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Case Number 146,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHC INVESTMENTS, LLC,	)	
	)	
Plaintiff-Below,	)	No. 146, 2020
Appellant,	)	
v.	)	CASE BELOW:
	)	
FIRSTSUN CAPITAL BANCORP,	)	Court of Chancery
WILLIAM D. SANDERS,	)	of the State of Delaware
WILLIAM P. SANDERS,	)	C.A. No. 2018-0353-KSJM
	)	
Defendants-Below,	)	
Appellees.	)	

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal arises out of the Court of Chancery's dismissal of CHC Investments, LLC's ("CHC") common law and Texas statutory fraud claims on the basis that both are time-barred.

CHC invested $25 million in Strategic Growth Bancorp ("SGB") in 2014. Strategic Growth Bank (the "Bank") was SGB's manager. SGB and the Bank were headquartered in Texas, and the meetings that precipitated CHC's investment took place in El Paso. CHC, SGB, and the Bank were each Delaware entities. Defendants-Appellees William D. Sanders and William P. Sanders ("Bill" and "Pablo Sanders," respectively) were officers and directors of SGB and the Bank.

In the operative Second Amended Complaint, CHC asserted claims against Bill and Pablo Sanders and FirstSun Capital Bancorp[1] for common law fraud and statutory fraud in violation of Texas Business and Commerce Code § 27.01.

In the trial court, Appellees moved to dismiss on a variety of grounds. In a Memorandum Opinion (the "Opinion," Exhibit A) the Court of Chancery ruled that both of CHC's claims were time-barred under Delaware's three-year statute of limitations, even though Appellees had not contested that CHC's Texas statutory fraud claim was governed by Texas' four-year statute of limitations. For the reasons

[1] SGB and the Bank merged into Appellee FirstSun Capital Bancorp, a Delaware corporation with its principal place of business in Denver, Colorado.

stated herein, this Court should reverse the trial court's decision to dismiss this case, and should remand for further proceedings.

SUMMARY OF ARGUMENT

1. The trial court erred by applying Delaware's borrowing statute, 10 *Del. C.*, § 8121, to conclude that Delaware's three-year statute of limitations applied to CHC's common law fraud claim, rather than Texas' four-year statute of limitations. In reaching that conclusion, the Court of Chancery failed to follow this Court's binding precedent set forth in *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1 (Del. 2005). In *Saudi Basic*, this Court held that the borrowing statute does not apply to cases where there is no evidence of forum shopping – *i.e.*, where an out-of-state plaintiff files in Delaware for strategic reasons, such as to obtain a longer statute of limitations or more favorable substantive law. Here, there is no evidence of forum shopping. Consequently, the trial court should have followed *Saudi Basic* and applied Texas' four-year statute of limitations, under which both of CHC's claims were timely.

2. The trial court erred by applying Delaware's three-year statute of limitations applicable to common law fraud to bar CHC's claim under Tex. Bus. & Com. Code § 27.01, which is subject to a four-year statute of limitations. In reaching its conclusion, the trial court relied on *Pack v. Beech Aircraft*, 132 A.2d 54, 58-59 (Del. 1957). In *Pack*, this Court held that where a foreign statute both creates a substantive right but limits the right with a "built-in" statute of limitations, that limitations period is substantive and must be applied by Delaware's courts. *Id.* Here,

however, Section § 27.01 does not have a built-in statute of limitations, so *Pack* does not control. The trial court instead should have applied Texas' four-year statute of limitations because Texas has the "most significant relationship" with the events underlying this case. *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).

STATEMENT OF FACTS

Bill and Pablo Sanders were officers and directors of SGB and the Bank. (A30-32.) In March 2014, SGB solicited CHC to make a $25 million investment in SGB as part of a $100 million capital raise. (A34-38.) As CHC learned much later, SGB's solicitation of CHC contained numerous misrepresentations and omissions.

In a presentation given by Bill and Pablo Sanders to CHC's Chris Cole (the "Management Presentation"), SGB represented that it was on the precipice of becoming a leading financial institution through development of an "integrated business plan" (the "Plan"). (A35.) Under this Plan, SGB would combine a regional community banking business with a national residential mortgage platform. (A35-36.) According to the Sanderses, the combination of these two business segments would allow SGB to capture profits from all levels of the banking and mortgage chains, including originations, servicing, capital markets activities, and investment management. (*Id*.) They further represented that SGB would benefit from certain economies of scale and synergies that either operation standing alone would lack. (A36.) SGB projected exponential growth in profits pursuant to this integrated model, with the mortgage unit to comprise more than half of SGB's total profits by 2015. (A36-37.)

SGB's Plan and management team required regulatory approval, and in 2013 SGB sent letters to its shareholders stating that it had preliminarily received a

favorable response to its approval request. (A38.) The Management Presentation touted Kevin Gasvoda and Daniel Sparks as key leaders of the management team, based on their history as senior mortgage executives at Goldman Sachs. (A37.) Bill and Pablo Sanders knew at the time of the written Management Presentation -- but failed to disclose -- that Sparks and Gasvoda were the targets of massive litigation by bank regulators that cast serious doubt on SGB's ability to get regulatory approval for the Plan. (A43-46, A51-53.) Specifically, Sparks and Gasvoda were named defendants in at least three lawsuits arising from their mortgage activities while at Goldman Sachs, all of which were pending at the time of the March 2014 offering. (A43-46.) Two of these lawsuits were class actions alleging that Sparks and Gasvoda violated federal securities laws as control persons by signing registration statements that understated investment risks and contained misstatements and omissions.[2] (A43-44.) A third action brought by the Federal Housing Finance Agency ("FHFA") alleged that both had deceived the FHFA about the risk levels of mortgage-backed securities originated by Goldman Sachs under their supervision.[3] (A45.) The class actions eventually settled for a total amount of $272 million, and

[2] *Neca-Ibew Health & Welfare Fund et al. v. Goldman Sachs & Co., et al.*, No. 1:08-cv-10783-LAP (S.D.N.Y. filed Dec. 11, 2008) and *The Police and Fire Retirement System of the City of Detroit v. Goldman, Sachs & Co.*, No. 1:10-cv-04429-LAP (S.D.N.Y. filed June 3, 2010).

[3] *Federal Housing Finance Agency v. Goldman, Sachs & Co., et al.*, No. 1:11-cv-06198-DLC (S.D.N.Y. filed Sept. 2, 2011).

the FHFA lawsuit was voluntarily dismissed in August 2014, after defendants – including Sparks and Gasvoda – agreed to pay $2.15 billion. (A45-46.) The Sanderses knew, but failed to disclose, that this litigation made it extremely unlikely that regulators would approve Sparks' and Gasvoda's involvement in the Plan. (A53.) Their conduct that resulted in the litigation was likewise material information regarding their track record that should have been disclosed in Management Presentations. (A57-58.)

In the Management Presentation, Bill and Pablo Sanders represented that the then-current regulatory climate was favorable for the Plan. (A40-41.) The Management Presentation stated that "[o]pportunities will be created by the new Consumer Financial Protection Bureau and the Dodd-Frank Act [which] materially alter the regulatory and compliance environment." (*Id.*)

What Bill and Pablo Sanders also knew at the time of that presentation, but did not tell CHC, was that the regulatory climate was *not* favorable because the Volcker Rule -- legislation adopted in December 2013 to substantially curtail proprietary securities trading by commercial banks -- likely prohibited the approach the Sanderses described. (A40-43.) Specifically, the mortgage unit's proposed mortgage banking and trading activities, as described in the Management Presentation, were activities subject to the Volcker Rule's prohibition on proprietary

trading and sponsoring covered funds. (A42-43.) These facts were not disclosed in the Management Presentation. (A43.)

In reliance on the foregoing representations, and being unaware of these risk factors, CHC entered into an agreement (the "Subscription Agreement") through which it purchased $25 million in shares of SGB at a price of $12.45 per share. (A38.) Less than seven months later, however, Defendants dramatically altered their entire business plan, and split off the mortgage unit that was the centerpiece of the Plan. (A29, A38.)

CHC would not have invested $25 million in March 2014 had it been told of the staggering levels of litigation pending against Sparks and Gasvoda; the regulatory hurdles they posed to approval of SGB's mortgage plan; or that parts of the Plan were likely barred by the Volcker Rule. (A52.)

Although SGB represented that the proceeds from the March 2014 offering were intended to build out SGB's mortgage platform, in November 2014 SGB abruptly notified stockholders of a pending reorganization of the mortgage operation. (A53.) Even at this time, Defendants failed to sufficiently disclose: 1) that SGB was legally prohibited from pursuing its Plan due to applicable regulations and/or, 2) that federal regulators would not approve the Plan based on Sparks' and Gasvoda's history with residential mortgage-backed securities. (A54-57.)

The reorganization culminated in the "December Exchange Offer," whereby the mortgage unit that had been the basis of CHC's March 2014 investment (called "Holdco" in the offer) would be split-off a mere 47 days later. (A53-55.) The December 2014 exchange offer memorandum, for the first time, disclosed Sparks' and Gasvoda's litigation history, and warned that they could again become the focus of regulatory scrutiny in the future. (A55-56.)

CHC brought this suit to recover its $25 million investment because Appellees induced the investment by providing incomplete and misleading information. CHC's common law and statutory fraud claims were based on Texas law because virtually all aspects of the solicitation and transaction occurred in Texas. The meetings and presentations to CHC took place in El Paso. (A33-34.) Cole initially met Bill Sanders in El Paso, and had repeated follow-up meetings with Sanders there over the years. (*Id*.) SGB and the Bank's principal place of business was in El Paso. (A30.) CHC's $25 million investment was wired to a bank in El Paso. (A39.) CHC brought the suit in Delaware solely because of a forum selection clause in the Defendants' Subscription Agreement. (A32-33.)

Appellees moved to dismiss, claiming in their opening brief that CHC's common law fraud claim was time-barred because Delaware's borrowing statute called for the application of Delaware's three-year statute of limitations instead of Texas' four-year statute of limitations.

As to CHC's statutory fraud claim under Tex. Bus. & Com. Code § 27.01, Appellees, in their opening brief, did not contend the claim was untimely or subject to Delaware's three-year statute of limitations. (A88 n.7 ("Although count two, CHC's statutory fraud claim, may not be time-barred under the four-year statute of limitations potentially applicable to that claim . . . count two remains no less subject to dismissal for the reasons set forth herein.").) Appellees instead moved to dismiss the statutory fraud claim on the grounds that it had been released and failed to state a claim. Only in a footnote in their reply brief did Appellees, for the first time, contend the statutory fraud claim was time-barred, conceding that Texas' four-year statute of limitations applies but arguing that the four-year period had already run before CHC filed suit. (A189 n.11.)

The Court of Chancery recognized that Delaware's borrowing statute was adopted to prevent a plaintiff from forum shopping in Delaware to obtain a longer limitations period. Opinion at 9-10. However, the Court then applied what it called the "narrow approach" of construing *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1 (Del. 2005) to conclude that Delaware's borrowing statute nevertheless governed unless CHC had been "forced" to file in Delaware. Opinion at 15-17. Because CHC filed in Delaware to comply with the forum selection clause in the Subscription Agreement, the Court concluded that CHC was not forced to file in Delaware, and therefore Delaware's three-year limitation period applied to

the common law fraud claim. *Id.* at 17-18. The Court also, *sua sponte*, engaged in an analysis of whether the Texas four-year statute of limitations period was a substantive right built into Texas' fraud statute and, concluding it was not, held Delaware's three-year statute of limitations applied to the statutory fraud claim. *Id.* at 9 n.26. The Court dismissed both of CHC's claims as time barred.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO FOLLOW *SAUDI BASIC* AND APPLYING DELAWARE'S BORROWING STATUTE.

A. Question Presented

Whether the trial court erred by failing to follow *Saudi Basic* and by applying the borrowing statute to conclude that Delaware's three-year statute of limitations applied rather than Texas' four-year statute of limitations, thus barring Plaintiff's common law fraud claim. This issue was preserved for appellate review at: A130-36.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's determination that CHC's claims are time-barred. *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009).

C. Merits of the Argument

1. Under *Saudi Basic*, the borrowing statute is inapplicable here.

Quoting Vice Chancellor Parsons in *Trustco Bank v. Mathews*, 2015 WL 295373, at *7 (Del. Ch. Jan. 22, 2015), the trial court wrote that "[t]he *Saudi Basic* decision appears to have engendered some uncertainty as to when the [b]orrowing [s]tatute applies . . . ." Opinion at 12. From that starting point, the trial court then concluded that "greater clarity -- in the form of legislative action or binding decisional authority" is needed so courts will know how and when to apply Delaware's borrowing statute. *Id*. at 16.

With respect, the trial court is mistaken -- such binding decisional authority already exists. This Court's opinion in *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1 (Del. 2005) (en banc) was clear; it was correct; and it is binding.[4] The purpose of the borrowing statute is to prevent the forum shopping spawned by the common law rule that the law of the forum state supplies the limitations period. Where no evidence of forum shopping is present, the borrowing statute simply does not apply. Here, there was no forum shopping, and applying the borrowing statute to the present facts would improperly bar Plaintiff's claims for no principled reason. To the extent there is any uncertainty surrounding *Saudi Basic*, it is not caused by the opinion itself -- but rather by lower courts that have improperly failed to apply it as written.

In arriving at its ruling, the trial court appeared to be substantially influenced by the article *Stop Borrowing Trouble: Clarifying the Saudi Basic Exception to Delaware's Borrowing Statute*. Dylan Consla & Brandon Mordue, 41 Del. J. Corp. L. 29 (2016). The trial court ruling in fact cites to that article eight times. That article, however, focused on the trees to the exclusion of the forest. As commentators are free to do -- but courts are not -- the article theorizes about varying

[4] *In re MFW S'holders Litig.*, 67 A.3d 496, 502 (Del. Ch. 2013) ("[T]he [lower] court has to satisfy itself that our Supreme Court has not already answered the question. If our Supreme Court has done so, this court is bound by that answer, which may only be altered by the Supreme Court itself or by legislative action.")

interpretations of the borrowing statute, unconstrained by this Court's plain language in *Saudi Basic*. *Saudi Basic* articulates a sound rationale, firmly rooted in common sense, and predicated on the uncontroversial proposition that the borrowing statute is intended to prevent forum shopping.

With this goal in mind, the General Assembly enacted 10 *Del. C.* § 8121, Delaware's borrowing statute, which provides:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.

The well-recognized problem with the borrowing statute, however, is that its rigid application can actually frustrate the very purpose it was intended to achieve, as is the case here. To avoid the possibility of the borrowing statute barring claims when no forum shopping is present, *Saudi Basic* articulated a bright line approach to when the statute applied, and when it did not.

As this Court made clear, the purpose of the borrowing statute is designed to prevent the situation "where a plaintiff brings a claim in a Delaware court that (i) arises under the law of a jurisdiction other than Delaware and (ii) is barred by that jurisdiction's statute of limitations but would not be time-barred in Delaware, which has a longer statute of limitations." *Saudi Basic*, 866 A.2d at 16. It is in that scenario

that the statute applies to bar the claim. *Id.* at 16-17. Because those were not the circumstances in *Saudi Basic*, the Court concluded that the borrowing statute did not apply. *Id.* at 17-18.

In *Saudi Basic*, partners in two Delaware partnerships (collectively "ExxonMobil") brought counterclaims based on a cause of action that arose in Saudi Arabia. *Id.* at 16.[5] A literal application of the borrowing statute would have dictated that Delaware's limitations period apply to bar the claim. *Id.* at 17. But Exxon Mobil had not forum-shopped – rather, it brought its suit in Delaware as a compulsory counterclaim. Had the suit been brought in Saudi Arabia, the claim would have been timely. *Id.* Since a strict application of the statute would not further its purpose of discouraging forum-shopping, the Court declined to apply it. Agreeing with the Superior Court reasoning that applying the borrowing statute would "basically turn the borrowing statute on its head for the purpose for which it was enacted," *id*. at 15, this Court held that applying the borrowing statute where there was no forum shopping would "subvert the statute's fundamental purpose, by enabling [the

[5] Citing the last sentence of the borrowing statute, Defendants claimed below that the Delaware statute of limitations applies because CHC is a Delaware LLC (A89), but *Saudi Basic* makes plain that the state of formation is not determinative if the borrowing statute does not apply. *Saudi Basic*, 866 A.2d at 17-18 (discussing *Pack v. Beech Aircraft Corp.*, 132 A.2d 54, 58 (Del. 1957), where borrowing statute was held not to apply to a Delaware resident plaintiff). The Court of Chancery's decision was not premised on the last sentence of the borrowing statute.

Plaintiff] to prevail on a limitations defense that would never have been available to it . . . in the jurisdiction where the cause of action arose." *Id*. at 17-18.

Here, CHC filed its claims in Delaware due to a forum selection clause in the Subscription Agreement. CHC did not file in Delaware to improperly gain the benefit of a longer limitations period. Under the Texas four-year statute of limitations, Plaintiff's claims are timely. Because the trial court rigidly applied the borrowing statute even in the absence of forum shopping, it incorrectly concluded that Plaintiff's claims were barred and ignored *Saudi Basic*.

2. The holding in *Saudi Basic* has been widely adopted, and its rationale has long been recognized by the Court of Chancery.

The many courts following *Saudi Basic* have likewise declined to apply the statute where there is no evidence of forum-shopping. In *Bear Stearns Mortg. Funding Tr. 2006-SL1 v. EMC Mortg. LLC*, 2015 WL 139731 (Del. Ch. Jan. 12, 2015), for example, the Court of Chancery refused to apply the borrowing statute where the foreign limitations period was longer than Delaware's. Recognizing *Saudi Basic*'s binding precedent, the court wrote, "[t]he *Saudi Basic* decision holds . . . that the Borrowing Statute only applies when a party seeks to take advantage of a longer Delaware statute of limitations to bring a claim that would be time-barred under the law of the jurisdiction governing the claim." *Id.* at *8; *see also id.* at *8 n.11 (collecting cases)).

The court in *Bear Stearns* reached this result even after initially dismissing the bulk of the plaintiffs' complaint as time-barred based on *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*, 2012 WL 3201139 (Del. Ch. Aug. 7, 2012). Like the court in *Central Mortgage*, the court in *Bear Stearns* initially held that the strict application of borrowing statute required that Delaware's shorter statute of limitations period apply. However, neither the initial *Bear Stearns* ruling, nor the ruling in *Central Mortgage*, considered this Court's binding decision in *Saudi Basic* that was handed down seven years earlier. Ultimately recognizing that it was "bound to follow" this Court's decision in *Saudi Basic*, the court reconsidered its ruling, and concluded that the borrowing statute did not apply.[6] *Id*. at *9.

The court in *B.E. Capital Mgmt. Fund LP v. Fund.com Inc.*, 171 A.3d 140, 147-48 (Del. Ch. 2017) applied the same rationale, and reached the same result. In *B.E. Capital*, the issue was whether to apply New York's six-year statute of limitations or Delaware's three-year statute. Because New York's limitations period was obviously longer than Delaware's, the Court concluded that the borrowing statute did not apply, and thus turned to the "most significant relationship test" (set forth in the RESTATEMENT (SECOND) CONFLICTS OF LAWS).[7]

[6] Because the parties' only connection to Delaware was the defendant's place of incorporation and the plaintiff's decision to file suit in Delaware, the Court applied New York's longer limitations period and allowed the claims to proceed.

[7] In *B.E. Capital*, the court ultimately concluded that the claim was time barred even under the longer foreign limitations period.

Furnari v. Wellpang, Inc., 2014 WL 1678419 (Del. Super. Apr. 16, 2014), involved a Florida plaintiff who brought claims in Delaware because the Delaware court had jurisdiction over the defendants. Florida had a longer limitations period than Delaware. The court applied the foreign limitations period, commenting that the foreign forum "has longer limitations periods than Delaware, making the facts of this case the opposite of what the Borrowing Statute seeks to prevent; Plaintiff is not attempting to circumvent the expiration of his claims by filing in Delaware, he only seeks jurisdiction over the parties. A finding otherwise would 'subvert that statute's underlying purpose.'" *Id*. at *5.

In re Mervyn's Holdings, LLC, 426 B.R. 488 (Bankr. D. Del. 2010) is another example of courts faithfully applying the plain holding and rationale of *Saudi Basic*. In *Mervyn's*, the plaintiff in a bankruptcy adversary proceeding filed suit in Delaware because that is where the debtor filed its bankruptcy case. Noting that Delaware had a shorter limitations period than the foreign limitations period, the court recognized that "[t]his is not a case where forum shopping might even remotely be an issue," and thus concluded that the borrowing statute did not apply. *Id*. at 503.

Another case that should guide this Court is *Juran v. Bron*, 2000 WL 1521478 (Del. Ch. Oct. 6, 2000). Though *Juran* pre-dated *Saudi Basic*, it is instructive because Chancellor Chandler applied the same rationale as *Saudi Basic* to similar facts. *Juran* involved litigation between former partners who were residents of

California; the contract at issue was executed in California; the contract was to be performed in California; and it was breached in California. The case was filed in Delaware because the entity parties were established under Delaware law. The Delaware limitations period was shorter than California's, and the defendants moved to dismiss on the basis that the claim was time-barred.

After noting the existence of Delaware's borrowing statute, Chancellor Chandler concluded that it would be inequitable to rigidly apply it under those facts. *Id*. at *11. The court noted that the borrowing statute "was designed to protect Delaware's courts from having to adjudicate stale out-of-state claims." *Id*. at *12. Recognizing that there was no danger of forum shopping because plaintiffs filed in the jurisdiction with the shorter limitations period, Chancellor Chandler concluded that the borrowing statute did not apply, and that plaintiffs' claims were timely.

Like *Juran*, Plaintiff here did not forum shop because the limitations period in Texas is longer than Delaware's. Also like *Juran*, this case is centered out of state. (A26-27.) SGB and the Bank's principal places of business were in El Paso, Texas. (A30.) CHC maintained an office there. (*Id.*) Cole met several times with Bill and Pablo Sanders in El Paso. (A30, A33.) Bill and Pablo Sanders invited CHC to a presentation in El Paso, at which time the Management Presentation was provided, and the misrepresentations at issue in this case were made. (A34-35.)

Following that presentation, CHC acted in reliance on the misrepresentations by wiring money to El Paso. (A38-39.)

Chancellor Chandler reached the proper result in *Juran* using the same reasoning that this Court ultimately applied in reaching its decision in *Saudi Basic*. Given the binding precedent of *Saudi Basic*, together with the fact that barring Plaintiff's claims here is contrary to the very purpose of the borrowing statute, the trial court's conclusion that the claims are nevertheless time-barred constitutes legal error.

3. The trial court's reasoning and the limited authority relied upon by the trial court are inconsistent with *Saudi Basic*.

After discussing all of these cases, and recognizing the benefits of *Saudi Basic*'s bright-line approach, the trial court nevertheless decided to apply *Saudi Basic* more narrowly than the opinion is written. According to the trial court, what Consla and Mordue characterize as the "broad" approach to interpreting *Saudi Basic* is unsound because it violates principles of statutory construction, ignoring the phrase "'whichever is shorter' in all circumstances." Adherence to proper rules of statutory construction, they conclude, requires that the borrowing statute only apply when "absurdity would result." Opinion at 14-15.

But this conclusion simply cannot be justified for several reasons. First, applying *Saudi Basic* faithfully and applying the borrowing statute only when needed to prevent forum shopping does not read any language out of the borrowing

statute; rather, it sets forth when the borrowing statute applies. If there is evidence of forum shopping (whether for limitations purposes or otherwise), *Saudi Basic* holds that the borrowing statute should be applied just as it is written. If the borrowing statute applies and Delaware's limitations period is shorter, the Court should apply it. If the foreign limitation period is shorter, then that foreign limitation period should apply.

The trial court concluded that under the broad approach to *Saudi Basic*, Delaware's limitations period will effectively never apply, Opinion at 15, but that conclusion is erroneous. Apparently, the trial court reasoned that if the Delaware limitations period is shorter, then the borrowing statute would not apply because there would necessarily be no forum shopping. But that analysis is flawed. It is possible that there could be evidence of forum shopping that has nothing to do with the statute of limitations (*e.g.*, a jurisdiction may be selected because it is perceived to be more plaintiff-oriented, or particularly burdensome to the defendants but its connection to the underlying events is tenuous). In that instance, the Delaware statute of limitations may be shorter and it would apply.

The trial court's criticism that the broad approach is a complete reversal from the common law that always defaulted to the forum's limitation period is immaterial. Opinion at 15. After all, even in the absence of the borrowing statute, the common law rule is no longer followed, and has instead been supplanted by the "most

significant relationship" test. It is difficult to understand why the trial court would be concerned about departing from the common law rule when that rule itself has been replaced.

According to the trial court, the "narrow approach" -- which concludes that the borrowing statute should apply unless the party asserting the underlying claim was "forced" to file its claim in Delaware, is the preferred approach. This approach supposedly better aligns with principles of statutory construction by applying the "absurd results" test, and "best targets the statute's purpose." Opinion at 17. But this rationale raises multiple concerns. First, there is nothing in this Court's *Saudi Basic* holding that lends support to this so-called "narrow" approach. Second, the trial court never explains why it is any less absurd to apply the borrowing statute to bar Plaintiff's claims here when there is no evidence of forum shopping.

There is no dispute that the purpose of the borrowing statute is to prevent forum shopping. Applying the borrowing statute here to bar Plaintiff's claims does not target the statute's purpose, it subverts that purpose by applying the borrowing statute to bar claims when there is no evidence of forum shopping at all.

The reality is that both the "broad" and the "narrow" approaches discussed by the trial court result in circumstances where the borrowing statute will not be applied. While it is true that the narrow approach results in fewer such instances, it also results in greater instances where the statute is applied in a way that subverts its

purpose -- as is the case here. Preferring an application of the statute that calls for it to apply more often, but in ways that are unjust, is certainly not a rational basis to adopt the narrow approach.

Cases cited by the trial court that have applied this so-called "narrow" approach fail to articulate a compelling reason why it should be the default position of Delaware courts. In *Huffington v. T.C. Grp., LLC*, 2012 WL 1415930 (Del. Super. Apr. 18, 2012), the plaintiff did, in fact, forum shop by trying to avoid a forum selection clause by initially filing in Massachusetts. Against that backdrop, the *Huffington* court held that *Saudi Basic* simply holds that the borrowing statute should apply unless doing so would "turn the borrowing statute on its head for the purpose for which it was enacted." *Id*. at *9 (quoting *Saudi Basic*, 866 A.2d at 15). The opinion recognized that by relying on *Saudi Basic* the plaintiff asked the court "to basically forgive his failed forum shopping attempt . . . ." *Id*. at *8. The court therefore concluded "under these circumstances" the borrowing statute "most certainly applies . . . ." *Id*. at *9.

Trustco Bank, supra, the case cited by the trial court for the proposition that *Saudi Basic* has "engendered some uncertainty" regarding when the borrowing statute applies, also adopted the narrow approach, but based on a contradictory analysis. In *Trustco*, a New York bank filed a fraudulent transfer claim in the Court

of Chancery. Plaintiff asserted that New York's six-year limitations period applied over Delaware's four-year limitations period.

In discussing *Saudi Basic*, the court in *Trustco* commented that "*Saudi Basic* has been read as delivering a fairly narrow holding that the Borrowing Statute does not apply when a litigant engages in the very practice the statute sought to prevent -- *i.e.*, forum shopping -- and would benefit unjustly from the Borrowing Statute's application." 2015 WL 295373 at *8. Plaintiff does not challenge this statement, aside from the fact that this interpretation is not narrow, but is instead what the trial court describe as the broad interpretation.

But then the *Trustco* analysis truly goes astray. It states that "[p]resumptively, therefore, the Borrowing Statute does apply when a Plaintiff's cause of action arose out of state, irrespective of whether the Plaintiff is forum shopping." *Id*. But *Trustco* never explains why that should be the preferred result. There is no support for that conclusion in *Saudi Basic*, and it produces a result here that is contrary to the express purpose of the borrowing statute.

In *TL of Florida, Inc. v. Terex Corp.*, 54 F. Supp. 3d 320, 327 (D. Del 2014), the court chose to apply the "literal language" of the borrowing statute while recognizing that the facts there "may not present the circumstances with which Delaware was most concerned." The court explained that it applied the shorter Delaware limitations period because "a literal construction of the borrowing statute

would not subvert the statute's underlying purpose." *Id.* Here, applying the borrowing statute literally is antithetical to the purpose of the statute because it would bar a claim where no forum shopping exists.

In both *Machala v. Bechringer Ingelheim Pharmaceuticals*, 2017 WL 2814728 (Del. Super. June 29, 2017) and *In re: Asbestos Litig.*, 2015 WL 5168121 (Del. Super. Sept. 1, 2015), the Superior Court applied the borrowing statute because the plaintiffs in out-of-state tort cases "chose" to file their claims in Delaware. The facts of both cases suggest that the plaintiffs were forum shopping, albeit for reasons other than the statute of limitations. Though the Plaintiff here voluntarily signed the Subscription Agreement that required claims to be filed in Delaware, this situation does not involve the level of tactical choice demonstrated by the tort plaintiffs in *Machala* and *Asbestos Litig.*, and does not present any element of forum shopping.

In sum, the trial court erred because it failed to apply the *Saudi Basic* opinion as it is written. The borrowing statute exists to prevent forum shopping. Because there was no forum shopping here, the borrowing statute does not apply, and Plaintiff's claims were timely-filed under the Texas four-year limitations period.

II. DEFENDANTS CONCEDED PLAINTIFF'S § 27.01 CLAIM WAS GOVERNED BY THE TEXAS FOUR-YEAR STATUTE OF LIMITATIONS; THE COURT OF CHANCERY ERRED BY CONCLUDING OTHERWISE.

A. Question Presented

Whether the trial court erred by applying *Pack* and the Delaware borrowing statute to CHC's Texas statutory fraud claim, given that: (i) Appellees admitted the Texas four-year statute of limitations applied, and accordingly did not even raise the arguments the trial court relied upon to dismiss the claim; (ii) *Pack* only applies where there is a built-in statute of limitations, and there is no such period built in to Tex. Bus. & Com. Code § 27.01; and (iii) Texas had the "most significant relationship" to the underlying events, and CHC's claim was timely under Texas' longer four-year statute of limitations. The argument that the Texas statute of limitations applies to this claim was preserved at: A135 n.11. The parties did not brief or argue the issue of whether *Pack* should apply to the statutory fraud claim since the Court raised that issue *sua sponte* in the Opinion, and thus this Court can consider the question in the interest of justice under Supreme Court Rule 8. *Reddy v. MBKS Co., Ltd.*, 945 A.2d 1080, 1086 (Del. 2008).

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's determination that CHC's claims are time-barred. *Reid*, 970 A.2d at 182.

C. Merits of the Argument

CHC asserted a Texas statutory fraud claim pursuant to Tex. Bus. & Com. Code § 27.01. Under Texas law, the statute of limitations applicable to that claim is four years. *Sullivan v. Hoover*, 782 S.W.2d 305, 306 (Tex. App. 1989). In the trial court, Defendants conceded the Texas statutory fraud claim was governed by the Texas four-year statute of limitations and did not, in their opening brief, contend it was time-barred. *See* A88 n.7 ("Although count two, CHC's statutory fraud claim, may not be time-barred under the four-year statute of limitations potentially applicable to that claim . . . [it is] subject to dismissal for the reasons set forth herein."); A189 n.11 (contending the statutory fraud claim is governed by the Texas four-year statute of limitations but still time-barred). Likewise, at oral argument, Plaintiff noted that "[t]he defendants have not moved to dismiss Count II [the § 27.01 claim] as time-barred" and Defendants never disagreed or argued that Count II *was* time-barred. A242.

The trial court, however, found the statutory fraud claim was, under the borrowing statute, governed by Delaware's three-year statute of limitations, an argument Defendants never asserted. *See* Opinion at 9 n.26 (citing *Pack v. Beech Aircraft*, 132 A.2d 54, 57 (Del. 1957) and *Natale v. Upjohn Co.*, 236 F. Supp. 37 (D. Del. 1964)). Under *Pack*, if a statute both creates and limits a right through a "built-in" statute of limitations found in the same statute, that foreign statute of limitations

is considered substantive and is applied by the forum state (*i.e.*, Delaware). *Pack*, 132 A.2d at 58-59. The trial court reasoned that because § 27.01 had no such built-in statute of limitations, the Delaware three-year statute of limitations applicable to common law fraud claims applied. The trial court thus erroneously concluded the § 27.01 was time-barred.[8]

The trial court's reliance on *Pack* is misplaced because *Pack*'s rationale is irrelevant here. *Pack* applies where a single statute both creates and limits a right. In *Pack*, a New Jersey statute both created a cause of action for wrongful death but required that any claim under the statute be brought within three years. *That* is the circumstance in which *Pack*'s "built-in" test applies. By contrast, Section 27.01 has no built-in statute of limitations, so the "built-in" test used by the trial court does not apply.

Instead, the trial court should have applied the Texas four-year statute of limitations for two reasons. First, there is no analogous Delaware statutory fraud action that sets a different limitations period, so the trial court should have simply applied the only statute of limitations applicable to the § 27.01 claim – Texas' four-

[8] As noted, Defendants made no such argument. Rather, after apparently acknowledging the statutory fraud claim was timely in the motion to dismiss, Defendants changed course in their reply and argued that CHC was on notice of facts sufficiently long ago that the claim was barred *under the Texas four-year statute of limitations*. *See* A189 n.11. Defendants' trial court briefing did not include any reference or citation to *Pack*.

year statute.[9] Second, the trial court should not have been guided by *Pack* when deciding what statute of limitations to apply. Not only was *Pack*'s "built-in" test inapplicable, the fallback common law rule then was that the law of the forum state automatically applied. *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) (noting this Court abolished the *lex loci* rule in 1991).

The modern rule is that trial courts are to apply the "most significant relationship" test to determine which state's law to apply. *Id*. The "most significant relationship" test calls for application of Texas' statute of limitations because the parties' relationship centers around El Paso, Texas; with the only factor pointing to Delaware being the immaterial fact that the entities so happened to be formed here. *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, at *2 (Del. Ch. Aug. 5, 2009) ("Delaware's only connection[] to this case [is] that Sokol happens to be incorporated in Delaware – which is largely irrelevant in a case not involving internal affairs"); *Caballero v. Ford Motor Co.*, 2014 WL 2900959, at *5 (Del. Super. June 24, 2014) ("Delaware's interest in this case is mainly dependent on it being the state of incorporation, which, at least in this case, is not as relevant in a choice of law analysis when compared to the place of conduct and principal place of business."); RESTATEMENT (SECOND) CONFLICT OF LAWS §145, cmt. e ("At least

[9] Delaware has a statutory cause of action for securities fraud. 6 *Del. C.* 73-605. That is the analog, however, of Texas' own securities fraud statute, Tex. Rev. Civ. Stat. Ann. art. 581-33. Plaintiff's claim under § 27.01 is a distinct cause of action.

with respect to most issues, a corporation's principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter place.").

In sum, the trial court erred by finding the statutory fraud claim time-barred based on a test that does not apply and even after Defendants conceded that the claim was governed by the Texas four-year statute of limitations. Regardless of this Court's holding on the *Saudi Basic* issue, it should reverse the trial court's dismissal of the § 27.01 claim based on the statute of limitations.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Chancery's conclusion that the statute of limitations barred CHC's claims, and remand for further proceedings.

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Dated: June 2, 2020

CERTIFICATE OF SERVICE

I, Bruce E. Jameson, do hereby certify on the 2nd day of June, 2020, that I caused a copy of the foregoing to be served by File&Serve*Xpress* upon the following counsel:

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