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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| GRAMERCY EMERGING MARKETS FUND, BALKAN VENTURES LLC, AND RILA VENTURES LLC,<br><br>Plaintiffs Below,<br>Appellants,<br><br>v.<br><br>ALLIED IRISH BANKS, P.L.C., AND THE BULGARIAN AMERICAN ENTERPRISE FUND,<br><br>Defendants Below,<br>Appellees. | No. 49, 2017<br><br>Court Below: Court of Chancery of the State of Delaware, C.A. No. 10321-VCG |

**ANSWERING BRIEF OF**
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# TABLE OF CONTENTS

## TABLE OF CITATIONS

**Page(s)**

**Cases**

**Other Authorities**

## PRELIMINARY STATEMENT

The Court of Chancery's decision was neither novel nor surprising. Plaintiffs initially elected to file their claims in Illinois. After years of litigation, the Illinois court dismissed the litigation in favor of the obvious forum: Bulgaria. Rather than proceed in Bulgaria, Plaintiffs elected to file this case in the Delaware Court of Chancery. In light of those undisputed facts, the Court below correctly applied this Court's ruling in *Lisa, S.A. v. Mayorga*, 993 A.2d 1042 (Del. 2010), and after careful consideration, the Court properly exercised its discretion to dismiss this case.

*Lisa* establishes that where, as here, "the Delaware action is *not* the first filed, the policy that favors strong deference to a plaintiff's initial choice of forum" no longer requires deference to the plaintiff's subsequent forum choice. *Id.* at 1047. To the contrary, the same policy "requires the court freely to exercise its discretion in favor of staying or dismissing the Delaware action." *Id.* (emphasis omitted). As this Court emphasized in *Lisa*, the fact "[t]hat the [first filed] [a]ction is no longer pending does not change the outcome." *Id.* at 1048.

Plaintiffs' suit below was not the first-filed in this litigation. Plaintiffs, a Cayman Islands investment fund and its two subsidiaries, first brought their claims regarding a provision of the Bulgarian securities law known as the Public Offering of Securities Act (the "POSA") to Bulgarian regulators in spring 2008. They complained that the potential purchase by Defendant Allied Irish Banks, p.l.c.

("AIB") of 49.9% of the stock of the Bulgarian American Credit Bank ("BACB"), a Bulgarian bank located in Sofia, Bulgaria, from Defendant Bulgarian-American Enterprise Fund ("BAEF") would violate a provision of the POSA that requires shareholders purchasing more than 50% of a company's stock to offer to purchase the stock held by the minority shareholders at the same price paid for the majority shares.

The Bulgarian regulators did not find that the POSA provision had been triggered. Rather than appealing the Bulgarian regulatory decisions, Plaintiffs waited three years. In August 2011, Plaintiffs filed suit in the Northern District of Illinois, alleging that AIB, BAEF, and BAEF's Chief Executive Officer violated the POSA. After that lawsuit was dismissed for lack of subject matter jurisdiction, Plaintiffs re-filed identical claims in the Illinois state court (the "Illinois Action"). After extensive discovery and substantial briefing on *forum non conveniens* issues, the Illinois court dismissed on *forum non conveniens* grounds in favor of Bulgaria. That decision was affirmed by the Illinois Appellate Court (together with the Illinois trial court, the "Illinois Courts"), which also held that Bulgaria was the appropriate forum for this dispute.

Rather than file their lawsuit in Bulgaria as directed by the Illinois Courts, Plaintiffs filed this lawsuit in the Court of Chancery. Thus, this case comes to Delaware not as Plaintiffs' first choice of forum, but as Plaintiffs' third choice –

preceded by dismissals in both the federal and state court in Illinois – and only after multiple Illinois courts have held that Bulgaria is the appropriate forum for this dispute. The Court of Chancery therefore properly held that, because this action was not the first filed, a lower standard of deference was applicable.

Contrary to Plaintiffs' arguments, the Vice Chancellor's decision was a straightforward application of *Lisa*. It was also sensible. As *Lisa* held, not every case filed in Delaware is subject to the "overwhelming hardship" standard. While that standard comports with Delaware's policy of providing a forum for first-filed litigation, Delaware does not have a policy interest in being a jurisdiction of second resort that reliably welcomes plaintiffs who file in the state in contravention of the directives of its sister states. When a litigant comes to Delaware under such circumstances, the "overwhelming hardship" standard is inapplicable, and the Court is permitted wide latitude to exercise its discretion in favor of dismissal. The Vice Chancellor considered all of the relevant factors and properly exercised his discretion to dismiss this case.

Plaintiffs advance a number of arguments for reversal, including encouraging this Court to rule for the first time on the *Cryo-Maid* factors. But none of Plaintiffs' arguments are meritorious: the Court of Chancery's decision conforms perfectly with this Court's decision in *Lisa*, and should be affirmed.

## NATURE OF PROCEEDINGS

On November 5, 2014, after receiving the ruling from the Illinois Appellate Court directing them to file their litigation in Bulgaria and while their petition for review to the Illinois Supreme Court was pending, the Plaintiffs filed their Complaint in the Court of Chancery (the "Complaint"). Except for dropping BAEF's CEO as a defendant, the Complaint was virtually identical to those filed in the courts in Illinois. The Vice Chancellor presided over three full rounds of briefing and heard oral argument on three separate occasions before issuing his ruling dismissing Plaintiffs' Complaint pursuant to the *Lisa* doctrine on December 30, 2016 (the Opinion or "Op.").[1]

[1] The first round of briefing and oral argument related to Plaintiffs' voluminous discovery requests. Pursuant to the Vice Chancellor's oral ruling that he would first consider *forum non conveniens* issues before addressing the Defendants' other grounds for dismissal (A2331-35), Defendants subsequently updated the discovery relating to *forum non conveniens* issues (A2492-550). The second round of briefing and oral argument related to Defendants' motions to dismiss pursuant to *forum non conveniens*. The third round of briefing and oral argument was specifically requested by the Vice Chancellor to aid his decision regarding the proper standard to apply in situations like this one. (*See* A3323-24.)

## SUMMARY OF ARGUMENT

1. *Denied* - The decision below is a straightforward application of the doctrine articulated in *Lisa*. Because Plaintiffs' action was not first-filed, the Vice Chancellor was permitted to afford lesser deference to Plaintiffs' forum choice, and freely to exercise his discretion in favor of dismissal. *Lisa*, 993 A.2d at 1047. This action, which has no meaningful contact with Delaware and which Plaintiffs filed only after being directed by the Illinois Courts that their action belonged in Bulgaria, was properly dismissed.

2. *Denied* - The Stock Purchase Agreement ("SPA") is an agreement between AIB and BAEF related to AIB's purchase of 49.9% of BACB, and does not pertain to Plaintiffs' claims arising under Bulgarian law. Nor is the existence of the SPA in any way probative of the hardship to AIB of litigating Plaintiffs' claims in this forum. This litigation has no other pertinent connection with Delaware.

3. *Denied* - The Vice Chancellor carefully considered the equities in dismissing this case, including Plaintiffs' attacks upon the Bulgarian courts. Every U.S. court to consider the adequacy of the Bulgarian courts, including the Illinois trial and appellate court in Plaintiffs' earlier suits, has concluded that the Bulgarian courts are an adeqate forum.

4. *Denied* - This Court need not reach the *Cryo-Maid* factors. However, because this dispute involves novel and important issues of Bulgarian law and because the

sources of proof are overwhelmingly located in Bulgaria and other European jurisdictions, it would be properly dismissed under any standard.

5. *Denied* - Plaintiffs had ample notice of the *Lisa* decision's application to cases in which the first-filed action is no longer pending. *Lisa* was decided more than a year before Plaintiffs filed their first action in Illinois. There is no reason it should not be applied to their case.

## STATEMENT OF FACTS

### I. The Parties' Investments in the Bulgarian American Credit Bank ("BACB")

#### A. The Parties to AIB's Purchase of BACB Stock

AIB is an Irish bank headquartered in Dublin, Ireland. (A0428, ¶ 5; A2119, ¶ 6.) BAEF is a private corporation organized under Delaware law, whose primary office was in Sofia, Bulgaria. (A0027, ¶ 5; A2494 at Int. Resp. No. 2; A0573-74 at Int. Resp. No. 2; A0776, ¶¶ 7, 9.)

BACB is a Bulgarian bank headquartered in Sofia, Bulgaria. (A0032, ¶ 25; A0252.) BACB was founded in Sofia by BAEF in 1996 as a Bulgarian bank that would provide loans to Bulgarian businesses. (A0032, ¶ 25.) It is regulated by multiple Bulgarian agencies. (*Id.*; A0191-201; A0211-14; A0250-75.)

#### B. Plaintiffs' Investment In BACB

Plaintiffs are investment funds that the opinion below accurately described as "a corporate citizen of the Cayman Islands doing business out of Greenwich, Connecticut" and "its two wholly-owned subsidiaries." (Op. at 1.) They became shareholders in BACB in April 2006. (A0032-33, ¶¶ 26-27.) Plaintiffs initially purchased 3% of the shares of BACB (*id.*), and over the next two years substantially increased their investment to 26% of the bank's shares (A0033, ¶ 30). During this period of expanding their ownership in BACB, Plaintiffs also sought and received permission from the Bulgarian National Bank to acquire up to 49.9% of BACB's

stock. (*See* A0187.) After becoming BACB shareholders in 2006, Plaintiffs actively participated in Bulgaria in the affairs of BACB, including sending representatives to BACB shareholders meetings held in Bulgaria. (A0303-23; A0327-28.) And, in 2011, Gramercy Emerging Markets Fund ("Gramercy") installed one of its managing directors on BACB's Supervisory Board, the Bulgarian equivalent of a board of directors. (*See* A0159-61; A0330-31.)

### C. AIB's Purchase Of 49.9% Of BACB's Stock

Around October 3, 2007, AIB learned that BAEF was conducting a sale of up to the entirety of BAEF's remaining 53.88% ownership interest in BACB. (A0180-82.) Bulgaria's POSA governs the purchase and sale of stock in public Bulgarian companies, such as BACB. Article 149 of the POSA provides that a shareholder purchasing *more than* 50% of a company's stock must offer to purchase the stock held by the minority shareholders at the price paid for the majority shares. (*See* A0584, ¶ 11; A0663-64.) Such a "mandatory tender offer" also may be required when multiple shareholders "who hold together more than 50 percent of the voting shares . . . have made an agreement to pursue a common policy related to the management of the corresponding company, through joint exercise of the voting rights held by them." (*Id.*; *see also* A0034, ¶ 34.)

### 1. Meetings in Bulgaria and AIB's decision to invest in BACB

Because AIB did not want to acquire 100% of BACB, AIB lawfully decided to purchase less than 50% of BACB's stock from BAEF and decided not to enter into any voting agreement with BAEF. (A0373.) Discussions surrounding AIB's purchase of the BACB shares largely took place in Bulgaria:

- AIB and BAEF representatives met on several occasions in Bulgaria to discuss AIB's potential investment. (A0515-16 at No. 17; A0567-68 at Int. Resp. No. 21.)
- Following a December 2007 meeting in Bulgaria, AIB sent a non-binding offer from its headquarters in Dublin, Ireland to BAEF's offices in Sofia, Bulgaria, offering to purchase 49.9% of BACB's stock from BAEF. (A0183-85.)
- AIB subsequently met with BAEF representatives and BACB personnel in Bulgaria to conduct due diligence related to its proposed investment. (A0515-16 at No. 17; A0567-68 at Int. Resp. No. 21.)
- AIB representatives traveled to Bulgaria to meet with the Bulgarian regulators. (A0382.)

In addition to the numerous meetings in Bulgaria, a single meeting between AIB representatives and BAEF representatives took place in Chicago, Illinois in

January 2008. (A0515-16 at No. 17.) No meetings between AIB and BAEF occurred in Delaware.

### 2. Plaintiffs' efforts in Bulgaria to force a tender offer

On February 22, 2008, BACB announced that AIB had agreed, subject to receiving approval from the Bulgarian regulatory authorities, to purchase a 49.9% interest in BACB. (*See* A0164-66.) Shortly thereafter, Plaintiffs engaged Bulgarian counsel to represent their interests before the Bulgarian regulatory authorities and to act as their litigation counsel in Bulgaria related to AIB's proposed BACB investment. (A0167-72.) On April 22, 2008, Plaintiffs, through their Bulgarian counsel, submitted a letter to the Bulgarian Financial Supervision Commission that accused AIB of violating the POSA. (A0186-90.) Specifically, Plaintiffs suggested that AIB and BAEF had made an agreement to vote their shares together and that as a result AIB should be required to make a tender offer for Plaintiffs' BACB stock. (*Id.*, ¶¶ 3-5.) Plaintiffs similarly "express[ed] concerns" to the Bulgarian Commission for Protection of Competition. (A0253-54.) No agency found that AIB was required to make a tender offer for Plaintiffs' stock. (A0192-98; A0259-60; A0273-75.)

### 3. Bulgarian regulatory approval of AIB's purchase of 49.9% of BACB

During this same period, AIB sought the Bulgarian regulatory approvals necessary for its proposed investment in BACB. (*See, e.g.*, A0203-10; A0224-47.)

In its submissions to the Bulgarian Commission for Protection of Competition, AIB provided a declaration representing, among other things, that it had not entered into any agreements with BAEF or other shareholders regarding "the exercise of control [or] management in respect of BACB." (A0248-49; *see also* A0227.) AIB provided similar representations to the Bulgarian National Bank. (A0222.)

AIB received the needed regulatory approvals, and those approvals were subject to review by the Supreme Administrative Court of the Republic of Bulgaria. (A0212; A0273.) Plaintiffs, however, did not appeal the regulators' decisions. Accordingly, AIB acquired 49.9% of BACB's stock at the end of August 2008. (A0028, ¶ 12.)

## II. Plaintiffs' Prior Suits in Illinois

In late August 2011, three years after the challenged transaction, Plaintiffs filed suit against AIB, BAEF, and BAEF's former CEO, Frank Bauer, in the United States District Court for the Northern District of Illinois. (A0431-47.) In December 2011, that court dismissed Plaintiff's complaint for lack of subject matter jurisdiction. (A0448-52.)

In February 2012, Plaintiffs filed a virtually identical complaint in the Circuit Court of Cook County in Chicago, Illinois, which also is nearly identical to the Complaint filed in the Court of Chancery. (*See* Op. at 12, 13 (noting that the three complaints are "strikingly similar"); *compare* A0453-71 *with* A0026-51.)

Defendants moved to dismiss the Illinois state court complaint pursuant to the doctrine of *forum non conveniens*. After Defendants filed their motions to dismiss, the Circuit Court permitted Plaintiffs to take what it termed to be "extensive" forum-related discovery, which resulted in Defendants producing more than 12,800 pages of documents, and providing detailed answers to numerous interrogatories. (*See, e.g.*, A0505-80; *see also* A0479.)

After extensive briefing, the Circuit Court issued a detailed decision granting Defendants' motions to dismiss based on the doctrine of *forum non conveniens*. The Circuit Court held: "As a result of the tenuous connection the case has to Illinois, a dismissal *in favor of Bulgaria* better serves the considerations of fundamental fairness, sensible and effective judicial administration and the ends of justice." (A0479 (emphasis added).) Plaintiffs appealed that decision to the Illinois Appellate Court. On July 28, 2014, the Illinois Appellate Court issued a 23-page opinion unanimously affirming dismissal in favor of proceedings in Bulgaria: "We agree with the trial court that the relevant factors in their totality *strongly favor transfer to Bulgaria*." (A0504, ¶ 55 (emphasis added).)

Plaintiffs characterize these opinions as simply relying on the fact that "Illinois was not Plaintiffs' home forum" in their decision to dismiss in favor of Bulgaria. (Br. at 8.) This is not the case. In fact, the Illinois Courts expressly addressed many of the factors that informed the Court of Chancery's decision,

including the location of witnesses and documents, the availability of compulsory process, the applicable law, and the availability and adequacy of Bulgaria as a forum for this litigation. (*See* pp. 20-21.)

On November 26, 2014, the Illinois Supreme Court denied Plaintiffs' petition for leave to appeal. *See Gramercy Emerging Mkts Fund v. Allied Irish Banks, P.L.C.*, 21 N.E.3d 714 (Ill. Nov. 26, 2014) (Table).

## III. The Absence of Evidence in, and Relevant Connections to, Delaware

Plaintiffs argue that "AIB ha[s] considerable business ties to Delaware." (Br. at 5.) This is incorrect. AIB is incorporated under the laws of Ireland, not Delaware. It is not registered to do business in Delaware, has no Delaware office, no Delaware employees, and no registered agent for service of process in Delaware. (A0428, ¶¶ 8-15; A2119, ¶ 6.)

Plaintiffs state that AIB's U.S. operations are "centered" in New York. (Br. at 5.) This is an overstatement. AIB has a single office in the United States, and it is located in New York. (A0428, ¶ 5; A2119, ¶ 6.) Only 55 of AIB's 12,468 employees are located in the United States. (A0428, ¶ 7; A2119, ¶ 6.) Of those 55 employees, all work in New York, with the exception of one employee who works out of his home near Baltimore, Maryland. (A2511 at No. 6.) None of the 55 U.S.-based employees were involved in AIB's investment in BACB. (A0428, ¶ 6; A2119, ¶ 6.)

AIB has two subsidiaries incorporated in Delaware: Allied Irish Banks North America, Inc. ("AIBNA") and AIB U.S. Realty Inc. ("AIB U.S. Realty").[2] Neither of those subsidiaries has business offices, employees, officers, or directors in Delaware. (A0429, ¶¶ 16-23; A2119-20, ¶¶ 9-16.) Neither subsidiary, nor their directors or officers, was involved in AIB's investment in BACB.[3] (A0429, ¶ 17; A2120, ¶ 10.)

BAEF no longer has business operations, and its relevant documents that were not already produced in this litigation are in storage in Sofia, Bulgaria. (A2494, at Int. Resp. No. 2; A0573-74 at Int. Resp. No. 2; A0776, ¶¶ 7, 9.)

With respect to this litigation, no witnesses or relevant documents have been identified in Delaware, and no events related to this litigation occurred here.

[2] AIBNA was formed for the purpose of selling certain notes, and its total net income as of December 31, 2013 was $48,000. (A0429, ¶¶ 16, 23.) AIB U.S. Realty was formed for the purpose of holding certain equity interests, and its profit on ordinary activities before tax as of December 31, 2014 was $65,350. (A2119, ¶ 9, A2120, ¶ 16.)

[3] No former AIB subsidiaries were involved in the investment (*see* A3095 & n.10), nor was AIB's former Chicago office, which closed in 2007, well before any of the events relating to Plaintiffs' allegations took place (*see* A3649 n.4; A3682, ¶ 3).

## ARGUMENT

## I. THE COURT BELOW CORRECTLY RULED THAT THE "OVERWHELMING HARDSHIP" STANDARD DOES NOT APPLY IN THIS CASE, AND PROPERLY EXERCISED ITS DISCRETION TO DISMISS IT.

### A. Questions Presented

Whether the Court below was correct in ruling that the "overwhelming hardship" standard does not apply to Plaintiffs' case, which was not first-filed in Delaware.

Whether the Court below properly exercised its discretion in dismissing this case.

### B. Scope of Review

This Court reviews the trial court's "stay or dismissal of a case under *McWane* for abuse of discretion," but it reviews "*de novo* any issues of law 'applied in reaching that decision,'" including whether *McWane/Lisa* is the proper standard.[4] *LG Elecs., Inc. v. InterDigital Commc'ns, Inc.*, 114 A.3d 1246, 1252 (Del. 2015) (quoting *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010)).

[4] The policy applied in *Lisa* requiring the court "freely to exercise its discretion in favor of staying or dismissing" a case that is not first-filed is often termed "'the *McWane* doctrine,'" after *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281, 283 (Del. 1970). *Lisa*, 993 A.2d at 1047.

## C. Merits of Argument

### 1. The Court Below Properly Applied the Rationale of the *Lisa* Decision to this Case.

This action is not the Plaintiffs' "first filed." Plaintiffs filed this case in Delaware only after their claims were dismissed in Plaintiffs' first forum (Illinois). Therefore, under the plain language of this Court's decision in *Lisa*, the "strong deference" that Delaware courts afford to a plaintiff's initial choice of forum is not warranted, and the "overwhelming hardship" standard does not apply. *Lisa*, 993 A.2d at 1047 (where "the Delaware action is *not* the first filed, the policy that favors strong deference to a plaintiff's initial choice of forum" no longer requires deference to the plaintiff's second forum choice, but instead "requires the court freely to exercise its discretion in favor of staying *or dismissing* the Delaware action"); *cf.* Op. at 5 (holding that the "extreme deference paid to a plaintiff's first choice of forum is not indicated here" and instead applying the doctrine articulated in *Lisa*).

Plaintiffs attempt to avoid this straightforward result by arguing that, contrary to its plain language, the *Lisa* decision governs only when there is a risk of flatly "inconsistent judgments" between the prior action and the Delaware action. (Br. at 12-13.) Plaintiffs thus argue that the *Lisa* doctrine can only be applied to a second-filed case when the decision in the first case renders the Delaware case "moot," or when the Delaware case is barred by *res judicata* or collateral estoppel because it would effectively require the "reversal" of the first decision. (Br. at 11-12.) Not

only is this reading inconsistent with *Lisa*'s plain language, it also makes no sense. If the Court in *Lisa* had intended to rule on *res judicata* or mootness grounds, it would have done so.

To the contrary, in support of its decision to apply the *McWane* doctrine in such a circumstance, the Court pointed not only to the "possibility of inconsistent and conflicting rulings" but also to the need to: (i) provide a lower standard of deference when the Delaware action is not the plaintiff's "initial choice of forum" (*id.* at 1047), (ii) respect "comity" among the states (*id.* at 1048), and (iii) "discourage forum shopping" (*id.* at 1047). The Court emphasized that refusing to defer to a plaintiff's second choice of forum was consistent with prior Delaware Supreme Court precedent: the Delaware action in *Lisa* was "the *last* filed" and "in all cases where this Court has applied the 'overwhelming hardship' standard, the Delaware action was either the first filed or the only filed action." *Id.* at 1047 & n.16.

Delaware courts that have applied *Lisa* have uniformly disagreed with the Plaintiffs' interpretation. As the Delaware Superior Court recently noted, *Lisa* "reaffirmed and expanded the *McWane* doctrine." *Chaverri v. Dole Food Co.*, 2013 WL 5977413, at *2 (Del. Super. Nov. 8, 2013) (dismissing a case under *Lisa* after the prior action had been dismissed on statute of limitations grounds), *aff'd*, 2014 WL 7367000 (Del. Oct. 20, 2014); *Abrahamsen v. ConocoPhillips Co.*, 2014 WL

2884870 (Del. Super. May 30, 2014) (dismissing a case under *Lisa* after plaintiffs voluntarily dismissed the prior action).[5]

Courts in other jurisdictions have agreed. Contrary to Plaintiffs' statement that "no court has ever held" that plaintiffs should be "discouraged" from filing in their second choice of forum (Br. at 2), courts have regularly refused to defer to a plaintiff's second choice of forum. *See Fennell v. Ill. Cent. R.R. Co.*, 2012 IL 113812, ¶ 25 (Ill. 2012) ("[T]he circuit court of St. Clair County should have accorded diminished deference in its *forum non conveniens* analysis to what was plaintiff's *second* choice of forum."); *Lusby v. Gamestop Inc.*, 297 F.R.D. 400, 406 (N.D. Cal. 2013) ("The Court gives little weight, now, to Plaintiff's *third* choice of forum . . . ."); *Wright v. Interbank Cap., Inc.*, 1999 U.S. WL 354516, *4 (N.D. Cal. May 19, 1999) ("While courts generally defer to a plaintiff's choice of forum, plaintiffs have failed to identify any authority indicating that courts generally defer to a plaintiff's second choice of forum."); *Kawamoto v. CB Richard Ellis, Inc.*, 225

[5] Plaintiffs fail to acknowledge these cases, and instead cite cases decided before *Lisa*, or in which the court was not made aware of *Lisa*. (*See* BAEF Br. at 23-24.) Plaintiffs also cite a Third Circuit case in which the court permitted a second-filed action to go forward because other potential fora were closed to the plaintiffs, including the foreign forum. *Chavez v. Dole Food Co., Inc.*, 836 F.3d 205, 212 (3d Cir. 2016) (en banc). That is not the situation here.

F. Supp. 2d 1209, 1216 (D. Hawaii 2002) ("The plaintiff's 'second choice' of forum is not automatically entitled to the same amount of deference.").[6]

### 2. Plaintiffs' Serial Litigation Should Not Be Entitled to Deference: Their Action Belongs in Bulgaria, Not Delaware.

*Lisa* applies with particular force to this case, because it implicates two central concerns that *Lisa* articulated: the concern for inter-state comity and the need to discourage forum shopping. *Lisa*, 993 A.2d at 1047-48. Plaintiffs argue that they are not serial litigators because, they argue, the Illinois courts' dismissal is no different from dismissal on personal jurisdiction grounds. (*See* Br. at 15, 21-22.) This comparison gets it exactly wrong for several reasons.

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[6] Moreover, in many circumstances, when an initial action is dismissed on *forum non conveniens* grounds and the same suit is brought in a second forum, the second forum does not apply *any* deference to the plaintiff's forum choice because it is wholly precluded from hearing the second action on *res judicata* grounds. *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 854 (3d Cir. 1977); *Can v. Goodrich Pump & Engine Control Sys.*, 711 F. Supp. 2d 241, 252, 256 (D. Conn. 2010); *555 Corporate Ventures, Ltd. v. Ash Grove Cement Co.*, 2005 U.S. Dist. LEXIS 8814, * 10-11 (D. Kan. Mar. 2, 2005); *Skewes v. Masterchem Indus., LLC*, 2005 WL 3555931, *3 (E.D. Mo. Dec. 23, 2005); *Alcantara v. Boeing Co.*, 41 Wash. App. 675, 676-678 (Wash. Ct. App. 1985). Plaintiffs argue that "there is no basis to deny" them the usual deference, but in the only cases on which Plaintiffs rely (*see* Br. at 16-17), the second forum either found dismissal of the case pursuant to *forum non conveniens* to be proper, *see Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 660 F.2d 712, 719 (8th Cir. 1981), or did not consider what general *forum non conveniens* standard should be applied, *see Cook v. Soo Line R. Co.*, 198 P.3d 310, 313 (Mont. 2008) (noting that Montana state courts had an "open door" policy precluding dismissal of the FELA claims at issue in the litigation); *see also* A3647, n.2.

***First,*** unlike in the circumstance in which a first-filed case is dismissed for lack of personal jurisdiction, numerous factors expressly considered by the Illinois Courts are the same as those relevant here, including

- "[N]early all of BAEF's documents are located in Bulgaria,"
- "Out of the identified witnesses, 23 of the 25 reside in European Union countries with more than half residing in Bulgaria,"
- "The cost of translation of both testimony and relevant documents [would] be substantially increased by keeping the case in Illinois,"
- "[W]itnesses from outside of the country could only be procured through the Hague Convention or letters rogatory requiring the use of consular and diplomatic channels which will be more difficult, more costly and less efficient,"'
- Bulgarian law applies because "[Plaintiffs'] entire case is based on a violation of Bulgaria's Public Offering Securities Act," so "[e]xpert testimony regarding Bulgarian law and the Securities Act would be required," and
- "Bulgaria is an adequate forum," despite arguments made by the Plaintiffs regarding "the filing fee required by Bulgarian courts and corruption there."

(*See* A0475-78; A0493-94, ¶ 27; *see also* Op. at 14-15 (identifying numerous findings made by the Illinois trial court, including that "[t]he strong connection to Bulgaria cannot be ignored").)[7]

The Illinois Courts spent more than two years addressing the litigation, including reviewing voluminous briefing and evidentiary material, before making careful and considered rulings on each of those factors. The Plaintiffs essentially ask this Court to ignore those rulings, and to act as if they had never happened.

***Second,*** unlike the circumstance in which a first-filed case may be dismissed for lack of personal jurisdiction, Plaintiffs have not come to a better potential forum

[7] Because Plaintiffs argued that Illinois was a proper forum based on their allegation that "AIB proposed the illicit shareholder voting agreement" at a meeting between AIB and BAEF in Chicago (A0783-84), the Illinois Courts carefully considered the Plaintiffs' theory regarding a purported secret voting agreement. Based on the same documents Plaintiffs rely upon in their Brief here (*see* Br. at 8 (citing A2357-A2359, A2617-A2621, A2642-A2650)), the Illinois Courts soundly rejected Plaintiffs' theory. (*See* A0475 ("Plaintiffs took discovery on this point and Plaintiffs have failed to show that any such voting agreement was ever made."); A0492, ¶ 23 ("[I]t is not at [all] clear that any injury 'took place' at the Chicago meeting based on the almost immediate follow-up email from BAEF's attorney that distanced that company from the possibility that a shareholder agreement would be made saying BAEF 'would rather not commit to a shareholders agreement'"); *see also* A3087-88 (addressing Plaintiffs' allegations regarding the purported secret voting agreement); A3182-84 (same); Op. at 18 & n.82 (describing Plaintiffs' allegations in this regard as "conspiracy theories"). Moreover, there is no evidence of collusive behavior. At every BACB shareholders meeting from October 2008 through 2010, whenever Plaintiffs voted, they voted their BACB shares the same way as AIB voted its BACB shares. (A0280-323.) In fact, 95% of BACB voting shares were voted the same way at each meeting prior to AIB's sale of its BACB shares in 2011. (*See id.*; A0037, ¶ 44.)

to bring their litigation. To the contrary, since their decision in 2008 not to appeal the decisions of the Bulgarian regulators to which they brought their claims, Plaintiffs have assiduously avoided Bulgaria, the jurisdiction that has the greatest interest in resolving this litigation, and in which it would be vastly more convenient to litigate. As the Illinois Courts held, Plaintiffs' litigation had little connection to Illinois – and it has even less connection to Delaware.[8]

***Finally,*** unlike in the circumstance in which a first-filed case is dismissed for lack of personal jurisdiction, Plaintiffs' initial action was specifically dismissed in favor of another jurisdiction: Bulgaria. The Plaintiffs assert that the Vice Chancellor "belie[ves] that the Illinois court had effectively decided for all jurisdictions that Bulgaria was the single most appropriate forum for this case." (Br. at 21.) This is not the case, as his opinion makes clear: "a decision of the Illinois court that Illinois is a fatally-inconvenient forum for this litigation is not *res judicata* of whether a Delaware forum is appropriate." (Op. at 19 n.83; *see also id.* at 4 ("I assume (without deciding) that the determination in favor of a Bulgarian forum in Illinois has no issue-preclusive effect here.").) Indeed, Plaintiffs' view represents the opposite

[8] The lack of connection to Delaware is further evidenced by Plaintiffs dropping Frank Bauer, one of the Defendants in Illinois, as a defendant here (presumably because there would be no personal jurisdiction over him in Delaware). Moreover, although the Vice Chancellor has deferred consideration of the issue, there is no personal jurisdiction over AIB for the reasons demonstrated in AIB's initial motion to dismiss. (*See* A0103-121.)

extreme – they argue that the Vice Chancellor was not permitted even to take into consideration the fact that they came to Delaware only as a result of ignoring the considered decision of Delaware's sister courts. Instead, they argue, the Court below must apply the same level of deference to their forum choice as if they had filed first in Delaware. This is wholly without merit.

### 3. The Court Below Properly Exercised Its Discretion to Dismiss this Case in Favor of Bulgaria.

Under the facts and circumstances of this case, the Court below properly exercised the discretion afforded to it by *Lisa*. Plaintiffs' depiction of the ruling as setting an "inflexible edict" (Br. at 17) is a gross mischaracterization. The Vice Chancellor simply ruled that, under the *Lisa* doctrine, in the circumstances of this case, his discretion was not constrained by the "overwhelming hardship" standard under *Cryo-Maid*. The Vice Chancellor's decision to exercise his discretion in favor of dismissal was both appropriate and sensible.

***First,*** there is no dispute that the claims and parties in the Illinois Actions are virtually identical to those here. Accordingly, if the Illinois Actions were still pending when the Vice Chancellor made his ruling, "it is . . . beyond cavil" that his discretion would have been guided by the *Lisa* standard, under which dismissal would have been proper. (Op. at 28; *see also Lisa*, 993 A.2d at 1047 (holding that the court is permitted "freely to exercise its discretion in favor of staying *or dismissing*" the later-filed action) (emphasis in original).) As the Vice Chancellor

observed, it would be an "incongru[ous]" result if the fact that the Plaintiffs lost the Illinois Actions and were told by the Illinois courts to file their action in Bulgaria operated to constrain the scope of his discretion in dismissing the action. (*Id.*)

***Second,*** as the Vice Chancellor noted, a contrary result would "not be consistent with inter-state comity," because

> [w]ere the overwhelming hardship standard to attach to later-filed Delaware actions such as Plaintiffs' here, litigants could, with little risk, test their ties to another forum for strategic reasons and then file in Delaware and still benefit from the great deference afforded by the overwhelming-hardship standard.

(Op. at 29 n.122.)

Plaintiffs insist that the "overwhelming hardship" standard must be applied to cases, like theirs, that are not first-filed in Delaware, because otherwise "future litigants with other potentially viable fora will necessarily err in favor of Delaware" out of fear of losing access to Delaware's "'plaintiff-friendly' . . . overwhelming hardship standard." (Br. at 25.) But encouraging plaintiffs to bring their first action in Delaware (when it is a proper forum) is a natural outcome of the "overwhelming hardship" standard, with its strong deference to Delaware as a plaintiff's "initial choice of forum." *Lisa*, 993 A.2d at 1047. By contrast, the overwhelming hardship standard was not intended to apply to plaintiffs who filed in Delaware as a fallback option after having unsuccessfully pressed their claims in other fora.

These Plaintiffs have amply demonstrated this principle. Notwithstanding their argument to the contrary (Br. at 19 n.7), Plaintiffs expressly asserted in their brief before the Court below that a dismissal by that Court would "encourage[]" them to file their action in a third U.S. jurisdiction. (A3556 n.16 ("To the extent that this Court is concerned about Plaintiffs filing in a third jurisdiction, shifting the burden to Plaintiffs increases the odds of dismissal, and thus ***encourages*** a third filing" (internal citation omitted).); *see also* A3738 (rejecting the Court's invitation to rule out litigation in another U.S. forum); A3396 (same).) Plaintiffs' lack of regard for the considered rulings of a sister state's courts, and their willingness similarly to disregard a dismissal by the courts of this State, amply demonstrates why their forum choice does not merit deference.[9]

[9] Defendants are not attacking Plaintiffs' subjective or strategic motivations. Rather, Defendants are pointing out that Plaintiffs' decision to ignore the Illinois Courts' directive to file their action in Bulgaria squarely implicates the concerns for comity and forum shopping that *Lisa* sought to prevent. Plaintiffs' citation to cases in which the defendants have criticized plaintiffs' subjective motives for filing in Delaware (*see* Br. at 22-25) is simply beside the point.

## II. THE COURT BELOW PROPERLY CONCLUDED THAT THE STOCK PURCHASE AGREEMENT BETWEEN AIB AND BAEF DOES NOT REQUIRE THAT THIS LITIGATION GO FORWARD IN DELAWARE.

### A. Question Presented

Whether the SPA by which AIB acquired 49.9% of BACB prohibited the Vice Chancellor from dismissing this case.

### B. Scope of Review

This Court reviews the decision of the Court of Chancery to "stay or dismiss[] . . . a case under *McWane* for abuse of discretion." *LG Elecs.*, 114 A.3d at 1252.

### C. Merits of Argument

#### 1. The AIB-BAEF Stock Purchase Agreement Does Not Govern This Dispute.

Plaintiffs rely heavily on the SPA between AIB and BAEF in their attempt to argue that this case should remain in Delaware. As an initial matter, the SPA does not prohibit the Vice Chancellor from dismissing their case – which was not first-filed – pursuant to the *Lisa* doctrine.

Moreover, the SPA simply provides that ***as between the parties***:

> [a]ny suit, action or proceeding ***against any Party hereto*** arising out of or relating to this Agreement or any transaction contemplated hereby may be brought in any federal or state court located in the state of Delaware . . . .

(A2608, ¶ 8.13 (emphasis added); *compare* Br. at 7 (omitting that the choice of forum clause is explicitly limited only to actions brought between the parties).)

The forum selection clause in the SPA was an agreement between two parties of different nationalities to litigate contractual disputes between themselves in a neutral forum. It is therefore unsurprising that, when they received the SPA in discovery in the Illinois Actions, Plaintiffs neither asserted that it supported Delaware as a forum for the litigation nor sought to dismiss the Illinois litigation in favor of Delaware. To the contrary, they continued to argue that Illinois was the appropriate forum for their claims.

As the Vice Chancellor held, such agreements only bind the parties to the agreement with respect to the causes of action identified in the agreement: "[t]he agreement in no way creates a contractual right for another shareholder to sue the parties to that contract in Delaware to enforce purported violations of Bulgarian securities laws." (Op. at 31-32; *see also Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1130, 1132, 1138-39 (Del. Ch. 2008); *Multi-Fineline Electronix, Inc. v. WBL Corp.*, 2007 WL 431050, at *6-7 (Del. Ch. Feb. 2, 2007).)

The *Candlewood* case, relied upon heavily by Plaintiffs, does not require that this case go forward in Delaware. *Candlewood* involved an action that was first-filed in Delaware. The plaintiff in *Candlewood* sued its contractual counterparty alleging breach of contract and related tort claims. *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 992 (Del. 2003). All of the witnesses that the U.S. defendant identified for its defense were under its control and could be

brought to the U.S. *See id.* at 994, 1001-02. The differences between that case and this, which involves tort claims by a third party under Bulgarian law for alleged violations of a Bulgarian statute that would require the testimony of many Bulgarian witnesses, none of whom are under the control of AIB, could not be more stark. The Vice Chancellor properly recognized that "[t]he issues, burdens, and considerations" involved in litigating "an alleged violation of Bulgarian securities law, premised on a purported secret agreement and accompanying conspiracy" are "radically different" from those involved in litigating a breach of contract between the two parties to that contract. (Op. at 32.)

Moreover, there is no evidence that the "oil and gas supply contracts" referenced in *Candlewood* contained the limiting clauses included in the SPA.[10] Finally, it bears noting that *Candlewood* was decided prior to this Court's decision in *Martinez v. E.I. DuPont de Nemours and Co.*, 86 A.3d 1102 (Del. 2014), which held, among other things that "'a more restrained meaning' is at the essence" of the "overwhelming hardship" standard.[11]

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[10] *See supra* p. 26; *see also* A2606, ¶ 8.4 (providing that there are no third-party beneficiaries to the agreement, that the agreement "is for the sole benefit of the Parties hereto . . . and nothing herein express or implied shall give or be construed to give to any Person, other than the Parties hereto . . . any legal or equitable rights hereunder").

[11] *Martinez, 86 A.3d* at 1105 (quoting *IM2 Merch. & Mfg., Inc. v. Tirex Corp.*, 2000 WL 1664168, at *26 (Del. Ch. Nov. 2, 2000)); see also *id.* at 1111-12 (stating that "[p]rior [l]aw [is] [c]hanged," and in particular recognizing "the importance of the

### 2. This Dispute Has No Connection to Delaware.

Setting aside the irrelevant SPA, this litigation's only Delaware connection is the state of incorporation of three parties: Plaintiffs' parent, Gramercy, is a Cayman Islands corporation with two wholly owned Delaware LLCs, and BAEF is a Delaware corporation.[12] As numerous Delaware courts have held, the state of a defendant's incorporation has little relevance to the *forum non conveniens inquiry*. *See e.g.*, *Nash v. McDonald's Corp.*, 1997 WL 528036, at *3 (Del. Super. Feb. 27, 1997) (dismissing on *forum non conveniens* grounds when "the only real nexus between this litigation and this forum is that all three defendants are incorporated here"); *IM2 Merch. & Mfg., Inc. v. Tirex Corp.*, 2000 WL 1664168, at *11 (Del. Ch. Nov. 2, 2000); *Oryx Capital Corp. v. Phoenix Laser Sys., Inc.*, 1990 WL 58180, at *5 (Del. Super. Feb. 26, 1990); *see also Hazout v. Tsang Mun Ting*, 134 A.3d 274, 291 (Del. 2016) ("[T]he doctrine of *forum non conveniens* remains a viable tool for even Delaware residents, including corporations, when sued on claims that have little connection to Delaware, where Delaware law is not at stake, and where the

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right of all parties (not only plaintiffs) to have important, uncertain questions of law decided by the courts whose law is at stake").

[12] Plaintiffs draw attention to the fact that, in connection with the SPA, BAEF obtained a certificate of incorporation and certificate of good standing from the Delaware Secretary of State. (Br. at 7, 22 n.9, 23, 43; A2664-67.) This is not a separate connection to Delaware; it was a ministerial act simply to show BAEF was in good standing. (*See* A2582, ¶¶ 3.2(a)(ii)-(iii), (b)(ii)-(iii).)

burdens of defending the suit in Delaware are substantial and not justified by any legitimate interest of the plaintiff in suing in Delaware.").

Apart from these irrelevant facts, no connection exists between this litigation and Delaware. No witnesses or documents are located in Delaware, no relevant events occurred here, and Delaware law is not at issue. (*See* pp. 39-42; *see also* Op. at 34 (noting that "Delaware's interests in this litigation . . . are sparse.")[13]

[13] Plaintiffs' description of *Pipal Tech Ventures Private Ltd. v. MoEngage, Inc.*, 2015 WL 9257869 (Del. Ch. Dec. 17, 2015), as a case in which *forum non conveniens* was denied despite a lack of Delaware connection is inaccurate. (*See* Br. at 43 & n.16.) The Court of Chancery denied *forum non conveniens* in that case because the defendants formed a new Delaware LLC in order to "hold, market, and monetize the purloined asset," in the United States in contravention of both Indian law and the "Delaware Uniform Trade Secrets Act." *Pipal*, 2015 WL 9257869, at *10.

## III. THE COURT BELOW DID NOT IGNORE EQUITABLE CONSIDERATIONS: BULGARIA IS AN AVAILABLE AND ADEQUATE FORUM FOR THIS LITIGATION.

### A. Question Presented

Whether the Court below "ignor[ed]" equitable factors regarding the adequacy of Bulgaria as a forum that requires Delaware to retain jurisdiction over this case.

### B. Scope of Review

This Court reviews the Court of Chancery's decision to "stay or dismiss[] . . . a case under *McWane* for abuse of discretion." *LG Elecs.*, 114 A.3d at 1252.

### C. Merits of Argument

#### 1. The Court Below Carefully Considered the Availability and Adequacy of Bulgaria as a Forum.

Plaintiffs argue that the Vice Chancellor "ignor[ed]" equitable factors regarding the supposed inadequacy of the Bulgarian court system. To the contrary, from the beginning of this litigation, the Vice Chancellor noted the importance of this issue. (*See* A2336 ("[I]t sounds to me like this motion [to dismiss] is going to turn on the ability of the Bulgarian courts to render justice.").) During the course of the litigation before the Vice Chancellor, Plaintiffs fully briefed their attacks upon the Bulgarian court system (*see* A2368-76), and filed a supplemental letter prior to oral argument on the motion to dismiss, in which they set forth their arguments a second time (*see* A3217-19). The Vice Chancellor probed this issue during oral

argument, putting questions to the parties regarding, for instance, Bulgaria's purported corruption (A3436) and its filing fees (A3438-42). Moreover, before finding that dismissal was appropriate, the Vice Chancellor explicitly noted that "[t]he Illinois trial and appellate courts, after discovery and on consideration of the positions of the parties, determined that Bulgaria provides an adequate forum and is the appropriate forum for any litigation." (Op. at 30.)

**2. Bulgaria Remains an Available and Adequate Forum.**

Bulgaria is an available forum for this litigation. Since the Illinois Actions were first filed, Defendants have consistently agreed that they will waive a statute of limitations defense to a suit in Bulgaria. Such a waiver is recognized by the Bulgarian court system. (A3122-23, ¶ 12; *see also* A3111-12 (explaining that it is uncontested that statutes of limitation may be waived in litigation in Bulgaria).)

Bulgaria also is an adequate forum. As the Illinois Appellate Court held, the Plaintiffs' "own legal expert opined that Bulgarian law would provide redress for" Plaintiffs claims, and that the claims would be "tried before professional judges trained as lawyers." (A0493-94, ¶¶ 26-27; A0771, ¶ 23; *see also* A0726, ¶¶ 4-8; A3123, ¶ 13.) Plaintiffs subsequently submitted an additional expert affidavit in the Delaware litigation, giving them the opportunity to change their expert's earlier affidavit if it was in error, and they did not do so. Nor did the Plaintiffs' expert at any point opine that the Bulgarian courts were corrupt.

Every U.S. court to address the issue has found Bulgaria to be an adequate forum. *See* A0474-75 (Illinois trial court opinion); A0493-94 (Illinois appellate court opinion); *Stroitelstvo Bulgaria Ltd. v. Bulgarian-Am. Enter. Fund*, 589 F. Supp. 2d 875, 888 (N.D. Ill. 2009), *aff'd*, 589 F.3d 417, 421 (7th Cir. 2009); *Asenov v. Silversea Cruises, Ltd.*, 2012 WL 1136980, at *3 (S.D. Fla. Mar. 28, 2012); *Zeevi Holdings Ltd. v. Republic of Bulgaria*, 2011 WL 1345155, at *9 (S.D.N.Y. Apr. 5, 2011), *aff'd*, 494 F. App'x 110 (2d Cir. 2012).[14] As already considered by other courts, the filing fee (which, it is undisputed, is fully recoverable as a matter of course by a winning plaintiff (A2438, ¶ 18; A3123-24, ¶ 15)), purported court congestion, and Plaintiffs' accusations of corruption do not render Bulgaria an inadequate forum.[15] (*See, e.g.*, A0475; A0493-94, ¶ 27; *Stroitselstvo Bulgaria*, 589

[14] These holdings are not contradicted by Plaintiffs' assertion regarding the alleged corruption of a single Bulgarian regulator. (Br. at 42 n.15.) As is evident from the exhibit Plaintiffs submitted, the individual served with the Bulgarian National Bank from 2007 through 2013, but the charges against him arise from the period between 2010 and 2013, after the events at issue in this litigation concluded. (*See* A3056.) Plaintiffs do not explain why the charges for this period would have anything to do with the share purchase.

[15] Plaintiffs provide no support for their assertion that the "filing fee strongly weighs against a Bulgarian forum" in this case. (Br. at 36.) The cases on which they rely (*see id.*) stand for the proposition that a forum may be unavailable where the plaintiffs are unable to pay the fee. *Henderson v. Metro. Bank & Trust Co.*, 502 F. Supp. 2d 372 (S.D.N.Y. 2007); *Bridgestone/Firestone North Am. Tire, LLC v. Garcia*, 991 So.2d 912, 917 (Fl. Dist. Ct. App. 2008) (imposition of filing fee would "deprive [plaintiffs] of a remedy"). Plaintiffs have not even attempted such a showing, nor could they: at oral argument, Plaintiffs' counsel described Plaintiffs

F. Supp. 2d at 888.) Plaintiffs have presented no basis for this Court to reach a contrary conclusion.[16]

as "one of the most, if not the most, prominent emerging market hedge funds in the United States; probably the world." (A3430.)

[16] Not only should this Court ignore the materials in Plaintiffs' Appendix that were not part of the record below (*see* A3749-68; Del. S. Ct. R. 8), none of these materials even remotely suggests that Bulgaria is not an adequate forum to hear Plaintiffs' suit.

## IV. THE APPLICATION OF THE *CRYO-MAID* "OVERWHELMING HARDSHIP" FACTORS IS NOT BEFORE THIS COURT, BUT THOSE FACTORS REQUIRE DISMISSAL AS WELL.

### A. Question Presented

Whether the Court below properly applied the *Lisa* doctrine to Plaintiffs' case.

### B. Scope of Review

This Court reviews the Court of Chancery's "stay or dismissal of a case under *McWane* for abuse of discretion," but it reviews "*de novo* any issues of law 'applied in reaching that decision,'" including whether *McWane*/*Lisa* is the proper standard. *LG Elecs., Inc.*, 114 A.3d at 1252.

### C. Merits of Argument

#### 1. Application of the *Cryo-Maid* Factors is Addressed to the Trial Court's Sound Discretion, and the Trial Court Has Not Yet Made a *Cryo-Maid* Ruling.

Plaintiffs ask this Court to find that Defendants "cannot meet their burden" under the overwhelming hardship standard. (Br. at 3.) Not only would such a finding be incorrect (*see* pp. 36-42), the issue is not ripe for this Court's determination. As this Court observed in the *Martinez* case, "[a] *forum non conveniens* motion is addressed to the trial court's sound discretion." 86 A.3d at 1104; *see also Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 38 (Del. 1991) ("The decision to grant [defendant's] motion to dismiss [based on *forum non conveniens*] was a discretionary act to be exercised by the Superior Court after a review of all of the facts and the pertinent law."); *Hupan v. Alliance One Int'l, Inc.*,

2015 WL 7776659, at *4 (Del. Super. Nov. 30, 2015) (the *forum non conveniens* doctrine "is only employed in the discretion of the trial judge"). This Court's role is not to make a *forum non conveniens* determination in the first instance, but instead to "determine[] 'whether the findings and conclusions of the [court below] are supported by the record and are the product of an orderly and logical [reasoning] process.'" *Martinez*, 86 A.3d at 1104 (quoting *Williams*, 594 A.2d at 37).

The Vice Chancellor did not make a final determination with regard to the "overwhelming hardship" factors. In his opinion dismissing the Plaintiffs' Complaint, the Vice Chancellor explained preliminarily the considerations that would "inform [his] analysis" under the "overwhelming hardship" standard. (Op. at 32.) However, he did not reach the question, finding that it was not necessary to do so because *Lisa* provided ample support for his decision. (*Id.* ("Because of my decision here, I need not reach the question of whether litigation in Delaware would create an overwhelming hardship for the Defendants.").) This Court should affirm on the same basis.

### 2. Defendants Would Face Overwhelming Hardship Under the *Cryo-Maid* Factors if Forced to Litigate this Action in Delaware.

Had the Vice Chancellor conducted a *Cryo-Maid* analysis, it would have demonstrated that Defendants have amply shown that litigating this case in Delaware will cause them "overwhelming hardship." *Martinez*, 86 A.3d at 1106 (Defendants

will meet the "overwhelming hardship" standard if they demonstrate that "the *forum non conveniens* factors weigh so overwhelmingly in their favor that dismissal of the Delaware litigation is required to avoid undue hardship or inconvenience to them").[17]

**a. This Dispute Requires the Resolution of Important and Unsettled Issues of Bulgarian Law.**

Plaintiffs' fiduciary duty and civil conspiracy claims, which themselves must be decided under Bulgarian law (*see* A3099-101), are premised entirely on the existence of alleged violations of a Bulgarian securities law and fiduciary duties allegedly owed by shareholders of a Bulgarian bank. (*See* A0040-45, ¶¶ 54-59, 64-66, 71-72, 74-80, 82-84.) This Court has held that, in making *forum non conveniens* decisions, Delaware courts "must acknowledge that important and novel [legal] issues of other sovereigns are best determined by their courts where practicable." *Martinez*, 86 A.3d at 1109-10. Plaintiffs argue that this holding is limited to situations like toxic tort litigation, and is intended only to ward off "a massive influx of cases" that could result from a decision in such a "heavily-litigated genre." (Br.

[17] The *Cryo-Maid* factors are as follows: (1) whether the controversy is dependent upon the application of Delaware law; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the possibility of the view of the premises; (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and (6) all other practical problems that would make the trial easy, expeditious, and inexpensive. *See Martinez*, 86 A.3d at 1104 ((citing *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964).)

at 40.) That is not what *Martinez* holds. To the contrary, it states that cases, like this one, in which the foreign forum has an "interest in resolving . . . novel issues to promote uniformity and clarity in the law that governs a great number of corporations" are exactly the sort of important and novel issues to which this holding was meant to apply. *Martinez*, 86 A.3d at 1109 n.36 (quoting *Brandin v. Deason*, 941 A.2d 1020, 1024 (Del. Ch. 2007) (emphasis omitted)).[18]

Specifically, for instance, having failed to uncover any evidence of an illicit voting agreement, Plaintiffs may argue (contrary to the terms of the Bulgarian securities statute) that some other evidence or proof that AIB and BAEF voted in the same manner at BACB shareholder meetings would be sufficient to demonstrate a violation. No precedential Bulgarian authority would be available to assist in this determination. (A3127, ¶ 22.) Moreover, as the Vice Chancellor observed, in order to rule in the Plaintiffs' favor, the Delaware courts would be required to find a violation of the Bulgarian securities law where Bulgarian regulators found none, as

[18] Contrary to Plaintiffs' assertions, the fact that Bulgaria is a civil law jurisdiction does not mean that the Court may not take into account the fact that no precedent is available to guide its decision, nor does it mean that the Court's decision is of "no weight" because, according to Plaintiffs, "Bulgarian courts do not even heed *Bulgarian* precedents." (Br. at 38-39, 41.) Argentina, the forum in favor of which *Martinez* affirmed dismissal, is a civil law jurisdiction, and this Court did not hesitate to find that issues of Argentinian law could be both "important and novel." 86 A.3d at 1109-11.

well as to determine the proper weight to afford the Plaintiffs' decision not to appeal the Bulgarian regulatory approvals. (Op. at 33.) The Vice Chancellor therefore properly observed that a ruling regarding the proper application of Bulgarian law is "of keen interest to Bulgaria, not Delaware," and "could have serious, unintended consequences on the development of Bulgarian law and on conditions for investment capital in that country." (Op. at 33, 34.)

**b. The Remaining *Cryo-Maid* Factors Also Strongly Favor Dismissal.**

The remaining *Cryo-Maid* factors also weigh strongly in favor of dismissal.

***The Location of Documents.*** BAEF's documents are located almost exclusively in Bulgaria (A0552 at Int. Resp. Nos. 2-3; A0776, ¶¶ 7,9; A2494 at Int. Resp. No. 2), and AIB's documentary sources of proof (with the exception of those already produced in this litigation) are located in Ireland or other European locations much closer to Bulgaria than to Delaware (A3152-53 at No. 3; *see also* A0509-15 at Nos. 8-9, 15-16). This litigation would require Defendants to collect documents abroad, and therefore this factor points in favor of dismissal. *Pipal*,2015 WL 9257869, at *6 ; *IM2 Merch.*, 2000 WL 1664168, at *10.[19] Moreover, as the Vice

[19] Contrary to Plaintiffs' assertion (43 n.17), this collection would be a hardship even with the aid of modern technological improvements. *See id.*

Chancellor observed, "[u]ndoubtedly, trial here would require translation of some documents written via the Cyrillic, not Latin, alphabet." (Op. at 34.)

***The Location of Material Witnesses.*** Of the 27 material witnesses identified by the parties,[20] 15 witnesses are located in Bulgaria, 9 in other European locations, 2 in Illinois, and 1 in Missouri. (*See* A3104; A0112.) These witnesses will assist Defendants in proving the absence of a voting agreement, and include, among others, nine witnesses from BACB, each of whom can testify, among other things, to the absence of any collusion between BAEF and AIB at shareholder meetings (A2496-99 at Int. Resp. No. 12); four Bulgarian regulators, who can each provide testimony regarding the considerations that supported their approval of the share purchase, including with respect to Article 149 of the POSA (A0510-11 at No. 10); and the parties' experts on Bulgarian law (*id.*; A2496-99 at Int. Resp. No. 12).[21] No potentially relevant witnesses are located in Delaware.

***The Availability of Compulsory Process.*** If this case were to proceed in Delaware, the Court would be forced to rely on the Hague Convention and Letters

[20] Twenty-five potential witnesses were identified in the Defendants' responses to interrogatories in the Illinois Action. Subsequently, the Defendants identified two additional potential witnesses: Scott Falk, an Illinois resident (*see* A0112 n.3) and Assen Alexiev, a Bulgaria resident (*see* A3104).

[21] A Bulgarian court could compel testimony from each of these Bulgarian witnesses. (*See* A3126-27, ¶ 21 (Bulgarian regulators would be permitted to testify to develop any facts not available through document discovery).)

Rogatory to compel testimony from the European witnesses, the majority of whom are not in Defendants' control. (A3105-07.) In contrast, two of the three United States witnesses have agreed to travel to Bulgaria if this case were brought there, so 26 of the 27 witnesses could testify without resort to diplomatic channels.[22] *See* Op. at 33 ("[A] number of the witnesses necessary to the Defendants are in Europe, including in Bulgaria, and there would be some burden securing their testimony."); *see also Ward v. Tishman Hotel & Realty*, 2010 WL 5313549, at *3 (Del. Super. Nov. 30, 2010).

***Remaining Factors***. In addition to the factors discussed, the facts that (i) Bulgarian, not Delaware, law applies to this controversy,[23] (ii) the Illinois courts already dismissed an essentially identical complaint, (iii) Plaintiffs also brought their

[22] European Union regulations provide Bulgarian courts with a direct court-to-court channel for evidence-taking from other European jurisdictions that is less burdensome than the Hague discovery process, including because it includes a 90-day time limit, while diplomatic channels can take over a year or more. (A3125-26, ¶¶ 17-20; A0727-28, ¶¶ 13-14; *see also In re Air Crash Over the Mid-Atl. on June 1, 2009*, 760 F. Supp. 2d 832, 843-44 & n.8 (N.D. Cal. 2010); *Vivendi S.A. v. T-Mobile USA, Inc.*, 2008 WL 2345283, at *13 (W.D. Wash. June 5, 2008), *aff'd*, 586 F.3d 689 (9th Cir. 2009).

[23] Plaintiffs insist that they were "injured in Delaware and Connecticut." (Br. at 39.) But the sole reason for their alleged injury is the purported violation of Bulgarian securities law with respect to their ownership of shares in a Bulgarian bank. They were injured in Bulgaria. Plaintiffs' tort theories, including an allegation that AIB breached its purported duties as a shareholder in BACB, require the application of Bulgarian, not Delaware law. (*See* A3099-101.)

claims before Bulgarian regulators, and (iv) this controversy is localized in Bulgaria, and has virtually no connection to Delaware, all require this case to be dismissed.

## V. THE COURT BELOW DID NOT APPLY A NEW RULE OF LAW, SO PLAINTIFFS' ARGUMENTS REGARDING "RETROSPECTIVE OPERATION" ARE WITHOUT MERIT.

### A. Question Presented

Whether the Court of Chancery was permitted to apply the *Lisa* doctrine to this case.

### B. Scope of Review

This Court reviews "*de novo* any issues of law 'applied in reaching'" the decision to dismiss pursuant to *McWane*/*Lisa*. *LG Elecs., Inc.*, 114 A.3d at 1252.

### C. Merits of Argument

Plaintiffs argue that the Vice Chancellor's ruling should not apply to them, and should only apply prospectively. This argument is baseless. The decision below did not "'establish[] a new principle of law.'" (Br. at 45 (quoting *Chevron Oil Company v. Huson*, 404 U.S. 97, 106-07 (1971)).) It straightforwardly applied *Lisa* to dismiss a case that was not first filed in Delaware. The *Lisa* decision was issued in 2010 and was available to the Plaintiffs well before they filed their initial action in Illinois in 2011. Moreover, the doctrine set forth in *Lisa* has been applied by lower courts in at least two cases, one of which was affirmed by this Court, in which no action was pending elsewhere. (*See supra*, pp. 17-18 (discussing *Abrahamsen* and *Chaverri* decisions).) The Vice Chancellor did not apply any new rule of decision nor are Defendants seeking one.

As the Vice Chancellor observed, "the Plaintiffs bought stock in a Bulgarian company regulated by Bulgarian law, and are trying to vindicate a right under that law." (Op. at 34.) Moreover, Plaintiffs already brought their litigation in the U.S. forum with the greatest ties to their cause of action, and were told by that Court to file their lawsuit in Bulgaria. There is nothing unjust in the Vice Chancellor's exercise of his discretion to dismiss this suit based upon *forum non conveniens*.

## CONCLUSION

For all of the foregoing reasons, the Court should affirm, in its entirety, the Court of Chancery's Opinion.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2017, a copy of the foregoing document was served via *File & ServeXpress* upon the following attorneys of record:

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