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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GXP CAPITAL, LLC, a Nevada limited liability company,

Plaintiff-Below/ Appellant,

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-Below/ Appellees.

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

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NATURE OF PROCEEDINGS

This is an interlocutory appeal filed by Appellant/Plaintiff-Below GXP Capital, LLC ("GXP" or "Plaintiff"). The core and only credible issue presented—which was raised *sua sponte* by the trial court in certifying this interlocutory appeal—is whether the *Axiall* comparative burden analysis is the correct framework to analyze *forum non conveniens* motions in the intermediate *Gramercy* posture, where courts of another state indisputably possess personal and subject matter jurisdiction over the case. The answer to that question is "yes."

The intermediate *Gramercy* standard requires the trial court to balance the *Cryo-Maid* factors, *without* a presumption in favor of the movant or a finding of "overwhelming hardship" where (as here) there is not a first-filed action. There is no thumb on the scales when *Gramercy* is applied; rather, as the trial court held, the *Axiall* comparative burden analysis logically applies. This is so whether the application of *Gramercy* is triggered by simultaneously filed actions, or where (as here) the case is a third-filed action, with an available alternative jurisdiction. In short, the comparative burden analysis of *Axiall* facilitates the trial court's *Gramercy* analysis through application of an unweighted balancing of competing burdens. The trial court's well-reasoned holding should be affirmed.

The remaining issues Plaintiff haphazardly presents lack credibility. Plaintiff fusses over the trial court's application of the *Cryo-Maid* factors as to California, but never bothers to explain or even suggest why the factors should have weighed in favor of Delaware, or why the trial court's failure to hold as much was an abuse of discretion. Plaintiff presents the red herring that technological advancement should affect consideration of the ease of introduction of evidence, but the trial court never held otherwise. Instead, the trial court carefully weighed the facts, assessed the *Cryo-Maid* factors, and properly concluded that California is the more appropriate forum. These facts include the location of key third-party witnesses in California (while none are in Delaware), the situs of all parties' headquarters and operations in California and Nevada, and the parties' choice of California law and consent to California jurisdiction. Finally, on the other side of the equation, the trial court considered that the *only* connection of this case to Delaware—into the courts of which Appellees/Defendants-Below ("Defendants")[1] were haled only after Plaintiff's federal litigation in California was dismissed—is that GXP was formed here. Plaintiff attempts to contort, but never directly challenges these factual

[1] The Defendants are Argonaut Manufacturing Services, Inc. ("Argonaut"), Telegraph Hill Partners III, L.P. ("THP"), and Telegraph Hill Partners III Investment Management, LLC ("THP III").

findings. The weight the trial court allocated to these factors in applying *Cryo-Maid* does not approach the high bar of abuse of discretion required for Plaintiff to prevail.

Separately, Plaintiff presents an untimely and frivolous reading of a consent-to-*California*-jurisdiction provision that bears no connection to the plain language of the clause, or the purpose or meaning of an exceptionally common commercial contract provision. Plaintiff asks this Court to hold that where commercial parties agree jurisdiction is appropriate in a particular forum (*e.g.* California) without specifying that it is exclusive, they waive all objections and consent to jurisdiction in every other alternative venue, which in this case includes Delaware. Plaintiff's "theory" would be amusing except that it imposes unjustifiable costs on the parties and parades a disregard for limited judicial resources.

Finally, while Defendants address the interlocutory nature of the trial court's order staying proceedings, as conceded by Plaintiff, this Court need not reach the issue given the overlapping breadth of the briefing and consolidated appeals before the Court. Defendants have no interest in wasting this Court's time demanding a ruling that might forestall consideration of frivolous arguments not expressly certified, or possibly beyond the scope of interlocutory review, and have no objection to the Court's consideration of the issues raised.

SUMMARY OF ARGUMENT

1. DENIED. The trial court's determination to stay (the "Stay Order") pursuant to the doctrine of *forum non conveniens* is an interlocutory order. The "Collateral Order" and "Out of Court" doctrines do not apply. However, because the Court granted certification of Plaintiff's overlapping interlocutory appeal without express limitation, and all issues briefed by Plaintiff will be reviewed, the Court need not reach this question.

2. DENIED. Consent by certain Defendants to non-exclusive California jurisdiction is not a waiver of objections and consent to venue in any other potential jurisdiction, inclusive of Delaware. Delaware courts do not rewrite agreements to say something else because it would be convenient for a party.

3. DENIED. The trial court did not abuse its discretion by staying proceedings on the grounds of *forum non conveniens*. Plaintiff quibbles with the application of the *Cryo-Maid* factors, but fails to point to any reason that they weigh in favor of Delaware, its third choice of forum, and ignores the weighty considerations in favor of litigating in California, offering instead a straw man argument that documents can be transmitted electronically in modern litigation.

4. DENIED. Plaintiff ignores and attempts to obscure that a plurality of critical non-party witnesses are in California and none are in Delaware, all parties are headquartered and operating in California and Nevada, and none of the witnesses

or Delaware entities party to this case are in fact located in Delaware. Plaintiff fails to mount a credible argument that the trial court abused its discretion in allocating weight to the availability of witnesses in California, as opposed to Delaware.

5. DENIED. The *Axiall* comparative burden framework is the correct intermediate framework through which to analyze the doctrine of *forum non conveniens*, where courts of another state indisputably possess personal and subject matter jurisdiction over the case, and it permits the trial court to make the appropriate determination whether there is justification to dismiss or stay the proceeding.

6. DENIED IN PART. Plaintiff concedes that the trial court has the inherent power to issue stays and Defendants agree. Plaintiff otherwise simply restates the argument articulated in its first summarized argument. Defendants respectfully refer to and incorporate their response to Plaintiff's first summarized argument.

STATEMENT OF FACTS

In July 2015, the CEO of Argonaut, Wayne Woodard ("Mr. Woodard"), was looking to form or acquire a biotech and life sciences-related manufacturing business, with financial support from venture capital firm THP. (A-14, A-17.) Argonaut and THP investigated a potential transaction with Bioserv Corporation ("Bioserv"), a San Diego company that was a debtor-in-possession in a voluntary bankruptcy proceeding filed in 2014 in the Southern District of California. *See In re Bioserv Corp.*, Case No. 14-08651-MM11 (Bankr. S.D. Cal. 2014) (the "Bioserv Bankruptcy"). (*See also* A-174 at ¶5; A-168 at ¶6; A-17 at ¶6.)

Messrs. Woodard and Paul Grossman ("Mr. Grossman"), a partner at THP and Director of Argonaut, held meetings and exchanged written communications with Bioserv's owners and its employees. (*See generally* A-17-23 at ¶¶7-20.) *All* of those meetings and communications took place in San Diego, California. (A-174 at ¶6; A-168 at ¶7.) Over the course of their dealings with Bioserv, Messrs. Woodard and Grossman, and others at Argonaut and THP, received information from Bioserv that became subject to two non-disclosure agreements. (A-174 at ¶7; A-168 at ¶8.)

As alleged by GXP, Defendants entered into two non-disclosure agreements, the "First NDA" and the "Second NDA." (A-17-20 at ¶¶8, 12.) The Second NDA contains a clear choice of law clause: "This Agreement shall be governed by the laws of the jurisdiction in which the Disclosing Party is located." (*Id.*; A-60.) The

Second NDA was signed by all parties in San Diego, California. (A-174 at ¶7.) Messrs. Woodard and Grossman received in San Diego all the information that Bioserv provided. (A-174 at ¶7; A-169 at ¶8.)

In November 2015, THP prepared a non-binding proposal to acquire the assets of Bioserv out of bankruptcy—what Plaintiff melodramatically refers to in its complaint as the "Hostile Bid." (A-30 at ¶45; A-169 at ¶9; A-175 at ¶8.) With the assistance of California counsel, they prepared and submitted that proposal to counsel for the Official Committee of Creditors (the "OCC") for the Bioserv Bankruptcy. Counsel for the OCC, of course, was located in San Diego, California. (A-175 at ¶8; A-169 at ¶8.)

GXP first filed its complaint in the United States District Court for the District of Nevada, initiating the matter captioned *GXP Capital, LLC v. Wayne Woodard, Argonaut EMS, Daniel Littlefiled, et al.*, 2:17-cv-02635-RFB-PAL (2017). GXP's counsel dismissed that case, acknowledging the Nevada Court could not exercise jurisdiction over any defendants. (A-133 at ¶4.)

GXP next filed its complaint in the Southern District of California, entitled *GXP Capital, LLC v. Argonaut EMS, et al.*, 17-cv-2283-GPC-BLM (2017) (the Southern District of California Action). The Court dismissed that case after approximately nine months, because GXP was unable to demonstrate the existence

of complete diversity in response to the Court's order to show cause. (A-133 at ¶5, Ex. A.)

This lawsuit is GXP's third effort to sue Argonaut in a court other than the Superior Court for the State of California, the most logical and appropriate forum for this dispute, as the trial court held below. (A-133 at ¶6.) California is the state where the events that are the subject of GXP's claims took place, and where the parties and non-party witnesses are predominately located. (*Id.*)

As GXP pleads in its complaint, its parent Bioserv Corporation filed its bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of California, which is located in San Diego, California ("the Bioserv Bankruptcy"). All of the events that are the subject of GXP's complaint occurred in California in connection with the Bioserv Bankruptcy. (A-134 at ¶7.) As a result, the parties and witnesses are predominately located in California, a fact borne out by the initial disclosures served by the parties in the Southern District of California Action. (A-134 at ¶8.) Defendants' disclosures initially identified ten persons with relevant information about GXP's claims; all ten are resident in California. (A-134 at ¶8; A-153-155.) GXP's disclosures initially identified sixteen persons with relevant information about GXP's claims; eleven of those reside in California, and none reside in Delaware. (A-134 at ¶8; A-144-147.)

The parties also conducted written discovery and document discovery in connection with the Southern District of California Action. None of that discovery revealed the existence of any relevant witnesses or documents located in Delaware. (A-134 at ¶9.)

As GXP alleged in its complaint, each of the Defendant companies is headquartered in California. (A-14 at ¶¶2-3.) GXP itself purports to be headquartered in Nevada. (A-14 at ¶ 1.) As GXP alleges, Bioserv Corporation is the former name of its parent company, and it was formed and headquartered in San Diego, California. (A-14 at n.1.) As the declarations of Messrs. Paul Grossman and Wayne Woodard discuss, the principals and employees of the Defendant companies predominately reside in California, and none reside in Delaware. (A-168 at ¶4; A-174 at ¶3.) Similarly, the discovery taken in the Southern District of California Action has not shown that any GXP or Bioserv-affiliated principals and/or employees reside in Delaware. (A-134 at ¶9.)

All of the likely non-party-affiliated witnesses also reside outside of Delaware:

- The bankruptcy examiner appointed in the Bioserv Bankruptcy was Richard Kipperman, who resides in San Diego. (A-135 at ¶11.) The examiner's counsel was Victor Vilaplana of the Foley & Lardner law firm, who also works and resides in San Diego. (A-135.)

- The counsel for the Official Creditor Committee for the Bioserv Bankruptcy was the law firm of Slater and Truxaw. (*Id.*) Its principals Gary Slater and Timothy Truxaw live and work in San Diego. (A-135.)

- The members of the Official Creditor Committee were Daniel Littlefield, Beth Bertelson-Putirka, and David Davis, who work and reside respectively in Texas, California, and Nevada. (A-135.)

- The participant for purported conspirator Tenax Therapeutics is alleged to be its vice-president and general counsel Nancy Hecox, who resides in North Carolina. (A-135-36.) Counsel for Tenax Therapeutics, also alleged to have a significant role in the alleged conspiracy, was the firm Allen Matkins Leck Gamble Mallory & Letsis. (A-136.) The alleged participants, who work in Allen Matkins' San Diego, California office, were Debra Riley and Charles Pernicka, each of whom reside in San Diego as well. (A-136, A-141-47.)

- The Bioserv Corporation assets were purchased out of the Bioserv Bankruptcy by a company called Sorrento Therapeutics, which is headquartered in San Diego, California. (A-136.) Sorrento Therapeutics principals, and its general counsel George Ng, work and reside in San Diego. (*Id.*)

- The investment bank used by the bankruptcy examiner to organize and market the sale of Bioserv Corporation assets was a firm called Wombat Capital, LLC. (*Id.*) Wombat Capital is headquartered in New York. (*Id.*)

Wombat's managing partner who managed the marketing, negotiation and sale of Bioserv Corporation's assets was Mr. Jean-Jacques Mondolini, who works out of Wombat's New York office. (*Id*.)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS APPLICATION OF THE *FORUM NON CONVENIENS* FACTORS UNDER *GRAMERCY*

A. Questions Presented

Did the trial court abuse its discretion by concluding that the *Cryo-Maid* factors weighed in favor of a finding of *forum non conveniens* under *Gramercy*? Plaintiff states a subsidiary question asking whether the trial court abused its discretion by not requiring Defendants to identify the subject matter of witness testimony and why deposition or videotaped testimony is insufficient when analyzing the compulsory process factor.

B. Standard and Scope of Review

The parties agree that the 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. *Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245, 1249 (Del. 2018); OB at 32.

On review, this Court determines "whether the findings and conclusions of the Superior Court are supported by the record and are the product of an orderly and logical reasoning process." *Martinez v. E.I. DuPont de Nemours & Co.*, 86 A.3d 1102, 1104 (Del. 2014) (internal citations omitted). "If they are, whether or not reasonable people could differ on the conclusions to be drawn from the record, this Court must affirm." *Id.*

C. **Merits of Argument**

Plaintiff does not dispute that the Superior Court appropriately decided Defendants' Motion to Dismiss on the grounds of *forum non conveniens* under the "intermediate" standard articulated in *Gramercy Merging Markets Fund v. Allied Irish Banks, P.L.C.*, 173 A.3d 1033 (Del. 2017) ("*Gramercy*"). (OB 33.) Instead, Plaintiff argues that the trial court abused 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." (OB at 32.) Plaintiff sets forth no basis for concluding that the trial court's findings constituted an abuse of discretion.

Instead, in the body of its argument, Plaintiff attempts to frame the question on appeal as "how one allocates weight to factors under the *Gramercy* standard compared to the 'overwhelming burden' standard." (OB at 33.) In so doing, Plaintiff improperly attempts to shift the standard of review from abuse of discretion to *de novo* review, or in some cases an "arbitrary and capricious" standard. (*e.g.*, OB at 41.) However, the trial court's decision to stay the action on the grounds of *forum non conveniens* is reviewed for abuse of discretion. This Court need only determine whether the findings and conclusions of the trial court are supported by the record and are the product of an orderly and logical reasoning process. *Martinez*, 86 A.3d at 1104 (internal citations omitted).

The facts and circumstances of this case led the trial court to find that, taken together, the *Cryo-Maid* factors weighed in favor of *forum non conveniens* relief. The trial court's ruling was amply supported by the record and the product of logical reasoning.[2] Plaintiff simply disagrees with the trial court's findings without offering a credible alternative and claims that "[t]here need to be guiding principles to ensure that when Judges engage in a *Gramercy* analysis, they are not acting arbitrarily." (OB at 34.) That is not the standard and Plaintiff has failed to show abuse of discretion as to the application of the *Cryo-Maid* factors.

1. *__Relative Ease of Access to Proof Weighs in Favor of Relief__*

As to the "relative ease of access to proof" factor, Plaintiff first argues that "transmittal of evidence electronically is not a burden, particularly in commercial disputes." (OB at 34 (citing *In re Asbestos Litig.*, 929 A.2d 373, 384-385 (Del. Super. 2006); *Hall v. Maritek Corp.*, 170 A.3d 149, 161 (Del. Super. 2017), *aff'd*, 182 A.3d 113 (Del. 2018); *Asten v. Wangner*, 1997 WL 634330, at *3 (Del. Ch. Oct. 3, 1997).) However, none of the cases to which Plaintiff cites were decided under the *Gramercy* intermediate standard, and Plaintiff does not explain how the holdings in any of these cases would support finding an abuse of discretion here.

[2] Plaintiff even tacitly acknowledges the inherent and appropriate exercise of discretion by the trial court, conceding that "[o]f course, different individual factors can have different priority depending on the facts and circumstances of a given case." (OB at 33.)

For instance, in *In re Asbestos Litigation*, the court acknowledged "the proximity of the evidence to the proposed forum is an important consideration under the access to proof factor, and may support a finding of hardship." 929 A.2d at 384-385. The court also noted that significant expenses would no doubt be incurred as a result of litigating in Delaware in that case, but that the attendant burden would be substantially attenuated because those defendants were large national and international corporations. *Id.* The court in *In re Asbestos* found the defendants in that case did not meet their burden of establishing "overwhelming hardship;" but that is not the standard under *Gramercy*, and the inescapable reality remains that, here, easier access to proof can be had in California. (A-134-135.)

Plaintiff's reliance on *Hall* is perplexing. In that case, concluding that allowing the case to remain in Delaware would be inconsistent with the administration of justice, the court noted:

> "[a]lthough unspecified by either side, original documents, witnesses, and information about communications and negotiations are necessary to prove or defend this case. They are not located in Delaware. With the possible exception of the documents, verbal proof would not be easily accessible….[I]t would be easier to develop the facts in another jurisdiction because all of the events took place elsewhere and witnesses who could shed light on those events are outside of Delaware. Moreover, while technology may be helpful and could ease some of the difficulty of proof, 'to the extent documentary and deposition evidence must be gathered, that process will largely take place [in another country] and certainly not in Delaware.'"

Hall, 170 A.3d at 161.

Similarly, here it would be easier to develop facts in California, as all of the events took place in California, and a plurality of witnesses who could shed light on those events are in California. None are in Delaware. (A-134-136.) While technology might ease some of the difficulty of access to proof, the fact remains—and Plaintiff does not dispute—that gathering of evidence will largely take place outside of Delaware.

In *Asten v. Wagner*, 1997 WL 634330 (Del. Ch. Oct. 3, 1997), the facts and circumstances were entirely different than they are here. In that case, there were no material witnesses or inaccessible documents or other items of relevant proof located any closer to South Carolina than Delaware, and the parties had already made all the necessary paperwork and witnesses available for mediation in Florida. *Id.* at *3.

In contrast, as the trial court noted, "GXP concedes that the parties all have their headquarters and operations in California and Nevada, and does not dispute that the sole connection Argonaut, THP, and THP III have to Delaware is that this is their place of formation." (OB, Ex. A at 1196.) With respect to the relative ease of access to proof, the court acknowledged that "Argonaut, THP and THP III identify a number of third-party witnesses, *a plurality of whom are from California, none of whom are in Delaware, and only one of whom is even close-by*." *Id.* at 1196-97 (emphasis added). The mere fact that electronic transmission of evidence is possible

says nothing of the fact that litigating in Delaware still poses challenges to the parties' ease of access to proof.

Plaintiff next argues that this factor does not support relief here because there was no showing that litigating in Delaware would prevent a party from being able to introduce any evidence. (OB at 34 (citing *Berger v Intelident Solutions, Inc.*, 906 A.2d 134, 136 (Del. 2006) and *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 1001-02 (Del. 2004).) But *Berger* does not stand for this proposition. Rather, this Court in *Berger* held that (i) the defendants had not identified any specific evidence necessary to their defense that they would be unable to produce in Delaware, and (ii) had not established that requiring them to move forward in Delaware would impede their access to the testimony of witnesses. Thus, on those facts the Court concluded, "while they may find Delaware inconvenient, [the defendants] will not be subjected to overwhelming hardship based on the location of documents and witnesses." 906 A.2d at 136.

Here, unlike in *Berger*, the trial court specifically held the parties *would be unable* to compel the attendance of *any* of the relevant third-party witnesses, and the overwhelming hardship standard that governed the outcome in *Berger* does not apply here. Further, unlike in *Candlewood*, the findings of the trial court are amply supported by the record and, in any event, are undisputed. (OB, Ex. A at 1196-97.)

More importantly, there is nothing in *Berger* or *Candlewood* that remotely supports Plaintiff's strained argument that the moving party must show it will not be able to introduce evidence before a trial court can determine that this factor weighs in favor of a *forum non conveniens* ruling under *Gramercy's* intermediate test. Plaintiff has failed to show how the trial court's findings as to this factor constitute an abuse of discretion. Rather, a close review of the record and relevant case law demonstrates that the trial court's findings and conclusions are firmly grounded in the record and the product of an orderly and logical reasoning process.

2. *The Trial Court Could Not Compel Testimony From Key Third-Party Witnesses*

With respect to the availability of compulsory process for witnesses, Plaintiff restates nearly verbatim the arguments it presented in its Brief in Opposition to the Motion to Dismiss (A-204-205)—arguments the trial court explained were unpersuasive. (OB, Ex. A, at 1197.) Specifically, the trial court reasoned:

> GXP does not deny that … the parties will be unable to compel the attendance of apparently *any* of the third-party witnesses, but instead—relying on *Kolber v. Holyoke Shares, Inc.*—argues that depositions are an adequate substitute. But a close reading of *Kolber* is not quite as helpful under *Gramercy* as GXP would hope. In *Kolber*, the Court found that, while not 'overwhelmingly' heavy, forcing a defendant to rely on depositions in lieu of live testimony and to travel from New York to Wilmington to face litigation were at least factors weighing in favor or relief.

Id. Plaintiff contends that the trial court's reading of *Kolber* was incorrect, but conveniently ignores this aspect of the holding in *Kolber* in its Opening Brief. (OB at 35.) The trial court was well within its discretion to find that, as in *Kolber*, this factor weighs favor of relief.

Plaintiff also cites a Superior Court opinion for the proposition that "[e]ven 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." (OB at 35 (citing *Kane v. Peugeot Motors of America, Inc.*, 1995 WL 945817, at *4 (Del. Super. Dec. 19, 1995).) In *Kane*, the defendant argued that certain individuals in Massachusetts could be possible witnesses, and that the cost and time of travel would be inconvenient to them. *Id.* Plaintiff ignores that the court in *Kane* held that the defendant's assertion there—like Defendants' assertion here—"*does seem to support the motion*," even if "only modestly." *Kane*, 1995 WL 945817, at *4.

As previously stated, the trial court found below that a plurality of third-party witnesses were from California, none were from Delaware, and only one was even remotely close. There can be no serious contention that the trial court's finding that this factor weighs in favor of a finding of *forum non conveniens* was an abuse of discretion, particularly given the lack of availability of compulsory process for *any* third-party witnesses that Defendants identified.

Plaintiff nevertheless cites *Hamilton Partners L.P. v. Englard*, 11 A.3d 1180, 1215 (Del. Ch. 2010), arguing that "the ability to exercise jurisdiction over corporate parties together with the availability of the commission process renders the *Cryo-Maid* factor largely insignificant for corporate and commercial cases." (OB at 35.) Plaintiff creates another straw man, asking "why is this any less true under the *Gramercy* standard?" (OB at 35.) But the trial court did not purport to find that this was any less true under the *Gramercy* standard. Instead, the court simply held that this factor weighed in favor of relief. It did not abuse its discretion in doing so.

Finally, Plaintiff argues that it was an abuse of discretion for the trial court to rely on the 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." (OB at 32.) Plaintiff relies on *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Refining, L.P.*, 777 A.2d 774, 781 (Del. 2001) and *States Marine Lines v. Domingo*, 269 A.2d 223, 226 (Del. 1970) for this proposition. (OB at 36.)

In addressing this argument below, the trial court reasoned that "[i]n both those cases the Court refused to find *overwhelming* hardship on that factor when the movants failed to identify the names and the witnesses beyond the reach of compulsory process, demonstrate their number, show their relationship to the case, or explain why their testimony could not be presented by deposition." (OB, Ex. A

at n. 49.) Plaintiff, however, omits the very next finding that a multiplicity of witnesses beyond compulsory process here were in fact identified by name, and that their relevance to the alleged conduct was clear and direct. *Id.* Because many of the witnesses are named by GXP as "co-conspirators" in the alleged wrongs, the trial court concluded that their credibility will be a key issue, and "reliance on depositions alone presents obvious and consequential hardship under the specifics of this case." *Id.*; *see also* A-135-36.

Plaintiff argues that the trial court's findings in this regard constituted "a conclusory statement with no supporting rationale or connection to the facts alleged in the Complaint, rendering it arbitrary." (OB at 38.) Again, Plaintiff confuses the governing standard of review and, in any event, fails to identify how the Court's findings constitute an abuse of discretion. They do not.

3. *Choice of Law*

Plaintiff concedes that Delaware law does not apply, and that California law does. (OB at 38.) However, Plaintiff takes issue with the trial court's finding that "[t]his factor adds little – but some – weight toward *forum non conveniens* relief." *Id*. Plaintiff argues this factor should be given no weight because California law "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*." (*Id.* (citing *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)).)

The problem with Plaintiff's argument is that the court in *Petroplast* did not hold that this factor was entitled to *no* weight—simply that it "did little to advance [the defendant's] cause." *Petroplast*, 2009 WL 3465984 at *6. That is precisely what the court found here. It held that this fact adds little (but some) weight toward *forum non conveniens* relief. Such a finding is not an abuse of discretion.

The crux of Plaintiff's fallacious argument is that the cases which hold that the application of other states' laws may not by itself be "sufficient to warrant dismissal" under the doctrine of *forum non conveniens* necessarily means that this factor should carry no weight. But while Delaware courts are accustomed to applying the laws of sister states—and Defendants do not doubt the capability of the trial court in this respect— Plaintiff fails to demonstrate how a finding that this factor carries at least some, minimal weight under *Gramercy* was an abuse of discretion. *See, e.g.*, *Sequa Corp. v. Aetna Cas. And Sur. Co.*, 1990 WL 123006, at *4 (Del. Super. July 13, 1990) ("The need to apply another state's law will not be a substantial deterrent to conducting litigation in this state."); *Monsanto Co. v. Aetna Cas. And Sur. Co.*, 559 A.2d 1301, 1305-06 (Del. Super. 1988) (The fact that the Court would need to adjudicate some or all issues using another state's laws "alone would not weigh overwhelmingly in favor of" defendant's dismissal request).

4. ***All Other Practical Problems that Would Make The Trial Easy, Expeditious and Inexpensive***

Plaintiff argues that the trial court improperly weighed the fact that the only connection Delaware has to this case is that the Defendants were formed here. (OB at 39.) However, Plaintiff mischaracterizes the record below. The trial court found that "GXP…does not dispute that the sole connection Argonaut, THP, and THP III have to Delaware is that this is their place of formation" (OB, Ex. A at 1196), and noted that "Delaware's public interest in providing a forum on the basis of incorporation is strongest in cases where issues of substantive corporate governance and structure are implicated." *Id.* at 1198. The court went on to hold that "this general – but important – interest in providing a forum for resolving disputes involving corporate citizens *can be outweighed* by the hardship occasioned from the other factors visited on those who appear to have been brought here for vexatious, harassing, or oppressive purposes." *Id.* at 1199 (emphasis added). Plaintiff contends that the trial court either improperly minimized the importance of this policy, or that the statement was "arbitrary and capricious." (OB at 41.)

Here again, Plaintiff applies the wrong standard of review and fails to demonstrate how the trial court's findings and conclusions constituted an abuse of discretion. This is particularly true given the trial court's related findings that GXP previously sought to litigate this case in California when it filed the second case in a federal district court there, indicating the strong amenability of all parties to suit in

California, and that, but for lack of complete diversity of citizenship, this case would currently be well underway in federal court in California by GXP's own prior election. "When that court closed its doors, GXP could have filed down the street in a California state court" but "[i]nstead it dragged the Defendants across the country and into this Court." (OB, Ex. A at 1198.)

Moreover, as to this cleanup factor, Delaware courts have considered "judicial economy, the motives of the parties in filing suit in the respective jurisdictions, and public interest." *Azurix Corp. v. Synagro Technologies, Inc.*, 2000 WL 193117, at *6 (Del. Ch. Feb. 3, 2000) (citations omitted). As Defendants explained in their Motion to Dismiss brief:

> "[T]here is no question that Delaware's <u>*only*</u> connection to this dispute is Defendants' place of incorporation. Aside from regulating the conduct of this State's corporate citizens, the residents of Delaware have no other conceivable 'interest' in this State's courts deploying critical judicial resources to resolve this dispute. On the other hand, the consequences of this litigation will be first and foremost felt in California, where the Defendants do business and where their employees—and all, or nearly all, of the relevant third parties—reside."

(A-115.) The judicial economy factor clearly weighs in favor of *forum non conveniens* relief, and the trial court did not abuse its discretion in so finding.

Although Plaintiff does not address the availability of an alternative forum, this additional factor underscores that the trial court's grant of *forum non conveniens* relief was not an abuse of discretion. "When the Court considers the residual factor

here, the availability of an alternative forum in the California state courts highlights the needless practical difficulties that a Delaware forum presents." (OB, Ex. A at 1198 (citing *Hupan v. Alliance One Int'l. Inc.*, 2016 WL 4502304, at *8 (Del. Super. Aug. 25, 2016) (The availability of an alternative forum is a practical consideration under the residual factor)).) There is no doubt that Delaware cases have observed the availability of an alternate forum to be an apposite factor. *Id.* (collecting authority). Although Plaintiff does not address this factor, the availability of an alternative forum (California) was appropriately considered, further demonstrating that the trial court was well within its discretion in deciding that a stay was appropriate under *Gramercy*.

Taking the foregoing together, the trial court did not abuse its discretion in this case. Its findings and conclusions were both fully supported by the record and the product of logical reasoning. Indeed, other courts have made similar findings under nearly identical circumstances. *See, e.g.*, *Schmidt v. Washington Newspaper Publishing Co.*, 2019 WL 4785560 (Del. Super. Sept. 30, 2019). This Court should affirm the trial court's decision in favor of *forum non conveniens* relief.

II. THE *AXIALL* COMPARATIVE BURDEN ANALYSIS IS THE CORRECT FRAMEWORK TO ANALYZE *FORUM NON CONVENIENS* MOTIONS IN THE INTERMEDIATE *GRAMERCY* POSTURE WHERE COURTS OF ANOTHER STATE INDISPUTABLY POSSESS PERSONAL AND SUBJECT MATTER JURISDICTION OVER THE CASE

A. Question Presented

Is the *Axiall* comparative burden analysis 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 below, and instead was raised *sua sponte* in the trial court's Final Order Granting Certification of Interlocutory Review. (OB, Ex. B at *7.)

B. Standard and Scope of Review

Whether the trial court applied the appropriate legal standard in considering a motion to dismiss presents this Court with a question of law that is reviewed *de novo*. *Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245, 1249 (Del. 2018).

C. Merits of Argument

The *Axiall* comparative burden analysis is the correct framework to analyze *forum non conveniens* motions in the intermediate *Gramercy* posture where courts of another state indisputably possess personal and subject matter jurisdiction over the case. In *National Union Fire Insurance Co. of Pittsburgh v. Axiall Corp.*, 2019

WL 4303388 (Del. Super. Sept. 11, 2019), the Superior Court addressed a *forum non conveniens* motion seeking a stay in lieu of dismissal where a suit on the same subject matter was contemporaneously filed in another jurisdiction. *Id.* at *2. The *Axiall* court weighed the *forum non conveniens* hardship factors presented to each litigant in the two competing jurisdictions against each other, and issued a stay because Delaware presented the greater hardship. *Id.* at *4. This Court refused interlocutory review. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Axiall Corp.*, 2019 WL 4795508, at *2 (Del. Oct. 1, 2019).

As the trial court noted below, although no case has yet been commenced in California state court, the undisputed personal and subject matter of those courts over this dispute supported application of a similar framework in considering the relative hardships to the parties each would present. (OB, Ex. B at *6.)_ The trial court was correct in reaching that conclusion.

When a case is first-filed in Delaware, a Delaware court will grant dismissal only when the defendant has established overwhelming hardship, thus tilting the analysis in the plaintiff's favor. By contrast, where a Delaware case is later-filed and its sister-state predecessors remain pending, *McWane*'s "strong preference for the litigation of a dispute in the forum in which the first action relating to such dispute is filed" applies, and the analysis is tilted in favor of the defendant. *Gramercy Emerging Markets Fund v. Allied Irish Banks, P.L.C.*, 173 A.3d 1033,

1044 (Del. 2017). But (as here) where a case is initiated after the first-filed action and its predecessors are no longer pending, the analysis is not tilted to favor either the plaintiff or the defendant. In that situation, Delaware trial judges exercise their discretion and award dismissal when the *Cryo–Maid* factors weigh in favor of that outcome. *Id*.

Where *Gramercy* applies, there is no presumption tilting the analysis in favor of either party; instead, trial judges must exercise their discretion to determine whether the *Cryo-Maid* factors sufficiently support awarding *forum non conveniens* relief. *Id*. As the trial court held, because "overwhelming hardship" is not required under *Gramercy*, and because there is no presumption in favor of the movant as in *McWane*, the comparative burden analysis is the proper intermediate framework within which to analyze *forum non conveniens* motions where courts of another state indisputably possess personal and subject matter jurisdiction over the case.

Plaintiff suggests that "[i]f 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." (OB at 45.) Plaintiff cites to *Mar-Land Indus. Contractors, Inc.* 777 A.2d at 78 and *Ison v. DuPont de Nemours*, 729 A.2d 832, 835 (Del. 1999) in support of that proposition. (OB at 45.) But each of these

cases was decided under the overwhelming hardship standard, where the analysis is tilted in the plaintiff's favor.

Plaintiff offers no meaningful distinction between application of the comparative burden analysis where (i) two cases are filed simultaneously, as the court did in *National Union Fire Insurance Co.*, and (ii) in the intermediate *Gramercy* setting, courts of another state unquestionably possess personal and subject matter jurisdiction over the case. The burden remains on the defendant in the first instance, and the comparative burden analysis provides the appropriate framework for determining whether the hardship shown by defendants is sufficient to warrant dismissal—*i.e.,* by weighing the hardships if relief is either granted or not granted. Plaintiff argues that "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." (OB at 45.) But no case so holds; it is precisely the comparative burden analysis that allows a trial court to make that determination.

Accordingly, the *Axiall* comparative burden analysis is 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.

III. CONSENT TO NON-EXCLUSIVE JURISDICTION IN CALIFORNIA IS NOT CONSENT TO JURISDICTION EVERYWHERE

A. Question Presented

Does a permissive forum selection clause preclude the application of the doctrine of *forum non conveniens* in potential forums not addressed by the clause?

Although Plaintiff asserts that "[t]his issue was raised in a letter to the Court" (OB at 29), the referenced letter in fact simply enclosed the *Ingres* opinion without explication in advance of a second hearing on the narrow, unrelated question of appropriate implementation of the Court's ruling that *forum non conveniens* relief should be granted. (A-299-303.) The issue was addressed in the trial court's opinion. (OB Ex. A at 1199.)

B. Standard and Scope of Review

Plaintiff's argument was not timely or "fairly presented to the trial court," and the standard of review is therefore plain error. Del. Supr. Ct. R. 8; *Cassidy v. Cassidy*, 689 A.2d 1182, 1184 (Del. 1997). Should the Court determine that the issue was fairly presented to the trial court in satisfaction of Rule 8, the question of law would be reviewed *de novo*.

C. Merits of Argument

1. *Ingres*, Delaware Law and The Plain Language of the Parties' Forum Selection Clause Are Squarely Against Plaintiff's Position

Trumpeting Delaware's contractarian leaning (OB at 30-31), Plaintiff asks this Court to read contractual language to say something it does not say. The parties' consent to California jurisdiction provided:

> [T]he parties agree to submit disputes arising out of or in connection with this Agreement to the non-exclusive [jurisdiction] [sic] of the courts in [California].

(A-60 (modifications undisputed, *see* A-318, at 7:21; A-321, at 1:3, 15:23).) The parties thus agreed that disputes could be brought in the courts of California, but that such jurisdiction was not exclusive. This provision reflected the parties' intent to specify California as an appropriate forum, and to preclude a challenge to California jurisdiction on *forum non-conveniens* or personal jurisdiction grounds. Plaintiff, however, contends this clause constitutes an agreement that *no forum*, in California or otherwise, may be challenged: that is, that consent to jurisdiction somewhere is consent to jurisdiction everywhere. (OB at 29-31.)

Addressing Plaintiff's motion for Reargument—the first time in which its purportedly dispositive reading of *Ingres* was briefed (A-324-326)—the trial court succinctly and correctly held that:

> Because it specifies non-exclusive jurisdiction, the clause in this case does stipulate as to personal jurisdiction and substantive law, without commanding one forum or another. Nothing about that silence constitutes a waiver of *forum non conveniens* objections in the appropriate case …. Far from stipulating amenability to suit in Delaware, the instrument further emphasizes the appropriateness and availability (and likely expectation) of California state courts to do prompt, complete, and impartial justice on GXP's claims.

(OB Ex. A at 1199.) In other words, a plain reading of the permissive forum selection clause at issue only further supports the appropriateness of California jurisdiction, and does not speak to the convenience of Delaware (or mention Delaware at all for that matter).

Ignoring the sound reasoning of the trial court's opinion, Plaintiff makes the conclusory and untethered statement in its Opening Brief that "it should be … true that parties can agree to place no limit on venue, essentially waiving claims of inconvenience, and expect courts to respect that choice…." (OB at 30.) While that may be true insofar as it goes, the statement is a *non-sequitur*. Plainly, there is no such provision anywhere in the record of this case that effects an express waiver of

claims of inconvenience with respect to any and all venues.[3] The parties agreed only that such objections could not be raised as to the jurisdiction of California courts.[4]

Plaintiff further argues that permissive consents to specific jurisdictions would "serve[] no purpose" unless applied broadly to venues not addressed in the provision. (OB at 31.) Such a conclusion would likely surprise legions of transactional attorneys, and it makes no sense. The purpose of the consent to California jurisdiction is plain: it is to preclude any objection to the exercise of California courts' jurisdiction. And in fact, the purpose of specifying California, or any other jurisdiction for that matter, would be lost if such a clause were read to work an equal waiver of forum objections in *all* potential jurisdictions, as Plaintiff argues.

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[3] Nor has any court ever inferred consent to all venues from parties' failure to reach agreement on an *exclusive* venue, thereby eviscerating the doctrine of *forum non conveniens* and the requirements of personal jurisdiction as Plaintiff blithely requests.

[4] Under California law which governs interpretation of the clause, a waiver will only be found when there is an intentional relinquishment of a right, and then only if expressed in "clear and unmistakable" terms. *California State Emps. Assn. v. Pub. Emp't Relations Bd.*, 51 Cal. App. 4th 923, 937 (1996). There is nothing in the parties' agreement that is close to a clear and unmistakable waiver of the right to object to the assertion of personal jurisdiction or raise *forum non conveniens* objections anywhere other than California.

In denying certification of Plaintiff's *Ingres* argument, the trial court properly considered this purpose. Observing that *Ingres* addressed a "forum selection clause[] designating *Delaware* and determining the effect of [that] clause[] on claims of hardship from Delaware litigation," the court held that where a California forum selection clause is at issue, as here, *Ingres* "only emphasize[s] the appropriateness of California litigation and thus the lack of hardship that the Court's relief imposes on GXP." (OB, Ex. B ¶ 17.)

As Plaintiff concedes, it unsurprisingly has no support for what would be a seminal legal development regarding a customary contract provision.[5] The trial court reached the correct, and only conclusion appropriate.[6]

2. Plaintiff Did Not Timely Raise and Therefore Waived Its Reading of *Ingres*

Not only does Plaintiff's reading of the forum selection clause lack any merit, "[o]nly questions fairly presented to the trial court may be presented [to this Court] for review…." Del. Supr. Ct. R. 8. The Court places "great value on the assessment

[5] Further, as Plaintiff acknowledges, California and Florida courts of appeals have come down against GXP's argument, although this Court will not need help reading the plain language of the forum selection clause at issue here and dispensing of Plaintiff's argument. (OB n. 7.)

[6] Plaintiff also carelessly declines to address the trial court's holding that, even if Plaintiff's interpretation of *Ingres* were correct, it could not bind non-signatories, Defendants THP and THP III, offering an independent basis to reject its position. (OB, Ex. A at 1199.)

of issues by our trial courts, and it is not only unwise, but unfair and inefficient, to litigants and to the development of the law itself, to allow parties to pop up new arguments … they did not fully present below….” *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 363 (Del. 2017). Accordingly, “[t]his Court, in the exercise of its appellate authority, will generally decline to review contentions not raised below and not fairly presented to the trial court for decision.” *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

While Plaintiff's interpretation of *Ingres* is so borderline frivolous that Defendants are hesitant to even burden the Court with the issue of Plaintiff's waiver, the timeline here provides an independent basis to reject Plaintiff's argument, and further illuminates Plaintiff's strategic disregard of the interests of judicial economy, a consideration that happens to be relevant to the Court's *forum non conveniens* analysis. *See, e.g.*, OB Ex. A at 1199 (observing the relevance of “vexatious, harassing, or oppressive” tactics).

Even if Plaintiff's incorrect reading of *Ingres* raised “controlling precedent” misconstrued by the trial court, the argument was presented too late, at the oral argument on the parties' supplemental submissions on January 31, 2020 addressing whether a stay or dismissal—pursuant to the doctrine of *forum non conveniens* already determined to apply—was appropriate. (A-312-313, 318.) Notwithstanding the now-proffered dispositive application of this Court's precedent in *Ingres*,

Plaintiff (i) filed its Answering Brief in opposition to Defendants' Motion to Dismiss on December 21, 2018 (A-177); (ii) presented oral argument on January 28, 2019 (A-248); and (iii) filed a supplemental submission on October 17, 2019, on the question of whether a dismissal or stay was appropriate (A-290)—all without mentioning the 2010 *Ingres* decision or its waiver-by-consent-to-California-jurisdiction argument. Only on the eve of the hearing on the narrow question of whether dismissal or a stay was appropriate relief (A-298; *see also* A-304-308), <u>over one year</u> after the close of briefing on the motion to dismiss, did Plaintiff enclose the *Ingres* decision by cover letter. (A-299-303.) Then Plaintiff interposed at the hearing its strained reading of *Ingres* to urge the trial court to detect a purportedly "clear and unmistakable" waiver of any *forum non conveniens* argument with respect to any potential forum, including Delaware. (A-312-313, 318.)[7]

It is well settled that "issues not addressed in briefing, and raised for the first time during oral argument, are deemed waived." *Saunders v. Preholding Hampstead, LLC*, 2012 WL 1995838, at *3 (Del. Super. May 23, 2012). This principle, and the considerations motivating Rule 8, apply with particular force here,

[7] As the Court observed in its opinion granting certification of Plaintiff's interlocutory appeal, on grounds not raised by Plaintiff, "GXP raised [the *Ingres*] issue[] only belatedly…. [i]t submitted *Ingres* by letter to the Court just days before oral argument—after the parties had submitted … all briefing on the original motion…." (OB, Ex. B ¶13.)

where Plaintiff first raised the *Ingres* case at a <u>second</u> hearing, convened only to discuss how to implement the order the trial court was prepared to issue. While the trial court nevertheless decided to consider (as trial courts often do for completeness) and readily reject Plaintiff's reading of *Ingres*, this Court need not exercise the same caution in endeavoring to address all issues subject to review and should not sanction Plaintiff's dilatory conduct. The issue was untimely raised, and GXP's effort to inject after-the-fact a frivolous issue does not comply with Rule 8, or its underlying principles, and only continues the tact of Plaintiff seeking to increase the cost and burden of this litigation. *See, e.g.*, *DFC Glob. Corp.*, 172 A.3d at 363.[8]

[8] *See also* OB, Ex. A at 1198 (observing that when the federal court in California "closed its doors [due to lack of complete diversity], GXP could have filed down the street in a California state court" but "[i]nstead, it dragged the Defendants across the country and into this Court.")

IV. WHETHER THE TRIAL COURT'S STAY CONSTITUTES A FINAL ORDER HAS BECOME AN ACADEMIC QUESTION

A. Question Presented

Did this Court's acceptance of Plaintiff's interlocutory appeal and asserted appeal as of right moot the question of whether the trial court's stay order was a final, appealable order, and if not, does the trial court's stay of proceedings to permit Plaintiff to file a separate action constitute a final appealable order?

This issue was not raised below.

B. Standard and Scope of Review

The Court's review of the related legal questions presented is *de novo*.

C. Merits of Argument

1. The Court Does Not Issue Opinions of Academic Consequence

This Court "decline[s] to provide advisory rulings or decide academic questions." *State v. Deery*, 655 A.2d 1225 (Del. 1995) (Table) (citations omitted); *see also State ex rel. Buckson v. Mancari*, 223 A.2d 81, 82-83 (Del. 1966) (observing the Court is "not require[d]…to decide cases which have become moot, or to render advisory opinions"). Here, where the Court accepted Plaintiff's interlocutory appeal without expressly narrowing its scope to the questions sought to be reviewed or the independent questions raised *sua sponte* and certified by the trial court, the resolution of this question has become academic and not sensible to expend judicial

resources resolving. While the Court's interlocutory review could potentially have been limited and any broader consideration of issues on appeal denied as premature, there was no express limitation on the questions presented for interlocutory review and such a limitation would certainly have been cumbersome; rather, the Court determined that "[i]n addition to *any other arguments* the parties wish to make, the parties' briefs should address: (i) whether the Stay Order is appealable as a final judgment; and (ii) the questions certified for interlocutory review by the Superior Court." (D.I. 6, at 9 (emphasis added).) Nevertheless, in the event only a narrow interlocutory review of the certified questions was intended, and in accordance with the Court's request, Defendants briefly address below the appealability of the Stay Order as a final judgment.

2. Plaintiff Waived Its Argument That the Stay Order Was Final by Seeking Certification Of and Filing An Interlocutory Appeal

Plaintiff is judicially estopped from asserting that the trial court's Stay Order was not interlocutory. *See Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008) ("Judicial estoppel acts to preclude a party from asserting a position inconsistent with a position previously taken in the same or earlier legal proceeding."). Before the trial court below, in moving for reargument of the trial court's order staying the case on *forum non conveniens* grounds, Plaintiff protested that while "GXP can (and will if need be) file for interlocutory review …. even if

this Court were to agree to certify an appeal, there is no assurance that, *given its interlocutory nature*, the Supreme Court will accept an appeal." (A-327 (emphasis added).) Then, by seeking certification of its interlocutory appeal (A-339-354) weeks prior to filing its notice of appeal as of right (D.I. 1),[9] Plaintiff further conceded the interlocutory nature of the trial court's order staying the case pending a determination on the merits in California. At no time during the pendency of its application for certification of its now-alternatively framed interlocutory appeal did Plaintiff suggest that its request for certification was merely an alternative placeholder. As a procedural matter, Plaintiff cannot pursue certification of its appeal on an interlocutory basis, leading the trial court to believe such certification was its only claimed avenue of review to maximize the chances of certification, and then on the eve of expiration of its deadline to appeal, simply elect to revert to a claimed appeal as of right. Plaintiff is bound by its actions and admissions designed to obtain relief from the trial court, and is estopped from taking subsequent, inconsistent positions.

[9] Nothing precluded Plaintiff from filing its two-page Notice of Appeal as of right prior to seeking certification in the alternative—instead, to maximize its chances of certification of its interlocutory appeal, perceived by the trial court as the only avenue of review based on Plaintiff's representations to the court (*see* A-327), Plaintiff elected to wait until the eleventh hour to submit its inconsistent Notice of Appeal as of right.

3. The "Out of Court" and "Collateral Order" Doctrines Do Not Apply

Appeals of stays on *forum non conveniens* grounds are interlocutory in nature. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Axiall Corp.*, 219 A.3d 523 (Del. 2019) (refusing interlocutory appeal of order granting motion to stay on *forum non conveniens* grounds); *ANR Pipeline Co. v. Shell Oil Co.*, 525 A.2d 991 (Del. 1987) (remanding after *interlocutory* appeal from Court of Chancery order staying litigation in favor of subsequent litigation commenced in Louisiana). Plaintiff's proposed application of the "out of court" exception disregards established precedent prescribing interlocutory review of analogous trial court rulings resolving forum disputes.[10]

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[10] The federal cases Plaintiff principally relies on are inapposite, addressing the abstention of federal jurisdiction altogether to permit state courts to decide matters otherwise properly initiated in federal court. Plaintiff cites no authority applying the "out of court" exception to stays pursuant to the doctrine of *forum non conveniens*, and Defendants are aware of none. The *Moses H. Cone* Court distinguished the general rule that a stay is not ordinarily appealable as of right by observing that the sole purpose and effect of the stay order at issue was to "surrender jurisdiction of a federal suit to a state court." *Id.* at 11 n. 11. That is not the posture here. Cases relying on *Moses H. Cone* reiterate the critical determination that the effect of the stay order (or remand) is "precisely to surrender jurisdiction *of a federal suit to a state court*" and "amounts to a refusal to adjudicate" the case in federal court (not a sister state court). *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 713-714 (1996) (emphasis added). Of course, federalism concerns are not present, nor is Plaintiff's right to seek redress in federal court.

With respect to the collateral order doctrine, Plaintiff ignores its own authority and misstates the elements of the doctrine. "In *Gannett*, this Court described the attributes of a collateral order comprising a final judgment: first, it determines a matter independent of the issues to be resolved in the original underlying proceeding; second, *it binds a person who was not a party* in the originally underlying proceeding; and third, it has a substantial effect on important rights." *Evans v. Justice of the Peace Court No. 19*, 652 A.2d 577, 577 (Del. 1995) (emphasis added); *compare* OB at 24-25 (ignoring the requirement that a non-party must be bound). Here, not only is there not an important right at issue (Plaintiff's claimed right to his *third* choice of forum),[11] the Stay Order did not bind a third party.

4. GXP Does Not Have a "Right" of Appeal in a Civil Matter

Plaintiff declares that "[t]he right to appeal is granted by Delaware's Constitution and statues." (OB at 26 (citing Del. Const., Art. IV § 11(1)(a); 10 *Del. C.* §§ 143, 148).) But the statutory and constitutional provisions cited simply do not directly say what Plaintiff suggests, and precedent from this Court suggests the opposite: "There is no right of direct appeal of civil matters to this Court from orders which are clearly interlocutory in nature; and such orders may not be reviewed by [the Supreme Court] unless … Rule 42(c) and (d) are complied with…." *Evans v.*

[11] "Delaware is not GXP's first choice [of forum] but instead its third…." (OB, Ex. A at 1201.)

Meekins, 520 A.2d 1044 (Del. 1987); *see also DuPont v. Family Court for New Castle Cty.*, 153 A.2d 189, 78 (Del. 1959) ("There is no right of appeal in civil cases ... provided for by the Delaware Constitution").[12] Plaintiff claims that "[i]t is no answer to say that GXP can wait 90 days, see the Delaware action dismissed, and then file an appeal." (OB at 27.) The answer, of course, was to seek interlocutory review of the trial court's interlocutory Stay Order, as Plaintiff conceded without qualification was appropriate by doing.

[12] Plaintiff's authorities in fact stand only for the proposition that, because there is no constitutional right of civil appeal in Delaware, any right of appeal must be statutorily derived and, if conferred, applied equally. (*See* OB at 26-27.)

CONCLUSION

For the foregoing reasons, Defendants-Below/Appellees respectfully request that the decisions of the trial court be affirmed.

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