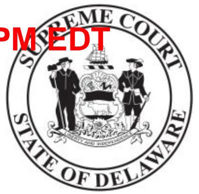
EFiled: Aug 23 2019 05:15PM EDT
Filing ID 64127883
Case Number 291,2019



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERMANINVESTMENTS AG, and **RICHARD HERRLING**, individually and on behalf of AHMR GmbH,

Plaintiffs-Below/
Appellants,

v.

ALLOMET CORPORATION, and **YANCHEP**, **LLC,**

Defendants-Below/
Appellees.

No. 291, 2019

Court Below: Court of Chancery of the State of Delaware
C.A. No. 2018-0666-JRS

APPELLANTS' OPENING BRIEF

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Dated: August 23, 2019

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NATURE AND STAGE OF THE PROCEEDINGS

As part of a transaction to rescue a struggling business, plaintiffs loaned several million dollars, in return for which, they were to become beneficial owners of 50% of that business, Allomet Corporation ("Allomet"), and of the special purpose entity, Yanchep, LLC ("Yanchep"), that owns the real property where Allomet has its corporate headquarters. Although the parties signed a Restructuring and Loan Agreement (the "Restructuring Agreement") that contemplated the transfer of Delaware stock and membership units and purchase agreements with integration clauses were thereafter duly executed and the consideration paid, stock certificates have not been reissued reflecting the new ownership of Allomet and Yanchep. The prior majority owner and present Chairman and Chief Executive officer of Allomet, Dr. Hannjörg Hereth ("Dr. Hereth"), purporting to have sole signatory authority for Allomet and as managing member of Yanchep, has refused to permit the stock or interest transfers to occur. With respect to Allomet, after the stock was delivered, has refused to permit its release from a safe deposit box to enable cancellation and reissuance and instead Dr. Hereth acts as if he is still the owner of Allomet.

Plaintiffs came to Delaware to vindicate AHMR GmbH's ("AHMR") rights as the sole owner of Allomet, a Delaware Corporation, and Yanchep, a Delaware limited liability company. On the basis of the Delaware General Corporation Law

(the "DGCL"), the Stock and Interest Purchase Agreements and the doctrine of unjust enrichment, Plaintiffs have requested, among other things, that the Delaware Court of Chancery declare AHMR the rightful owner of all outstanding shares of Allomet stock and order Allomet to cancel all of the outstanding stock and reissue stock certificates in the name of AHMR. Plaintiffs also seek specific performance and damages under contract, and alternatively, unjust enrichment for money lent under a contract that the Defendants have argued is not a valid contract and which funds they have not disputed were lent to Allomet by Plaintiffs.

The Court of Chancery dismissed all counts of the Complaint for lack of jurisdiction based on a European Union regulation that does not apply in Delaware or, under the facts of this case, in Austria that the Court used to interpret a clause in the Restructuring Agreement that simply states that "[the Restructuring Agreement] is subject to Austrian law. The Place of Jurisdiction is Vienna." (the "Forum Clause"). From this vague language and based on European law, the Chancery Court found that the Forum Clause was a mandatory and not permissive forum selection clause and that "there is no basis to require Defendants to answer Plaintiffs' claims in Delaware." Ex. A at 3. In reaching this conclusion, the Chancery Court applied European law urged by Defendants and ignored Plaintiffs' arguments and material based on Austrian law (and arguments based on the EU Regulation itself). The Defendants initially provided only the legal provision to support their interpretation

of the Forum Clause. The Chancery Court then rejected the Plaintiffs' argument that the motion should be denied for failure of proof and then relied on material Defendants had held back and submitted in reply in support of their position.

Plaintiffs had initially argued that the motion to dismiss should be denied for failure of proof since defendants had not proven foreign law, then when the motion to dismiss was granted, moved for reargument, supported by an affidavit of an Austrian law expert. The Court of Chancery rejected the motion for reargument, restating that this was not a "circumstance that compels equities intervention." Ex. B at 7. The Court of Chancery also did not consider the law contending it was "new evidence" that should have been submitted earlier, even though Delaware Chancery Court Rule 44.1 provides that material regarding foreign law can be considered whether it is admissible as evidence or not and irrespective of the fact that the procedure applied wrongly placed the burden of proof of foreign law on Plaintiffs.

Plaintiffs hereby request that this Court reverse the decision of the Court of Chancery dismissing Plaintiffs' Complaint and remand this matter to the Court of Chancery for further proceedings.

SUMMARY OF ARGUMENT

(I) Because Plaintiffs cannot otherwise access the shares of stock of Allomet, they seek, among other things, the reissuance of shares in their name under Section 168 of the Delaware General Corporation Law ("Section 168"). The Court of Chancery erred when it dismissed Plaintiffs' claims, finding that Section 168 was not the proper mechanism for Plaintiffs to seek such relief—ignoring *Castro v. ITT Corp*, a case where the relevant facts were similar. 598 A.2d 674 (Del. Ch. 1991).

In *Castro*, there was not universal agreement as to the identity rightful owners of the stock when the action was initiated and the physical location of the certificates stock could be surmised, although the certificates were inaccessible. 598 A.2d at 677-684. Nevertheless, Chancellor Allen in *Castro* found that the plaintiff had properly brought a Section 168 action and that even if that statutory provision was not the exact provision under which the issues should be raised, that the Court of Chancery should nonetheless decide the issues presented. Likewise, Plaintiffs in this action have properly invoked Section 168.

Furthermore, the Court of Chancery has jurisdiction to hear internal corporate claims, and Section 115 of the Delaware General Corporation Law ("Section 115") prohibits a corporation from waiving Delaware as a forum to hear such claims. The Court of Chancery erred when it found that a corporation could eliminate Delaware as a forum through contract even though Section 115 was enacted to prevent

corporations from eliminating Delaware as a forum. Such a finding is contrary to logic, public policy, and the hierarchy of the governing documents of a corporation. A party should not be able to use a Delaware corporation as a vehicle for wrongdoing against its stockholders yet remove himself from the authority of Delaware courts. Furthermore, Delaware has a strong public policy in the consistent interpretation of Delaware law, especially with respect to the ownership of a Delaware corporation.

(II) The language of the forum provision in the restructuring agreement as well as the selection of Delaware law in the stock purchase agreement indicate that the forum provision is permissive, not mandatory.

Furthermore, as the ones who raised Austrian law as a basis for their motion to dismiss, Defendants had the burden to establish the substance of Austrian law, yet they did not supply the Court of Chancery with the affidavits or testimony of any experts in Austrian law. By granting the motion to dismiss before considering any affidavits prepared by experts on Austrian law, the Court of Chancery effectively put the burden on Plaintiffs to rebut Defendants' assertions of foreign law (but let Defendants put most of their evidence on the points in Reply) and departed from established practice in the Court of Chancery for establishing the substance of foreign law. Likewise, the Court of Chancery erred in refusing to consider the affidavit of foreign law when submitted and denying Plaintiffs' motion for reargument by relying on the concept that it could not consider "new evidence" on

rehearing even though the applicable rule, Ch. Ct. R. 44.1, expressly provides a court may consider material on foreign law irrespective of whether or not it is admissible evidence.

STATEMENT OF FACTS

A. Factual Background

Allomet is a headquartered in North Huntingdon Township, Pennsylvania and supplies high-performance, tough-coated hard powders using a patented and proprietary technology. A0019 (¶ 6), A0020 (¶12). Prior to the events giving rise to this dispute, Allomet was 96 percent owned by non-party Fobio, which was in turn wholly owned by Dr. Hereth. A0020 (¶ 9-10). Dr. Hereth is Chairman of the board of Allomet and at all relevant times has represented to Plaintiffs that he controls and makes decisions for Allomet. A0021 (¶ 14). The real property at Allomet's Pennsylvania headquarters is the sole asset of Yanchep LLC ("Yanchep"), which is wholly owned by Dr. Hereth's wife, Myrtha Hereth. A0019 (¶ 7). Dr. Hereth is the co-manager of Yanchep. A0019, A0047 (¶ 6).

Allomet is likely insolvent or would be insolvent if not for the continuous subordination of shareholder loans over the years.[1] A0021 (¶ 16). Since 2002, Allomet has incurred yearly losses, with a total net operating loss of $25 million as of 2017 and Allomet once owed Fobio $42, 525, 475.25—among other creditors—as of 2017. A0021 (¶¶ 15-16).

[1] Allomet has refused to provide to Plaintiffs Allomet's 2017 audited financial statements or any financial information from June 2018 through present. A0281.

Dr. Hereth and plaintiff Richard Herrling were introduced in mid-2016 and began discussing the latter's investment in Allomet. Compl. ¶¶ 17-18. At a meeting in October 2016, Dr. Hereth represented that he was looking for a partner for Allomet due to his age, health, and other commitments in Brazil, as well as a lack of liquidity. A0021.

In subsequent discussions, the parties agreed to take the following steps:

- A to-be-created Austrian holding company (eventually AHMR) would become the sole owner of Allomet's intellectual property rights and outstanding stock. A0022.
- The holding company would also become the sole owner of Yanchep's membership interests, buildings, land, and rights. A0022.
- All of Allomet's existing indebtedness to Fobio would be cancelled or transferred to the holding company. A0022.
- Mr. Herrling and Dr. Hereth would each own half of the holding company. A0022-23.

On the basis of this oral agreement, Mr. Herrling began loaning Allomet money to finance operations, totaling $850,000 between January 31, 2017 and May 10, 2017. The oral agreement was documented in several written and executed agreements, including the Restructuring Agreement, executed on May 29, 2017. The Restructuring Agreement stated that Mr. Herrling would provide the loans already extended to Allomet, as well as an additional $100,000 at a date still unknown. A0023 (¶ 25); A0054. In total, Mr. Herrling was to provide €10 million plus $250,000 in loans to Allomet over a period of five years in consultation with Dr. Hereth according to Allomet's liquidity needs and evaluation of market needs.

A0023, A0024. The Restructuring Agreement also provided that all outstanding loans to Allomet from Fobio, totaling $42,525,475.25 would be assigned to the holding company unless Mr. Herrling or Dr. Hereth agreed otherwise. A0024-25 (¶ 29), A0054. Finally, the Restructuring Agreement provided that "[a]ll the shares in the Allomet Corporation that have been issued at the present time are to be adapted to the newly created shareholder situation. This shall require a share split (cancellation and subsequent re-issue of the shares), which shall follow the establishment of the holding company." A0024-25 (¶ 30); A0054.

The Parties implemented the terms of the Restructuring Agreement. Mr. Herrling and Dr. Hereth formed AHMR.[2] In reliance on the existence of an agreement to transfer ownership rights to Allomet to AHMR, Mr. Herrling and GermanInvestments continued to make payments to and on behalf of Allomet, which by March 5, 2018 totaled $3,6665,000. A0026 (¶ 36). The last two payments made on February 20, 2018 and March 5, 2018 totaled $1,355,000. A0026-0027. AHMR entered into a Stock Purchase Agreement with Fobio and a related assignment

[2] Forty nine percent of AHMR is owned by GermanInvestments Aktiengesellschaft (AG) ("GermanInvestments") (which is in turned owned by members of Mr. Herrling's family) and 1% is owned by Tanja Hausfelder who has given all litigation rights to Mr. Herrling. A0019 (¶ 4), A0025 (¶ 34). The other 50% of AHMR is owned by Dr. Hereth (49%), and Dr Hereth's son-in-law Valentin Biederman (1%). A0025 (¶¶ 32, 34).

agreement under which it purchased 100% of the stock of Allomet.[3] Section 9.1 of the SPA selects Delaware's law as the governing law and Section 8.2(b) selects arbitration pursuant to the Delaware Rapid Arbitration Act. Compl. Ex. C at 4. Ms. Hausfelder and Mr. Biedermann received Allomet's stock certificates on behalf of AHMR and then moved Allomet's outstanding stock certificates, which had not been reissued to reflect AHMR as the current owner, to AHMR's safe deposit box. A0027 (¶ 38).

According to the terms of the Supplementary Agreement executed by GermanInvestments, Dr. Hereth, Mr. Biedermann and Ms. Hausfelder on January 24, 2018, the SPA, along with a Member Purchase Agreement, the Assignment and

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[3] On January 24, 2018, the parties executed five additional agreements in order to effectuate the agreement, including a Stock Purchase Agreement (the "SPA") between Fobio, AHMR, and Dr. Hereth. A0027-28. The SPA stated that Allomet had issued 54,132 shares of common stock, and 1,304 shares of preferred stock and Fobio owned 52,249 and all of those shares respectively. A0029 (¶ 41), A0059. Section 3.2 of the SPA required Fobio to "deliver or cause to be delivered to [AHMR] all certificates (if any) representing the Seller Shares and, if requested by [AHMR] at any time, execute and deliver lost stock affidavit(s) for lost stock certificates. A0029 (¶ 42); A0060. Exhibit A to the SPA is an executed Stock Power agreement, which states:

> "[Fobio] hereby sells, assigns and transfers unto AHMR GMBH . . . (i) 1,304 shares of the . . . preferred stock . . . and (ii) 52,249 shares of Common Stock . . . and does hereby irrevocably constitute and appoint any officer of [Allomet] as attorney to transfer the said shares on the books of said Company with full power of substitution in the premises." A0029-030 (¶ 43), A0067.

Assumption Agreement, the Affidavit of Lost Stock Certificates, and the Debt Cancellation Agreement (the "Transaction Agreements") constituted the "entire transaction structure under company law for all of the Allomet shares" to be transferred from Fobio to AHMR and for all the interests of Yanchep to be transferred to AHMR. A0032-33 (¶ 60); A0090. The Supplementary Agreement allowed the amendment of the Transaction Agreements until March 31, 2018. A0033; A0091. At which time the parties were to "regard the already signed [Transaction Agreements] as definitive" and should "then be Executed/Implemented as such." A0033 (¶ 62); A0091.

B. Allomet Breaches The Transaction Agreements And Its Board Chairman Frustrates The Registration Of Shares In AHMR

The parties have complied with many of the terms of the Restructuring Agreement, including, significantly, the requirement that Mr. Herrling individually and through GermanInvestments provide funding to Allomet through tranches over a period of time. A0034 (¶ 66). Allomet and Yanchep however have not taken steps to reflect AHMR's ownership of their equity and other assets. A0035 (¶ 67-68). Specifically, Allomet has not taken steps to have its stock certificates cancelled and reissued in the name of AHMR and has not updated its stock registry, so Allomet's stock certificates still reflect Toth and Fobio as the holders of the stock. A0035 (¶ 69).

Plaintiffs are unable to open AHMR's lock box and retrieve Allomet's stock certificates without the cooperation of a member of "Group A" of AHMR's managing directors, which consists of Dr. Hereth, Mr. Biederman, and Mirta Hereth (Dr. Hereth's wife). A0026 (¶ 35), A0027 (¶38), A0035 (¶ 69). Mr. Herrling, individually and on behalf of GermanInvestments has attempted to resolve the issue. A0035-37 (¶¶ 70-76). But Dr. Hereth has represented that he does not recognize Mr. Herrling (and presumably GermanInvestments) as having any equity interest in Allomet. A0037 (¶¶ 74-76), A0100.

Without the relief sought in the Complaint, Plaintiffs cannot exercise AHMR's various rights as a stockholder in Allomet. Plaintiffs cannot even prevent Dr. Hereth from potentially selling Allomet's shares of stock to another party. A0038 (¶ 77-78). In short, Dr. Hereth persuaded Mr. Herrling and Germaninvestments to invest money in Allomet and then back out of a binding Delaware-law governed contracts to enhance his investment in Allomet and cause harm to Plaintiffs. Plaintiffs sued Allomet and Yanchep to enforce those binding Delaware contracts and asserted three counts, one under section 168 of the DGCL, one for specific performance, and one for unjust enrichment. Plaintiffs' prayer for relief included the following:

> A. Declare AHMR the rightful owner of all outstanding shares of Allomet stock and order Allomet to immediately cancel all of its outstanding stock and reissue stock certificates in the name of

AHMR and reflect AHMR as the owner of all of Allomet's stock on its stock registry;

B. Declare AHMR the rightful owner of all outstanding membership interests of Yanchep and order Yanchep to immediately change its books and records to reflect AHMR as its sole member;

C. Subject to Plaintiffs' reservation of rights and proof at trial, and consistent with the terms of the Supplementary Agreement, that specific performance of the agreements does not result in unfavorable economic consequences for AHMR, specific performance of the agreements as follows:

   (i) Declare AHMR the rightful owner of all of Allomet's intellectual property and order Allomet to immediately transfer all right, title, and interest in all intellectual property to AHMR;

   (ii) Declare AHMR the rightful owner of all of Yanchep's assets and order Yanchep to immediately transfer all right, title, and interest in its assets to AHMR;

D. Declare that Defendants have breached the Restructuring Agreement and award Plaintiffs all compensable damages including, at a minimum, $3,665,000 plus accrued interest; [and]

E. Declare that Allomet has been unjustly enriched by Plaintiffs and award Plaintiffs all compensable damages including at a minimum, $3,665,000 plus accrued interest, as well as require Allomet to disgorge any and all profits. A0043-44.

C. Defendants Move To Dismiss Pursuant To Their Interpretation Of Foreign Law And The Court Of Chancery Dismisses The Complaint Without Considering Any Affidavits Of Foreign Law Experts

On December 10, 2018, Defendants moved to dismiss the Complaint on the ground that the Delaware Court of Chancery was an improper venue and pointed to the Forum Clause in the Restructuring Agreement. A0138. Defendants claimed

that Article 25 of the European Regulation on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, Regulation (EU) No. 1215/2012 (the "Brussels Regulation"), a treaty among member states of the European Union, rendered that clause a mandatory clause. Defendants provided the Brussels Regulation but not commentary, applicable case law, or any affidavit of an Austrian expert.

Plaintiffs filed their Answering Brief in Opposition to Defendant Allomet Corporation and Yanchep, LLC's Motion to Dismiss on January 11, 2019. A0294. Plaintiffs explained that the Forum Clause in the Restructuring Agreement did not apply to the claim asserted under Section 168 or to the unjust enrichment claim because, among other reasons, these claims did not arise under the Restructuring Agreement, the Stock Purchase Agreement with the transaction selected and Delaware law and the enforcement of the Forum Clause is prohibited by Section 115 and public policy, and consequently the Court of Chancery could and should decide the underlying dispute. A0323-A0330.

Plaintiffs also objected to the application of foreign law because Defendants had failed to "adequately cite to the foreign law they urge the court to apply" and thus the Forum Clause should be interpreted pursuant to Delaware law. A0336. Plaintiffs pointed out that Defendants had supplied "no articles, no relevant case, no expert testimony, etc." in their opening brief, but instead relied on conclusory

statements about the law of Austria and hence had failed to meet their burden of demonstrating that Plaintiffs should prevail on their motion to dismiss as a matter of Austrian law. A0318-19, A0343. Notwithstanding that Defendants had failed to meet their burden, Plaintiffs explained that the Forum Clause was permissive, not mandatory whether interpreted by Austrian or Delaware law, and that the Brussels Regulation, by its own terms, only applies to Member States of the European Union. A0335-49. Plaintiffs pointed out, among other things, that the "relevant stock purchase agreements for the purchase of Delaware equity and membership units are governed by Delaware law." A0337.

The Court of Chancery held oral argument on the motion to dismiss on March 5, 2019. Plaintiffs that the Share Purchase Agreements were governed by Delaware law. A0736 (54:11-18). The Court of Chancery stated that it would reach out to the parties requesting "more information on Austrian law/EU law as relates to the Brussels treaty" but that "to get there, [it] would have to decide several issues in a particular way," including whether Delaware law or Austrian law should be applied to the Restructuring Agreement, whether Section 115 would nullify the Forum Clause as a matter of law, whether Section 168 appropriately applied to Claim I, and whether the unjust enrichment claim nullifies the Forum Clause. A0775 (92:1-93:12). The Court of Chancery also stated that in the event that after deciding those issues, it found that the motion to dismiss would turn on the question of whether the

Forum Clause was mandatory or permissive under Austrian law and "questions or nuances" with respect to the Austrian law question, the Court of Chancery would give notice to the parties that it needed additional guidance. A0775 (93:13-22).

The parties next heard from the Court of Chancery when it issued an opinion finding that foreign law governed the Restructuring Agreement. The Court of Chancery ruled that the Brussels Regulation applied to Forum Clause, rather than the Austrian Jurisdiction Act, and that under the Brussels Regulation, a forum selection clause was mandatory unless stated otherwise. Ex. A at 18-19. In a footnote, the Court of Chancery stated that "[w]hile the Court could convene a hearing to take testimony regarding the parties' competing views of the governing foreign law, there is no need to put the parties or the Court through that added burden because the law is, in my view, clear." Ex. A at 16 n.73. The Court of Chancery also said that "the parties have provided extensive foreign authority and affidavits interpreting that authority." *Id.* The Court of Chancery thus affirmed the applicability of Austrian law and subsumed the case under Austrian law, contrary to expert opinion. A0796.

The Court of Chancery found that it was not the proper forum to hear Plaintiffs' claims regarding the ownership of Allomet, ruling that that "[s]tockholders can expressly waive Delaware venue in a contract between stockholders and a corporation" (Ex. A at 24-25) and "Section 115 places limitations

on the scope of forum selection provisions that Delaware corporations may place in their governing documents; it does not reach other contracts between the corporation's constituents." *Id*. at 24. The Court of Chancery also ruled that regardless of whether it could be divested of jurisdiction to hear claims pursuant to mandatory provisions of the DGCL, Section 168 was not applicable to this dispute. *Id*. 23-24.

D. Plaintiffs Move For Reargument And Provide An Affidavit Of An Austrian Law Expert

The Plaintiffs moved for reargument on the basis that, among other things, the Court of Chancery did not discuss the Delaware choice of law in the Share Purchase Agreements, nor did it explain how *Castro*, a similar case under Section 168 is inapplicable, even though that decision states that disputes over ownership of stock that do not fit precisely under Section 168 should still be decided by the Court of Chancery as the issue is within its equitable power. A0790. Plaintiffs also argued that the Court of Chancery overlooked the public policy embedded in Section 115. Finally, the motion for reargument stated that the Court of Chancery had misapplied Austrian law and submitted an affidavit of an Austrian law expert, Dietmar Czernich, which it had obtained after the decision was issued to determine if the decision accurately applied Austrian law. A0783. The Court of Chancery denied the motion for reargument. Ex. B.

E. **Plaintiffs Appeal The Court Of Chancery's Ruling**

On July 8, 2019, the Plaintiffs filed a timely notice of appeal with the Delaware Supreme Court, challenging the Court of Chancery's dismissal of the Complaint and its denial of the Motion for Reargument. A0845 (*GermanInvestments AG v. Allomet Corporation*, Del. Supr., No. 291, 2019, Trans. ID 63518055 (Del. July 8, 2019)).

ARGUMENT

I. THE COURT OF CHANCERY ERRED WHEN IT DETERMINED THAT IT COULD NOT ADJUDICATE THE OWNERSHIP OF A DELAWARE CORPORATION

A. Question Presented

1. Vice Chancellor Allen once observed that where the "essence" of a claim is determination of equitable title to Delaware stock in circumstances "sufficient to qualify [parties] as 'owners' or 'lawful owners[,]'" that claim is "classically a matter for a court of equity that should proceed in Delaware under section 168 of the Delaware General Corporate Law even if one accepts the proposition that a case is "not a Section 168 case." *Castro v ITT Corp.*, 598 A.2d 674, 667 n.4 (Del. Ch. 1991). The Court below ruled that this case was not a Section 168 case. Ex. A at 23. Plaintiffs plead equitable facts that justified the Court proceeding under Section 168, however, and gave notice to relevant parties in compliance with *Castro*. A0035 (¶¶ 68-69), A0039 (¶ 83-84), A0354 at n.17, A0756-57 (74:13-75:12). The Court did not address *Castro*, ruled that the matter was not a Section 168 case but one of contract, and refused to decide the ownership dispute of stock sold under and Delaware law-governed stock purchase agreement. *Id*. at 23-24.[4] The Chancery Court also held a Delaware corporation can eliminate

[4] Yanchep had also executed an Interest Purchase Agreement, that while not subject to section 168, did require the issuance of the membership units in Yanchep to AHMR as a matter of specific performance. This Interest Purchase Agreement was

Delaware as a jurisdiction for resolution of internal corporate claims notwithstanding the new prohibition against that action in Section 115 of the DGCL. If this holding is allowed to stand, the General Assemblies' efforts in Section 115 have been eviscerated, allowing Delaware corporations to simply eliminate Delaware as a choice of forum with mandatory forum selection clauses for states outside of Delaware to resolve disputes over stock issuance, fiduciary duty claims against Delaware officers and directors, and other statutorily defined "internal corporate claims."

1A. The Delaware Chancery Court should decide a dispute as a matter of equity under Section 168 or otherwise when a Delaware corporation's board chairman and chief executive officer sells stock and delivers stock certificates to the purchaser but then interferes with the purchasers' ability to exchange those certificates.

1B. The Court should also address the issue of whether the Chancery Court was incorrect when it held that in the face of newly enacted Section 115 a Delaware corporation can by contract eliminate Delaware as a choice of forum for "internal corporate claims" as defined in that section of the DGCL.

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also subject to Delaware law and yet the Court ruled that it too should be subject to the Vienna forum clause in the Restructuring Agreement. (Ex. A at 19.)

1C. If this Court determines that Section 115 of the DGCL does not prohibit the elimination of Delaware as a forum for disputes over the ownership of stock in a Delaware corporation, it should address the issue of whether a Delaware court can enforce forum selection provision eliminating Delaware as a forum in a dispute over the ownership of stock in a Delaware corporation as a matter of public policy.

This argument was preserved in the Plaintiff's answering brief in opposition to the Motion to Dismiss (A0323-330) and at oral argument (A0723 (41:2-4), A0724 (42:17-21), A0725 (43:20-44:14), A0727 (45:14-23), A0728 (46:16-47:3), A0370 (48:17-20), A0731 (49:8-50:18), A0751 (69:18-70:9), A0752 (70:15-71:2), A0753 (71:6-71:13), A0756 (74:13-12), A0772 (90:2-18)).

B. <u>Scope of Review</u>

Review of the Court of Chancery's interpretation of statutory construction is reviewed *de novo*. *Del. State Univ. Chptr. of the Am. Ass'n of Univ. Professors v. Del. State Univ*., 813 A.2d 1133, 1137 (Del. 2003).

C. <u>Merits of the Argument</u>

The Court of Chancery committed errors of law when it found that it was not the proper venue to resolve the dispute. The Court of Chancery's decision should, thus, be reversed and remanded for further proceedings.

1. The Delaware Court Of Chancery is the Proper Venue To Decide Ownership of the Stock Under Section 168

The Court of Chancery ruled that Section 168(a) was the wrong mechanism for Plaintiffs to vindicate their equitable rights to Allomet as owners of AHMR because "No stock has been lost, stolen or destroyed. Defendants have simply elected not to issue stock to AHMR because they maintain they are not obligated to do so" and "is not and never was intended to address disputes regarding stock ownership." Ex. A at 23. But in *Castro v. ITT Corp*., the Court of Chancery did just that. 598 A.2d 674 (Del. Ch. 1991). Plaintiffs were individuals (or the heirs of such individuals) who were the general partners of a Cuban partnership, which was seized by the Cuban government during the Cuban Revolution of 1962 without compensation. *Id*. at 675. The partnership had invested in a Delaware Corporation, the ITT Corporation. *Id*. at 675. The plaintiffs in *Castro* brought a Section 168 action, seeking to be recognized by the ITT Corporation and United States law as the owners of the partnership's property located in the United States, including the partnership's shares of ITT Corporation. *Id*. at 67.

ITT Corporation moved to dismiss, refusing to recognize the individuals as equitable owners of the stock of the corporation pointing to the fact that the plaintiffs were not registered owners and arguing that the Court of Chancery did not have jurisdiction to decide the matter because it was an action "to determine legal title to property." *Id*. at 676-77. The Court of Chancery noted that third parties might assert

rights to the shares at issue and required that notice be published in Cuba (*Id*. at 680, 683) and acknowledged that "there is some indication of the location of the certificates" (*Id*. at 684). Nevertheless, the Court of Chancery referred to certificates as "lost" (*Id*. at 680) and found that Section 168 was the proper mechanism to determine the lawful owners of the shares. (*Id*. at 677). Plaintiffs have stated a claim under Section 168 as the Court of Chancery can, and has, heard Section 168 cases in which there was a question of ownership with respect to the shares and where the location of the certificates is known, but they are inaccessible.

The Court of Chancery cited *Ohrstrom v. Harris Trust Co. of New York*, 1998 WL 13859 (Del. Jan. 9, 1998), for the proposition that "a claim did not fall under Section 168 when plaintiffs did not allege the disputed shares were ever issued to them or that they ever held certificates for them." Ex. A at 24 n.100. But in *Ohrstrom*, the court held that a matter did not fall under Section 168 when there was no allegation that the disputed shares were ever issued to them or that they ever held the certificates. *Ohrstrom*, 1998 WL 13859, at *2. Plaintiffs satisfied both of these principles when it attached to its complaint the Share Purchase Agreements and alleged in the Complaint that those shares it purchased were issued to AHMR's representatives but then effectively, lost, stolen or destroyed because the Chairman and CEO of Allomet refused to allow AHMR to access those shares. AA0027 (¶ 38), A0035 (¶ 68-69), A0039 (¶ 82-85), A0058-076. The Court also relied on *In re*

Metro Realty Corp., 62 A.2d 857, 858 (Del. Super. Ct. 1948) which discusses the burden of proof on a Section 168 petition and so is not relevant to the question of the Court of Chancery's jurisdiction.

The Court of Chancery also found that Section 168 was inapplicable here because the dispute was grounded in contract, "either the R&L Agreement or the SPA contemplated by the R&L Agreement." Ex. A at 24. But the Plaintiff's claims pursuant to Section 168 and in equity are about determining the lawful owner of the shares of Allomet, a question that should be decided by Delaware law and not Austrian contract law. And in the specific performance count, the Plaintiffs sought specific performance of "Yanchep's contractual obligation to convey all of its membership interests and real property the AHMR[,]" yet, the Court of Chancery referred to that contract, noted it was governed by Delaware law, but ruled in error that it was subject to the Forum Selection clause.

2. Section 115 Of The DGCL Prohibits Delaware Corporations From Eliminating Delaware As A Choice Of Forum Through Contract

Section 115 of the Delaware General Corporate Law ("Section 115") states that "[n]o provision of the certificate of incorporation or bylaws may prohibit bringing [any internal corporate claims] in the courts of [Delaware]." Although Delaware law is generally flexibility with respect to contracts among stockholders, the corporation itself should not be able to waive rights in a contract that it is prohibited from waiving by statute in its charter or bylaws.

In *Providence v. First Citizens Bancshares, Inc*., the Court of Chancery held that a board could modify a Delaware corporation's bylaws to select a forum other than Delaware as a dispute—in that case, the same state where the corporation's headquarters was located and majority of the corporation's business was conducted. 99 A.3d 229, 286 (Del. Ch. 2014). The *Providence* decision was contrary to a prior decision, *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (2013), where then Chancellor Strine had ruled that a company could valid adopt a Delaware-only provision in its bylaws for resolution of corporate disputes.

The possibility that parties could eliminate Delaware as a forum for internal corporate disputes raised several concerns, including that the most experienced courts in questions of Delaware law would be prevented from hearing questions of Delaware, that parties would forum shop, that litigation in various other jurisdictions would lead to inconsistent development of Delaware law, and that bad actors would be able to use Delaware corporate law for nefarious purposes while escaping the oversight of Delaware courts. *See* Andrew Holt, *Protecting Delaware Corporate Law: Section 115 and its Underlying Ramifications*, 5 AM. U. BUSINESS L. REV., 209, 214-220 (2016). Thus, "due to the increasing number of Delaware corporations adopting such clauses in their charters and bylaws and the subsequent cases upholding these adoptions in *Chevron* and *City of Providence*, Delaware acted." *Id.* at 210.

Logic requires that a corporation should not be able to avoid Section 115, defeating the purpose of the prohibition and that the General Assembly's decision to enact Section 115 should not blithely be ignored as avoidable by contract, especially in view of the statements in *Chevron* that the corporate bylaws "constitute a binding part of the contact between a Delaware corporation and its stockholders." *Chevron,* 73 A.3d at 955. And, as argued below, the charter and bylaws sit atop the contractual hierarchy enacted in the DGCL and should not be avoided by some lesser ancillary contract – meaning that while an alternate forum to Delaware can be selected for now statutorily-defined "internal corporate claims" like one asserted under Section 168, Delaware cannot be eliminated as a forum. A0323-A0330.

Quite simply, Section 115 creates a mandatory right, which cannot be waived by a Delaware corporation. In recommending the enactment of the current Section 115, the Corporation Law Council explained that "while the DGCL and fiduciary law do provide remarkable flexibility, they also contain certain 'bottom line' provisions that cannot be changed. . ." and that "[n]o one seriously argues that the statute should be so flexible as to allow these to be eliminated." Corporation Law Council, *Explanation of Council Legislative Proposal*, at 10 (2015). Del. S.B. 75 syn., 148th Gen. Assem. (2015). The concept that stockholders cannot contract away mandatory rights enshrined in the DGCL is not new. *Matter of Appraisal of Ford Hldgs. Inc. Preferred Stock*, 698 A.2d 973, 976 (Del. Ch. 1997) ("Generally,

these mandatory provisions may not be varied by the terms of the certificate of incorporation or *otherwise*") (emphasis added); *Instituform of N. Am. Inc. v. Chandler*, 534 A.2d 257, 270 (Del. Ch. 1987) (rejecting use of voting agreement to circumvent Section 160(c): "the policy expressed in our corporation law in Section 160(c) would require a very clear intent to create such a right before a court would recognize it."); *Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 404 (Del. Ch. 2008) (holding that contracts cannot "grant advancement and indemnification rights that are 'contrary to the limitations or prohibitions set forth in the other section 145 subsections, or other statutes, court decisions, or public policy.'"); *Marmon v. Arbinent-Thexchange, Inc*., 2004 WL 936512, at *5 (Del. Ch. Apr. 28, 2004) (noting that directors cannot by contract eliminate their disclosure obligations or shareholder inspection rights).

Limiting Section 115 to only the bylaw and charter also violates the hierarchy of governing documents of a corporation. *Sinchareonkul v. Fahnemann,* 2015 WL 292314, at *6 (Del. Ch. Jan. 22, 2015) ("[L]ower components of the contractual hierarchy must conform to the higher components.").

If the Court of Chancery's ruling is allowed to stand, Section 115's effectiveness will be gutted, leading to the real potential for inconsistency and confusion with respect to the ownership and control of Delaware Corporations as well as an opportunity for abuse by Delaware corporations that can avoid its impact

by side agreements with investors.

Delaware has an interest in the uniform and fair determination of the stockholders of Delaware corporations. Restatement (Second) Conflicts of Laws § 303. Allowing a corporation to remove Delaware courts as a forum for disputes over the ownership of stock in Delaware corporations by contract could lead to a situation where ownership of stock in a corporation is decided inconsistently with respect to different stockholders forced to bring actions in different forums. If a corporation can eliminate Delaware as a forum by contract, then a corporation could include a mandatory forum selection in a subscription agreement requiring that all disputes related to "internal corporate claims," as defined in Section 115, be brought outside of Delaware. And finally, situations such as this will arise again, where a party has complied with various obligations to become a stockholder and is out of pocket a considerable sum of money, but because his name is not on the certificates, he is unable to avail himself of any of the other protections of the DGCL, such as calling a meeting of stockholders, inspection rights, etc. and instead would be forced to first undertake extensive litigation in a foreign jurisdiction before courts without a background in Delaware's corporate law who may, at the end of the day, determine the dispute should have been brought in Delaware anyway, which as explained in the next section is the expected outcome here.

3. **The Enforcement Of Mandatory Forum Provisions On Disputes Regarding Ownership Of A Delaware Corporation Is Contrary To Public Policy**

If the Forum Clause is mandatory, Delaware courts are not bound to enforce it in this instance, a dispute over the ownership of a Delaware corporation and specific performance from Delaware limited liability corporation, and an equitable claim of unjust enrichment. When the "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of applicable law in absence of an effective choice of law by the parties." The (Second) of Conflicts of Laws § 187(2)(b).

"[F]orum selection clauses are not enforced when they violate a strong public policy of the forum. . . ." *Mitek Sys., Inc. v. U.S. Services Auto Ass'n*, 2012 WL 3777423 (D. Del. Aug. 30, 2012); *In Matter of Liquidation of Freestone Ins. Co*., 143 A.3d 1234 (Del. Ch. 2016) (explaining that even a mandatory forum selection provision is not dispositive and cannot be used to "trump the statutory provisions and public policies of the domiciliary state, such as the public policy of centralizing proceedings in the domiciliary jurisdiction and the statutory provisions that implement that policy."); *Li v. loanDepot.com, LLC*, 2019 WL 1792307 (Del. Ch. Apr. 24, 2019) (noting that the parties could have made a public policy argument with respect to a forum selection clause in an LLC agreement).

Delaware has a strong public policy interest in disputes over who is a stockholder in a Delaware corporation. "[U]niform treatment of the shareholders of a corporation is an important objective which can only be attained by having their rights and liabilities with respect to the corporation governed by a single law." Restatement (Second) Conflicts of Laws § 303. Indeed, the general public policy that the state of formation should have jurisdiction to decide disputes regarding the internal affairs of a corporation is reflected in Austrian law as well.

Austrian law would defer to Delaware with respect to the relief sought in item A of the Complaint's prayer for relief (seeking the cancellation of outstanding stock of Allomet and the reissue of stock certificates) and in item B of the Prayer for Relief (seeking the declaration that AHMR is the rightful owner of all outstanding membership interest of Yanchep). The remainder were related to internal claims between stockholders and a corporation. A0043, A0806 (¶ 27). If Plaintiffs were to bring the action in Vienna, the courts there would find that the choice of forum clause was invalid as to the relief sought in paragraphs A and B of the Prayer for Relief, and would instead apply § 66 of the Austrian Jurisdictional Act, requiring that the case be filed in Delaware because under Austrian law regarding general jurisdiction, a defendant must be sued in its domicile (here Delaware) unless there is some other basis for special jurisdiction, such as place of performance, place where a tort was committed, place where immovable property is located etc. A0806

(¶ 29). Thus, here, by forcing Plaintiffs to go to Austria to litigate a Delaware Corporate law dispute when it is likely to result in the Austria court telling the Plaintiffs to go back and litigate in Delaware, justice has been denied to Plaintiffs. A0805, A0806 (¶ 29).

II. EVEN IF THE FORUM PROVISION IS ENFORCEABLE IN THIS ACTION, IT IS PERMISSIVE

A. Question Presented

While Delaware courts generally honor a contractually-designated choice of law provision if the selected jurisdiction bears some material relationship to the transaction, the "law of the foreign jurisdiction cannot be used to interpret a contract in a manner repugnant to the public policy of Delaware."[5] The contracts relevant to the dispute provided (1) that the laws of the State of Delaware apply without effect to the choice of law or conflicting provision and selected Wilmington, Delaware as the place for resolution of the dispute and (2) that it was "subject to Austrian law. The place of jurisdiction is Vienna."[6] The Chancery Court ignored the Delaware forum provision and applied Austrian law without expert testimony and in so doing dismissed a dispute over ownership of a Delaware corporation and a Delaware limited liability company so that a court in Vienna could interpret Delaware law relating to stock and interest purchase agreements that elected Delaware-based dispute resolution mechanics.

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[5] *J.S. Alberici Const. Co., Inc. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000).

[6] The dispute mechanism in the Delaware-law governed agreements was first mediation and then arbitration under the Delaware Rapid Arbitration Act, 10 *Del. C.* § 5801. The Chancery Court did not address any aspect of this choice of law and forum provision; however, the issues were discussed at length at argument before the court.

2A. This Court should find that the determination of who owns a Delaware entity should be decided by Delaware law when the relevant stock purchase agreement selects Delaware law and the alternative jurisdiction has no material relationship to the transaction.

2B. This Court should also decide whether a Delaware corporation can eliminate Delaware as a forum for disputes over ownership of stock in a Delaware corporation and require a foreign court to decide who owns stock in that Delaware corporation. Additionally, the Court should decide the related issue of whether a foreign court should make that decision where even if the relevant stock and interest purchase agreements, with an integration clause, contains Delaware choice of law and dispute resolution clauses but a prior agreement referenced the sale of that stock and those LLC interests contains different forum selection clauses.

2C. If the Court answers the above questions in a manner that would otherwise require an interpretation of the Forum Clause under Austrian law, the Court should first determine whether the Chancery Court erred when it put the burden of proof of foreign law on the non-movant, Appellants here, since Delaware's decisional law is that the party seeking the application of foreign law has the burden of adequately providing the substance of the foreign law.[7]

[7] *See Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725 (Del. Ch. 2014); *Vichi v. Koninklijke Philips Elecs., N.V.*, 62 A.3d 26 (Del. Ch. 2012); *Republic of Panama v. American Tobacco Co.*, 2006 WL 1933740 (Del. Sup. June 23, 2006) at *4.

2.D. If putting the burden of proof on the non-movant was not in error, this Court should determine whether the Chancery Court erred as a matter of law in its interpretation of Austrian law, including when it did not consider the only expert affidavit tendered in this action that demonstrates the Chancery Court's ruling was erroneous.

This argument was preserved in Plaintiffs' answering brief in opposition to the Motion to Dismiss (A0334-A0342) and at oral argument (A0734 (52:13-15), A0734 (53:12-54:18), A0738 (56:10-66:16), (A0749 (67:5-17)).

B. Scope of Review

Review of the Court of Chancery's interpretation of contractual terms is *de novo*. *BLGH H'ldgs LLC v. enXco LFG H'ldg, LLC*, 41 A.3d 410, 414 (Del. 2012). Court of Chancery Rule 44.1 treats the determination of foreign law as a question of law. When a party contends that the lower court made incorrect determinations of foreign law, and the lower court's determination of foreign law did not rest of the credibility of foreign law experts, such determinations are treated as rulings on a question of law and are subject to de novo review. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochmical Co., Inc.*, 866 A.2d 1, 30 (Del. 2005). Accordingly, this Court should review the Court of Chancery's ruling with respect to the substance of Austrian law de novo.

C. Merits of the Argument

1. Austria Has No Material Relationship To The Transaction, And Therefore The Court Should Apply Delaware Law To The Contract, Which Requires Express Language For A Forum Provision To Be Mandatory

Delaware will "honor a contractually designed choice of law provision so long as the jurisdiction selected bears some material relationship to the transaction." *Deuley v. DynCorp Int'l, Inc.*, 8A.3d 1156, 1161 (Del. 2010). "A material relationship exists where a party's principal place of business is located with the foreign jurisdiction, a majority of the activity underlying the action occurred within the foreign jurisdiction, and where parties to a contract performed most of their services in the foreign state." *Id.* The court here found that AHMR's formation in Austria created that "material relationship." Despite the fact that AHMR is a special purpose holding company created to hold the equity in two Delaware entities and their IP and real estate.

Allomet is a Delaware Corporation with headquarters in Pennsylvania. A0019 (¶ 6). Yanchep is Delaware LLC with assets in Pennsylvania. A0019 (¶ 7). The location of a Delaware corporation's stock is Delaware. 8 *Del. C.* § 169. GermanInvestments is a Swiss Company, with headquarters in Switzerland. A0019 (¶ 4). Mr. Herrling is domiciled in Switzerland. A0019 (¶ 5). Dr. Hereth is citizen of Switzerland who lives in Brazil. A0020 (¶ 10). Fobio is a Hong Kong Limited Company. A0020 (¶ 9). The Restructuring Agreement was executed in Switzerland.

A0053-A0057. The SPAs for the purchase of Delaware equity and membership units are governed by Delaware law. A0063 (§ 9.1), A0072 (§ 9.1). All negotiations occurred in Switzerland, Europe, or Pennsylvania—the parties never once met in Austria. A0338 (¶ 38).

The connection between this dispute and Austria is that AHMR, a holding company is an Austrian entity. But a plaintiff's state of formation alone is not sufficient to constitute a "material relationship." *Matter of Anta Corp.*, 1987 WL 7956, at *3 (Del. Ch. Mar. 16, 1987). Accordingly, there is not a sufficient material relationship to the transaction for Austrian law to apply and the Chancery Court's holding here to that effect was plain error. Indeed, the Defendant's argument was that the entity on which the Court relied to establish the material jurisdictional to Austria was actually a failed joint venture of no material legal effect. A0123 ("While the Court need not (and should not) wade into these issues to dismiss this Complaint, under Austrian law, no joint venture would exist and the claim to enforce a joint venture would fail."). Of course if accurate, then the issues remaining in this litigation would be the dispute under the Share Purchase Agreements and Section 168 and the unjust enrichment count, one of which is expressly subject to Delaware law and forum and the other of which is an equitable claim outside of the Restructuring Agreement Defendants contend failed (and presumably will continue

to contend failed in Austria). And, neither of which would be subject to the Forum Clause.

Additionally, under Delaware law, the Forum Clause is permissive. Chancery Rule 12(b)(3) motion will be granted on the grounds of jurisdiction only when the parties expressly excluded all other courts. *Ashall Homes Ltd. v. ROK Entm't Grp. Inc*., 992 A.2d 1239, 1245 (Del. Ch. 2010); *Eisenbud v. Omnitech Corp. Sols, Inc*., 1996 WL 162245, at *1 (Del. Ch. Mar. 21, 1996). In other words, under Delaware law, a forum clause will be interpreted as mandatory only if the "forum selection clause contains clear language indicating that litigation will proceed exclusively in a designated forum." *In re Bay Hill Emerging P'rs I, L.P*., 2018 WL 321765, at *5 (Del. Ch. July 2, 2018).

It is not the case here that the parties expressly excluded all other forums—either by the language of the Forum Clause or by other expressions of intent. The Forum Clause in the Restructuring Agreement is therefore permissive under Delaware law.[8] It only states that "[t]he place of jurisdiction is Vienna" but does not include any language that Vienna is the "only" or "exclusive" jurisdiction. Accordingly, the Forum Clause reflects the parties' agreement that Vienna was an

[8] Furthermore, from an Austrian law perspective, a decision without taking Delaware law into account and disregarding the factual aspects relating to Delaware is inconceivable. This is because an Austrian court would have to interpret the meaning of the SPA by choosing jurisdiction in Delaware. A0809-811 (¶¶ 40-48).

appropriate forum, not the only forum. *See Eisenbud v. Omnitech Corp. Sols, Inc.*, 1996 WL 162245, at *1 (Del. Ch. Mar. 21, 1996).

2. The Determination Of Who Owns A Delaware Entity Should Be Decided In Delaware When The Relevant Stock Purchase Agreement Selects Delaware

In addition to the language of the Forum Clause in the Restructuring Agreement, which makes no indication that the Forum is to be exclusive, the SPA shows that the parties did not intend for Vienna to be the exclusive forum for disputes arising from the larger transaction. A0062-63 (§ 8.2). Furthermore, the parties rights pursuant to the SPA are part of Plaintiffs' Section 168 claim for Allomet and part of the specific performance count under Count II with respect to compelling registration of Yanchep's membership units in AHMR's name. With respect to Count I, the Complaint alleges that "AHMR is . . . in accordance with the Restructuring Agreement, Assignment Agreement, *and the SPA*, the 100 percent stockholder of Allomet," and that GermanInvestments must protect AHMR's interest as outlined in the Restructuring Agreement *and Transaction Agreements*" and that "[i]n breach of the Restructuring Agreement *and SPA*, Allomet has not reissued its stock in AHMR's name." A0038-39 (¶¶ 80, 82, 83). And yet in denying the rehearing request, the Court of Chancery held that Plaintiffs had waived this argument that the record shows they had raised in a variety of different ways.

3. The Court Of Chancery Erred When It Put The Burden Of Proof Of Foreign Law On The Non-Movant Rather Than On The Movant

By failing to provide expert affidavits or otherwise proffer the opinion of experts of Austrian law as applied to this case, and in light of the real and material open questions with respect to Austria law, Defendants have not met their burden of establishing the substance of foreign law. Consequently, the Court of Chancery erred when it accepted Defendants' interpretation without consulting the opinion of experts and ruled on that basis.

"In order for the Court to consider the application of foreign law, the party seeking the application of foreign law has the burden of not only raising the issue that the foreign law applies, but also the burden of adequately proving the substance of foreign law." *Republic of Panama v. Am. Tobacco Co*., 2006 WL 1933740, at *4 (Del. Super June 23, 2006). In other words, establishing the substance of foreign law is a "threshold requirement" shouldered by the moving party. *Id*. at 3. Where the parties have not cited the foreign law to "an appreciable extent, the analysis will proceed exclusively under Delaware law." *Ashall Homes Ltd. v. ROK Enter. Grp. Inc*., 992 A.2d 1239, 1241246 n.36 (Del. Ch. 2010) (applying Delaware law even though "the agreement clearly chose English law to govern the parties' relationship, and it appears that most of the relevant conduct occurred in England").

The standard requiring the moving party to establish the substance of foreign law has led to a standard practice in Delaware courts that when there is a disputed

issue of foreign law, the courts seek or consider the opinion of experts in the relevant foreign law as applied to the case at hand. *See, e.g. Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc.,* 866 A.2d 1, 31-32 (Del. 2005); *Pallano v. AES Corp.,* 2012 WL 1664228, 1 n.2 (Del. Super. May 11, 2012); *Parlin v. Dyncorp Intern., Inc.,* 2009 WL 3636756, at *2 (Del. Super. Sept. 30, 2009); *Kostolany v. Davids*, 1995 WL 662683, at *2-3 (Del. Ch. Nov. 7, 1995).

Defendants moved to dismiss, claiming that Austrian law supported their arguments. The questions that consequently arose regarding Austrian law are complex. Ex. A at 2 ("I cannot agree the issues presented are "simple" in any degree of that term."). The parties disagree on many points of Austrian law, including whether the Forum Clause is permissive or mandatory, and, if the Forum Clause is mandatory, whether it is enforceable with respect to paragraphs A and B of the prayer for relief. In this context, the failure of Defendants to provide an affidavit of an expert in Austrian law means that they failed to meet their burden as the moving party and their motion to dismiss should have been summarily denied.

If the moving party submits some materials in support of its reading of foreign law, but does not submit an opinion of experts in that law, the courts have found that the moving party has not met its burden. In *Republic of Panama*, the court found that the materials provided were inadequate—explaining that although the affiants were "head[s] of their respective governments' health agencies" and doubtless had

"some understanding of their countries' laws," neither affiant had "proffered that they have an expertise in law of their jurisdictions." *Republic of Panama*, 2006 WL 1933740, at *5.

Here Defendants have submitted some materials, including secondary sources, that they claim support their position but they were not prepared to specifically address the case at issue and therefore may have failed to capture the nuance of this action. In fact, Defendants cite Czernich et al., European Jurisdiction and Enforcement Law: Guide (4th ed., 2014) in support of their contention that the Brussels Regulation applies rather than the Austrian Jurisdictional Act. A0485-86, A0654. Attorney Czernich came to the opposite conclusion in his affidavit, offered by Plaintiffs. A0809-811 (¶ 40-45). Furthermore, Defendants have not established the expertise of the authors of their sources, and in one instance (Exhibit B to the Hill Affidavit), the individual authorship is unknown. A0569.

4. The Court Of Chancery Erred As A Matter Of Law In Its Interpretation Of Austrian Law

The Court of Chancery erred in its application of Austrian law on several counts. As noted above, the materials cited in its Opinion are only the Brussels Regulation, and material that was not submitted until the Reply and to which the Plaintiffs could only have argued at argument and were not given a chance to rebut with any affidavit or expert view, namely a single law review article, and a law firm's advocacy piece about how the Brussels Regulation applies in England, not in

Austria. Ex. A n.74-91 (citing Hill Transmittal Aff. at A and B). And in interpreting Austrian law, the Court used Delaware law in some instances to reach conclusions about Austrian law. *Id.*, n.88 (citing Delaware case law for the proposition that recitals are irrelevant in the Brussels Regulation. In other instances, the Court of Chancery was critical of Plaintiffs for suggesting that Delaware law would apply to a dispute over stock issuance and ownership of stock in a Delaware company. *Id.* at 23. From these sources and references, Plaintiffs submit that the Court of Chancery misapplied the law of Austria for many reasons.

First, the Brussels Regulation does not apply to courts in the United States. The Brussels Regulation is applicable under three circumstances: 1) the defendant is domiciled in a Member State of the European Union, 2) there is a choice of forum agreement in favor of a court which has it seat in a Member State of the EU and the action is brought before any court which has its seat in the European Union, or 3) there is a certain contact which mandates exclusive jurisdiction under Art. 4-6, 24. A0802 (¶ 17), A0809 (¶ 40). By its own terms, the Brussels regulation does not aim to apply to states outside the EU. It is meant to govern the interplay between domestic and European law before the courts of the European Union. A0816 (¶ 44). Brussels Regulation is not binding on the United States or Delaware. It is a legal instrument based on a treaty governing the functioning of the European Union, binding on signatories of the treaty, but not on the United States or Delaware. The

Hague Choice of Court Convention (signed, but no ratified by the United States) would be redundant if the Brussels Regulation applied to the U.S.

When the Brussels Regulation is not applicable, the jurisdiction of the courts in Austria is governed by the domestic law of Austria, in this case the Jurisdictional Act. A0803 (¶ 8), A0809 (¶ 40-42), Article 6 of the Brussels Regulation. Under Austrian law, choice of forum agreements are permissive in nature unless the language in such agreement indicates otherwise. A0811 (¶ 46); A0424 (Austrian Supreme Court 18.10.2007 Case No 2 Ob 180/07w) ("[T]he agreement on jurisdiction . . . shall not be deemed exclusive unless the parties have agreed otherwise, but shall constitute a non-exclusive forum."). The Austrian approach to determining the intentions of parties is the same as Delaware's and under Delaware law, as noted in the cases cited below, the language of the Restructuring Agreement was insufficient to make this Forum Clause exclusive and rendered it permissive.

Specifically, they list Delaware as the forum for disputes, showing the parties' intent that the Forum Clause be permissive. This argument was raised by Plaintiffs' in briefing (A0337) and discussed extensively at the hearing on the motion to dismiss (A0723 (41:4-9), A0727 (45:17-23), A0730 (48:7-8); 5A0736 (4:15-16)). And, yet, it was ignored. Addressing the Motion for Reargument, the Court of Chancery said it was waived and could not be asserted. Ex. B at 6 n.15. The record does not reflect any such waiver and justifies reversal of the Chancery Court's decision.

CONCLUSION

For the reasons set forth above, the decision of the Court of Chancery of the State of Delaware dismissing the Complaint should be reversed and the case remanded for further proceedings.

DATED: August 23, 2019

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