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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' REPLY BRIEF

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INTRODUCTION

AHMR[1] purchased all of Allomets' shares from Fobio Enterprises Ltd. ("Fobio") under an executed SPA and from Richard Toth under an Assignment and Assumption Agreement. Hannjörg Hereth, chair of the board of Allomet, controls Fobio and signed the SPA and related affidavits of lost stock. Before the shares of Allomet were registered in AHMR's name, Hereth used his power to block AHMR's ability to register the shares and have new certificates issued.

Germaninvestments properly petitioned on AHMR's behalf under applicable Delaware law, namely Section 168 of the DGCL, to have the shares registered in its name because they have effectively been lost, stolen, or destroyed. Richard Herrling, an owner of Germaninvestments, together with Germaninvestments also lent Allomet money. Allomet has refused to repay those loans. Plaintiffs thus also sued for specific performance or damages for unjust enrichment.

When a Delaware company refuses to register lost shares conveyed under a valid stock purchase agreement with a Delaware choice of law and venue provision, one would assume Delaware courts would exercise authority conferred by the DGCL to ensure the lost shares are registered in the name of the owner. But here, the Chancery Court determined the SPA (with an integration clause making all other

[1] Capitalized terms not defined in this brief shall have the same meaning as in Appellants' Opening Brief.

agreements irrelevant) was not binding and the Forum Clause required litigation in Vienna.

It was erroneous to ignore the SPA and to determine it was not raised. It was attached to the Complaint, asserted in the briefing, addressed by defendants, and discussed in oral argument. Defendants even argued Plaintiffs should add Fobio as an indispensable party or must pursue dispute resolution under the SPA. They now abandon those arguments and cling to the erroneous findings that Plaintiffs never raised their SPA argument. Based on the Defendants' arguments, notwithstanding the outcome of this appeal, the parties to the SPA and the Membership Interest Purchase Agreement (the "Yanchep Agreement") retain their right to pursue claims under those agreements.[2] Nonetheless, the record shows Plaintiffs did not waive the provisions of the SPA and asserted it below.

The Defendants have consistently argued the SPA is not binding because it is integrated with other transaction documents, and notwithstanding the terms of the Supplementary Agreement, the Restructuring Agreement, read alone, has failed. Even if correct, the SPA's choice of Delaware law and forum is evidence the Forum

[2] Defendants argue if Plaintiffs "truly believed the argument they now make, they would have at least tried to comply with the SPA's dispute resolution provisions prior to filing suit. They did not." AB at 38. This is troubling as the evidence in the record demonstrates that prior to the filing of the complaint, the parties did discuss the dispute. Plaintiffs have also sought mediation in Delaware with a former jurist a number of times; Defendants have either refused to come to Delaware or have simply ignored the request.

Clause did not indicate the parties intent for Vienna to be the exclusive forum; rather, they agreed on Vienna or Delaware. A contrary holding was erroneous. And since debated at length below, it serves as a valid ground for reversal.

Additionally, there is no material relationship between Austria and the transaction. AHMR, the only Austrian party to the transaction, was not a party to the Forum Clause and nothing in the record demonstrates anything material occurred in Vienna.

Finally, the Forum Clause, if relevant, is permissive, not mandatory. Defendants did not meet their burden to establish Austrian law and so Court of Chancery should have interpreted the provision under Delaware law (which would find the Forum Clause was permissive) or it should have considered the only expert affidavit, submitted by Plaintiffs, which explained that the under Austrian law the Forum Clause was permissive not mandatory.

ARGUMENT

I. THE COURT OF CHANCERY IS THE PROPER VENUE TO ADJUDICATE THE OWNERSHIP OF A DELAWARE CORPORATION

A. The Parties Intended for the Restructuring Agreement and SPA to Be Binding and Enforceable in Delaware

Defendants minimize the significance of the Delaware choice of law and forum provisions in the SPA by arguing it is a "nullity" because a failure of a condition precedent. Plaintiffs have contested this characterization of the Restructuring Agreement and SPA. (A0309-A0312.) The Chancery Court erred in dismissing Plaintiffs' claims without addressing Plaintiffs' arguments the SPA is binding and enforceable.

The Restructuring Agreement and the SPA are binding. Defendants string together various sound bites to incorrectly argue the Supplementary Agreement made "expressly clear" the SPA was not binding. (AB at 3.) But by its terms, when the Supplementary Agreement expired on March 31, 2018, the SPA would become "definitive" and be "Executed/Implemented as such." (A0312, A0091.) When this provision is understood, Defendants' entire theory crumbles.

The parties' actions show they considered the Restructuring Agreement and SPA binding.[3] Herrling and Germaninvestments performed all obligations

[3] Defendants argue Plaintiffs have conceded the Supplementary Agreement is "express evidence the venture had not been consummated[.]" (AB at 15.) Plaintiffs

contemplated in the transaction, including loaning funds to Allomet and forming AHMR. (A0024-A0025, A0026-A0027.)

The parties that have not performed their obligations are Defendants. Allomet and Yanchep failed to transfer property to AHMR, and Allomet has not reissued its stock in AHMR's name. (A0039, A0310.) The failure of a party to a contract to perform some or all of its obligations does not make the contract non-binding, otherwise breach of contract could never be a viable claim. The Chancery Court erred when it declined to consider the implications of the choice of law and forum provisions in the SPA on the basis "[t]here is no dispute to resolve under the SPA if the R&L's conditions precedent were not fulfilled" without first determining whether the parties intended to be bound by the transaction documents. (Op. at 16 n.71.) Defendants have never identified this supposed condition precedent.[4]

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have never conceded this and the cited footnote merely reserves Plaintiffs rights to seek appropriate tax treatment when equitable relief is entered in its favor.

[4] The court did not identify it in its opinion, (Op. at 16 n. 71), and neither have Defendants in Appellees' Answering Brief, despite citing this portion of the Opinion a number of times. (AB at 4, 6, 9, 17, 32, and 38.)

B. Section 168 Of The DGCL Is the Appropriate Mechanism for Appellants to Seek Issuance of Stock in Allomet's Name

Defendants contend the SPA cannot be "divorced" from the Restructuring Agreement, and the Chancery Court was correct to rule the unidentified condition precedent was required for the SPA to be binding. (AB at 4.) The relevant facts demonstrate this argument and the ruling it urges this Court to affirm are incorrect.

First, as noted, the SPA is fully executed, dated January 24, 2018, and contains an integration clause in section 9.6, providing the SPA is "the entire agreement reached between the PURCHASER and SELLER with respect to the transaction contemplated in this Agreement and supersedes all prior or contemporaneous agreements, understandings, representations, and warranties between PURCHASER and SELLER." (A0063.) An integration clause of this nature is binding under Delaware law and should have been enforced, and since it was entered into ***after*** the Restructuring Agreement, the SPA stands apart from it by its own terms.

Second, even if the SPA is somehow subject to the Restructuring Agreement, as modified by the Supplementary Agreement, those documents demonstrate the SPA was and is legally binding. The transaction was that, in exchange for a loan, 100% of the shares of Allomet currently held by Fobio will be transferred to AHMR. (A0054.) The Supplementary Agreement then says shares of Allomet and the interests in Yanchep were sold to AHMR as "agreed by the parties." (A0090.) The

Supplementary Agreement provides the SPA will be signed with the full knowledge that amendments may have to be made but if those amendments were not made (which they were not) by March 31, 2018, then the Supplementary Agreement "shall expire, meaning that the Parties shall regard the already signed transaction contracts as definitive and these shall then be Executed/Implemented as such." (A0091.)

Based on this plain language, the SPA was fully executed as of March 31, 2018, and the parties agreed to implement it as written. When the parties failed to implement the SPA, Plaintiffs sued Allomet under Section 168, asking for the Allomet shares it purchased to be issued in its name. Rather than adjudicate the dispute, the court below determined the SPA was irrelevant and only the Restructuring Agreement, which AHMR had not even signed because it did not then exist, without reference to the Supplementary Agreement, governed AHMR's disputes under the SPA. The lower court then erroneously invoked the Forum Clause as exclusive, dismissing Plaintiffs' action without prejudice to refiling the claims in the event an Austrian court refused to adjudicate these Delaware issues. In support of reargument, Plaintiffs submitted unrebutted material showing the Austrian courts will not consider the action as they will consider it to be one properly decided in Delaware. (A0812.)

The gravamen of Defendants' argument[5] against the application of Section 168 of the DGCL and the *Castro* decision is that resolution would require "the issuance of new stock, not replacement stock." (AB at 19, *citing In re Metro Royalty Corp.*, 62 A.2d 857, 858 (Del. Super. 1948).) Defendants attempt to distinguish *Castro* by claiming Plaintiffs "do not claim the Allomet shares have devolved upon them by operation of law;" contending instead that Fobio is "under a contractual obligation to transfer its shares to AHMR." (AB at 23.) This is inaccurate, the Complaint alleged the SPA resulted in the transfer of shares to AHMR and those shares were delivered to AHMR, but due to the refusal of AHMR's owners affiliated with Allomet, those the relevant certificates have been effectively lost or destroyed as required by Section 168. (A0035; A0038-39.) As this is the basis for Defendants' contention *Castro* does not apply, and those facts were never proven and are in fact contrary to the SPA and allegations in the Complaint, Defendants have not distinguished *Castro*; it compels reversal of the decision below.

[5] Defendants' reliance on *Genger* is misplaced. *Genger* was a Section 225 action, not a Section 168 petition; its scope was limited to resolving the question of who was entitled to vote in a board election. *Genger v, TR Invs. LLC*, 26 A.3d 180 (Del. 2010). Furthermore, the beneficial ownership was truly disputed—the transferees and a group of investors both had competing contractual claims to the stock. Consequently, the Supreme Court found that Chancery Court could not make a binding determination of the beneficial ownership of the disputed stock when one faction of claimants to the stock was not properly before the court. *Id*. at 200-201. In contrast, here, no party claiming entitlement to the stock at issue disputes the validity of the SPA since Plaintiffs complied with the instructions in *Castro* and no party came forward.

Defendants' reliance on *Metro Royalty* is misplaced. There, a witness with a faulty memory testified he thought a defunct partnership had once owned shares of stock in a company, and since no one else had ever presented those certificates for registration, as a former partner, he must still own them. *Id*. at 858-59. But other evidence contradicted this. *Id*. *Metropolitan Royalty* has no bearing on this case where a valid and fully executed SPA was attached to the Complaint, which alleged the shares were delivered by the seller now blocking access to them in order to stop AHMR from registering them in its name.

Defendants also rely on *Ohrstrom v. Harris Trust Co. of New York*, 1998 WL 13859 (Del. Ch. Jan. 9, 1998). The *Ohrstrom* case, like *Castro*, demonstrates Plaintiffs properly filed their petition. In addressing whether a petition under Section 168 fails if it neither provides an account of ownership or identity of original certificates or an account of the loss, theft, or destruction of stock certificates in issue. It stated:

> Section 168 requires that a stockholder seeking an order to show cause why the new stock certificate should not be issued must include in its complaint, a statement of the circumstances surrounding the loss, theft or destruction of the certificate. For most claims, a party is not required to plead the elements of the claim with particularity, but rather, need only plead general averments that set forth the elements of the claim. Likewise, § 168 does not require that the facts surrounding the alleged loss of the certificate be plead with particularity. Accordingly, plaintiffs' 'complaint provides a sufficient general averment of the

> circumstances surrounding the loss or theft of the stock certificate.'

Id. at *1. Plaintiffs satisfied this standard. (A0035.)

Defendants attempt to read into *Castro* a requirement that a Section 168 plaintiff must be an undisputed stockholder or the shares at issue must "devolve on [plaintiff] by operation of law." (AB at 23.) But the Court in *Castro v. ITT Corp.*, actually held that in order to have a viable Section 168 Claim, a petitioner must be the "lawful owner." 598 A.2d 674, 676 (Del. Ch. 1991). To answer whether petitioners in that action were "lawful owners," *Castro* determined "that if the petitioners prove the allegations they make, they will be entitled to relief under Section 168." *Id.* at 678-79. Plaintiffs incorporate their Opening Brief arguments on *Castro* here and assert *Castro* favors their right to proceed under Section 168.

The court erred in its decision that this action was not a Section 168 action. Nothing in *Metropolitan Royalty*, *Castro*, or *Ohrstrom* changes this.

C. Section 115 Of The DGCL Prohibits the Enforcement of the Forum Clause With Respect to the Determination of Ownership of Allomet, a Delaware Corporation

The essence of Plaintiffs' claims is that AHMR owns all the shares of Allomet, and Allomet is obligated to reissue shares of stock in AHMR's name. Defendants argue that "[t]his dispute does not concern an 'internal corporate claim.'" (AB at 24.) But Section 115 defines "[i]nternal corporate claims" as "claims, including claims in the right of the corporation . . . as to which this title confers jurisdiction upon the

Court of Chancery." As explained above and in Plaintiffs' opening brief, Section 168 creates an "internal corporate claim."

Section 115 provides that regarding internal corporate claims, the charter or bylaws may provide for litigation exclusively in Delaware, and that if they do not, they may not eliminate Delaware as a forum. Defendants argue this dispute is a "bilateral contractual dispute" (AB at 23 n.7), and since the Forum Clause is not in the charter or bylaw, it is legitimate to eliminate Delaware as a forum. If Defendants are correct, Section 115 is meaningless and the DGCL is indistinguishable from the LLC Act. Under the guise of "freedom of contract," any Delaware corporation can eliminate Delaware as a forum. (AB at 17, 30.) The logical inconsistency here is that the parties freely contracted for a Delaware forum in the SPA, so it is confounding why the parties were not free to enter into that contract selecting Delaware but were free to enter into a forum selection clause that enables Allomet to litigate internal corporate claims solely in a foreign jurisdiction. In any event, to find the Forum Clause unenforceable here would not impact the ability of parties to use forum provisions in contracts that do not avoid Section 115's limitations.

The risks are clear: if the charter or bylaws provide Delaware is the exclusive forum for a breach of duty claim or is silent and Delaware cannot be eliminated under Section 115, a Delaware corporation need only have its shareholders sign a subscription agreement or an ESOP that says breach of fiduciary duty claims must

be litigated exclusively in some other state—say Texas or California. Under the Chancery Court's decision that contract would override the charter or bylaw and require litigation in the other state, resulting in a dismissal of the breach of duty action if it is filed in Delaware, totally eviscerating Section 115 and the DGCL. This is not what the General Assembly envisioned when enacting Section 115. Defendants' only contention is that Plaintiffs did not sign the Restructuring Agreement in their capacity as shareholders. (AB at 7.) This argument correctly implies that if they had, Section 115 would prohibit the Austrian forum. The record shows the transaction was focused on transfer of ***all*** shares and they were transferred.

As owner of the stock, AHMR, seeks to compel Allomet to reissue the shares of stock AHMR bought under the SPA that have been effectively lost, stolen, or destroyed. Accordingly, Allomet's obligations toward AHMR were as a Delaware corporation towards a stockholder. And Delaware law does not allow a Delaware corporation to eliminate Delaware as a forum for internal corporate claims or to place such a restriction on ***all*** of the shares of a Delaware corporation.

In an effort to avoid substance and attack counsel, Defendants refer to another case the undersigned law firm is litigating. (AB at 26.) Contrary to Defendants' charged language, however, the issue in *Manti* was not nearly "identical." (*Id*.) The issue in *Manti* was whether a stockholders agreement that governed all the corporations' existing stock and subsequent purchases and transfers, and purported

to waive statutory appraisal rights nine years in advance of a transaction triggering appraisal rights was enforceable, not by the counter-party stockholder, but by the surviving ***corporation*** post closing, even though the transaction was carried out by written consent, appraisal was triggered after closing per section 262 (d)(2) of the DGCL, and the stockholders agreement had expired by its express terms at closing. The only overlapping issue in this case and *Manti* is whether a corporation (as opposed to stockholder to stockholder) can circumvent Section 115 by separate agreement that purports to bind all stock and operates above and overrides the Delaware hierarchy (i.e., DGCL over charter, over bylaws, over separate agreements).[6] (OB at 24-29.)

[6] Included in the Appendix to this Reply Brief are the relevant briefs in the *Manti* case should the Court want to explore the issues further.

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

A. The Binding SPA Selects Delaware Law and Demonstrates the Forum Clause is Non-Exclusive

Defendants argue that the Delaware choice of law and venue provisions in the SPA are irrelevant to whether the parties intended for the Forum Clause to be mandatory or permissive because it was drafted and executed after the Restructuring Agreement was executed. (AB at 37 n.13.) The SPA nonetheless is evidence of AHMR's intent that the parties intended a dispute could be brought in Delaware as it was the final agreement that was to be implemented as required by the Supplementary Agreement.

Defendants rely on a provision in a European Union Regulation that provides that where parties agree that courts of a European Union member state are to have jurisdiction to settle disputes that jurisdiction shall be exclusive "unless the parties have agreed otherwise." The Chancery Court did not determine whether the parties "agreed otherwise." Plaintiffs argued that Austrian law would apply to the question—and the Chancery Court ignored that argument—but regardless of what law applies, the choice of law provisions in the SPA and the Yanchep Agreement are evidence that the parties did not intend for Austria to be the exclusive forum for resolution of disputes related to the transaction.

Subsequent actions of parties can illustrate their intent regarding a contract. *Shipman Assocs., LLC v. Kotler*, 2019 WL 4025634, at *17 n.200 (Del. Ch. Aug. 27, 2019). The Restructuring Agreement was dated May 29, 2017. Thereafter, on January 24, 2018, the parties executed the SPA and the Yanchep Agreement—if the Parties were intent on an exclusive forum selection clause, the SPA and Yanchep Agreement would have also selected Austria as the forum for dispute resolution—but they did not. Furthermore, the intentions of the same key individuals involved in drafting both the Restructuring Agreement and the SPA and Yanchep Agreement can be inferred from the contents of both. Indeed, the Supplementary Agreement expressly referenced the SPA and Yanchep Agreement. And, AHMR executed the SPA and Yanchep Agreement selecting Delaware law and forum and was not a party to the Restructuring Agreement.

Defendants have the audacity to allege that if Plaintiffs "did not want to litigate disputes arising under the R&L Agreement in Austria, they could have contracted otherwise." (AB at 31.) But the Plaintiffs did contract otherwise and chose Delaware where they properly brought this suit. For these reasons, the Court can and should consider the SPA and Yanchep Agreement as illustrative of the parties' intentions to select Delaware as a probably forum of any disputes.

1. Appellants' Petitioned Under the SPA and Properly Raised the Delaware Law and Venue Provisions in the SPA

Defendants claim Plaintiffs rely on a "single cite" to oral argument below and argue that Defendants did not properly raise the existence of the SPA's Delaware dispute resolution and choice of law provisions below. More troubling, Defendants claim that Plaintiffs acknowledged that the SPA issue "did not come through clearly in the briefs[,]" (AB at 37), which on close inspection of the record cited shows this comment was not made during a discussion of the SPA but during a discussion of whether a court outside Europe would apply the Brussels Regulation to the Restructuring Agreement. The fact that Defendants have had to stretch so hard to support the claim that this argument was waived demonstrates the error plainly.

But as noted in the opening brief on appeal (OB at 34), Plaintiffs preserved their SPA arguments—The Complaint referenced the SPA and attached it, and Plaintiffs also properly raised the SPA's relevant provisions in the briefs. Count I of the Complaint seeks issuance of new stock certificates on the basis that AHMR is the 100 percent stockholder of Allomet "in accordance with the Restructuring Agreement, Assignment Agreement, ***and the SPA***" and states that "[i]n breach of the Restructuring Agreement ***and SPA***, Allomet has not reissued its stock in AHMR's name." (A0038-A0039 (emphasis added).)

Plaintiffs also argued the Forum Clause was permissive under either Austrian or Delaware law, explaining:

> [T]he very documents that are unquestionably valid, the Stock Purchase Agreement and Membership Interest Agreement both contain Delaware choice of law and forum clauses, further demonstrating the logical connection of Allomet's restructuring to Delaware. Because Austrian law bears no material relationship to the transaction at issue, the Court should apply Delaware law exclusively to determine the applicability of the Forum Clause."

(A0338.) Plaintiffs further explained "Austrian law would make the same determination as this Court would under Delaware law." (A0341.) At oral argument, counsel stated:

> "[O]ne of the key things we rely on that ties into what we were talking about a few moments ago, which is if you say the agreements are integrated, you have a restructuring and loan agreement that has Austria and you have share purchase agreements that have Delaware law. And so you can take from that that the parties didn't intend to have that exclusively governed in Vienna . . . under Austrian law."

(A0736.) Also at oral argument, counsel again stated with respect to whether the Forum Clause was mandatory or permissive, that:

> [T]hey would look at the facts and circumstances around the negotiation of the agreement, and they would find the stock purchase agreements that have Delaware law.

(A0740-A0741.) Plaintiffs properly raised the import of the SPA's Delaware choice of law and dispute resolution provisions. Any suggestion to the contrary is not supported by the record. The Court should consider those provisions on appeal.

B. Delaware Law Must Apply to the Restructuring Agreement

The Chancery Court erred when it based its forum ruling on a material relationship between Austria and the transaction because AHMR, a non-active holding company, was formed in Austria. Defendants did not establish that AHMR's principal place of business is in Austria (or that it even had one beyond a "brass plate"). Furthermore, Austria is not the principal place of business of *any* entity relating to the transaction and only a negligible amount of activity relating to the transaction occurred in Austria (and certainly not a majority of the activity underlying the transaction). Ironically, the Defendants' theme below was that AHMR had failed and was irrelevant to the dispute; now they cling to its formation in Austria as the main feature of the Forum Clause analysis. As Plaintiffs have argued all along, Delaware, not Austrian, law applies and the Forum Clause is permissive under Delaware law.

Defendants argue for an exclusive interpretation of the Forum Clause solely because AHMR is an Austrian entity. (Op. at 16.) (A0321.) AHMR is not a party to the Restructuring Agreement and did not agree to the Forum Clause because it did not exist at that time. Thus, the Restructing Agreement's Forum Clause should not bind AHMR. *See e.g., Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 772 (Del. Ch. 2014) ("Vichi's remaining claims against Philips N.V. do not arise under, nor do they seek to enforce, the Notes. . . . Although reference to the Notes may be

required to determine, for example, the extent of Vichi's damages, that fact alone is insufficient to justify the application of equitable estoppel."). (*See also* A0321-A0323.)

Defendants cite *Reads, LLC v. WBCMT 2006-C29 NC Office LLC*, for the proposition that when "a party's principal place of business is located within the foreign jurisdiction" or "a majority of the activity underlying the action occurred within the foreign jurisdiction" there is a material relationship to those jurisdictions. 2015 WL 13698545, at *3 (Del. Super. Feb. 3, 2015).

AHMR is an Austrian entity, but Defendants never argued that its principal place of business is in Austria. And, there are no facts in the record regarding whether AHMR, a non-operational holding company, even has a "nerve center." Defendants have also not established that a majority of the activity underlying the transaction occurred in Austria. Plaintiffs, however, set out that all the relevant facts to this transaction occurred outside of Austria. A0336-A0338.

C. The "Plain Language" of the Brussels Regulation is Irrelevant Because if Austrian Law Applies, the Brussels Regulation Does Not

Defendants argue that the language of Article 25 of the Brussels Regulation means that a forum provision such as the one at issue here is enforceable and exclusive against parties regardless of their domicile. (AB 43-45.) But Defendants are incorrect that Article 25 is relevant to a dispute in a court outside the European Union. (A0809.) First, as noted above, to determine whether the parties intended the Forum Clause to be exclusive requires application of Austrian law, which would lead to the conclusion that they intended it to be non-exclusive.

Articles 4 through 6 of the Brussels Regulation provide it is only applicable when (a) a defendant is domiciled in a Member State of the European Union, or (b) if there is a choice of forum agreement in favor of a court which has its seat in a member State of the European Union *and the action is brought before a court within the European Union*, or (c) there exist contacts which mandate exclusive jurisdiction under Article 24. (A0802 (¶17), A0166 (Art. 4-6).) The Czernich affidavit explains:

> [t]he objective of this rule is to govern the interplay between domestic and European law before the courts in the European Union. Therefore, the rule of Art 25 Brussels Regulation is only applicable if the court seized has its seat in a member state of the European Union. It does not, however, govern the relationship between European and domestic law if the court seized is located in any other country, such as the United States.

(A0810, A0186.)

Article 6 of the Brussels Regulation explains that domestic law applies if (a) defendant is not domiciled in a "Member State" of the European Union and if (b) the court seized is not located in a Member State of the European Union. (A0810.) Here, defendant Allomet is a Delaware corporation and the court seized is located in Delaware, outside of the European Union. Article 6 states that if the defendant is not domiciled in a Member State, the jurisdiction of a Member State court shall be determined by the domestic law of the Member State. Therefore the Austrian choice of law provision in the Restructuring Agreement means that Austrian domestic law applies, in this case, the Jurisdictional Act. (A0810.) Under the Jurisdictional Act, the forum selection provision would be permissive. (A0805, A0809-A0810.) As such, the Chancery Court erred when it found that it was mandatory. And it was error to ignore this on rehearing, putting the burden of proof on foreign law on Plaintiffs rather than Defendants, and allowing an erroneous decision to stand.

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

Defendants characterize the Czernich Affidavit as "untimely." (AB at 20.) This ignores the context and procedural history in which the affidavit was proffered. (*See* OB 39-41.) The Defendants' motion to dismiss raised several issues of foreign law other than the Brussels Regulation. Defendants failed to provide any support for these other issues and instead Defendants sought "leave for supplemental briefing and to submit a Declaration of Foreign law" "in the event the Court

determines to reach this issue." (A0123, A0141.). The court should not have bothered interpreting foreign law, as argued by Plaintiffs below. It became clear after the submission of the Plaintiff's motion to dismiss that the outcome of the action would turn specifically on whether the Forum Clause is enforceable with respect to Plaintiffs' claims and whether it is permissive or mandatory. Defendants conflate the requirement of Court of Chancery Rule 44.1 that a party give notice that it intends to raise an issue of foreign law with the question of whether the party raising an issue of foreign law has met its burden. (AB at 39); *see Vichi*, 85 A.3d at 765 ("In cases where foreign law may be applicable, the party seeking the application of foreign law has the burden of not only raising the issues that foreign law applies, ***but also the burden of adequately proving the substance of foreign law***.") (citations omitted). Defendants provide no response for this burden of proof issue. Instead, they raise irrelevant points about the location of Plaintiffs' American counsel's affiliated foreign offices and argue that a court has discretion on whether to employ an expert. (AB at 40.) In essence, defendants argue that Plaintiffs had time to prepare and submit expert reports. (*Id.*) But that misses the point that requiring that improperly shifted the burden of proof onto Plaintiffs and allowed Defendants to hold back all their proof until their reply brief. Defendants' tactics, if sustained, will guide future litigants on foreign law to use similar tactics. The right answer is that when this happens, a court should ignore the foreign law and apply

Delaware law. *Ashall Homes Ltd. v. ROK Entm't Grp. Inc.*, 992 A.2d 1239, 1246 (Del. Ch. 2010) ("In deference to the English courts, for which this court has great respect, and because the parties have not cited to English law to an appreciable extent, the analysis will proceed exclusively under Delaware law."). Defendants argue Plaintiffs push for a *per se* rule that has no support in Rule 44.1. (AB at 5.) This is incorrect since case law shows the burden is on the party raising foreign law, the Defendants.

Defendants argue that the Chancery Court was "deliberate in its choice not to accept additional evidence" and "consider[ed] the extensive record," stating that Defendants provided it with "extensive foreign authority and *affidavits interpreting* that authority." (AB at 42 (emphasis added).) The only affidavit submitted prior to the Motion for Reargument was Defendants' transmittal affidavit provided by counsel, so it is unclear to what affidavit interpreting authority Defendants refer. In any event, the Court of Chancery did not consider the only expert affidavit submitted in this action, allowing its judgment to remain in error instead of examining the law and trying to reach a just decision.[7]

[7] Defendants argue the Court should reject the Czernich Affidavit as "internally inconsistent." (AB at 41 n.14.) It is not. The affidavit does not assert the Brussels Regulation binds Delaware courts, rather it explains why "*Austrian courts* will dismiss any action brought by plaintiff with regard to the first part of prayer of relief C.(ii)." (A0808 (emphasis added).) Defendants further criticize the affidavit because it explains that Austrian law would characterize this dispute as concerning

CONCLUSION

The decision of the Court of Chancery dismissing the Complaint should be reversed and the case remanded for further proceedings.

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a corporation's internal affairs. (AB at 41 n.14.) Disagreement with conclusions is no basis for precluding an expert affidavit.