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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GXP CAPITAL, LLC, a Nevada limited liability company, Plaintiff, v. ARGONAUT MANUFACTURING SERVICES, INC., a Delaware corporation, TELEGRAPH HILL PARTNERS III, L.P., a Delaware limited partnership, and TELEGRAPH HILL PARTNERS III INVESTMENT MANAGEMENT, LLC, a Delaware limited liability company, Defendants.	)	Nos. 247,2020 and 248,2020 On appeal from the Superior Court of the State of Delaware in C.A. No. N18C-07-267-PRW

OPENING BRIEF ON APPEAL OF APPELLANT GXP CAPITAL, LLC

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NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff-below/Appellant GXP Capital, LLC ("GXP" or "Appellant") filed its action against Defendants-below/Appellees Argonaut Manufacturing Services, Inc., Telegraph Hill Partners III, L.P. and Telegraph Hill Partners III Investment Management, LLC (collectively, "Appellees") on July 27, 2018. (D.I. 1).

GXP had previously filed suit against Appellees in federal district court in the District of Nevada. Due to a lack of personal jurisdiction, GXP voluntarily dismissed that action and filed a second case in the Southern District of California. The second action was dismissed *sua sponte* for lack of subject matter jurisdiction, because the parties lacked complete diversity.

Appellees here filed a Motion to Dismiss the Complaint on the basis of *forum non conveniens* and, as to Counts II and IV through IX of the Complaint, pursuant to Superior Court Civil Rule 12(b)(6), for failure to state a claim upon which relief can be granted. (D.I. 8). The parties subsequently stipulated to dismissal without prejudice of Counts II and IV through IX (D.I. 25), retaining claims for breach of contract and misappropriation.

On May 4, 2020, the Superior Court issued an Opinion and Order staying the action on the ground *forum non conveniens*. (D.I. 33). GXP filed a Motion for Reargument on May 11, 2020. (D.I. 34). In response the Superior Court withdrew its Opinion and Order and on July 1, 2020, reissued a new Opinion and Order. *GXP*

Capital, LLC v. Argonaut Mfg. Services, Inc., 234 A.3d 1186 (Del. Super. 2020). (D.I. 37).

On July 9, 2020, GXP filed a Motion for Certification of an Interlocutory Order. (D.I. 38).

On July 30, 2020. GXP filed a Notice of Appeal and a Notice of Appeal from an Interlocutory Order. On October 7, 2020, this Court accepted the Interlocutory Appeal and determined that further briefing was required on the claim to an appeal as of right.

This is the Opening Brief on Appeal of Appellant GXP Capital, LLC.

SUMMARY OF ARGUMENT

1. The decision of the Superior Court granting a stay on the ground of *forum non conveniens* for the purpose of having GXP initiate a new action outside of Delaware constitutes an appealable final order under both the "Collateral Order" doctrine and the "Effectively Out of Court" doctrine as it decides a collateral matter independent of the underlying merits, and terminates litigation of the merits in Delaware, giving GXP the choice of either litigating in California, effectively denying the right to appeal the Superior Court's decision, or risking having the claim being deemed abandoned and therefore dismissed with prejudice, creating substantially increased risk in the event of a lack of success on appeal.

2. The Superior Court erred by not enforcing by the permissive venue provision. The parties contracted that any venue would be convenient, and that decision should be respected, especially in light of the facts that (i) Delaware is a contractarian state and (ii) to not enforce that provision would render it superfluous.

3. The Superior Court erred by granting a stay on the ground of *forum non conveniens* for the purpose of having GXP file a new lawsuit elsewhere by giving weight to factors which this Court has held are not worthy of weight in modern commercial litigation. In such circumstance, the fact that the "undue burden" standard did not apply should be of no consequence.

4. The Superior Court erred by relying on the need for in-person testimony from witnesses identified as "co-conspirators," when the bulk of those witnesses are not subject to compulsory process in California or Delaware, and one is the CEO of one of the Appellees and so can be made to testify in Delaware.

5. The comparative burden on a plaintiff from a stay or dismissal on the ground of *forum non conveniens* should not be relevant until a Court determines that there is justification for a stay or dismissal on that ground.

6. The Superior Court erred in issuing a stay which has the effect if a dismissal. Courts have the inherent power to issue stays, but where the stay has the purpose of terminating litigation in Delaware and ceding jurisdiction to a court in another state, without the intention of litigating the merits in Delaware, it is effectively a dismissal, and should be treated as such.

STATEMENT OF FACTS ALLEGED IN THE COMPLAINT

PARTIES

GXP is a Nevada limited liability company with headquarters in Las Vegas, Nevada. On or about September 8, 2017, GXP CDMO, Inc. (hereinafter referred to as "Parent"), the parent company of GXP, assigned substantially all of its assets, including the causes of action described in the Complaint, to GXP, as part of a validly executed assignment agreement entered into between Parent and GXP.[1] (A-1).

Argonaut is the successor to Argonaut EMS, a sole proprietorship formed by Wayne Woodard in California for the purpose of identifying an acquisition candidate to provide manufacturing services for the medical device and pharmaceutical industries. Argonaut is a Delaware corporation headquartered in California and the direct business successor to Argonaut EMS. (A-1).

THP III is a Delaware limited partnership headquartered in California. Its general partner THP is a Delaware limited liability company also headquartered in California. Collectively, THP and THP III shall be hereinafter referred to as the "THP Entities" or "THPE". The THP Entities constitute one or more private equity

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[1] Parent was named Bioserv Corporation through December, 2016, when it sold the rights to that name to Sorrento Bioservices, Inc. as part of a pre-confirmation asset sale. The entity formerly known as Bioserv Corporation then became GXP CDMO, Inc., and confirmed a Chapter 11 Reorganization Plan using the cash acquired from the asset sale to Sorrento. (A-1 n.1).

funds that provided financing to Argonaut EMS and Argonaut ("the Argonaut Entities"). (A-1-2).

BANKRUPTCY CASE SUMMARY

On October 31, 2014, Parent filed a voluntary petition before the United States Bankruptcy Court for the District of Southern California (the "Bankruptcy Court") (Case No. 14-08651-MM11) for relief under 11 U.S.C §§ 101, et seq., commencing a Chapter 11 bankruptcy proceeding. Parent conducted the business and affairs as debtor-in-possession. Later, as a result of the wrongful acts set forth herein, Parent lost control of the business when an Examiner was appointed with expanded powers to sell the business. As a result, Parent lost an opportunity to reorganize in a favorable manner and retain control of its business. The economic advantage lost to Parent exceeded $12 million. Instead, Parent's business was sold on December 29, 2016 to Sorrento Bioservices for $3.6 million. Parent subsequently reorganized pursuant to a confirmed Plan of Reorganization (the "Plan") with unsecured creditors receiving 100% of valid claims. The Plan had an Effective Date of May 26, 2017. (A-4).

THE ARGONAUT ENTITIES AND THP

On July 23, 2015, Albert Hansen, a successful entrepreneur that owned Parent through an affiliate, was introduced to Wayne Woodard by a pharmaceutical executive known to both of them. Mr. Woodard was interested in a possible investment in Parent. (A-4).

Mr. Hansen sent Mr. Woodard a confidential presentation regarding Parent (then named Bioserv Corporation). Included in this presentation was the following language (the "Confidentiality Language") displayed prominently in bold on the first page. (A-5).

> **BY ACCEPTING THIS PRESENTATION AND NOT PROMPTLY RETURNING OR DESTROYING IT, THE RECIPIENT SHALL BE DEEMED TO AGREE TO KEEP THIS INFORMATION CONFIDENTIAL.**

(A-5, 41-43).

Mr. Woodard responded in an email that same day, July 23, 2015:

> **Thank you very much Al. I am interested in having a followup discussion. Before I do this though I would like to share the document you included with my business partners. Just two people Paul Grossman for Telegraph Hill Partners and Jack Percoskie my finance guy. Are you OK with this? We will hold it strictly confidential.**

(A-5-6, 45, the "Woodard 7/23 Email").

Thus, Mr. Woodard accepted the presentation and promised to keep it confidential while sharing it with his business partners. In doing so, Mr. Woodard

agreed to be bound by the Confidentiality Language, with the Confidentiality Language forming the text of a binding agreement (the "First NDA"). In addition, Mr. Woodard stated in writing that he was a "business partner" of Telegraph Hill Partners. In so doing, Mr. Woodard represented himself and acted as a partner of THPE. As such, he agreed to the First NDA on their behalf. (A-6).

On July 28, 2015, Mr. Hansen had a teleconference to discuss Bioserv with Mr. Woodard and Mr. Paul Grossman, a partner of THPE. Mr. Grossman confirmed that THPE was exploring a possible financial relationship with Mr. Woodard involving the purchase of a manufacturing business in which Mr. Woodard would be the CEO. Mr. Grossman also confirmed that he would keep information confidential. (A-6).

THPE was exploring the possibility of providing financing to Mr. Woodard and the Argonaut Entities. Later, THPE did finance the Argonaut Entities. Mr. Woodard sent the confidential material to the THP Entities with the same Confidential Language on the first page. In the Woodard 7/23 Email, Mr. Woodard also stated that THPE was his business partner and that the information would be kept confidential. In addition, by accepting the confidential material without objection and without returning or destroying the confidential material, THPE agreed to be bound by the Confidentiality Language and by the First NDA. (A-7).

On or about August 5, 2015, Mr. Woodard visited Parent with Mr. Grossman. They had a tour of the facility, a discussion of the business plan and met with the senior management of Parent. During this and subsequent meetings, Mr. Woodard was provided confidential information. (A-7-8).

In this visit and subsequent meetings, Mr. Hansen provided confidential information to Mr. Woodard and Mr. Grossman orally both in meetings and conferences by telephone. Once this confidential information was learned, it was impossible to "unlearn." (A-8).

On August 24, 2015, Mr. Woodard requested additional financial information from Parent. Two days later, another NDA was signed ("the Second NDA"). (A-8). The Second NDA included the following language:

> This Agreement shall be governed by the laws of the jurisdiction in which the Disclosing Party is located (or if the Disclosing Party is based in more than one country, the country in which its headquarters are located) (the "Territory") and the parties agree to submit disputes arising out of or in connection with this Agreement to the non-exclusive [sic[2]] of the courts in the Territory.

(A-47-49).

On September 21, 2015, there was a meeting during which Mr. Woodard said he and the THP Entities would like to enter serious negotiations and due diligence

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[2] The parties have agreed that the omitted word is "jurisdiction." *GXP Capital, LLC,* 234 A.2d at 1199 n.62.

to try to arrange a deal with terms agreeable to all parties. Mr. Woodard, Mr. Hansen and senior management of Parent attended this meeting. Mr. Woodard produced minutes of this meeting. This meeting was also attended telephonically by Mr. Grossman. (A-8-9).

From July 23 until October 30, 2015, Parent provided confidential material to Mr. Woodard, his team, Argonaut EMS, and the THP Entities. The parties had many meetings, telephone conferences and exchanged many emails. Mr. Woodard was given total access and even provided a key with access to an office area. Parent would never have shared all this information if Mr. Woodard and the THP Entities were they not bound by the First NDA and by the Second NDA (the "Two NDAs"). (A-9, 51-52).

Mr. Woodard asked Mr. Hansen during this time about Mr. Hansen's views on the value of Parent. Mr. Hansen pointed out that Pacific GMP, a business that was very similar to Parent located in San Diego, had been acquired for $12 million. Pacific GMP had revenues of about $3 million and was breakeven. It was believed to have a workforce of approximately 25 employees and facilities, similar to Parent. Parent had revenues of over $3.5 million and was breakeven. In many respects, Parent was very similar to Pacific GMP. (A-9).

On Tuesday, October 13, 2015, there was a dinner meeting attended by Mr. Woodard and the Mr. Grossman. Mr. Hansen provided some highly confidential

information to Mr. Woodard and Mr. Grossman. The parties discussed various business issues, including THP's lack of familiarity with bankruptcy and investing in bankrupt companies. Mr. Hansen also disclosed his personal views of the Official Committee of Unsecured Creditors and its counsel (the "Offensive Comments"). In addition to the Offensive Comments, there was also a discussion of a revised reorganization plan and strategy for plan approval (the "Plan Approval Strategy"). Mr. Hansen would have never revealed confidential details such as the Offensive Comments or the Plan Approval Strategy except for the fact that both Mr. Woodard and the THP Partner were bound by the terms of the Two NDAs. (A-9-10).

Soon after, Mr. Peter Gilhuly, a partner from Lathan and Watkins LLP, serving as counsel for the THP Entities, contacted Benjamin Carson, primary counsel to Parent. Mr. Gilhuly questioned several aspects of the Plan Approval Strategy. (A-10). Mr. Carson asked if the THP Entities would sign a new NDA. Mr. Gilhuly responded in an email dated October 18, 2015, "Our client group already has an NDA." This again confirmed the THP Entities agreement to the Second NDA. (A-10).

On or about October 22, 2015, Mr. Carson sent a revised NDA to Mr. Gilhuly and requested that the THP Entities and Mr. Woodard sign the revised NDA. After further review and discussion, the THP Entities and Mr. Woodard declined to sign the revised NDA. (A-10).

As a result of this refusal and other factors, Mr. Hansen decided to terminate the Second NDA in accordance with its termination provision. This provision required the return or destruction of all the confidential information that had been provided to Mr. Woodard, Argonaut EMS, and the THP Entities. On October 30, 2015, Mr. Hansen sent Mr. Woodard an email terminating the Second NDA with respect to Mr. Woodard, Argonaut EMS, and the THP Entities, and requesting destruction or return of all the Proprietary Information. Mr. Woodard later acknowledged that the Second NDA was terminated and that all confidential information was returned or destroyed. (A-11).

NEGOTIATIONS WITH THE OCC ON THE PLAN

The United States Trustee in the United States Bankruptcy Court for the District of Southern California, case number 14-08651-MM11 (the "Bankruptcy Case"), appointed the Official Committee of Unsecured Creditors (the "OCC") on or about January, 2015 to represent the unsecured creditors in the bankruptcy proceedings. Attorney Gary Slater was appointed counsel to the OCC. (A-11).

Parent prepared a draft disclosure statement that included a reorganization plan (the "First Plan"). If approved by the Bankruptcy Court, the First Plan would have allowed Parent to emerge from bankruptcy. As a result, the value of its equity would have increased significantly. Parent sent a draft of the First Plan to the OCC. On September 11, 2015, Mr. Slater and Mr. Carson discussed the First Plan. Mr.

Slater stated he would review the First Plan and discuss with the members of the OCC. (A-11-12).

On October 6, 2015, Parent filed the First Plan with the Bankruptcy Court.[3] (A-12).

On October 12, 2015, Mr. Slater sent Mr. Carson an email with questions on the First Plan. Mr. Slater requested certain changes to the First Plan by means of these questions. He also raised the issue of the Parent's alleged weak financial condition.

Mr. Carson responded to the OCC's questions on or about October 14, 2015. Mr. Carson also requested a call between Mr. Hansen and the OCC members. Mr. Hansen wished to present the First Plan directly to members of the OCC. As part of the negotiation process, Mr. Hansen also wanted to determine what changes to the First Plan were necessary to obtain the support of the OCC. (A-12-13).

On November 6, 2015 there was a teleconference with Mr. Hansen, Mr. Carson, Mr. Slater, and two members of the OCC, Beth Bertelson and David Davis. Mr. Hansen provided a brief history of the bankruptcy proceedings, a financial and business update, and a summary of the First Plan. Members of the OCC asked questions and Mr. Hansen responded. Mr. Hansen asked for the OCC to support the

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[3] Parent subsequently filed a motion for approval of the disclosure statement that included the First Plan on November 2, 2015. (A-12 n.3).

First Plan. He also said that he understood that the OCC may require improvements to the First Plan to give its support. Mr. Hansen asked the OCC to respond with the specific improvements, if any, that would be required, to gain the support of the OCC. (A-13).

On November 10, 2015, the OCC submitted its statement of position on the First Plan. It noted that no one had filed an objection to the First Plan by the November 6, 2015 deadline. It also stated that it would not object to a Court order approving the disclosure statement to the First Plan. This effectively was a qualified statement of support for the First Plan. (A-13).

Given that, before the occurrence of the Conspiracy described below, no party objected to the First Plan, and given the OCC's response to the First Plan, Parent was on track to get the First Plan approved and confirmed via the consent of those classes of creditors impaired under the First Plan. Thus, Parent had an economic advantage for approval of the First Plan, or some modified version, that was worth millions of dollars. Had the First Plan or a similar version thereof been approved, Parent would have been able to sell at a value similar to that of Pacific GMP, which was operationally and financially comparable to Parent. However, the wrongful acts completely scuttled the First Plan, causing Parent millions of dollars in damages. (A-14).

THE CONSPIRACY AND THE AMBUSH

Defendants and other parties[4] (the "Co-Conspirators") devised, during one or more out-of-court discussions and using confidential information in breach of the Two NDAs, a corrupt and devious plan (the "Conspiracy"). (A-14).

The Conspiracy was launched in October 2015. THPE masterminded the conspiracy. (A-15).

On October 30, 2015, Defendants had agreed to destroy all confidential information as a result of the termination of the Second NDA. It was impossible for Defendants to proceed with any transaction involving Parent, which was not approved by Parent, without a breach of the Two NDAs. It was simply impossible for Defendants to "unlearn" all the confidential and sensitive information that Defendants had been provided under the Two NDAs. As such, any business transaction involving Parent that was initiated by Defendants would necessarily involve the Confidential Information and be in violation of the Two NDAs. (A-15).

During early November 2015, Defendants continued to plot and conceived the Ambush (defined below). The Ambush was a dastardly plan to gain control of Parent's business without warning and effectively deprive Parent of due process by

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[4] The other parties included Wayne Woodard, Argonaut EMS and Tenax Therapeutics, Inc. ("Tenax"). (A-14 n.6).

feigning an emergency which never existed. But, for the Ambush to succeed, the Conspirators needs the help of two Co-Conspirators, the OCC and Tenax. (A-15).

On or about November 10, 2015 Mr. Gilhuly, counsel to THPE, attempted to contact Mr. Slater, counsel to the OCC. Mr. Slater responded on November 12, 2015. There was a telephonic discussion on Friday, November 13, 2015. (A-15-16).

Mr. Slater also had one or more telephonic conversations on November 13, 2015 with Ms. Deborah Riley, counsel to Tenax. These two lawyers knew each other well and had a productive professional relationship for many years. (A-16).

There were a number of communications between Mr. Slater and Mr. Gilhuly from November 13 – November 17, 2015. (A-16, 58-69).

During this period, THPE, represented by Mr. Gilhuly, fraudulently deceived the OCC, represented by Mr. Slater by partial and misleading disclosure. (A-16).

Mr. Gilhuly told Mr. Slater of the Offensive Comments which had been disclosed to Defendants by Mr. Hansen under the Two NDAs. (A-16). He also advised Mr. Slater of the forthcoming offer of $1.27 million which had not been discussed with or approved by Parent (the "Hostile Bid"). The Hostile Bid relied upon confidential information in breach of the Two NDAs (the "Confidential Information"). (A-16). However, Mr. Gilhuly did not disclose to Mr. Slater the existence of the Two NDAs. (A-17).

Mr. Gilhuly also did not tell Mr. Slater of the extensive due diligence that Defendants conducted, pursuant to the Two NDAs, and that the Confidential Information had been used, in violation of the Two NDAs, to make the Hostile Bid. (A-17). Mr. Gilhuly also suggested to Mr. Slater that Tenax file an emergency motion to appoint a trustee. (A-17). Mr. Slater conveyed the idea of an emergency motion to appoint a trustee to Ms. Riley. (A-17).

Mr. Gilhuly discussed with Mr. Slater two key actions: a) the Hostile Bid and b) the emergency motion to appoint a trustee. These two actions, combined with the fact that a Court hearing was already scheduled on November 19, 2015, comprised the plan to ambush the Parent and to seize control of its business at a low-ball price (the "Ambush"). (A-17).

On November 15, 2015, Ms. Riley called Todd Curry, counsel representing a Parent affiliate. Ms. Riley told Mr. Curry that her client will "blow up" the bankruptcy if her client, Tenax did not get what it wanted (the "Outrageous Threat"). (A-17).

On November 17, 2015, THPE sent a letter to the OCC, offering to purchase the business of the Parent for $1.27 million (the "Hostile Bid Letter"). The Hostile Bid Letter fraudulently and deceitfully stated that it was based on public information. It was also deceptive because it avoided any mention and concealed the existence of

the Two NDAs and the detailed three-month due diligence period during which the Confidential Information was provided. (A-18).

On the same day, November 17, Tenax filed an emergency motion to appoint a trustee (the "Emergency Motion"). (A-18).

On November 18, the OCC completely reversed its position from one of qualified support of Parent to outright hostility and personal animus towards Parent and its CEO, Mr. Hansen. It withdrew its statement of non-opposition to the First Plan and now supported the appointment of a Chapter 11 Trustee. The sole reason offered by the OCC for supporting the appointment of a Chapter 11 Trustee was the allegation that Parent could not be trusted to evaluate the Hostile Bid. But for Defendants breaching the Two NDA's in preparing the Hostile Bid and disclosing the Hostile Bid and the Hostile Bid Letter to the OCC, the OCC would have continued to support the First Plan and never would have supported the appointment of a Chapter 11 Trustee. In addition to formulating the Hostile Bid and the Hostile Bid Letter breach of the Two NDA's, THPE disclosed certain confidential information to the OCC including the Offensive Comments and the Plan Approval Strategy (the "Wrongful Disclosure"), which was an additional breach of the two NDAs. (A-18-19).

On November 19, 2015, the Court issued a tentative order stating that it was inclined to appoint a Chapter 11 trustee. The only reason cited by the Court was the OCC support of the appointment of a Chapter 11 trustee.

In preparing the Hostile Bid, Argonaut EMS and the THP Entities wrongfully used confidential information provided by Parent, thus breaching the Two NDAs. Parent sent a letter to Mr. Woodard and Argonaut EMS on or about December 10, 2015. The letter listed over a dozen separate items of confidential information that were used by Argonaut EMS and the THP Entities to formulate the Hostile Bid). Argonaut EMS subsequently denied that it used confidential information. (A-20).

Parent was shocked that the THP Entities would hatch a Conspiracy, send a fraudulent Hostile Bid Letter and launch an Ambush (the "Shocking Behavior"). Parent believed that the THP Entities supported struggling entrepreneurs and would never support a hostile bid. Parent believed that the THP Entities would not have discussed or disclosed to the limited partners of their investment fund in their offering documents the risk that they might pursue hostile bids as part of their investment strategy. Hostile bids frequently involve expensive and possibly damaging litigation. Also, the THP Entities were becoming involved in a bankruptcy-related investment without any previous experience. Plaintiff alleges that the limited partners of the investment funds may not have invested in THP III if the risks of investing in hostile bids and bankruptcies had been adequately disclosed

in the offering documents of the Partnership. For all these reasons, Parent was taken aback by the Shocking Behavior. (A-20-21).

In addition to breaching the Two NDAs, Appellants misappropriated the confidential information covered by the Two NDAs in order to devise the Conspiracy and to pursue the Hostile Bid. Mr. Woodard, Argonaut EMS, and the THP Entities knowingly and wrongfully devised the Conspiracy to deprive Parent of a substantial economic opportunity to make millions of dollars. In addition, Tenax wrongfully abused the Bankruptcy process by making an emergency motion to appoint a Trustee when there was no emergency. Without the Wrongful Disclosure and the Hostile Bid Letter, the OCC, which only days earlier appeared to support the First Plan, would not have agreed to now oppose the First Plan and support the appointment of a Trustee.[5] Hence, but for Appellants' Wrongful Disclosure and Hostile Bid Letter, Parent would have confirmed the First Plan via the consent of the First Plan's impaired classes of creditors. (A-21-22).

Appellants' Conspiracy and wrongful acts effectively scuttled the First Plan, caused the appointment of the Examiner, forced Parent to incur substantial,

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[5] The OCC knew that the appointment of a Trustee would have resulted in a zero recovery for creditors and thus it was contrary to the interests of the unsecured creditors whom the OCC represented to support the appointment of a Trustee. However, the appointment of a Trustee could have resulted in a substantial payment to the counsel of the OCC. (A-21-22 n. 11).

additional legal and other costs, caused substantial losses to KESA (the owner of Parent) and subsequently caused the series of events that resulted in a forced sale of its business at an unattractive price to Sorrento Bioservices, Inc., rather than achieving a fair market value.

As a result, KESA and Parent lost millions of dollars. The Co-Conspirators arranged the Conspiracy to allow for Tenax to retaliate against Parent and allow for Argonaut and THPE to purchase the Parent at the Hostile Bid price of $1.27 million (the "Hostile Bid Amount") so that there would be sufficient resources to pay the professional fees of the case with little left over for the creditors. (A-22-23).

As described above, a business very similar to that of Parent, Pacific GMP, was sold in August 2015 for about $12 million. Parent believes this was the fair market value of the economic opportunity lost by Parent and KESA because of the Conspiracy and Wrongful Acts Parent could have, and, Plaintiff alleges, would have achieved the fair market value had there been no Conspiracy or Wrongful Acts interfering with the First Plan. The First Plan would have been approved and confirmed pursuant to the United States Bankruptcy Code. (A-23).

As a result of the Conspiracy and the Wrongful Acts, the Bankruptcy Court eventually appointed an Examiner with expanded powers to sell the Parent. (A-23).

After a lengthy and expensive process which lasted almost a year, Parent was sold for the depressed price of $3.6 million to Sorrento Bioservices, Inc. on

December 29, 2016. The Sale was initiated and managed by the Examiner and his investment banker. Parent lost millions of dollars as a result of the Conspiracy and those breaches, described herein, used to pursue the Conspiracy, because the Conspiracy disrupted the First Plan, interfered with the business development efforts of the Parent caused by the uncertainty of the Sale process, depressed the financial results of the Parent, caused Parent to sell its business at an unattractive price of $3.6 million instead of at fair market value, and caused it to incur substantial, additional costs and fees. (A-23-24).

ARGUMENT

I. THE SUPERIOR COURT'S ORDER STAYING THE DELAWARE ACTION TO ALLOW GXP TO FILE A NEW ACTION IN CALIFORNIA IS AN APPEALABLE FINAL ORDER AS IT EFFECTIVELY ENDS LITIGATION IN DELAWARE WITHOUT ADDRESSING THE MERITS, CREATING A SITUATION WHICH DENIES ANY OTHER RIGHT OF APPEAL.

A. QUESTION PRESENTED.

Does the decision of the Superior Court to stay an action for the purpose of having GXP file a new action in California raising the same claims qualify as a final order subject to appeal as of right where the stay is intended to terminate the Delaware litigation without addressing the merits?

This issue was not raised below.

B. SCOPE OF REVIEW.

Whether an Order is appealable as a final order is an issue of law, addressed *de novo*.[6] *In re Adams,* 2008 WL 8444788 at *5 (9th Cir. B.A.P. Feb. 7, 2008).

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[6] This Court has held that the grant or denial of a motion to stay on the ground of *forum non conveniens* is appealable, although interlocutory, because it because it determines the plaintiff's right to litigate in this jurisdiction and the defendant's obligation to meet the plaintiff in this forum, and so implicates due process concerns. *United Engines, Inc. v. Sperry Rand Corp.*, 269 A.2d 221, 222 (Del. 1970); *Moore Golf, Inc. v. Ewing*, 269 A.2d 51, 51-52 (Del. 1970). However, this Court has also denied applications for interlocutory appeals arising from decisions staying an action under the doctrine of *forum non conveniens*. *E.g., National Union Fire Insurance Company of Pittsburgh, PA v. Axiall Corporation*, 2019 WL 4795508, *disposition reported at* 219 A.3d 523 (Del. 2019) (Table).

C. MERITS OF THE ARGUMENT.

An appeal as of right in a civil case must be from a final order. However, the requirement of finality is to be given a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541, 546 (1949). *See also Brown Shoe Co. v. U.S*., 370 U.S. 294, 306 (1962). Courts (including this Court) have found circumstances which extend the definition of a "final order."

1. THE COLLATERAL ORDER DOCTRINE.

In *Cohen*, the United States Supreme Court established what has become known as the "collateral order" doctrine. That doctrine provides permits a direct appeal of "that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546-47. This Court has adopted the collateral order doctrine. *Gannett Co., Inc. v. State*, 565 A.2d 895, 899-900 (Del. 1989); *Evans v. Superior Court of the State of Delaware*, 652 A.2d 574, 576-77 (Del. 1995). Appeals based on the collateral order doctrine are deemed to be as of right. *Gannett Co., Inc. v. State*, 1998 WL 985343 at *1, *disposition reported at* 723 A.2d 396 (Del. 1998) (Table).

The decision of the Superior Court in this action satisfies the requirements of the collateral order doctrine:

1. A plaintiff's right to select fora (within the confines of a contract) and a defendant's right to a fair and just trial in a proper forum are important. *States Marine Lines v. Domingo*, 269 A.2d 223, 225 (Del. 1970).

2. The decision is entirely divorced from and independent of the merits of the underlying action, and does not require the Court to assess the merits of the claims or otherwise become meaningfully entangled with the facts and issues underlying the Complaint.

3. There is no benefit in waiting until the "whole case is adjudicated," as it will not be (not by a Delaware court, anyway). The stay was for the specific purpose of GXP filing suit anew in California and having that court adjudicate the merits.

2. THE "EFFECTIVELY OUT OF COURT" DOCTRINE.

The "effectively out of court" doctrine applies where a stay puts the parties effectively out of court, having the effect of the court surrendering jurisdiction *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 9-10 (1983); *Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 713-14 (1996).

State courts have adopted this doctrine. *E.g., Canter's Pharmacy, Inc. v. Elizabeth Associates*, 578 A.2d 1326, 1329 n.1 (Pa. Super. 1990) (stay pending arbitration); *County Com'rs of Frederick County v. Schrodel*, 577 A.2d 39, 45 (Md.

App. 1999) (stay pending administrative action putting plaintiff effectively out of court deemed subject to appeal under collateral order doctrine).

The stay here is not for the purpose of allowing litigation in another jurisdiction to proceed because a decision in that other jurisdiction may resolve an issue that is relevant to the Delaware litigation. Rather, the stay is for the purpose of ending the Delaware litigation in favor of a conclusive decision on the merits in another jurisdiction. As such, it amounts to a refusal by the Superior Court to proceed to a disposition on the merits.

3. THE STAY IMPOSED BY THE SUPERIOR COURT DENIES GXP AN APPEAL AS OF RIGHT.

The Superior Court issued a stay to allow GXP to file suit in California. If the California court were to accept and the case and resolve it on the merits, then the Superior Court would dismiss this action. In so ruling, the Superior Court has created a unique circumstance where GXP will not be able to get appellate review of this Court's decision, as acceptance of the case by the California court will effectively moot any appeal of the Order.

The right to appeal is granted by Delaware's Constitution and statutes. Del. Const., Art. IV §11(1)(a); 10 Del. C. §§143, 148. Those rights are subject to the constitutional protections. *See Du Pont v. Family Court for New Castle County*, 153 A.2d 189, 192 (Del. 1959); *LeGates v. Heverin*, 196 A.2d 403, 405 (Del. Super. 1962). As the Legislature has created appellate rights, only the Legislature, and not

the judiciary, can curtail those rights. Courts can only deny the right of appeal where it is clear that under the law the party has no right to appeal. *Burke v. Silcox*, 64 A. 73, 74 (Del. Super. 1906). Excluding a right of appeal is a judicial revision of appellate rights granted by law which imposes a substantial burden on GXP's rights, and so violates the separation of powers. *See Williams v. Singleton*, 160 A.2d 376, 378 (Del. 1960) (court may not by rule revise a provision of a statute calculating the time for an appeal).

The Superior Court granted a stay of 90 days to permit GXP to file suit in California. *GXP Capital, LLC*, 234 A.3d at 1201. The Superior Court stated that "[s]hould GXP initiate such a suit, the Court will renew the stay for the duration of the litigation to ensure it reaches a final ruling on the merits before dismissing the instant case." *Id*. It also stated that "Should GXP fail to initiate such a suit, the Court will consider the underlying claim abandoned and dismiss the suit entirely." *Id.*

It is no answer to say that GXP can wait 90 days, see the Delaware action dismissed, and then file an appeal. A dismissal based on abandonment is generally with prejudice. *See, e.g., In re Affiliated Computer Services, Inc. Shareholders Litigation*, 2009 WL 296078 at *11 (Del. Ch. Feb. 6, 2009); *Solarcity Corporation v. Sunpower Corporation*, 2017 WL 1739169 at *5 (N.D. Cal. May 4, 2017); *Perkins v. Federal Fruit & Produce Co., Inc.*, 2012 WL 1247192 at * (D. Colo. Apr. 12, 2012.

The Superior Court gave no indication that it was deviating from this general rule. As such, waiting it out would put GXP at risk of the loss altogether of the ability to sue elsewhere if GXP were to lose the Appeal.

II. THE NON-EXCLUSIVE VENUE PROVISION PRECLUDES THE APPLICATION OF *FORUM NON CONVENIENS*.

A. QUESTION PRESENTED.

Does the rule of *Ingres Corp. v. CA, Inc*., 8 A.3d 1143 (Del. 2010), that the inclusion of a forum agreement in a contract precludes application of the doctrine of *forum non conveniens*, apply equally when the forum provision is permissive?

This issue was raised in a letter to the Court (D.I. 31) and was addressed in the Superior Court's Opinion. *GXP Capital, LLC*, 234 A.3d at 1199.

B. SCOPE OF REVIEW.

Contract interpretation is a matter of law subject to *de novo* review. *Borealis Power Holdings Inc. v. Hunt Strategic Utility Investments, L.L.C.*. 233 A.3d 1, 8 (Del. 2020).

C. MERITS OF THE ARGUMENT.

In *Ingres Corp.*, this Court held, in a case involving an exclusive venue provision, that:

> where contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties' contract and enforce the clause, even if, absent any forum selection clause, the *McWane* principle might otherwise require a different result. The reason is that the *McWane* principle is a default rule of common law, which the parties to the litigation are free to displace by a valid contractual agreement.

8 A.3d at 1145 (footnote omitted). Although the forum provision in that case was mandatory, the Court did not restrict its ruling to mandatory forum provisions.

In *Utilipath, LLC v. Hayes*, 2015 WL 1744163 (Del. Ch. Apr. 15, 2015), the Court of Chancery applied *Ingres* to an agreement which said that venue "shall properly (but not exclusively) lie in any state court of the State of Delaware" and held that: "Nothing in the Supreme Court's opinion in *Ingres*, however, limited its reach to forum selection clauses that are exclusive in nature. The Court stated that, 'the *McWane* principle is a default rule of common law, which the parties to the litigation are free to displace by a valid contractual agreement,'" footnote omitted). WL Op. at *4.

This conclusion is supported by two fundamental principles of Delaware law. First, Delaware is a contractarian state, more so than other jurisdictions. *GRT, Inc. v. Marathon GTF Tech., Ltd*., 2011 WL 2682898 at *12 (Del. Ch. July 11, 2011). *See also Libeau v. Fo*x, 880 A.2d 1049, 1056-57 (Del. Ch. 2005), *aff'd in part, rev'd on other grounds*, 892 A.2d 1068 (Del. 2006).

In *Ingres*, this Court recognized the right of contracting parties to decide that a specific jurisdiction would be the focus of any litigation. If parties can agree to select one location without fear of denial of that contractual right by default common law rules, it should be equally true that parties can agree to place no limit on venue, essentially waiving claims of inconvenience, and expect courts to respect that choice equally.

Second, contracts are to be interpreted in a manner that renders none of the provisions superfluous. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010). If the contractual right to seek redress in any forum can be taken away pursuant to the doctrine of *forum non conveniens*, then the venue provision serves no purpose.[7]

[7] In candor to the Court, there are non-Delaware cases holding that where a venue provision is permissive rather than mandatory, a court may still apply the doctrine of *forum non conveniens*. *E.g., Animal Film, LLC v. D.E.J. Productions, Inc*., 123 Cal.Rptr.3d 72, 76 (Cal. App. 2011); *Celebrity Cruises, Inc. v. Hitosis*, 785 So.2d 521 (Fla. App. 2011). Those cases do not provide a rationale for the distinction, or explain how a "more contractarian" state like Delaware would not differ, applying the legal principles set forth above.

III. THE SUPERIOR COURT MIS-APPLIED THE *FORUM NON CONVENIENS* FACTORS.

A. QUESTION PRESENTED.

1. Did the Superior Court abuse its discretion in distinguishing Supreme Court precedent finding *forum non conveniens* factors to be of no weight because that precedent was decided under the "overwhelming burden" standard?

2. Did the Superior Court abuse its discretion by relying on the claimed need for in-person testimony of certain witnesses, without requiring Appellees to identify the subject matter of their testimony and why deposition or videotaped testimony is insufficient, especially when witnesses are either aligned with the Appellees or are not in either Delaware or California?

These issues were raised in the briefing (A-107-116, 201-209, 231-28), and were addressed by the Superior Court in its Opinion. *GXP Capital, LLC*, 234 A.3d at 1193-1200.

B. SCOPE OF REVIEW.

"Generally, a trial court's decision to dismiss a complaint on the ground of *forum non conveniens* is reviewed by this Court for an abuse of discretion. Whether the trial court applied the appropriate legal standard in considering a motion to dismiss, however, presents this Court with a question of law that is reviewed *de novo*." *Mar-Land Indus. Contractors, Inc. Caribbean Petroleum Refining, L.P.,* 777 A.2d 774, 777 (Del. 2001) (citation omitted).

C. MERITS OF THE ARGUMENT.

Appellees' Motion to Dismiss on the ground of *forum non conveniens* was decided under *Gramercy Emerging Markets Fund v. Allied Irish Banks, P.L.C.*, 173 A.3d 1033 (Del. 2017). Under *Gramercy*, a court analyzing a *forum non conveniens* challenge where a previous suit by the plaintiff in another jurisdiction was dismissed for reasons other than the merits, applies the *Cryo-Maid* factors without a presumption or preference for or against dismissal or a stay ("without a preference").[8] GXP did not challenge the correctness of the reliance on that case under the facts here in the Superior Court. There is, however, a distinction in this case in that the prior dismissal in *Gramercy* was a discretionary dismissal based on *forum non conveniens*, whereas the prior dismissals by prior courts in the present action were for lack of personal and subject matter jurisdiction. *GXP Capital, LLC,* 234 A.2d at 1192. Thus, unlike in *Gramercy*, the parties were never actually made it into the prior courts.

Apart from this, an unanswered and critical question in this appeal is how one allocates weight to factors under the *Gramercy* standard compared to the "overwhelming burden" standard. Of course, different individual factors can have

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[8] A similar result occurred in *Acierno v. New Castle County*, 679 A.2d 455 (Del. 1995). This Court affirmed a decision of the Court of Chancery disregarding a claim that an action filed in federal court was first filed, and condoned the application of *forum non conveniens* without giving any weight to the fact that the federal case was technically first-filed. *Id.* at 458.

different priority depending on the facts and circumstances of a given case. But that is different from assigning weight to those factors. There need to be guiding principles to ensure that when Judges engage in a *Gramercy* analysis, they are not acting arbitrarily. A review of the factors in this case highlights the problem.

1. Relative Ease of Access to Proof. In 1964, when this Court decided *Cryo-Maid*, there was no electronic transmission via the Internet. Trial courts, in undertaking a *forum non conveniens* analysis, now recognize that transmittal of evidence electronically is not a burden, particularly in corporate and commercial disputes. *E.g., In re Asbestos Litigation*, 929 A.2d 373, 384-85 (Del. Super. 2006); *Hall v. Maritek Corp.,* 170 A.3d 149, 161 (Del. Super. 2017), *aff'd mem.*, 182 A.3d 113 (Del. 2018); *Asten v. Wangner*, 1997 WL 634330, at *3 (Del. Ch. Oct. 3, 1997).

In any event, the issue underlying this factor is a factual one: does litigating in Delaware prevent a party from being able to introduce any evidence? *See Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 136 (Del. 2006); *Candlewood Timber Group, LLC,*, 859 A.2d 989, 1001-02 (Del. 2004). There was no showing below that such is the case here and the Superior Court did not make any findings about that, so this factor does not support relief.

2. The availability of compulsory process for witnesses. Deposition testimony is deemed to be an acceptable substitute, even where facts "are

in hot dispute." *Kolber v. Holyoke Shares, Inc.*, 213 A.2d 444, 446 (Del 1965). Even when the credibility and demeanor of a witness is an issue, the availability of videotaped testimony (and live close circuit transmission *a la* Zoom) has diminished the importance of the absence of compulsory process for witnesses. *Kane v. Peugeot Motors of America, Inc.,* 1995 WL 945817 at *4 (Del. Super. Dec. 19, 1995). The question then becomes why is this any less true under the *Gramercy* standard?

The Superior Court dismissed the significance of *Kolber*, stating that "forcing a defendant to rely on depositions in lieu of live testimony and to travel to Wilmington to face litigation were at least factors weighing in favor of relief." *GXP Capital, LLC*, 234 A.3d at 1197. That, however, is not the lesson of *Kolber*.

In *Kolber*, this Court noted that "[t]he advantages of 'live testimony', as contrasted with depositions, are unquestionable; but litigants are constantly obliged to resort to depositions under our broad discovery procedures, even where the facts are in hot dispute; and we perceive no sufficient reason for making this case an exception on that ground." *Id.*

"The ability to exercise jurisdiction over corporate parties together with the availability of the commission process renders this *Cryo–Maid* factor largely insignificant for corporate and commercial cases." *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1215 (Del. Ch. 2010). Why is this any less true under the *Gramercy* standard?

This Court has held that, under the "undue hardship" standard, to tip the scales in Defendants' favor as to this factor, they had to identify the potential witnesses, the subject of their testimony and why deposition testimony would be inadequate. *Mar-Land Indus. Contractors, Inc*., 777 A.2d at 781; *States Marine Lines*, 269 A.2d at 223.

The Superior Court rejected those requirements on the ground that *Mar-Land* and *States Marine Lines* were decided under the "undue hardship" standard. *GXP Capital, Inc.*, 234 A.3d at 1197 n.49. However, the need for this information has nothing to do with the burden of proof. Rather, it is necessary to give a court the evidence it needs to determine whether the use of deposition transcripts or videotaped or remote live testimony is entitled to *any* weight.

The Superior Court avoided relying on this point by finding that live in-court testimony is crucial because "many of the witnesses are named by GXP as 'co-conspirators' in the alleged wrongs, and hence their credibility will be a key issue." *Id.* The Complaint identifies as co-conspirators: Wayne Woodard, Argonaut EMS, OCC, and Tenax Therapeutics, Inc. (A-26 & n.6, 32):

a. Woodard is the CEO of defendant Argonaut Manufacturing Services, Inc., a Delaware corporation, (A-173). Through its jurisdiction over the defendant entities, formed in Delaware, the Superior Court can compel the appearance at trial

of directors, officers, and managing agents of the corporate entities. *Hamilton Partners, L.P.*, 11 A.3d at 1214-15.

b. Argonaut EMS is the predecessor to Argonaut Manufacturing Services, Inc., a sole proprietorship owned by Woodard. (A-14). To the extent that it is possible to take the deposition of a predecessor entity, it would be through Mr. Woodard. As he is aligned with the successor entity, Argonaut Manufacturing Services, Inc., compulsory process is not an issue. *National Union Fire Insurance Co. of Pittsburgh, PA v. Crosstex Energy Services, L.P.*, 2013 WL 6598736 at *9 (Del. Super. Dec. 13, 2013) ("Compulsory process is generally not required to obtain the appearance of witnesses aligned with one of the parties").

c. The witness for Tenex Therapeutics, Inc. is located in North Carolina. (A-135-36). As such, she is not subject to compulsory process in either Delaware or California.

d. The OCC is a collection of unsecured creditors representing all of the creditors in a bankruptcy proceeding. While its counsel is located in California (A-135), members identified as potential witnesses are located in Texas, Nevada, and California. (A-145-46). As such, California provides no meaningful benefit.

Apart from the co-conspirator witnesses, other third-party witnesses are located in Texas and Nevada as well as California. Litigating in California offers no easier access to these witnesses.

Additionally, how does being named a co-conspirator of itself make one's credibility so important that depositions, by written transcript or video, are not sufficient? The Superior Court did not explain. This was a conclusory statement with no supporting rationale or connection to the facts alleged in the Complaint, rendering it arbitrary.

3. Choice of law. Delaware law does not apply. However, this Court has recognized that Delaware courts are competent to address questions relating to the law of other States or foreign countries. *Berger,* 906 A.2d at 137; *Kolber*, 213 A.2d at 445. "Delaware courts often decide legal issues - even unsettled ones - under the law of other jurisdictions." *Berger*, 906 A.2d at 137 (Del. 2006).[9]

The Superior Court recognized these principles. Additionally, there was no showing that California law differed in any material aspect from Delaware law on the issues raised in the Complaint, that the law to be applied was uncertain or novel, or that California had any special interest in deciding these issues. Appellees made

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[9] Cases involving the law of foreign countries may, in some circumstances, prove more complex and difficult, and so may support dismissal. *Emerging Markets Fund v. Allied Irish Banks, P.L.C.*, 173 A.3d 1033 (Del. 2017) (Bulgarian law); *Martinez v. E.I. DuPont de Nemours and Co., Inc*., 86 A.3d 1102 (Del. 2014) (Argentinian law); *Hall*, 170 A.3d at 163 (Bahamian law). *But see Candlewood Timber Grp., LLC,* 859 A.2d at 1002–03; *Taylor v. LSI Logic Corp.,* 689 A.2d 1196, 1200 (Del. 1997) ("It is not unusual for courts to wrestle with open questions of the law of sister states or foreign countries. The application of foreign law is not sufficient reason to warrant dismissal under the doctrine of forum non conveniens").

no showing that they would be burdened by a Delaware court applying California law.

Notwithstanding all this, the Superior Court that stated that "[t]his factor adds little -- but some – weight toward *forum non conveniens* relief." *GXP Capital, LLC*, 234 A.3d at 1197. The question is why is it entitled to any weight, given the repeated pronouncements of this Court that application of another state's laws carries no weight? California law, however, has been applied without difficulty in Delaware courts, and its application has been deemed an inadequate basis to dismiss an action under forum non conveniens. *E.g., Petroplast Petrofisa Plasticos S.A. v. Ameron Intern. Corp*., 2009 WL 3465984 at *6 (Del. Ch. Oct. 28, 2009); *Mt. Hawley Ins. Co. v. Jenny Craig, Inc.,* 668 A.2d 763, 768-69 (Del. Super. 1995).

4. All other practical problems that would make the trial easy, expeditious and inexpensive.[10]

a. Connection to Delaware. The Superior Court placed weight on the fact that the only connection Delaware has to this case is that the defendants were formed here. However, this fact has been held to not justify dismissal on the ground of *forum non conveniens*. *See Mar-Land Indus. Contractors, Inc.,* 777 A.2d at 779-80 ("the traditional showing a defendant must make in order to prevail on a motion to dismiss on the ground of forum non conveniens" does not

[10] The view of the premises factor has no bearing here.

change even if "a dispute's only connection to Delaware is the fact that the defendant is a Delaware entity"); *Taylor,* 689 A.2d at 1200 ("Delaware courts 'are accustomed to deciding controversies in which the parties are non-residents of Delaware and where none of the events occurred in Delaware' such that 'these factors alone are not sufficient to warrant interference with the plaintiff's choice of forum'"); *Kolber*, 213 A.2d at 446. Indeed, this Court and lower courts have found this factor to be less significant in commercial cases than in tort cases. *See, e.g., Hall,* 170 A.3d at 165.

These cases, both decided under the "overwhelming hardship" instruct that (assuming there are no issues of personal jurisdiction) the limited connection with Delaware is not to be given weight in a *forum non conveniens* analysis. *Mar-Land* suggests it carries no weight and *Taylor* suggests it may carry some weight in an overall analysis. Is that no longer the case under *Gramercy* and, if so, how is that difference justified?

Appellees, by incorporating in Delaware, accepted the risk that they would be sued in Delaware, and so should be deemed to have waived any argument that litigating in Delaware is inconvenient to them. *See HFTP Investments, L.L.C. v. ARIAD Pharmaceuticals, Inc.*, 752 A.2d 115, 124 (Del. Ch. 1999) ("it is ironic that ARIAD, despite having voluntarily chosen to incorporate in Delaware, proclaims

that it is inconvenient for a Delaware court to determine ARIAD's obligations to its preferred stockholders").

b. Delaware's interest in regulating the conduct of its citizens. Delaware has an interest in "mak[ing] available to litigants a neutral forum to adjudicate commercial disputes against Delaware entities, even where the dispute involves foreign law and the parties and conduct are centered in a foreign jurisdiction." *Candlewood Timber Group, LLC*, 859 A.2d at 1000. As *Candlewood* demonstrates, that interest exists and is significant even when a lawsuit is not dealing with issues of the internal governance of Delaware entities. What justifies treating this interest as any less significant under a *Gramercy* analysis?

The Superior Court minimized that interest by saying that this interest "can be outweighed by the hardship occasioned from other factors visited on those who appear to have been brought here for vexatious, harassing, or oppressive reasons." *GXP Capital, LLC*, 234 A.2d at 1198. It is not clear whether the Superior Court was accusing GXP of acting "for vexatious, harassing, or oppressive reasons." It certainly did not make any such finding. If it did not intend such an accusation, then the Superior Court improperly minimized the importance of this policy. If it did intend such an accusation, it was made without reference to any evidence or rationale, and therefore is arbitrary and capricious (and wrong) and improperly interjected into the Opinion.

c. ***Absence of Other Lawsuits***. The Superior Court recognized that there are no other lawsuits by the parties against each other elsewhere, and deemed that fact "neutral within a *Gramercy* analysis." *Id.* at 1197.

5. ***Summary.*** As the Superior Court recognized, the test is hardship, not mere inconvenience. *Id.* 1193. If the factors are equal or only slightly favor Appellees, GXP's choice of forum should prevail. *Connell v. Ammons*, 2011 WL 4827581 at *1 (Del. Super. Sept. 6, 2011). In this action:

* There is no showing of difficulty in obtaining evidence due to litigating in Delaware.

* Witnesses the Superior Court deemed necessary to hear in person are employed and aligned with a defendant or are not subject to compulsory process in either California or Delaware.

* There is no showing that there are any novel or unresolved issues of California law best left to the California courts to address.

* Delaware has a strong policy in favor of making available to litigants a neutral forum to adjudicate commercial disputes against Delaware entities, even where the dispute involves foreign law and the parties and conduct are centered in a foreign jurisdiction, and California has no countervailing policy.

* There is no other case between the parties pending elsewhere.

This very meager showing does not come near even a minimal level of hardship required to deny GXP its choice of forum. As such, the Superior Court abused its discretion in staying (effectively dismissing) this action.

IV. COURTS SHOULD NOT WEIGH COMPARATIVE BURDENS BEFORE DETERMINING WHETHER A DEFENDANT HAS SATISFIED THE REQUIREMENTES FOR RELIEF UNDER FORUM NON CONVENIENS.

A. QUESTION PRESENTED.

Is the comparative burden analysis referenced in *National Union Fire Insurance Company of Pittsburgh, PA v. Axiall Corp.,* 2019 WL 4303388 (Del. Super. Sept. 11, 2019), the correct framework to analyze *forum non conveniens* motions in the intermediate *Gramercy* posture where the courts of another state indisputably possess personal and subject matter jurisdiction over the case?

This issue was not raised or briefed by the parties below. Instead, it was raised *sua sponte* by the Superior Court in its Opinion granting certification of an interlocutory appeal. (Ex. B hereto).

B. SCOPE OF REVIEW.

The issue of the correctness of a legal standard is an issue of law subject to *de novo* review. *Dover Historical Soc., Inc. v. City of Dover Planning Com'n*, 902 A.2d 1084, 1089 (Del. 2006).

C. MERITS OF THE ARGUMENT.

In *forum non conveniens* cases, the defendant has the burden, in the first instance, of showing hardship. *Martinez*, 86 A.3d at 1104; *Candlewood Timber Group, LLC*, 859 A.2d at 999. The Superior Court found that this rule applies even in a *Gramercy* case. *GXP Capital, LLC*, 234 A.3d at 1192.

If the burden is on a defendant in the first instance, then until such time as a court determines that the defendant meets the appropriate legal test, the comparative hardship that will be suffered by a plaintiff from a dismissal or stay should be irrelevant. If a plaintiff is required at the outset to prove comparative hardship, then that plaintiff is denied the presumption that its choice of forum will be respected (albeit less so with non-resident plaintiffs, but more so when there are no prior actions pending). *Mar-Land Indus. Contractors, Inc*., 777 A.2d at 778; *Ison v. DuPont de Nemours,* 729 A.2d 832, 835 (Del. 1999) ("The fact that the plaintiffs are foreign nationals does not deprive them of the presumption that their choice of forum should be respected. Although that presumption is not as strong in the case of a foreign national plaintiff as in the case of a plaintiff who resides in the forum").

A plaintiff with arguments supporting a claim of comparable hardship would be wise to submit such arguments. However, a court need not address those arguments until it determines that the defendant has the better of the argument under the *Cryo-Maid* factors.

Thus, while a balancing if the *Cryo-Maid* factors may depend on the facts and circumstances of the individual case, a balancing of hardships should not be required unless and until a court has determined that the defendant may be entitled to a stay or dismissal.

VI. COURTS HAVE THE POWER TO ISSUE STAYS UNDER FORUM NON CONVENIENS, BUT THE ISSUE IS THE CONSEQUENCE OF A STAY, AND WHETHER OR NOT IT AMOUNTS TO A DISMISSAL.

A. QUESTION PRESENTED.

Is a trial court within its discretion to grant a stay in lieu of dismissal in a *Gramercy* case when that relief is, in the court's judgment, the least burdensome to the parties under the *forum non conveniens* factors?

This issue was raised by the Superior Court in a letter to counsel (A-287-89) and addressed by the Superior Court in its Opinion. *GXP Capital, LLC*, 234 A.3d at 1200.

B. SCOPE OF REVIEW.

While the exercise of a court's power is reviewed for abuse of discretion, the issue of the scope of that inherent power, being a legal conclusion, is reviewed *de novo*. *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1328 (11th Cir. 2002); *Hill v. City of Warren*, 740 N.W.2d 706, 713 (Mich. App. 2013).

C. MERITS OF THE ARGUMENT.

The Superior Court has the inherent power to grant a stay. *White v. Preferred Investment Services, Inc*., 2019 WL 1876693 at *6 (Del. Super. Apr. 26, 2019). In *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964), this Court approved a stay in favor of an Illinois court which similarly allowed the plaintiff to

re-apply to the Delaware court for an injunction to protect trade secrets if it was unable to obtain relief in Illinois. *Id.* at 480.

GXP did not and does not question the Superior Court's ability to issue a stay. GXP's point is that the stay here, designed to terminate litigation in Delaware, is effectively a dismissal and, as a consequence, the decision is effectively a final order.

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff-below/Appellant GXP Capital, LLC respectfully requests that the Court reverse the decision of the Superior Court, and permit this action to proceed on the merits in Delaware.

Respectfully submitted,

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