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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ANSWERING BRIEF OF
DEFENDANT BELOW-APPELLEE
BULGARIAN-AMERICAN ENTERPRISE FUND

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NATURE OF PROCEEDINGS

In *Lisa, S.A. v. Mayorga*, 993 A.2d 1042 (Del. 2010), this Court explained that Delaware has two distinct *forum non conveniens* doctrines. One—which provides that a court may dismiss a case only if the defendants can prove that litigating will subject them to overwhelming hardship—applies "[w]here the Delaware action is the first-filed." *Id.* at 1047. The other—which gives the court broad discretion to dismiss a suit as justice requires—applies "where the Delaware action is *not* the first filed." *Id.* (emphasis in original). In this case, the Delaware action was not the first filed, so the latter standard applies. That simple point should be the beginning and the end of the matter: the Court of Chancery did not remotely abuse its discretion by dismissing this case under that standard.

This is a dispute over *Bulgarian* corporate law: it has nothing to do with Delaware or Delaware corporate law. In particular, plaintiffs-appellants Gramercy Emerging Markets Fund and its wholly owned subsidiaries Balkan Ventures LLC and Rila Ventures LLC (collectively Gramercy) allege that a 2008 contract between defendants-appellees Bulgarian-American Enterprise Fund (BAEF) and Allied Irish Banks, p.l.c. (AIB) for the purchase of less than 50% of the shares in a Bulgarian bank—which was approved by Bulgarian regulators—violated Bulgaria's Public Offering of Securities Act (POSA). But rather than suing in Bulgaria, Gramercy sued in Illinois federal court. When that ploy failed—that

court dismissed for lack of jurisdiction—Gramercy again sued in Illinois state court. But yet again, the court dismissed, this time on *forum non conveniens* grounds. The court held, quite reasonably, that the case belongs in Bulgaria, and that decision was affirmed on appeal. But Gramercy paid no heed and proceeded to sue in Delaware instead. Even though this is the *third*-filed action, Gramercy argued that the Court of Chancery could not dismiss the case on *forum non conveniens* grounds unless defendants proved "overwhelming hardship." The court rejected that argument under *Lisa*, and—applying a straightforward discretionary *forum non conveniens* analysis—concluded (like the Illinois courts) that this case belongs in Bulgaria.

Gramercy devotes its primary efforts to arguing that *Lisa*'s discretionary standard does not apply here, and that the Court of Chancery thus should have required defendants to prove "overwhelming hardship." But this is *precisely* the kind of case for which *Lisa*'s discretionary standard was devised. A plaintiff should not be allowed to travel the country shopping for a preferred forum while keeping Delaware in its back pocket as a fallback. Under Gramercy's theory, it could have filed this lawsuit in all 49 other States and been dismissed on *forum non conveniens* grounds in each and every one, but still be entitled to sue in Delaware unless defendants could prove "overwhelming hardship." *Lisa* sensibly held that the plaintiff-friendly "overwhelming hardship" standard does not apply in these

circumstances, but instead applies only where the plaintiff seeks to avail itself of a Delaware forum in the first instance. Delaware should not become a magnet for litigation previously pursued, but rejected, elsewhere.

Because the *Lisa* standard applies, and the Court of Chancery properly dismissed this case on *forum non conveniens* grounds under that standard, this Court should affirm.

SUMMARY OF ARGUMENT

1. Denied. Under Delaware law, a court may "freely … exercise its discretion in favor of … dismissing" an action on *forum non conveniens* grounds if the plaintiff previously filed the same suit in another jurisdiction. *Lisa*, 993 A.2d at 1047 (emphasis omitted). That is so even when the first-filed suit has been dismissed. *Id.* at 1048. (By contrast, a suit filed for the first time in Delaware may be dismissed only when the defendant would otherwise suffer "overwhelming hardship." *Id.* at 1047.) Because Gramercy previously filed the same action in Illinois, the Court of Chancery properly held that it enjoyed broad discretion to dismiss. It makes no difference that the previous action was dismissed on procedural grounds; Gramercy's argument to the contrary is refuted by this Court's precedents, undercuts this Court's policy goals (*i.e.*, to defer to a plaintiff's initial choice of forum and discourage forum shopping), and is hard to administer. Gramercy fares no better in arguing that it *would have* filed in Delaware first had it known about BAEF and AIB's agreement to litigate certain disputes in Delaware. This Court has never been in the business of making case-specific exceptions for which standard governs based on a plaintiff's knowledge; at best, this kind of argument is a factor for a lower court to consider in exercising its discretion. In any event, as explained in the next section, that forum selection clause is irrelevant.

2. Denied. Gramercy's claim that Delaware is a proper forum in light of BAEF and AIB's agreement to litigate disputes between themselves here is incorrect. Although BAEF and AIB agreed to litigate *their* disputes in Delaware, they did not agree to defend *third party* suits in the State. *See* A2606. Gramercy believes that is of no moment, relying on *Candlewood Timber Group, LLC v. Pan American Energy, LLC*, 859 A.2d 989 (Del. 2004). But *Candlewood* involved an application of the inapposite overwhelming hardship test, and its conclusion does not control here. *Candlewood* thus lends no support to Gramercy's radical position that this Bulgarian securities lawsuit belongs in Delaware.

3. Denied. The lower court did not abuse its discretion in deciding that Bulgaria is an adequate alternative forum and that Delaware has sparse interests in the suit. This case presents novel and complicated questions of Bulgarian law, and no significant issues affecting Delaware. Gramercy responds that the court failed to address the Bulgarian courts' alleged corruption, excessive filing fees, and congestion, but these arguments are meritless and other U.S. courts have consistently rejected them.

4. Denied. Gramercy's argument that Delaware is a proper forum under the overwhelming hardship analysis, and that the lower court erred in suggesting otherwise, fundamentally misreads the court's opinion. Because the court found the overwhelming hardship test inapposite, it expressly *declined* to address that

test's application. In the event this Court were to conclude that the overwhelming hardship test governs, the proper course would be to remand.

5. Denied. Delaware law has a presumption in favor of giving judicial decisions retroactive effect. A litigant can only rebut that presumption by, among other things, establishing that the judicial decision announced a new rule that was not foreshadowed by past precedent. But a decision that the court had discretion to dismiss this action because it is not the first filed is not remotely new or surprising; it is a simple application of *Lisa*. *See* 993 A.2d at 1047.

STATEMENT OF FACTS

A. Factual Background

Seeking to support fledgling capitalist democracies in Eastern Europe as the Cold War drew to a close, Congress in 1989 enacted the Support for East European Democracy (SEED) Act. A30. Pursuant to that Act, the United States established ten "Enterprise Funds"—public-private partnerships that invested in former Soviet-bloc countries. A31. BAEF is one such fund, established in 1991 to promote the development of the Bulgarian private sector.[1] A32. BAEF ceased all business operations effective September 30, 2015, A2494, but during its operational existence, its principal office and nearly all of its employees were located in Sofia, Bulgaria, A32, A262, A573-76. BAEF is incorporated under Delaware law but never maintained a presence here; rather, its U.S. office was in Illinois. A27, A573-74.

In 1996, BAEF provided funding for the creation of the Bulgarian American Credit Bank (BACB)—a Bulgarian bank headquartered in Sofia, which provides loans to small and medium-sized businesses throughout that country. A32. BAEF was BACB's majority shareholder from the Bank's creation until 2008. A32-33.

BAEF decided to issue an IPO in April 2006, seeking to reduce its 65% stake in BACB to 53.88%. A32. Sensing an economic opportunity, Gramercy

[1] Bulgarian-American Enterprise Fund is incorrectly denominated in the caption as The Bulgarian American Enterprise Fund.

purchased 3% of BACB's stock. A32. (Gramercy Emerging Markets Fund is incorporated in the Cayman Islands; its principal office is in Connecticut. Its wholly owned subsidiaries Balkan and Rila are limited liability companies incorporated in Delaware; both also have principal offices in Connecticut. A26-27.) Gramercy subsequently acquired more shares, increasing its stake in BACB to roughly 26%. A33.

Less than two years later, BAEF decided to sell more BACB shares. *Id.* Its offer drew interest from AIB, an Irish company with its headquarters in Dublin (and no employees or operations in Delaware). A33, A428, A508-09. BAEF met with AIB on several occasions in Bulgaria—and one time in Chicago—to discuss the possible sale. A515-16, A567-68. In December 2007, AIB offered to purchase 49.9% of BACB's shares from BAEF, which would leave BAEF with a 3.89% stake. A34. BAEF, AIB, and BACB met repeatedly in Bulgaria in 2008 so that AIB could conduct due diligence regarding the purchase. A516, A567. They never met in Delaware.

BAEF signed a Purchase Agreement with AIB on February 21, 2008. A2569-2611. Under the Agreement, AIB agreed to pay 216 million euros to BAEF for these shares. A2581. In their contract, BAEF and AIB added a choice-of-law provision—stating the Agreement shall be governed by Delaware law—and a forum selection clause—stating that any action "against any Party hereto arising

out of or relating to this Agreement" may be pursued in state or federal court in Delaware. A2608. But, BAEF and AIB further specified, "[t]his Agreement is for the sole benefit of the Parties"—*i.e.*, BAEF and AIB alone—"and nothing herein express or implied shall give or be construed to give any [other] Person … any legal or equitable rights hereunder." A2606.

Gramercy objected to the proposed deal. Gramercy based its objections on Bulgaria's Public Offering of Securities Act, which regulates the sale of stock in Bulgarian public companies. A584, A590-723. Under the POSA's "mandatory tender offer" rule, a shareholder who purchases more than 50% of the stock of a publicly-traded company must offer to buy other shareholders' outstanding shares as well—at the same price. A663-65. The law further provides that the tender offer requirement applies whenever two shareholders who together hold more than 50% of a company's stock agree to vote jointly to pursue a common management policy. A34, A663-65. Gramercy alleged that AIB had violated the POSA by structuring its purchase to avoid the tender offer rule, while controlling BACB via an alleged voting agreement with BAEF. A476, A484.

Gramercy and AIB made their respective arguments to Bulgarian regulators; AIB sought approval for the purchase, while Gramercy asked regulators—*i.e.*, the Bulgarian Financial Supervision Commission and the Commission on Protection of Competition—to stop it (or to require AIB to make a tender offer). *Id*. The

regulators approved the deal. A212-14. Gramercy could have appealed to Bulgaria's Supreme Administrative Court but did not. *Id.*

AIB's stock purchase closed on August 28, 2008, in Sofia, Bulgaria. A36. AIB subsequently sold all of its shares in BACB in 2011. A37.

B. Procedural History

In August 2011, Gramercy filed suit against BAEF and AIB in the U.S. District Court for the Northern District of Illinois. A431-47. It also named former BAEF CEO Frank Bauer, an Illinois resident, as a defendant. *Id*. BAEF and AIB responded with motions to dismiss on three grounds: (1) *forum non conveniens*; (2) lack of jurisdiction; and (3) failure to state a claim. The District Court (Gottschall, J.) granted the motions to dismiss due to lack of diversity jurisdiction. A448-52. The court did not rule on the remaining grounds for dismissal. *See id.*

Rather than appeal, Gramercy tried its luck in a second Illinois forum; in February 2012, Gramercy filed a near-identical complaint in Illinois state court. A453-71. BAEF and AIB again filed motions to dismiss, again seeking dismissal on *forum non conveniens* grounds. As before, the court sided with BAEF and AIB; after "extensive" forum-related discovery, the Illinois Circuit Court (Mitchell, J.) granted the motions. A472-80. The court held the case had a "tenuous connection … to Illinois" and "dismissal in favor of Bulgaria better serves the considerations of fundamental fairness, sensible and effective judicial administration and the ends

of justice." A479. The court reached that conclusion in part because Bulgarian substantive law would govern, and because the relevant documents and witnesses were generally in Bulgaria. *Id.* The court rejected Gramercy's claim that Bulgarian courts are corrupt and have excessive filing fees, and are thus an inadequate alternative forum. A475.

Gramercy appealed to the Illinois Appellate Court. In July 2014, that court unanimously affirmed, agreeing that the case belonged in Bulgaria. A481-504. Gramercy then sought leave to appeal to the Illinois Supreme Court, which was denied on November 26, 2014. *See Gramercy Emerging Mkts. Fund v. AIB*, 21 N.E.3d 714 (Ill. Nov. 26, 2014) (Table).

But Gramercy did not stop there. On November 5, 2014—three weeks before the Illinois Supreme Court denied leave to appeal—Gramercy filed this lawsuit in the Delaware Court of Chancery. A26-46. As before, Gramercy complained about AIB's purchase of a 49.9% stake in BACB without also offering to buy Gramercy's shares. A26-39. And as before, the claims hinged on BAEF and AIB's purported violations of Bulgaria's POSA. Op. 32. For the third time, BAEF and AIB moved to dismiss, *inter alia*, on *forum non conveniens* grounds. A52-146.

The Court of Chancery (Glasscock, V.C.) granted BAEF and AIB's motion. Under Delaware law, the court noted, a plaintiff's choice of forum typically "is

entitled to strong deference," such that courts will dismiss a case only where the defendant can establish that it otherwise would suffer "overwhelming hardship." Op. 2 (emphasis omitted). Such deference to a plaintiff's initial choice of forum, the court held, reflects "public policy concerns involving comity and avoidance of forum-shopping." *Id.* But that standard is not appropriate, the court continued, for litigants who first file in another State and subsequently sue in Delaware. Rather, "[w]here a matter has been first-filed elsewhere, interests of comity and the avoidance of forum shopping cut the other way," and courts "freely exercise [their] discretion to dismiss or stay in favor of the first-filed action, as justice requires." *Id.* at 3 (citing *Lisa*, 993 A.2d at 1047). That is so even if "no earlier-filed actions remain pending." *Id.* And it is true regardless of the ground(s) on which those first-filed actions were dismissed; neither precedent nor policy supported drawing lines between prior dismissals on the merits and those on procedural grounds. *See id.* at 29-30.

The facts of this case triggered the latter rule—known as the *McWane* doctrine, named for *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281 (Del. 1970). *See* Op. 3. After all, Gramercy "did *not* choose this Court, or this jurisdiction, as the appropriate forum for resolution of this dispute." *Id.* at 4 (emphasis in original). Gramercy was thus the classic "serial filer" that did not deserve Delaware's generous "overwhelming hardship" standard;

Gramercy even admitted that if BAEF and AIB's motions to dismiss prevail in Delaware, it "may seek to litigate in yet another American jurisdiction." *Id*.

The court also addressed and rejected Gramercy's argument that Delaware was a proper forum in light of the Delaware forum selection clause in BAEF and AIB's Purchase Agreement. Op. 31-32. That argument, the court held, "overlooks the fact that such provisions were explicitly limited to" BAEF and AIB and "in no way creates a contractual right for another shareholder to sue … in Delaware to enforce purported violations of Bulgarian securities laws." *Id.* The clause thus did "not require nor favor" finding Delaware a proper forum for this litigation. *Id.*

The Court of Chancery then exercised its discretion to dismiss. The suit, it pointed out, boiled down to this: a company "bought stock in a Bulgarian company regulated by Bulgarian law, and [is] trying to vindicate a right under that law." *Id.* at 34. While Delaware courts are certainly capable of resolving issues of foreign law, these are particularly thorny ones; Gramercy's allegations under Bulgaria's POSA raise "certain questions of first judicial impression," *id*. at 33, as well as daunting issues regarding Bulgaria's "deference to regulators" and "exhaustion of remedies." *Id.* The court worried about "serious, unintended consequences" that its decision might have "on conditions for investment of capital" in Bulgaria. *Id.* at 34. There were practical problems too: "a number of the witnesses necessary to [BAEF and AIB] are in Europe, including in Bulgaria," and the case "require[d]

translation of some documents written via the Cyrillic, not Latin, alphabet." *Id.* at 33-34. Delaware, in contrast, had only "sparse" interests at stake. *Id.* at 34.

In fact, given the tenuousness of the lawsuit's connection to Delaware, the court mentioned in passing that it was not even clear Gramercy would "easily" win under the "overwhelming hardship" standard. *Id.* at 32. But because the court held that the *McWane* standard governed, it did "not reach the question of whether litigation in Delaware would create an overwhelming hardship" for these defendants. *Id.*

The court entered final judgment dismissing Gramercy's complaint. A3744-45. Gramercy timely appealed to this Court on January 26, 2017. *Id.*

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY DECLINED TO APPLY THE OVERWHELMING HARDSHIP STANDARD.

A. Question Presented

Whether the Court of Chancery properly declined to apply the overwhelming hardship standard.

B. Scope of Review

This Court reviews *de novo* questions of law, including whether the Court of Chancery employed the proper legal standard for dismissing a complaint. *See, e.g.*, *LG Elecs., Inc. v. InterDigital Commc'ns, Inc.*, 114 A.3d 1246, 1252 (Del. 2015).

C. Merits of Argument

1. The overwhelming hardship standard does not apply where the plaintiff previously filed the same suit in another jurisdiction.

As the Court of Chancery correctly held, Delaware law establishes two rules for *forum non conveniens* motions: one where Delaware is a plaintiff's first choice forum, and one where it is not. When a plaintiff files a lawsuit in a Delaware court in the first instance, a defendant bears the burden of demonstrating overwhelming hardship to obtain a *forum non conveniens* dismissal. But that is decidedly *not* the rule where, as here, the plaintiff first files in another jurisdiction (or two), and the first-filed suit is dismissed. Then, courts have broad discretion to dismiss a case as justice so requires under Delaware's *McWane* doctrine.

This Court already established that precise dichotomy in *Lisa*. There, as here, a plaintiff filed its complaint in another jurisdiction (Florida) before filing suit in Delaware. *Id.* at 1045-46. The lower court stayed Lisa's Delaware suit in light of the pending Florida case; once the Florida court dismissed that suit, the court dismissed the Delaware action on *forum non conveniens* grounds. *Id.* The plaintiff appealed, urging this Court to find that the defendants had failed to establish overwhelming hardship. This Court refused to do so, instead noting that "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.13 (collecting cases). The plaintiff's claim was thus "without merit, because the 'overwhelming hardship' standard does not apply to Delaware actions—like this one—that were not 'first filed.'" *Id.* at 1047. Rather, "where the Delaware action is not the first filed," the court is to "freely … exercise its discretion in favor of … dismissing the Delaware action." *Id.* (emphasis omitted).

Lisa also clarified that the *McWane* doctrine applies even where there are no earlier-filed actions still pending in any other jurisdiction. To be sure, in *McWane* itself the first-filed action was still pending in another state. *See Lisa*, 993 A.2d at 1048. But *Lisa* treated that as a distinction without a difference; although Lisa's first-filed Florida action had been dismissed, that "d[id] not change the outcome." *Id.* So a plaintiff is entitled to substantial deference only "'if there is no action

pending *or decided* between the parties.'" *Id.* at 1048 n.20 (quoting *Taylor v. LSI Logic Corp.*, 715 A.2d 837, 842 (Del. 1998)) (emphasis added in *Lisa*). Thus—as Gramercy itself admits—the fact that the prior Illinois actions are no longer pending is "irrelevant" to the *forum non conveniens* analysis. Gramercy Br. 12.

Delaware's two rules—one for when Delaware is the first-choice forum, and one for when it is not—make sense as a policy matter. The whole point of the overwhelming hardship standard, this Court noted, was to ensure that "the plaintiff's choice of forum will be respected and rarely disturbed, even if there is a more convenient forum." *Lisa*, 993 A.2d at 1047. But that policy concern—*i.e.*, "strong deference to a plaintiff's initial choice of forum"—points in the *opposite* direction when the plaintiff's initial choice of forum was not Delaware; a subsequent choice of Delaware is not entitled to the same respect. *Id.* And by focusing on plaintiff's initial choice, "the two doctrines of overwhelming hardship and *McWane*—operate consistently and in tandem to discourage forum shopping and promote the orderly administration of justice by recognizing the value of confining litigation to one jurisdiction, whenever that is both possible and practical." *Id*. (internal quotation omitted).

On appeal, Gramercy admits that *McWane* governs when a plaintiff filed the same case in another jurisdiction even if that case has been dismissed—but tries to limit *McWane* to situations where the prior suit was "resolved on the merits."

Gramercy Br. 12. *Lisa*, Gramercy argues, "concluded that the fact that the [prior] Florida action was not pending was irrelevant *because it had been decided on the merits*, and thus the *McWane* policy disfavoring inconsistent judgments still applied." *Id.* (emphasis added). If another state rules on procedural grounds, however, Gramercy contends that *McWane* no longer applies. *Id.* Gramercy gives two reasons for seeking to carve out these cases from *Lisa*'s ambit: (1) "there is no risk of litigating the merits of the same 'cause of action' in two fora," and (2) "there is no risk of inconsistent judgments because the [first] courts refused to adjudicate the merits." *Id.* at 12-13.

Lisa does not support any such limitation on the first-filed rule. Again, *Lisa* held explicitly (and categorically) that "the 'overwhelming hardship' standard does not apply to Delaware actions—like this one—that were not 'first filed.'" 993 A.2d at 1047. It never said that this test "does not apply to Delaware actions … that were not first filed" *unless the prior suits were dismissed on procedural grounds*. In fact, *Lisa* never even stated the grounds on which the first-filed action in that case was dismissed, something it surely would have done if that were a dispositive consideration in its analysis. *See id.* at 1045 (noting that "[t]he 1998 Florida Action was dismissed," but not stating the reasons for that dismissal). And as importantly, Gramercy misapprehends the policies that animate *Lisa*. To Gramercy, *Lisa* was driven solely by concerns of *res judicata* and the possibility of

conflicting rulings. But that is wrong; *Lisa* specifies that its rule also seeks "to discourage forum shopping," 993 A.2d at 1047, which—as this case underscores—occurs regardless of whether the prior case is dismissed on merits or non-merits grounds. Under Gramercy's view, even if the courts of every other State concluded that this is a Bulgarian lawsuit that belongs in Bulgaria, a Delaware court would be required to exercise jurisdiction unless BAEF and AIB proved that litigation in Delaware would subject them to overwhelming hardship—the same standard for a plaintiff that chooses Delaware in the first instance.[2] That is not the law. The degree of deference a Delaware court owes a plaintiff's choice of forum turns on the *plaintiff's* decision to file first elsewhere, not the happenstance of how the court elsewhere resolved the matter. *See Lisa*, 993 A.2d at 1047 ("[I]n all cases where this Court has applied the 'overwhelming hardship' standard, the Delaware action was either the first filed or the only filed action.").

Plaintiffs thus err by trying to reframe *Lisa* as being based solely on the preclusive effect of a first-filed action. Indeed, *Lisa* did not even decide whether

[2] The Court of Chancery made exactly this point in rejecting Gramercy's claims. "Requiring the attachment of the overwhelming-hardship standard to this later-filed Delaware action could," it noted, "incentivize … a species of serial litigation." Op. 29-30 n.122. To give Gramercy the benefit of the overwhelming hardship standard even though it already tried its luck in another jurisdiction (or two) would allow litigants, "with little risk, [to] 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." *Id.* That would encourage forum shopping and undermine, not promote, "inter-state comity." *Id.*

the first-filed action in that case was entitled to preclusive effect; *Lisa* noted only—in a footnote—that "dismissal of the [first-filed action] also *raises questions* of *res judicata* and collateral estoppel." 993 A.2d at 1048 n.19 (emphasis added). If *Lisa* were trying to draw a dispositive doctrinal line between prior dismissals that have preclusive effect and those that do not, it could not have dodged the preclusion issue presented in that very case.

Gramercy's rule also suffers from grave administrability problems. Reframing *Lisa* and *McWane* as it does, the critical question under Gramercy's approach is whether a prior decision has preclusive effect. But that question is easier asked than answered. Preclusion is one of the most complicated areas of the law (so it is no surprise that *Lisa* expressly declined to decide the preclusion issue), and—contrary to Gramercy's assumption—a non-merits ruling can sometimes have preclusive effect. While a non-merits disposition of a case has no preclusive effect on the merits, that does not mean that a non-merits disposition has no preclusive effect *with respect to the non-merits issues decided*. To the contrary, "[t]he judgment remains effective to preclude relitigation of the precise [non-merits] issue ... that led to the initial dismissal." 18A Charles A. Wright *et al.*, *Federal Practice & Procedure* § 4436, at 149 (2d ed. 2012); *see Pastewka v. Texaco, Inc.*, 565 F.2d 851, 853 (3d Cir. 1977) ("'[W]here the judgment for the defendant is not on the merits, ... [the plaintiff] is precluded from relitigating the

very question which was litigated.'") (quoting *Restatement of Judgments* § 49 cmt. b (1942)). Were the law otherwise, this Court could affirm the dismissal of this very case on *forum non conveniens* grounds and plaintiffs could refile immediately in Delaware to relitigate the issue.

To implement Gramercy's rule, then, Delaware courts would have to wade into the morass of determining whether a prior non-merits decision has preclusive effect. This case is a perfect example of how challenging that can be. State and federal courts alike "have held that a dismissal based on the doctrine of *forum non conveniens* can have a preclusive effect," *Ex parte Ford Motor Credit Co.*, 772 So.2d 437, 441 (Ala. 2000) (collecting cases), and so a plaintiff may not relitigate a *forum non conveniens* issue unless it can show "objective facts … that materially alter the considerations underlying the previous resolution"—something Gramercy has not done, *id.* (citation omitted). Of course, any differences between the Illinois and Delaware *forum non conveniens* doctrines may prove that the Illinois courts' ultimate conclusion that this suit belongs in Bulgaria is not binding. *See, e.g.*, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148-49 (1988) (holding that a Texas state court was not bound by a federal court's *forum non conveniens* dismissal given their vastly different legal standards). But that is no reason to hold that Illinois courts' *findings on discrete issues* are not entitled to preclusive effect. That is the lesson of *Chick Kam Choo*; even as a Texas court was not bound by a

federal court's ultimate *forum non conveniens* determination, the Texas court *was* bound by component aspects of the federal court's decision (*e.g.*, a choice-of-law determination) common to Texas law. *See id.* at 150-51. Thus, the Illinois state court's decision in this case may be entitled to preclusive effect insofar as the Illinois court resolved specific issues (*e.g.*, choice-of-law) relevant to a Delaware *forum non conveniens* analysis. *See generally Federal Practice & Procedure* § 4436, at 173-74 (in *forum non conveniens* cases, "issue preclusion is appropriate if the issue actually remains the same"). The Illinois courts made many rulings relevant here, *e.g.*, Bulgaria's courts are not corrupt, Bulgarian law governs, and the documents and witnesses are mostly located there. *See* A475-79. It is neither necessary nor appropriate for a Delaware court to re-litigate these issues. *See Lisa*, 993 A.2d at 1048 (noting the desire to prevent the "possibility of inconsistent and conflicting rulings" between States). At the very least, this case (like *Lisa*) raises complicated preclusion issues. Under the *McWane* analysis, these preclusion questions are beside the point; courts apply the dichotomy between first-filed and later-filed actions with ease. In Gramercy's world, a Delaware court would have to resolve these tricky preclusion questions to proceed.[3]

[3] For that reason, if this Court were to cut back on *Lisa*'s clear holding and side with Gramercy, the proper course would be to remand to the Court of Chancery to decide in the first instance whether (and to what extent) the Illinois court's *forum non conveniens* decision has preclusive effect. *See* Op. 4 ("I assume (without

With this Court's precedent and policy pointing the same way, it is also no surprise that Gramercy's efforts to dredge up case law in support of its position fall short. Gramercy cites two Superior Court decisions—(1) *Trinity Inv. Trust, L.L.C. v. Morgan Guar. Trust Co. of N.Y.*, 2001 WL 1221080 (Del. Super. Ct. Sept. 28, 2001), and (2) *In re Asbestos Litig.*, 2012 WL 1980414 (Del. Super. Ct. May 16, 2012)—that it says apply the overwhelming hardship test when the first-filed case is not dismissed "on the merits." Gramercy Br. 14-16. But neither case addresses *Lisa*, and thus neither case provides any basis for ignoring *Lisa*.

It is no mystery why *Trinity* does not address *Lisa*: *Trinity* predates *Lisa* by almost a decade. *Trinity* simply applied the overwhelming hardship standard to a case that previously had been filed in another jurisdiction, and dismissed on *forum non conveniens* grounds. *See* 2001 WL 1221080, at *2-3. No one argued that the earlier suit rendered the overwhelming hardship test inapplicable, or that *McWane* governed instead, and the court did not address any such argument (and did not need to, because the defendant there had shown overwhelming hardship in any event, *id.* at *3-4). Accordingly, *Trinity* sheds no light on *Lisa*.

Although *Asbestos* (unlike *Trinity*) was decided after *Lisa*, it offers no more guidance. No one brought *Lisa* to the court's attention in that case, and the court

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deciding) that the determination in favor of a Bulgarian forum in Illinois has no issue-preclusive effect here.").

did not address it. Indeed, notwithstanding *Lisa*, the *Asbestos* court said that it was "aware of no decision applying a differen[t] standard because other similar suits were previously filed and dismissed elsewhere." 2012 WL 1980414, at *2. So, as in *Trinity*, the court simply applied the overwhelming hardship test and dismissed. *See id.* at *2-3. *Asbestos* sheds no more light on *Lisa* than does *Trinity*.[4] But *Lisa* says exactly what it means: *McWane*, not overwhelming hardship, governs when Delaware is not the first-choice forum.

2. The overwhelming hardship standard does not apply under the facts of this particular case.

Properly understood, *Lisa* compels the conclusion that BAEF and AIB need not establish overwhelming hardship in this case. According to *Lisa*, "where the Delaware action is not the first filed," a court can "freely … exercise its discretion in favor of staying or dismissing the Delaware action." *Lisa*, 993 A.2d at 1047 (emphasis omitted). Because this Delaware action is not the first filed, the Court of Chancery enjoyed broad discretion to dismiss on *forum non conveniens* grounds.

[4] Gramercy mentions a third Superior Court decision, *Fres-Co System USA, Inc. v. The Coffee Bean Trading-Roasting, LLC*, 2005 WL 1950802 (Del. Super. Ct. July 22, 2005), but that case also predates *Lisa*. And Gramercy turns to some non-Delaware cases for support, *see* Gramercy Br. 16-17, but those jurisdictions do not apply the same overwhelming hardship standard to cases first filed in that jurisdiction, and thus do not address whether that standard applies to cases first filed elsewhere.

But Gramercy argues that even if the *McWane* rule *generally* applies to later-filed actions, it should not apply here for two reasons. *First*, Gramercy asserts, this Court should not apply its "bright-line rule" for later-filed actions because Gramercy "*would have* filed [its] first action in Delaware had [it] known" BAEF and AIB's Purchase Agreement required disputes be heard in Delaware. Gramercy Br. 17 (emphasis added). *Second*, Gramercy argues (in two sections) that it has not engaged in "serial litigation" or "forum shopping," and thus its case is not "worthy of dismissal." *Id.* at 19-26.

But this Court has never determined the applicable *forum non conveniens* standard based on such case-specific considerations—and in fact, has done exactly the opposite. *Lisa*, like *McWane* before it, announced bright-line rules, *i.e.*, the "well settled rule" that plaintiffs who choose Delaware first can benefit from the overwhelming hardship test, and the converse rule that those who choose Delaware later cannot. *Lisa* left no room for any exceptions based on whether the individual plaintiff had good reasons for choosing another forum first, or whether it was a forum shopper. And that is why Gramercy has failed to identify a single case in support of its case-by-case approach to picking the governing legal standard. Any case-specific considerations can be taken into account in the application of the discretionary *McWane* standard, but provide no reason to apply a different legal standard in the first place.

Indeed, adopting case-specific exceptions to the dichotomy announced in *Lisa* would dissolve that dichotomy, and leave the proper *forum non conveniens* analysis entirely unclear. It should go without saying that "administrative simplicity is a major virtue" when it comes to announcing threshold rules on matters like venue and jurisdiction: "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims," "produce appeals and reversals, [and] encourage gamesmanship." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Simplicity also "promote[s] greater predictability." *Id.*; *see Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1574 (2016) (litigants need "ready answers to jurisdictional questions"). *Lisa*'s bright-line rule advances those goals: litigants (and courts) know the overwhelming hardship test applies if the Delaware suit is the first filed, and *McWane* applies if it is not.

Gramercy's approaches are, by contrast, anything but simple. Rather than maintain a bright-line rule, Gramercy seems to want the *forum non conveniens* test to hinge on such questions as whether the plaintiff had a good reason for filing first elsewhere; whether the plaintiff is a serial filer (apparently not established by the mere fact it filed elsewhere first); and whether it is a "forum shopper." Those can be complicated factual issues. Courts would have to evaluate what a litigant knew when it filed and decide whether the litigant would have acted differently with new

information. Courts would also apparently have to assess plaintiffs' intent in deciding if they are really "serial filers" or "forum shoppers." These debates can eat up time, produce appeals, and undercut predictability—all just to assess what legal standard applies on a threshold, non-merits issue.

Even if this Court made case-by-case determinations—and it should not—this Court should reject Gramercy's demand for a personal exception. Gramercy's first reason, *i.e.*, that it would have filed first in Delaware had it known of BAEF and AIB's Delaware forum selection clause, has no force. In reality, as explained in Part II below, the clause is irrelevant. BAEF and AIB agreed to litigate *their* disputes in Delaware, not *third-party* claims. Nothing about the clause entitles Gramercy to bring its Bulgarian securities action in Delaware.

Gramercy's other response—that it is not a "serial filer" and is not "forum shopping"—is just as strange. Actions speak louder than words: Gramercy sued in Illinois federal court, then in Illinois state court, and *then* came to Delaware. And it did so even after the Illinois court said the case belonged in Bulgaria. Gramercy has not even promised to take no for an answer in Delaware; at oral argument in the Court of Chancery, Gramercy threatened that if BAEF and AIB prevail here, it "may seek to litigate in yet another American jurisdiction." Op. 4. The Court of Chancery properly dubbed Gramercy a serial filer, just as it properly decided that the *McWane* standard, as articulated in *Lisa*, applies here.

II. THE COURT OF CHANCERY PROPERLY HELD THAT A FORUM SELECTION CLAUSE BETWEEN TWO DEFENDANTS DOES NOT ENTITLE A THIRD PARTY TO SUE THEM IN DELAWARE FOR ALLEGED VIOLATIONS OF FOREIGN SECURITIES LAWS.

A. Question Presented

Whether the Court of Chancery properly held that a forum selection clause between two defendants does not entitle a third party to sue them in Delaware for alleged violations of foreign securities laws.

B. Scope of Review

BAEF agrees with Gramercy that this Court reviews legal conclusions *de novo*. *See* Gramercy Br. 27. But that has no relevance here, because the question is whether the lower court properly *applied* the legal standard given the presence of a forum selection clause between the defendants. Application of the *forum non conveniens* standard is discretionary and is reviewed for abuse of discretion. *See, e.g.*, *Martinez v. E.I. DuPont de Nemours & Co.*, 86 A.3d 1102, 1104 (Del. 2014).

C. Merits of Argument

Even if *McWane* supplies the governing discretionary standard, Gramercy claims that it is entitled to litigate in Delaware in light of BAEF and AIB's Purchase Agreement. *See* Gramercy Br. 27-30. In contracting to sell BACB shares, BAEF and AIB agreed that actions "arising out of or relating to [their] Agreement" belonged in Delaware. A2608. That clause, Gramercy says, refutes the argument that allowing this suit to proceed would burden BAEF or AIB. Thus,

according to Gramercy, the lower court was wrong to hold that the clause did "not require nor favor" finding Delaware a proper forum here. Op. 32.

But Gramercy's position runs afoul of the Purchase Agreement's plain text. It is true that BAEF and AIB agreed to pursue actions "arising out of or relating to this Agreement" in Delaware. A2608. But that is only part of the story; the Agreement also said it was "for the sole benefit of the Parties hereto"—*i.e.*, BAEF and AIB—"and nothing herein express or implied shall give or be construed to give any Person, other than the Parties … any legal or equitable rights hereunder." A2606. That is, BAEF and AIB agreed to litigate disputes *between themselves* in Delaware, but not disputes with *third parties*. As the Court of Chancery put it, Gramercy "overlooks the fact that" the forum selection clause was "limited to the parties to that agreement" and "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. 31-32.

Candlewood is not to the contrary. That case, like this one, involved a foreign-made contract and two companies operating abroad. 859 A.2d at 991. But the similarities end there. In *Candlewood*, unlike here, the Delaware action was first filed, so the overwhelming hardship test applied. *Id.* at 998. While the lower court found that "heavy burden" satisfied, this Court disagreed. *Id.* *First*, it said, the lower court had mistakenly relied on the foreign forum's interest in the case (a

consideration that is, of course, highly relevant under the *McWane* standard applicable here). *Id.* at 998-99. *Second*, the lower court's factual findings lacked support. *Id.* at 998, 1000-03. This Court recognized that these two conclusions "would be a sufficient basis" to find that the defendant there failed to establish overwhelming hardship. *Id.* at 1003. The Court nevertheless went on to observe that, in any event, the defendant could not "argue that being required to litigate in Delaware would inflict a hardship." *Id.* That was so because, among other things, the defendant "frequently … enter[ed] into oil and gas supply contracts that contain forum selection clauses which require [it] to litigate in the United States" and "recently defended a litigation in the Court of Chancery." *Id.* at 1004.

Whatever their significance under the overwhelming hardship standard, such considerations do not control here. For one, this case is *not* governed by the overwhelming hardship analysis; instead, *McWane* grants courts substantial discretion to decide the proper forum. The inquiry thus is not trained entirely on the hardship a defendant faces, but on deciding which forum is most convenient. For another, unlike in *Candlewood*, neither AIB nor BAEF customarily litigate in Delaware—most of BAEF's litigation is in Bulgaria, and multiple U.S. courts have dismissed cases against it on *forum non conveniens* grounds (including in this very case). *See, e.g., Stroitelstvo Bulgaria Ltd. v. BAEF*, 589 F.3d 417 (7th Cir. 2009); A473-80 (Ill. Circuit Court); A482-504 (Ill. Appellate Court). And in

Candlewood, "no potential witnesses, documents, or evidence" were outside of the defendant's control. 859 A.2d at 994. Here, apart from the parties' experts, *none* of defendants' 15 potential Bulgarian witnesses could be compelled to testify in Delaware. A510-11, A2496-98. *Candlewood* simply does not stand for Gramercy's radical assertion that a single agreement between BAEF and AIB means Delaware should hear this Bulgarian securities lawsuit.

There is a good reason why *Candlewood* provides no support to Gramercy; Gramercy's approach has breathtaking consequences. For one thing, it produces incentives for contracting parties to *avoid* Delaware as their forum. If contracting parties know that a decision to include a Delaware forum selection clause in a contract might require them to litigate unrelated third-party suits—even those sourced in a foreign nation's law—they would surely think twice about choosing Delaware. As fundamentally, Gramercy's approach undermines the consent that is so critical to contract law—by opening parties to liability in Delaware from third parties not involved in the contracting process. A forum selection clause, like any contract, is a bargain between two parties; Gramercy (like other similarly situated shareholders) is not entitled to benefit from a deal it did not strike. And so it is no wonder that other cases confronted with Gramercy's arguments reject them. *See, e.g.*, *Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1132, 1137-38 (Del. Ch. 2008) (a forum selection clause "applies only to those causes of action that are identified

in the … provision"; a clause covering claims "arising out of" a merger agreement thus did not cover third party plaintiffs' breach of fiduciary duty claims stemming from the merging parties' actions); *Multi-Fineline Electronix, Inc. v. WBL Corp.*, 2007 WL 431050, at *6-7 (Del. Ch. Feb. 2, 2007) (same). As the Court of Chancery held, the forum selection clause is not relevant to (much less dispositive of) the *forum non conveniens* analysis for Gramercy's Bulgarian-law claims.

III. THE COURT OF CHANCERY PROPERLY EXERCISED ITS BROAD DISCRETION TO DISMISS THIS CASE.

A. Question Presented

Whether the Court of Chancery properly exercised its broad discretion to dismiss this case.

B. Scope of Review

As before, BAEF agrees with Gramercy that the proper legal standard for a *forum non conveniens* dismissal is a question deserving *de novo* review. *See* Gramercy Br. 31. But as explained above in Part II, that has no bearing here; the question is whether the court applied that standard correctly given the equitable considerations Gramercy sets forth. That application is reviewed only for abuse of discretion. *See, e.g.*, *Martinez*, 86 A.3d at 1104. To be sure, Gramercy's claim is that the court ignored certain considerations altogether. But the fact that a lower court did not mention every factor the parties presented does not mean it used the wrong standard, and its determination is still reviewed for abuse of discretion. *See, e.g.*, *Brooks v. State*, 58 A.3d 982, 2012 WL 6553923, at *1 (Del. Dec. 13, 2012) ("The substantive issue presented is whether a trial court's failure to articulate explicitly every factor upon which it bases a decision constitutes an abuse of discretion.").

C. Merits of Argument

The Court of Chancery did not abuse its discretion—and, in fact, was plainly correct—in holding that Bulgarian courts should resolve the novel Bulgarian legal issues in this case. Gramercy confidently calls this an easy case requiring nothing more than a straightforward application of Bulgaria's POSA. *See* Gramercy Br. 38-39. Not so. Bulgaria is a civil law country, and there are no decisions instructing what it means to enter into a voting agreement under the POSA (and thus trigger its tender offer rule). A726, A3127. A court addressing the merits would have to decide whether such evidence as similar voting records—absent evidence of an *actual* agreement—shows that BAEF and AIB violated the POSA. And more than that, the court would have to decide whether Gramercy can establish a POSA violation notwithstanding the Bulgarian regulators' approval of the deal, and what consequences, if any, flow from Gramercy's failure to challenge that approval before Bulgaria's Supreme Administrative Court. That is why the Court of Chancery did not abuse its discretion in finding the claims raised "questions of first judicial impression" and issues of "deference to regulators" and "exhaustion of remedies." Op. 33. That is also why Gramercy's protestation that Delaware must be able to hear cases from civil law countries rings hollow—that is true enough, but this Court should *not* do so when the case presents such novel and

tricky issues. *See, e.g.*, *Martinez*, 86 A.3d at 1110 ("[I]mportant and novel issues of other sovereigns are best determined by their courts where practicable.").[5]

The Court of Chancery was also right in concluding that Delaware had only limited interests in the suit. Although two of the plaintiffs (like BAEF) are incorporated in Delaware, *see* Gramercy Br. 42, both are wholly owned by a Cayman Islands hedge fund, have principal places of business in other states, and "chose to first sue in Illinois," Op. 34. The only other Delaware ties Gramercy cites are BAEF and AIB's inapposite forum selection clause and the fact the Delaware Secretary of State issued certificates for the deal to close. *See* Gramercy Br. 43. But what Gramercy does not mention is that the latter were simply certificates noting BAEF's existence and good standing. *See* A2582. That is not a basis for suing in Delaware; it just restates the insufficient fact that BAEF is incorporated here. *See 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…."). And the reason Gramercy offers no other ties to Delaware is

[5] Gramercy asserts that even if the issues are novel, they are unimportant because a Delaware decision will have no precedential weight—rejecting the lower court's conclusion that its decision could impact investment conditions in Bulgaria. Gramercy Br. 41. But investors will of course look at foreign decisions interpreting the POSA just as they look at Bulgaria's—especially if those foreign courts agree to decide such cases absent any real connection to them.

because there are none: this suit boils down to whether "individual actors … —all of whom are outside of Delaware—structured a transaction which violated Bulgarian securities law." Op. 34-35. "There are no novel issues of Delaware corporate governance to be decided," *id.* at 34, and the relevant meetings took place in Bulgaria. Gramercy cannot find even one relevant event in Delaware.

And the Court of Chancery properly held that practical considerations point to litigation in Bulgaria as well. The court noted that "a number of the witnesses necessary to [BAEF and AIB] are in Europe, including in Bulgaria," and that the case "require[d] translation of some documents written via the Cyrillic, not Latin, alphabet." *Id.* at 33-34. That is exactly right. *None* of BAEF and AIB's witnesses are in Delaware—15 are in Bulgaria and 9 are elsewhere in Europe (that is, 24 of the 27 material witnesses the parties identified below). A112, 3104. Strikingly, Gramercy does not (and cannot) dispute that this Court would be unable to compel testimony from the vast majority of those witnesses, who are not under the parties' control. *See* A552-53, A562-65, A568. Gramercy says that use of the Hague Convention and letters rogatory should be sufficient, Gramercy Br. 44, but those alternatives create an uphill battle for BAEF and AIB, prejudicing their ability to defend themselves. *See, e.g., Abrahamsen v. Conoco Phillips Co.*, 2014 WL 2884870, at *3 (Del. Super. Ct. May 30, 2014) ("Hague Conventions' procedures ... result in delay and added expense"). Supplying documentary evidence (*e.g.*,

records related to regulators' approval of the deal, and from BACB shareholder votes following the closing) will be no easier—BAEF's evidence is in off-site storage in Sofia, Bulgaria.

Against these compelling justifications, Gramercy responds that the Court of Chancery erred in ignoring "a litany of important equitable considerations"—*i.e.*, that Bulgarian courts allegedly are too corrupt to adjudicate this lawsuit, charge excessive fees, and are congested. Gramercy Br. 31-37. But the court's decision not to mention these considerations in its opinion—which are not even doctrinal factors—is not, alone, reason to reverse. *See, e.g., Sudler v. State*, 611 A.2d 945, 949 (Del. 1992) (decision "may not be set aside simply because the court may have failed to explicitly verbalize the precise words ... or to articulate on the record all of the facts which support finding a deliberate exercise of discretion") (citation omitted); *Brooks*, 2012 WL 6553923, *1 ("trial judge did not abuse her discretion by not explicitly addressing" a party's proffered "factors"). That is especially so where, as here, there is no doubt the lower court was aware of and considered these issues. The court asked questions regarding Bulgaria's alleged corruption and fees, *see* A3436, A3438-42, noted that "this motion [to dismiss] is going to turn on the ability of the Bulgarian courts to render justice," A2336, and stated in its opinion that other courts had already found Bulgaria adequate, Op. 30. The only issue is

thus whether Gramercy's listed considerations compel the conclusion that the court abused its discretion in holding Bulgaria to be the proper forum.

The answer to that question is crystal clear: none of the considerations even indicate that the lower court erred, let alone abused its discretion. Gramercy's lead argument, that Bulgarian courts are too corrupt to hear this case, lacks support in law or the record. As a threshold matter, such claims rarely succeed. *See, e.g.*, *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311-12 (11th Cir. 2001) ("The 'alternative forum is too corrupt to be adequate' argument does not enjoy a particularly impressive track record.") (internal quotation omitted). But more importantly, other courts have already held Bulgaria adequate despite similar allegations. *See, e.g.*, *Stroitelstvo*, 589 F.3d at 421 ("generalized, anecdotal complaints of corruption are not enough" to declare that Bulgaria's "legal system is so corrupt that it can't serve as an adequate forum"); *Asenov v. Silversea Cruises, Ltd.*, 2012 WL 1136980, at *3 (S.D. Fla. Mar. 28, 2012) (same); *Zeevi Holdings Ltd. v. Republic of Bulgaria*, 2011 WL 1345155, at *8-9 (S.D.N.Y. Apr. 5, 2011), *aff'd*, 494 F. App'x 110 (2d Cir. 2012) (same); A473-80 (Ill. Circuit Court); A482-504 (Ill. Appellate Court). That makes good sense: "Bulgaria gained admission to the European Union in 2007, and one requirement for EU membership is that the nation have a stable legal system that guarantees the rule of law." *Stroitelstvo*, 589 F.3d at 421; *see also Zeevi Holdings*, 2011 WL 1345155, at

*8 (noting that "neither the EU nor any of its member states has invoked any of the safeguards to exclude [Bulgaria] from Pan-European legal regimes because of the inadequacies of its judicial system"). And Gramercy's own expert never suggested Bulgaria's legal system is corrupt; he confirmed "Bulgarian law would provide redress" for Gramercy's claims and has "professional judges trained as lawyers." A493-94, A771. Gramercy cannot cite a *single case* finding the Bulgarian courts are too corrupt to be equitable and provides this Court no reason to be the first.

Gramercy's claims regarding filing fees and congestion fare no better. As to the fees: courts do "not abuse [their] discretion in concluding that Bulgaria's [4%] filing fee, typical for a civil law country, and driven in size only by [the plaintiff's] complaint, did not make Bulgaria an inadequate forum." *Stroitelstvo*, 589 F.3d at 424 (citation omitted); *see also id.* (collecting cases to show "[f]ederal courts have declined to find foreign forums inadequate based on filing fees similar to the 4% fee"). Gramercy's contrary citations, Gramercy Br. 35-36, are distinguishable—in both, the plaintiff could not afford the fee; here, by contrast, Gramercy never said it cannot pay, and Gramercy would recoup these fees if ultimately successful, *see* A2438, A3123-24 (expert declarations). And as to congestion: while Gramercy leaves out how long Bulgarian courts will take to resolve this lawsuit, other U.S. courts have found that time "comparable" to that of U.S. jurisdictions. *Stroitelstvo*, 589 F.3d at 425 ("[C]ourt congestion [i]s essentially a wash.").

Congress' endorsement of BAEF and its investments in Bulgaria is no reason to hear this case in Delaware either. Even if the Federal Government has an interest in ensuring SEED Act funding is used properly, a foreign country "has an equal if not greater interest in guarding against" the violations of its own securities laws within its own borders—especially when those purported violations involve sale of stock in a Bulgarian bank. *Id.* This case does not belong in a U.S. court simply because Congress supported investments in Bulgaria. At bottom, the Court of Chancery did not abuse its discretion in determining that this Bulgarian case belongs in Bulgaria.

IV. THE COURT OF CHANCERY DID NOT APPLY THE OVERWHELMING HARDSHIP STANDARD.

A. Question Presented

Whether the Court of Chancery applied the overwhelming hardship standard and, if so, whether it erred in its application.

B. Scope of Review

"A *forum non conveniens* motion is addressed to the trial court's sound discretion," and the exercise of that discretion is reviewed for abuse of discretion. *Martinez*, 86 A.3d at 1104.

C. Merits of Argument

Assuming (contrary to *Lisa*'s clear teaching) that the overwhelming hardship standard applies, Gramercy argues that it is entitled to win under that standard. *See* Gramercy Br. 38-44. The Court of Chancery, Gramercy asserts, "misapplied" the established factors for determining if overwhelming hardship exists. *Id.* at 38.

But Gramercy's assertion is puzzling, because the lower court never ruled on this issue at all. To the contrary, the court held that the overwhelming hardship test was irrelevant here. All the court said about that test was that it was "dubious" that Gramercy would "easily" win even under that plaintiff-friendly standard, given the myriad reasons for keeping this Bulgarian suit in Bulgaria. Op. 32. But the court went no further, and indeed expressly declined to "reach the question" of the proper result under that test. *Id.*

If this Court were to decide the overwhelming hardship standard governs this case, the proper course would be to remand and let the lower court apply that test in the first instance. That is especially appropriate where, all agree, its eventual decision will be reviewed only for abuse of discretion. *See, e.g., United Techs. Corp. v. Treppel*, 109 A.3d 553, 560 (Del. 2014) ("[W]e believe it is more prudent to have the Court of Chancery consider how to exercise its discretion in the first instance."). The lower court can make findings with respect to each relevant factor; there is no reason for this Court to prejudge that discretionary and factual evaluation.[6]

[6] This Court can, of course, "affirm on the basis of a different rationale than that which was articulated by the trial court." *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015). If this Court chooses to address the overwhelming hardship standard, it should affirm for the reasons given in AIB's brief. *See* AIB Br. Section IV. BAEF joins in that analysis, and incorporates it by reference.

V. THE COURT OF CHANCERY PROPERLY APPLIED ITS HOLDING IN THIS CASE TO THE PARTIES IN THIS CASE.

A. Question Presented

Whether the Court of Chancery properly applied its holding in this case to the parties in this case.

B. Scope of Review

This Court reviews questions of law, including the retroactive application of judicial decisions, *de novo*. *See, e.g., General Motors Corp. v. New Castle Cnty.*, 701 A.2d 819, 822 (1997).

C. Merits of Argument

At the very end of its brief, Gramercy throws a Hail Mary pass: even if this Court confirms that *McWane* governs, this Court should apply that rule prospectively (and so not to Gramercy). But that claim flies in the face of precedent. Delaware has a "presumption," this Court has held, "in favor of giving a decision retroactive effect and the party seeking to avoid retroactive application bears the burden of persuasion." *General Motors*, 701 A.2d at 822 (internal quotation omitted). That presumption is logical: it treats parties alike by applying the same rule to everyone, incentivizes parties to litigate the boundaries of the law by allowing the victor to benefit from its victory, and reflects the judiciary's proper role of deciding what the law is (and not usurping the essentially legislative role of deciding what it should be in the future). It follows that this Court will "deny

retroactive application 'only where on balance the weight of [three] factors favor prospective application'": whether (1) a case "'establish[ed] a new principle of law, either by overruling clear past precedent … or by deciding an issue of first impression'"; (2) "'retrospective operation will further or retard [the rule's] operation'"; and (3) a rule "'could produce substantial inequitable results if applied retroactively.'" *Id.* (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

All three factors demand application of *McWane* here. Most fundamentally, this decision is not "new"; this Court *already* said that "where the Delaware action is not the first filed," a court is to "freely … exercise its discretion in favor of … dismissing" it. *Lisa*, 993 A.2d at 1047 (emphasis omitted). (And it said this in 2010, a year before Gramercy filed its first suit in Illinois.) The "clear past precedent" thus supports, rather than undermines, applying *McWane* in this case.[7] Applying this rule here also furthers the rule's operation—and that of other procedural rules—by incentivizing parties to litigate the doctrine's contours knowing they will enjoy the fruits of victory. That in turn ensures future litigants the benefit of clear procedural rulings. And finally, no unfairness will result from

[7] Gramercy asserts that it had been entitled to rely on the overwhelming hardship test in light of *Trinity* and *Asbestos*—but those are two Superior Court decisions, one of which long predates this Court's key precedent and the other of which ignores it entirely.

retroactive application. Gramercy contends it would have filed in Delaware had it known about the Delaware forum selection clause, *see* Gramercy Br. 46, but that has nothing to do with whether *McWane* or overwhelming hardship applies. *McWane* plainly should govern this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

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CERTIFICATE OF SERVICE

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