantage litigants that chose a second forum after a purely procedural dismissal in a first.[2] *See also Chavez v. Dole Food Co., Inc.,*, 836 F.3d

[2] The lower court incorrectly states that if Plaintiffs had brought their Delaware action while the Illinois action was pending, it would have been dismissed under *McWane*. (Op-28.) Rather, the proper course would have been to *stay* the Delaware action until the Illinois court decided if it would provide a forum. Once Illinois declined, it would have rendered itself incapable of "administering prompt ***and complete*** justice," *McWane*, 263 A.2d at 283, and the Delaware analysis would have then shifted to application of the overwhelming hardship standard.

205, 221-222 (3d Cir. 2016) (*en banc*) (lower court abused discretion in applying first-filed doctrine to dismiss later-filed Delaware action where first-filed action was dismissed on statute of limitations grounds and dismissal did not preclude plaintiff from filing in jurisdiction with longer limitations period).

2. Plaintiffs Are Entitled to Deference To Their Choice of A Delaware Forum

The lower court erroneously held that one reason for the overwhelming hardship standard is deference to a plaintiff's choice of forum, and that only litigants that make Delaware their first choice are entitled to deference. (Op-22.) It further asserted that Plaintiffs "did *not* choose this Court, or this jurisdiction, as the appropriate forum for resolution of this dispute." (Op-4 (emphasis in original).) However, Plaintiffs did indeed "choose" Delaware to resolve their dispute. The fact that they chose Delaware *second* does not render it any less of a "choice." Nor does Delaware law support the proposition that a plaintiff's second choice of forum following a purely procedural dismissal in another is entitled to less deference than its original choice.

To the contrary, in *Trinity Investment Trust, L.L.C. v. Morgan Guaranty Trust Co. of New York*, 2001 WL 1221080 (Del. Super. Sept. 28, 2001) and *In re Asbestos Litigation*, 2012 WL 1980414 (Del. Super. May 16, 2012), the plaintiffs initially filed suit outside Delaware (in *Asbestos Litigation* the plaintiff filed in *two* other jurisdictions before Delaware). In both cases, the first-filed actions were

dismissed on *forum non conveniens* grounds. In both cases, the plaintiff refiled in Delaware (in *Trinity*, only after an unsuccessful appeal[3]), and the defendants sought *forum non conveniens* dismissal. In both cases, the Delaware courts correctly held that defendants still had to satisfy the overwhelming hardship standard. (And notably, unlike two of the Plaintiffs here, the plaintiffs in *Trinity* and *Asbestos Litigation* were not Delaware citizens.) *See also Fres-Co System USA, Inc. v. The Coffee Bean Trading-Roasting, LLC*, 2005 WL 1950802 (Del. Super. July 22, 2005) (applying overwhelming hardship standard where plaintiff first filed in Pennsylvania and voluntarily dismissed after defendant moved to dismiss on personal jurisdiction grounds).

The lower court rejected *Trinity* because it pre-dated *Lisa*, and *Asbestos Litigation* because the parties "apparently" did not cite *Lisa*. (Op-31.) But the likely reason that *Asbestos Litigation* did not address *Lisa* was because everyone understood that re-filing in a second jurisdiction following dismissal in another on venue, personal jurisdiction, or *forum non conveniens* grounds (as opposed to a dismissal on the merits) is extremely common, and certainly no cause to penalize litigants with harsher standards – particularly where, as here, two Plaintiffs and one Defendant are Delaware citizens. *See Candlewood*, 859 A.2d at 1000 (Noting the "significant Delaware interest… to make available to litigants a neutral forum to

[3] *Trinity Invest. Trust, LLC v. Morgan Guaranty Trust Co. of New York*, 275 A.D.2d 661 (N.Y. App. Div. 2000).

adjudicate commercial disputes against Delaware entities…."); *Forum Shops, LLC v. Chin-LV, LLC*, 2008 WL 8974439, at *3 (Del. Super. Ct. May 22, 2008) ("It is established that Delaware has an interest in serving as a neutral forum for its corporate citizens….")

Trinity and *Asbestos Litigation* demonstrate that the lower court did not appreciate the monumental difference between attempting to re-litigate a claim in a second jurisdiction after obtaining a ruling ***on the merits*** in another, and simply choosing another jurisdiction after unsuccessfully attempting to secure an initial choice of forum. The former is an affront to inter-state comity, as *Lisa* clearly and expressly held; the latter is a non-event. When one state declines to provide a venue for a dispute, its laws are plainly not offended if another accepts. And like *Trinity* and *Asbestos Litigation*, state and federal courts outside Delaware do not alter their *forum non conveniens* standards to punish litigants previously dismissed on those grounds from other jurisdictions. Thus, there is no basis to deny Plaintiffs' the usual deference. *See, e.g., Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 660 F.2d 712, 716-17 (8th Cir. 1981) (applying ordinary federal *forum non conveniens* standard to conclude that Plaintiff was entitled to forum in Missouri federal court following Ninth Circuit's affirmance of Arizona federal court's *forum non conveniens* dismissal in favor of Mexico); *Cook v. Soo Line R. Co.*, 198 P.3d 310, 312-313, 315 (Mont. 2008) (applying ordinary Montana *forum*

non conveniens standard despite prior *forum non conveniens* dismissal in favor of Indiana by Illinois state court); (*see also* cases cited at A3545-A3546.)

3. The Overwhelming Hardship Standard Should Apply Under the Circumstances of this Particular Case

The lower court establishes a rigid rule denying the overwhelming hardship standard to ***all*** litigants previously dismissed from another jurisdiction on *forum non conveniens* grounds, but fails to explain why this bright-line rule is necessary. The lower court's inflexible edict is particularly inappropriate here, where Plaintiffs would have filed their first action in Delaware had they known that the Defendants' own contract required resolution of all disputes concerning the Purchase Agreement in Delaware.

Plaintiffs reasonably chose Illinois based on what they knew at the time: then-defendant Frank Bauer was an Illinois resident; Defendant BAEF was an Illinois resident; Defendant AIB had an office in Chicago proximate to the relevant time period; and many of the underlying events occurred in Chicago. (A2470, A2534, A2559-A2561, A2607, A2612-A2621, A2642-A2650, A0516, A0567.) In short, Plaintiffs properly chose Illinois because, based on the limited information available, they believed it was the most appropriate forum for the litigation. That calculus certainly would have changed had Plaintiffs known that the Purchase

Agreement contained a Delaware forum selection and choice of law clauses,[4] especially given that two of the Plaintiffs were Delaware entities, BAEF was a Delaware entity, and AIB had a long history of operations in Delaware. But it was only through discovery obtained in the Illinois action that Plaintiffs learned of the Delaware forum selection clause.[5] (A2426 n.73, A2564-A2611.) Accordingly, even if a less plaintiff-friendly standard than overwhelming hardship might apply in *some* cases where Delaware is not the plaintiff's very first forum choice, this is not such a case. To hold otherwise would punish Plaintiffs simply because they had no way of learning the terms of the Purchase Agreement at the time they chose Illinois.

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[4] As explained in Point II, *infra*, under *Candlewood*, the Delaware forum selection clause establishes that Defendants cannot prevail on their motion.

[5] In a footnote, the lower court suggests that Plaintiffs should have dismissed its Illinois action and proceeded directly to Delaware immediately upon receiving the Purchase Agreement in discovery. (Op-31 n.128.) However, it would have been rash indeed to abandon efforts in a potentially viable forum based on the receipt of a single document in the midst of *forum non conveniens* discovery focused on ***Illinois contacts***, particularly because Plaintiffs had no reason to believe that they would be penalized if they followed through in Illinois unsuccessfully, and then filed in Delaware. Plaintiffs selected Illinois based on the information available to them, pursued their choice diligently, and exhausted their appellate rights before involving a second forum. There was nothing improper about that course – which Defendants themselves agree "made sense" and was "logical" (A3341:20-22-A3343:7-9) – which was clearly preferable to jumping impulsively from jurisdiction to jurisdiction based on half-completed discovery.

4. Plaintiffs Are Not Engaged in "Serial Litigation"

In its opinion and during oral argument, the lower court explained why it declined to apply the overwhelming hardship standard: "It's really a kind of serial litigation, where you reach a result in one court that indicates a foreign court is the most convenient, and then you try it again." (A3723:21-24.) In other words, the lower court took issue with Plaintiffs' decision to re-file in Delaware because in its view, the Illinois courts had decided that Bulgaria was the most appropriate forum. *See* (A3381:11-16 ("The Court in Illinois said, 'This ought to be tried in Bulgaria.'")); Op-30 (emphasis added) ("The Illinois…courts…determined that Bulgaria…is the appropriate forum for ***any litigation***."); Op-35 ("Plaintiffs' first choice of forum resulted in a decision that justice required the case to proceed, ***if at all***, in Bulgaria….") (emphasis added).[6] This reasoning misapprehends the limits of the Illinois court's ruling, and its jurisdiction.[7]

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[6] It is undisputed that the Illinois courts' rulings have no *res judicata* or collateral estoppel effect here. *Trinity*, 2001 WL 1221080, at *2. Curiously, the lower court acknowledged as much (Op-30), but nevertheless proceeded to treat the Illinois rulings as dispositive.

[7] The lower court's opinion artificially increases the number of filings by Plaintiff before coming to Delaware by counting the Illinois federal and state actions as separate cases. (Op-4.) Plaintiffs selected Illinois once; the state filing was merely the product of the federal court's determination that diversity jurisdiction was lacking. (A0451.) The opinion below also asserts that Plaintiffs indicated at oral argument that they might file in another jurisdiction if dismissed from Delaware. (Op-4.) The transcript reveals, however, that Plaintiffs' counsel merely agreed with the court's assertion that a third jurisdiction might take the case. (A3396:10-21.)

All the Illinois court purported to do was decide whether, under ***Illinois*** *forum non conveniens* law (which is vastly different from Delaware's, (A2426-A2430; A3381:17-21; Op-4)), and in light of the factual nexus between the case and ***Illinois***, a Bulgarian forum was preferable ***to Chicago***. Specifically, the Illinois appellate court held that the district court had not abused its discretion in finding that the "relevant factors…favored Bulgaria over a ***Cook County*** forum." (A0482.) Thus, contrary to the lower court's suggestion, the Illinois courts did ***not*** find that Bulgaria was the single most appropriate forum for this litigation on the planet. They found that, based on Illinois law and the ties between the case and Illinois, Bulgaria was preferable to Cook County. And they certainly did not decide whether Delaware was an appropriate forum under its own very different laws, and based on the ties between this case and Delaware.

Nor did the Illinois courts have the *authority* to decide where the case should be re-filed. A state court deciding a *forum non conveniens* motion has no authority to tell a litigant that it must proceed in any particular alternative forum, or that it cannot seek a forum in another state. *See, e.g.*, *Cook*, 198 P.3d at 315 (refusing to dismiss Montana action following prior *forum non conveniens* dismissal in Illinois ordering plaintiff to re-file in Indiana; Illinois court had no power to force plaintiff to proceed in Indiana, and because Illinois dismissal was not on the merits, it was of no effect outside Illinois). As noted above, the lower court's decision to

penalize Plaintiffs for "serial litigation" was based on its belief that the Illinois court had effectively decided for all jurisdictions that Bulgaria was the single most appropriate forum for this case. Because that view is mistaken, the lower court's justification for denying Plaintiffs the overwhelming hardship standard fails.

The lower court's references to "serial litigation" might also be read to condemn the mere act of attempting to litigate the same legal issue (here, *forum non conveniens*) successively in separate forums. But litigants dismissed on, for example, personal jurisdiction grounds in one state invariably test jurisdiction in a second state thereafter. No court has ever suggested that re-filing under those circumstances is "serial litigation" worthy of dismissal.

5. Plaintiffs Are Not Engaged in "Forum Shopping"

The lower court's opinion suggests that application of the overwhelming hardship standard in this case would reward "unwholesome forum-shopping." (Op-2-3,20,22-23,25,30.)[8] Noticeably absent from the decision, however, is any legal authority supporting the proposition that Plaintiffs have engaged in any conduct warranting deterrence. Again, litigants frequently re-file cases in a new jurisdiction after dismissal of an identical case in another state on personal jurisdiction grounds. Re-filing under those circumstances is not "forum shopping" – it is

[8] Oddly, the lower court recognized at oral argument that Plaintiffs were *not* engaged in improper forum-shopping. (A3723:4-24.)

standard litigation practice.[9] *See Manning v. Utilities Mut. Inc. Co.*, 1999 WL 782569, at *2 (S.D.N.Y. Sept. 20, 1999) (holding that because plaintiff's initial suit was dismissed for lack of personal jurisdiction, he was "hardly 'forum-shopping' by bringing suit in the Southern District of New York"). Here, *forum non conveniens* dispositions are indistinguishable from personal jurisdiction dismissals, and the lower court offers no rational reason why the overwhelming hardship standard should change. Cases like *Trinity*, *Asbestos Litigation*, and *Cook* recognize that it should not.

Moreover, the lower court seems to equate improper "forum shopping" with any effort by Plaintiffs to pursue their interests. Delaware courts acknowledge that "forum shopping…, in and of itself, is not necessarily problematic at all, and indeed may be unquestionably proper or part of the zealous advocacy expected of attorneys." *In re Allion Healthcare Inc. Shareholders Litig.*, 2011 WL 1135016, at *4 (Del. Ch. March 29, 2011). As the court observed in *Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1990 WL 123006, at *7 (Del. Super. July 13, 1990):

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[9] The lower court falsely asserts that Plaintiffs sought out Delaware for its "plaintiff-friendly overwhelming-hardship standard." (Op-28.) If Plaintiffs were so motivated, however, they would have selected Delaware first. Plaintiffs came to Delaware because two of them (and one Defendant) are Delaware citizens; because of the Delaware forum selection and choice of law clauses in the Purchase Agreement; and because the underlying transaction could not have closed without multiple certifications of the Delaware Secretary of State. Plaintiffs' choice of Delaware was unconnected to the standard.

> Defendants… accuse plaintiffs of "blatant forum shopping." While this may have rhetorical value, and even if true, it does not advance the defendants' position. It is a fact of life that a party's choice of forum will more likely than not be motivated by strategic considerations. … If 'forum shopping' means filing an action in a location that the plaintiff considers advantageous, then most plaintiffs in litigation involving significant commercial disputes will be guilty of it.

(quoting *Williams Nat. Gas Co. v. Amoco Prod. Co.*, 1990 WL 13492, at *9 (Del. Ch. Mar. 20, 1990)).

Plaintiffs filed their Illinois action in good faith, and with more than colorable basis. They initially chose Illinois because events relevant to the case took place there, and they believed it would be most convenient for BAEF (which had its headquarters in Chicago); AIB (which had a Chicago office shortly before Plaintiffs filed the original action); and two key BAEF witnesses, Frank Bauer and Scott Falk (both of whom lived in Illinois). After learning of Defendants' Delaware forum selection and choice of law clauses during the Illinois action, Plaintiffs re-filed here in good faith and with more than colorable basis, particularly given the Delaware entities on both sides of the caption and the Delaware Secretary of State certifications essential to close the underlying transaction. Plaintiffs were at all times motivated to obtain a neutral forum in their home country and *avoid* venue disputes, not to gain any untoward advantage. *See Chavez*, 836 F.3d at 222-23 (forum-shopping "generally denotes some attempt to gain an unfair advantage or

unmerited advantage in the litigation process. … The plaintiffs were not trying to game the system by filing duplicative lawsuits. They were trying to find one court, and only one court, willing to hear the merits of their case.").

Although Plaintiffs admittedly disfavor Bulgarian courts because of extreme judicial corruption, severe court congestion, language barriers,[10] and excessive financial burden (*see* Point III, *infra*), no court has ever held that selecting or avoiding a forum based on those factors is improper.[11] To the contrary, these are precisely the type of considerations that Delaware courts recognize are perfectly appropriate (particularly because two of the Plaintiffs are Delaware residents, *see Sequa*, 1990 WL 123006, at *6 (noting, in case where plaintiff's only tie to Delaware was place of its formation, "Delaware has an interest in opening its courts to its citizens.")). In fact, the overwhelming hardship analysis itself determines whether a plaintiff is impermissibly "forum shopping." For example, the plaintiff in *Asbestos Litigation* (unlike Plaintiffs) was not a Delaware citizen, had sued in two other jurisdictions before filing in Delaware, and one of those actions had been dismissed on *forum non conveniens* grounds. And yet the court

[10] Plaintiffs would need a translator to understand any aspect (spoken or written) of any legal proceedings in Bulgaria, and perhaps to communicate with their lawyer as well. Defendants' personnel, in contrast, speak English and would have no difficulty understanding legal proceedings in Delaware. (A0512-A0513, A2498, A2504.)

[11] In contrast, the plaintiff in *Lisa* was attempting a "do over" by pursuing their claims after they had been dismissed on the merits. 993 A.2d at 1047-48.

acknowledged that the defendant's claims of "blatant forum shopping" would be resolved by the time-honored overwhelming hardship inquiry: "'the Court cannot concern itself with the plaintiffs' subjective motivation in bringing their claims to Delaware,' instead the court must focus on whether Defendant[s] will suffer overwhelming hardship." 2012 WL 1980414, at *3 (quoting *In re Asbestos Litig.*, 929 A.2d 373, 388 (Del. Super. 2006)).

The lower court suggests that its decision will dissuade others from "test[ing] their ties to another forum for strategic reasons and then fil[ing] in Delaware…." (Op-29-30 n.122.) It does not explain why such deterrence in necessary. Nor does it define the "strategic interests" to which it refers or identify what is inherently improper about a litigant pursuing those interests or attempting to secure a preferred forum. The lower court does, however, ignore the perverse countervailing incentives its unprecedented rule creates. Delaware's popularity as a place of business formation means that many cases have a colorable relationship to this State. Under the lower court's holding, future litigants with other potentially viable fora will necessarily err in favor of Delaware – ***even if it is not the optimal or preferred forum for the case*** – for fear of losing the "plaintiff-friendly" (Op-28) overwhelming hardship standard. The Delaware courts will then effectively be *coercing* litigants who prefer a different forum for valid reasons of strategy or convenience to file in Delaware. There is no legitimate interest in such coercion,

which could eventually lead to hundreds, if not thousands, of cases filed unnecessarily and unwillingly in this jurisdiction.

II. THE LOWER COURT ERRED IN FAILING TO FIND THAT THE DELAWARE FORUM SELECTION CLAUSE REQUIRED DENIAL OF DEFENDANTS' MOTION

A. Question Presented

Does this Court's decision in *Candlewood* require denial of Defendants' *forum non conveniens* motion? (A2364-A2367.)

B. Standard and Scope of Review

This Court reviews a trial judge's legal conclusions *de novo*. *Kahn*, 23 A.3d at 836.

C. Merits of Argument

Under *Candlewood*, 859 A.2d at 1004, which Plaintiffs emphasized below yet is omitted from the lower court's opinion, Defendants cannot establish overwhelming hardship as a matter of law because ***they agreed*** to litigate ***in Delaware*** all actions that (like the instant case) "arise out of" or "relat[e] to" the Transaction. (A2608 § 8.13.) This Court should find that the overwhelming hardship standard applies, and that, pursuant to *Candlewood*, Defendants cannot satisfy that standard. The Court should also conclude that *Candlewood* warrants denial of Defendants' motion, even if a lesser standard applies.

In *Candlewood*, defendant claimed that the case belonged in Argentina, and that it would suffer overwhelming hardship from litigating in Delaware. This Court reversed the Court of Chancery's *forum non conveniens* dismissal, holding that defendant's execution of forum selection ***clauses with counterparties other than***

the plaintiff requiring it to litigate in the U.S. was "flatly inconsistent with [its] claim of hardship." *Id.* at 1004. Here, that inconsistency is even *more* pronounced. This Court found a lack of "overwhelming hardship" in *Candlewood* because defendant had accepted U.S. forum selection clauses in agreements that did not pertain to the plaintiff in any way and had nothing whatsoever to do with its dispute with the plaintiff. In contrast, Defendants' forum selection clause here specifically designates Delaware and relates directly to the subject matter of this very case.

The lower court suggested that Defendants will suffer overwhelming hardship in Delaware, even though ***they have already agreed that all disputes related to or arising out of the Transaction would be litigated exclusively in Delaware***. The lower court claims that Plaintiffs have "overlook[ed]" that they were not parties to the Purchase Agreement and had no contractual rights thereunder. (Op-31-32.) *First*, the plaintiff in *Candlewood* ***also*** was not a party to the forum selection clauses executed by the defendant, and yet this Court found those provisions defeated any claim of overwhelming hardship. *Second*, Plaintiffs made clear at oral argument that they did *not* claim to be contractually entitled to enforce the forum selection clause against Defendants; they contended that Defendants' claim of "overwhelming hardship" in Delaware could not be squared

with their unequivocal agreement to litigate exclusively in Delaware all cases arising out of or relating to the Transaction. (A3350:10-A3352:2.)

The lower court also held that the "issues, burdens, and considerations" involved in the Delaware forum selection clause Defendants agreed to between themselves are "radically different" from those at stake here. (Op-32.) The same could have been said (and accurately) of the forum selection clauses that proved dispositive in *Candlewood*, which were wholly unrelated to the parties' dispute. Moreover, the Defendants' forum selection clause is extremely broad and contemplates that all variety of disputes concerning the Transaction would be litigated in Delaware, including those involving Bulgarian law and documents, events, and facts centered on Bulgaria. For example, if AIB sued BAEF for fraud in connection with the Transaction, that action would clearly fall within the Delaware forum selection clause. And because such a claim would sound in tort, not contract, the Delaware choice of law provision would not apply,[12] resulting in the potential (if not *likely*) application of Bulgarian law to the dispute. Discovery in any such action would almost certainly involve documents and witnesses located in Bulgaria and, moreover, one can conjure multiple plausible scenarios in which a

[12] *E.g., Gloucester Holding Corp. v. U.S. Tape and Sticky Products, LLC*, 832 A.2d 116, 122-23 (Del. Ch. 2003) (holding that Asset Purchase Agreement choice-of-law clause stating that agreement "'shall be construed, interpreted and the rights of the parties determined in accordance with the laws of the State of Delaware'" was not broad enough to cover tort claims between parties).

fraud suit between the Defendants could involve third-party litigants and claims. Thus, the parties' forum selection clause clearly contemplates litigating matters in Delaware other than simple contract actions governed by Delaware law, and involving "issues, burdens, and considerations" similar to those implicated here.

III. THE LOWER COURT IGNORED CRITICAL EQUITABLE CONSIDERATIONS.

A. Question Presented

Did the lower court misapply the *forum non conveniens* standard by failing to consider equitable factors such as corruption of the Bulgarian judiciary; the excessive filing fees in Bulgaria; the severe congestion in Bulgarian courts; and the U.S. legislative origins of the investment at issue? (A2370-A2376.)

B. Standard and Scope of Review

Whether the lower court applied the appropriate legal standard when dismissing under *forum non conveniens* is reviewed de novo. *See Mar-Land Inds. Contractors v. Caribbean Petroleum Refining, L.P.*, 777 A.2d 774, 777 (Del. 2001).

C. Merits of Argument

Even if the lower court correctly determined that the overwhelming hardship standard does not apply, its alternative analysis apparently involved the "'free[]' exercise [of] its discretion . . . as justice requires." (Op-3.) However, that inquiry did not address a litany of important equitable considerations that Plaintiffs featured prominently in their briefs. (*See* A2370-A2376, A3632.) The lower court erred in ignoring those factors, which warrant retention of jurisdiction in Delaware under ***any*** *forum non conveniens* standard, and which collectively explain why

Defendants themselves agreed to litigate all their disputes regarding this supposedly quintessentially Bulgarian transaction in Delaware.[13]

1. The Bulgarian Judiciary is Corrupt.

Bulgaria is renowned for public corruption. (*See* A2901 ("By almost any measure, ***Bulgaria is considered the most corrupt country in the 27-member European Union.***") (emphasis added).) This corruption extends to Bulgaria's judiciary and legal system, which is a morass of bribery, cronyism, and incompetence. Despite prodding from various outside institutions, Bulgaria's corruption problem has ***worsened*** in recent years (A2907-A2909; *see also* A3217-A3294; A3749-A3767), and Bulgaria has experienced increased political instability and a continued "lack of resolve to reform" via anti-corruption measures. (A2910-A2913.) Indeed, Bulgaria's endemic corruption and severe need for judicial reforms have held back its accession to the Schengen States.

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[13] The Chancery Court must always consider the equities of the disputes before it. *See Kelly v. Fuqi Int'l, Inc.*, 2013 WL 135666, at *6 (Del. Ch. Jan. 2, 2013) ("The Court of Chancery is a court of equity, which at its core, deals in concepts of fairness."); *Yuen v. Gemstar-TV Guide Int'l, Inc.*, 2004 WL 1517133, at *3 n.14 (Del. Ch. June 20, 2004) ("A court of equity will consider the equities . . . in adjudicating claims before it . . . ."). Further, *forum non conveniens* is an equitable doctrine. *See, e.g., Miller v. Phillips Petrol. Co. Nor.*, 529 A.2d 263, 270 (Del. Super. 1987), *aff'd*, 537 A.2d 190 (Del. 1988). Accordingly, in applying any *forum non conveniens*, the lower court should have considered whether relegating Plaintiffs to a Bulgarian forum is fundamentally fair and comports with principles of equity. *See Williams*, 1990 WL 13492, at *8-9 (equities must be considered in applying *forum non conveniens* doctrine).

(A2915; *see also, e.g.*, A2924 ("Corruption remains a serious problem. The judiciary consistently scores among the least trusted institutions in the country with widespread allegations of nepotism, opaque selection procedures, and political and business influences."); A3749-A3767 (recent articles and reports detailing severe corruption problems in Bulgarian judiciary)).

Bulgaria's corrupt judiciary particularly targets foreign investors like Plaintiffs. In December 2014, France's ambassador to Bulgaria stated that "***Bulgaria is not a safe place for foreign investors***. Each company can be stolen with the help of the 'bad apples' in the Bulgarian judicial system" and there are "'bad apples' everywhere." (A2943 (emphasis added).) The French ambassador was denouncing the acts of a judge in the Sofia City Court (the court that would preside over this case in Bulgaria (A2437 ¶ 14)) who declared a French company's Bulgarian subsidiaries bankrupt under highly suspicious circumstances, as part of a scheme to steal the companies' assets. (A2950.) The ambassador further alleged that case assignment to that judge was not random. (*Id.*) Subsequently, ambassadors from seven EU countries signed a letter calling for reforms to Bulgaria's judiciary. (A2953-A2954.) The scandal deepened in late 2015 when leaked wiretap recordings involving the same judge from Sofia City Court revealed apparent collusion between key figures in the judicial and executive branches of Bulgaria's government. (*See* A3221-A3222.)

Moreover, Britain's former ambassador to Bulgaria stated that for commercial litigants, "[i]n Bulgaria, going to court still takes too long and is too unpredictable" and noted that Bulgaria's financial regulators face allegations of incompetence or corruption. (A2958-A2964; *see also* A2921 ("Foreign investors often encounter the following problems: a sluggish government bureaucracy . . . corruption, frequent changes in the legal framework, lack of transparency, and pre-determined public tenders . . . a weak judicial system limits investor confidence in the courts' ability to serve as an enforcement mechanism."). In light of the foregoing, the lower court's ruling effectively ensures that Plaintiffs will never get a fair hearing on their claims. *See Lano v. Franco*, 2012 WL 6840576, at *2 (Del. Super. Ct. Dec. 3, 2012) (noting "Delaware's well known public policy that favors permitting a litigant to resolve her case on the merits.").

2. Plaintiffs Should have a U.S. Forum to Resolve a Dispute Arising out of a Transaction Actively Encouraged by U.S. Law and Policy.

Contrary to the lower court's effort to portray this case as involving a unilateral decision by Plaintiffs to buy "stock in a Bulgarian company regulated by Bulgarian law," (Op-34), Congress established BAEF with U.S. taxpayer funding and tasked it with encouraging private American investment in Bulgaria. (A0030-A0033 ¶¶ 18-31.) The goal was to "Westernize" former Soviet-bloc countries. BAEF formed BACB in pursuit of these Congressional aims, and Plaintiffs helped

fulfill them by investing in BACB. Plainly, the U.S. and the several states, including Delaware in particular, have an interest in ensuring that a Delaware entity (BAEF) lawfully fulfills its taxpayer-funded mission, and that American investors (like Plaintiffs, two of which are Delaware citizens) can seek redress in a domestic forum for harm caused by an investment actively encouraged by U.S. law in service of U.S. foreign policy. Indeed, banishing Plaintiffs to Bulgaria defeats the Congressional policies codified in the SEED Act by informing prospective investors that, if they decide to oblige Congress in its desire to create investment in that country and later suffer damages, they will be relegated to a distant, corrupt, and alien judicial system.

3. Excessive Filing Fees.

To file in Bulgaria, Plaintiffs would need to pay a filing fee equal to 4% (***and up to 8%*** if appeals are taken) of their requested damages (A2438 ¶ 17), which exceed $40 million. (A0029 ¶ 17.) The $1.6-3.2 million Bulgarian filing fee is "significantly greater than the expenses [Defendants] face[] to transport witnesses and documents (which may be sent electronically) to the United State***s***." *Henderson v. Metro. Bank & Trust Co.*, 502 F. Supp. 2d 372, 380 (S.D.N.Y. 2007) Plaintiffs could only hope to recoup this $1.6-3.2 million filing fee *if*, after several years of litigation, they prevail on their claims and the Bulgarian court awards Plaintiffs their costs. (A0030 ¶ 18.) Given the highly corrupt and inefficient

Bulgarian judiciary, there is effectively no chance of that happening. Meanwhile, Plaintiffs would be unfairly deprived of the use of that sum for several years (A0031 ¶ 22.) Thus, the filing fee strongly weighs against a Bulgarian forum. *See, e.g.*, *Bridgestone/Firestone N. Am. Tire, LLC v. Garcia*, 991 So.2d 912, 917 (Fla. App. 2008) (noting that 3% Argentinian filing fee weighed against grant of *forum non conveniens* motion); *Henderson*, 502 F. Supp. 2d at 380 (denying *forum non conveniens* motion where plaintiffs faced filing fee proportionate to claimed damages in Philippines). Because two Plaintiffs (and one Defendant) are Delaware citizens, all parties do business in the U.S., and "[b]ecause, as a practical matter, Plaintiffs will not be able to pursue their case in [Bulgaria] due to the fee, the United States has a strong interest in allowing Plaintiffs to bring their action in an American forum." *Henderson*, 502 F. Supp. 2d at 380.

4. Court Congestion

Bulgarian courts – and the Sofia City Court, in particular – are heavily congested. (*See* A2924 ("The busiest courts in Sofia . . . lack adequate resources and as a result suffer from serious backlogs and inefficient procedures that ***hamper the swift and fair administration of justice***.") (emphasis added); A3027-A3030 (explaining that "***[o]verall, the Bulgarian legal system is disorganized and inefficient***…."); A3768 (noting resignations and judicial protests over excessive caseloads in Sofia courts of 1000 cases per judge per year). *See also* A2440 ¶ 22;

Finger v. Bulgaria¸ App. No. 37346/05 Eur. Ct. H.R. (Aug. 10, 2011), http://hudoc.echr.coe.int/eng#{"dmdocnumber":["885172"],"itemid":["001-104698"]}, at 31-32 ¶102 (finding systemic problems resulting in unreasonably long delays in Bulgarian civil proceedings, in violation of Article 6 § 1 of the European Convention on Human Rights)). This factor further compounds the inequity of denying Plaintiffs a Delaware forum. *See Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1227-1228 (3d Cir. 1995) (holding litigation delay in Indian legal system sufficient grounds to deny *forum non conveniens* dismissal).

IV. THE LOWER COURT MISAPPLIED THE *CRYO-MAID* FACTORS.

A. Question Presented

Did the lower court err in its tentative analysis of the *Cryo-Maid* factors? (Op-32-35.)

B. Standard and Scope of Review

This Court reviews the trial judge's application of the *Cryo-Maid* factors for abuse of discretion. *See Mar-Land*, 777 A.2d at 777.

C. Merits of Argument

The lower court's consideration of select *Cryo-Maid* factors is also flawed.

1. This Case Does Not Involve Any Novel or Important Issues of Bulgarian Law

The lower court expresses concern about applying Article 149(2) of the POSA, stating that it "poses certain questions of first judicial impression" because there are no published cases applying the provision. (Op-33.) Initially, Bulgaria is a civil law jurisdiction – judicial opinions do not exist on most issues, and those that do are generally ignored.[14] Under the lower court's flawed reasoning, no Delaware court would have ever retained a case involving foreign civil law. *See, e.g.*,

[14] *Corvel Corp. v. Homeland Ins. Co. of N.Y.*, 112 A.3d 863, 870 (Del. 2015) ("Under civil law, priority is given to statutes and codes over common law jurisprudence."); *King v. Cessna Aircraft Co.*, 2010 WL 5253526, at *10 (S.D. Fla. Sept. 13, 2010) ("The doctrine of *stare decisis* utilized in the common law tradition, where a judicial decision possesses a precedential value, is rejected by the civil law systems.") *Phoenix Can. Oil Co. Ltd. v. Texaco, Inc.*, 842 F.2d 1466, 1480 (3d Cir. 1988) (holding that trial court was free to reject decision of Supreme Court of Ecuador because Ecuador is a civil law jurisdiction).

Candlewood, 859 A.2d at 1002 (applying Argentine civil law); *Warburg, Pincus Ventures, L.P. v. Schrapper*, 774 A.2d 264, 271 (Del. 2001) (applying German civil law). Further, the lower court's suggestion that there is something unusually novel or significant about Article 149(2) is belied by the plain language of its official English version, which states that a tender offer is required where "persons[] hold together more than 50 percent of the voting shares and have *made an agreement to pursue a common policy related to the management of the corresponding company, through joint exercise of the voting rights held by them*." (A0664.) This principle is straightforward, and there is no evidence that Article 149(2) is a topic of disproportionately high concern in Bulgaria.

In a footnote (Op-33 n.130), the lower court cites *Martinez v. E.I. DuPont de Nemours & Co. Inc.*, 86 A.3d 1102 (Del. 2014), which held that where "the plaintiff…is a citizen of a foreign state whose law is at issue…the injury…occurred in that foreign state," and liability turns on "important and novel" issues of foreign law, a trial court can exercise discretion "to weigh appropriately the defendant's interest in obtaining an authoritative ruling from the relevant foreign courts…." *Id.* at 1111. Here, Plaintiffs are not citizens of Bulgaria, and they were injured in Delaware and Connecticut, *see TrustCo Bank v. Mathews*, 2015 WL 295373, at *10 (Del. Ch. Jan. 22, 2015) ("A corporation sustains its injuries where it is incorporated and where it has its principal place of

business…."). Moreover, in *Martinez*, the plaintiffs asked the Delaware courts to rule that Argentinian law would recognize the "direct participant" theory of liability in asbestos cases, which permitted parent corporations to be held liable for the activity of foreign subsidiaries. 82 A.3d 1, 6-7, 17-18 (Del. Sup. Ct. 2012) The theory had been developed by U.S. courts in response to the workers' compensation bar. Argentina, however, had no workers' compensation bar, and its civil code contained no indication that it accepted the direct participant theory. If the Court had decided in plaintiffs' favor, virtually overnight numerous multi-national corporations would have been exposed to massive, unprecedented liability in one the largest categories of toxic tort cases in history, and Delaware would have been flooded with new asbestos filings. *Id.* at 19-20, 33-34, 38. This case is entirely different. Plaintiffs asked the lower court to apply the plain language of the official English version of the Bulgarian civil code, not to engraft uniquely American legal theories onto Bulgarian law. Moreover, there is no dispute over the central legal principle at issue; under the plain language of the POSA, if the Defendants colluded to exercise collective control over BACB to avoid the tender offer requirement, that conduct violated Article 149(2). (A0664; A2446-A2447 ¶ 31.) Further, any Article 149(2) ruling in Delaware will not spur a massive influx of cases or generate an unprecedented expansion of liability in a heavily-litigated genre of toxic tort cases. In fact, a Westlaw search reveals that this is the only case

in the history of American jurisprudence that even *mentions* the POSA. Thus, Article 149(2) is neither "important" nor "novel" within the meaning of *Martinez.*

The lower court's assertion that its adjudication of this case could have "serious unintended consequences on the development of Bulgarian law and on conditions for investment of capital in the country" (Op-34) lacks support. The outcome of this case will not have any impact on anyone or anything other than the parties. Bulgarian courts will give no weight to a Delaware decision on a matter of Bulgarian law; given the civil law system, Bulgarian courts do not even heed *Bulgarian* precedents. As for potential future investors in Bulgarian companies, they already know that the plain language of Article 149(2) prohibits conspiracies to avoid the tender offer requirement through voting agreements – nothing a Delaware court decides will change that basic principle. Ironically, this case has had only one concrete effect on "investment of capital" in Bulgaria to date; because the courts of their home country have refused to provide a forum to resolve a dispute concerning an investment that was underwritten and actively encouraged by U.S. law, Plaintiffs have suspended indefinitely all SEED Act investments. Any future investors considering investments in Bulgaria (particularly SEED Act investments) who read the lower court's opinion will likely adopt the same course. Accordingly, in an effort to avoid an entirely *speculative* negative

impact on foreign investment in Bulgaria, the lower court has issued a decision that has *actually caused such an effect*.[15]

2. Delaware Has A Significant Interest In This Case

The lower court also questions Delaware's interests in this case *vis-à-vis* Bulgaria. (Op-34.) *First*, this Court has repeatedly refused to dismiss cases on *forum non conveniens* grounds in which the parties, applicable law, underlying events, witnesses, and other evidence had virtually no relationship to Delaware. *Candlewood*, 859 A.2d at 995; *Warburg*, 774 A.2d at 266-67; *Mar-Land*, 777 A.2d at 777, 780; *Taylor*, 715 A.2d at 837-839. The lower court itself recently denied a *forum non conveniens* motion in a case where every relevant factor (including the applicable law, location of witnesses and evidence, situs of the events giving rise to the suit, and the residence of the parties) related directly to India. *Pipal Tech Ventures Private LTD v. MoEngage, Inc.*, 2015 WL 9257869, at *6 (Del. Ch. Dec.

[15] The lower court raises issues concerning Plaintiffs' interactions with Bulgarian regulators (Op-32-33), but concedes that no Bulgarian regulator ever investigated or decided whether Defendants violated the POSA. In response to Plaintiffs' complaints, the Bulgarian regulators outlandishly stated that Defendants would self-report if they had engaged in a conspiracy to circumvent Article 149(2). (Op-11-12.) Consequently, the lower court's assertion that this case would "presumably" require it to apply the Bulgarian doctrines of "exhaustion of remedies" and "deference to regulators" is speculative, as is its "presum[ption]" that those doctrines even *exist* in Bulgaria. Moreover, the Bulgarian regulatory system is beset by rampant corruption (*see, e.g.*, A3220-A3294), and indeed one of the regulators that responded to Plaintiff's concerns about the Transaction ***was indicted for corruption***. (A3055-A3056.)

17, 2015).[16] *Second*, Delaware has an interest in providing a neutral forum to Plaintiffs and BAEF, its citizens. *Candlewood*, 859 A. 2d at 1000; *Forum Shops*, 2008 WL 8974439, at *3. *Third*, the Transaction (in which Defendants conspired to avoid the tender offer required by Article 149(2)) could not have closed without certificates issued by the Delaware Secretary of State. (A2582 §3.2.) Delaware has an interest in ensuring that its auspices are not used to engage in fraud. *Cf. Nacco Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 26 (Del. Ch. 2009) ("Delaware has a powerful interest…in preventing the entities that it charters from being used as vehicles for fraud. Delaware's legitimacy as a chartering jurisdiction depends on it.")

3. The Location of Evidence and Witnesses Does Not Support Defendants' Motion

Finally, the lower court references issues regarding the location and availability of witnesses and documents,[17] and translation. (Op-33-34, 35 n.132.) In that regard, there are numerous U.S. witnesses (A0112, A0552-A0553; A2495-A2496, A2504), and Defendants have failed to identify any foreign witness who would not appear voluntarily at trial in Delaware, or whose testimony could not be

[16] Although *Pipal* tangentially involved the formation of a Delaware LLC, it had no employees, was controlled by an Indian company, had no presence in Delaware, and performed no acts in Delaware. *Id.*

[17] The location of documents is irrelevant to the overwhelming hardship analysis. *See, e.g. Asten v. Wangner*, 1997 WL 634330, at *3 (Del. Ch. Oct. 3, 1997) ("Modern methods of information transfer render concerns about transmission of documents virtually irrelevant.").

obtained through the Hague Convention or letters rogatory.[18] Absent such a showing, they cannot prove overwhelming hardship. *See Pipal*, 2015 WL 9257869, at *7-*8. Further, of the 13,394 pages of documents produced in limited document discovery in the Illinois litigation, 12,832 (92%) were written in English only; another 1,060 pages (7.7%) were in both English and Bulgarian; and just 42 pages (0.3%) were exclusively in Bulgarian. (A2454-A2455 ¶ 3.) Thus, if this case proceeded in Bulgaria, a massive effort would be required to translate documents from English to Bulgarian. Similarly, virtually every witness in this case (even those resident in Bulgaria) is fluent in English (A0558-A0560, A0510-A0513; A2496-A2498), and therefore could testify in Delaware without a translator. In contrast, numerous key witnesses outside Bulgaria cannot speak Bulgarian (A0510-A0513) and would have to testify in Bulgaria through a translator.

[18] Defendants' list of purported witnesses is grossly overstated and cumulative. (A2393-A2395; A3410:19-A3415:21.)

V. EVEN IF THE COURT DECIDES THAT THE OVERWHELMING HARDSHIP STANDARD DOES NOT APPLY, ITS RULING SHOULD HAVE ONLY PROSPECTIVE EFFECT.

A. Question Presented

Did the lower court err in failing to apply its ruling prospectively only? (A3556-A3558.)

B. Standard and Scope of Review

This Court reviews a trial judge's legal conclusions *de novo*. *Kahn*, 23 A.3d at 836.

C. Merits of Argument

Judicial decisions should not be applied retroactively where "the weight of the three *Chevron* factors[19] favor [only] prospective application." *Gen. Motors Corp. v. New Castle Cnty.*, 701 A.2d 819, 822 (Del. 1997). The *Chevron* factors are (1) whether the judicial decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or [] decid[es] an issue of first impression whose resolution was not clearly foreshadowed"; (2) "whether retrospective operation will further or retard [the] operation" of the new rule; and (3) whether retroactive application would produce inequitable results. *Chevron*, 404 U.S. at 106-07 (citations omitted).

Here, the *Chevron* factors weigh heavily against retroactive application. *First*, the lower court's ruling flatly contradicts *Trinity* and *Asbestos Litigation*,

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19 *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

which are directly on point. Its application of *Lisa* to dismiss a Delaware case where an earlier first-filed action in another state was dismissed on *forum non conveniens* grounds was by no means "clearly foreshadowed." *Second*, retroactive application here would serve no useful policy goals. If the purpose of the lower court's rule is to discourage parties from re-filing in Delaware, and thus avoid the expenditure of resources associated with litigating *forum non conveniens* in Delaware, it is too late to serve that goal in this case. *Third*, applying the lower court's interpretation of *Lisa* to Plaintiffs would be especially unfair, given that they would have originally filed in Delaware had they been aware of the Delaware forum selection clause in the Purchase Agreement. Additionally, as noted earlier, Plaintiffs undisputedly chose the Illinois and Delaware forums in good faith and with ample factual basis.

Dated: March 23, 2017

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