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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 CASE BELOW: Court of Chancery of the State of Delaware, C.A. No. 10321-VCG

APPELLANTS' CONSOLIDATED REPLY BRIEF

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PRELIMINARY STATEMENT[1]

Forum non conveniens was developed to permit a change of venue where plaintiffs file suit in a forum so manifestly inappropriate as to constitute a gratuitous effort to burden and harass the defendant. *See Ison v. E.I. Dupont de Nemours & Co.*, 729 A.2d 832, 834 (Del. 1999). This case involves three Delaware citizens (two Plaintiffs and Defendant BAEF). Defendants agreed to litigate all disputes related to the underlying Transaction in Delaware under Delaware law. The Transaction was wholly contingent on multiple certifications of the Delaware Secretary of State. Defendant AIB has a long history of litigation and business activity in Delaware. Plaintiffs' investment resulted directly from an act of the U.S. Congress. Yet, on this appeal, Plaintiffs face the prospect of *never* receiving a hearing on the merits of their claims because Delaware is purportedly an "inappropriate" forum for this case. Bulgarian courts—which present a massive language barrier for the U.S.-based Plaintiffs and which are woefully corrupt, congested, and inefficient—are neither a viable nor reasonable option. Defendants acknowledged as much when they chose Delaware as the exclusive forum for all disputes related to the Transaction, notwithstanding that it involved a sale of Bulgarian stock. Indeed, Defendants' *forum non conveniens* motion has nothing to

[1] The parties' appellate briefs are cited as follows: "**PBxx**" refers to Appellants' Corrected Opening Brief on Appeal; "**AIBxx"** refers to AIB's Answering Brief on Appeal; and "**BAEFxx**" refers to BAEF's Answering Brief on Appeal. Other definitions are as specified in Appellants' Opening Brief.

do with convenience, and everything to do with their recognition that an affirmance will effectively end this case and deprive Plaintiffs of due process.

Plaintiffs' ability to exercise their due process right to have their case decided on the merits, rather than a procedural technicality, now comes down to this Court's interpretation of its prior decision in *Lisa*. After almost 20,000 words of briefing, Defendants have not explained why Delaware courts should apply a different *forum non conveniens* standard to litigants (like Plaintiffs) who refile in Delaware following a procedural dismissal in another jurisdiction. This case in no way implicates the policy concerns underlying the *McWane* comity doctrine as applied in *Lisa*. There is no risk of duplicative litigation of the merits of Plaintiffs' claims, and no risk of inconsistent judgments. There is no improper forum-shopping. Lacking any rational reason why the *McWane* doctrine should apply here, Defendants adopt the only course available to them—they cling to a few scattered excerpts from *Lisa*, and mindlessly incant the mantra that only those who file in Delaware first are entitled to the overwhelming hardship standard. But the appropriate rule is clear: absent *true* forum-shopping, where litigants re-file in Delaware following a procedural dismissal in another jurisdiction, the purposes underlying *McWane* are inapposite, and Delaware courts should adhere to the time-honored overwhelming hardship test.

Furthermore, this Court's *Candlewood* decision dictates that Defendants cannot prevail under *any* standard given their unequivocal acknowledgement that Delaware is the most appropriate and convenient forum to litigate all disputes concerning the underlying Transaction. That conclusion is buttressed by numerous equitable factors overlooked by the Court of Chancery, including corruption, congestion, and prohibitively burdensome filing fees in Bulgarian courts, as well as the U.S. government origins of BAEF, BACB, and Plaintiffs' investment. In any event, at a bare minimum, the lower court's ruling should apply only prospectively to avoid a grossly inequitable result.

LEGAL ARGUMENT

I. THE LOWER COURT ERRONEOUSLY FAILED TO APPLY THE OVERWHELMING HARDSHIP STANDARD.

A. *McWane* and *Lisa* Do Not Apply.

Defendants correctly note that there are two *forum non conveniens* standards in Delaware: the *McWane* comity doctrine and overwhelming hardship. (BAEF1; AIB3.) Only one can apply. Defendants cherry-pick language from *Lisa*, advocating a rule that asks only whether Plaintiffs filed their first action in Delaware – if so, overwhelming hardship applies; if not, dismissal is discretionary under *McWane*. In contrast, Plaintiffs ask the Court to consider the *purposes* of *McWane*: avoiding inconsistent judgments and duplicative litigation of the merits. 263 A.2d at 283. Defendants cannot establish that those policies apply here because the Illinois courts never reached the merits of Plaintiffs' claims.

Legal rules should have a rational purpose. Delaware has compelling interests in remaining a preeminent forum for resolution of commercial disputes, providing a neutral forum for litigation involving its corporate citizens, and ensuring that entities it charters are not used as vehicles for fraud. (PB43.) Where (as here) there is no risk of duplicative litigation or inconsistent judgments on the merits, and no forum-shopping,[2] there is no sound reason to apply a different standard to litigants who re-file in Delaware following dismissal on ***procedural***

[2] *See Chavez v. Dole Food Co.*, 836 F.3d 205, 222 (3d Cir. 2016) (*en banc*) ("[F]orum shopping…denotes some attempt to gain an unfair or unmerited advantage in the litigation process.").

grounds in another jurisdiction—especially when that dismissal was not occasioned by such litigant. Courts recognize that the "first-filed" doctrine cannot be used to deprive plaintiffs of a hearing on the merits of their claims simply because their claims were previously dismissed in another forum for procedural reasons. *See Worthington v. Bayer Healthcare, LLC*, 2012 WL 1079716, at *8 (D.N.J. Mar. 30, 2012) (dismissing second-filed action in favor of first-filed but, "[i]n the interest of 'fundamental fairness,'" granting leave to refile if first-filed action was "dismissed on ***procedural grounds***.") (emphasis added); *see also Burger v. Am. Mar. Officers Union*, 170 F.3d 184, 1999 WL 46962, at *1-*2 (5th Cir. Jan. 27, 1999) (*per curiam*) (dismissal of plaintiff's virtually identical second-filed action with prejudice was erroneous because in plaintiff's first-filed action the court had dismissed some defendants on personal jurisdiction grounds and plaintiff was in the process of appealing, "creat[ing] the risk that the merits of [plaintiff's] claims could never be addressed"); *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 628-29 (9th Cir. 1991) (overturning district court's dismissal of second-filed case under first-filed rule because of "jurisdictional uncertainty" concerning first-filed case). The first-filed doctrine is designed to ensure that plaintiffs get *only one forum* to hear the merits of their claims. If plaintiffs merely seek a single forum to adjudicate the merits of their claims, the comity principle has no application.

The only conceivable reasons for Defendants' proposed rule are (1) cases like this are inundating Delaware courts, and (2) Delaware is a jealous and vindictive jurisdiction with an interest in penalizing litigants who do not choose it first.[3] There is no evidence for the former concern, and the latter is absurd. Defendants' reading of *Lisa* has some surface consonance with a handful of isolated passages from the decision, but does not withstand scrutiny of *why* their proposed interpretation should prevail.[4] *Chemtura Corp. v. Certain Underwriters at Lloyd's*, 2015 WL 5340475, at *2 (Del. Super. Aug. 26, 2015) (courts "'cannot perfunctorily apply *McWane* or *forum non conveniens* if either doctrine is to accomplish the purposes for which they were crafted by the Delaware Supreme Court.'").

BAEF observes that in *Lisa*, dismissal of the first-filed Florida action did not preclude application of *McWane*. (BAEF16.) The reason *Lisa* reached that conclusion, however, was the risk of inconsistent judgments on the merits—one of the two major policies underlying *McWane*. In *Lisa*, the Florida action alleged

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[3] Defendants seemingly support the latter view. (AIB24 (positing that Delaware courts should penalize litigants who use them as a "fallback option.").) Plaintiffs, however, are confident that Delaware courts do not decide weighty policy issues on such petty grounds.

[4] BAEF asserts that *Lisa* does not state that comity is inapplicable where the first-filed action was dismissed on procedural grounds. (BAEF18.) But the Court obviously issued its decision based on the facts and circumstances before it (which involved a non-procedural dismissal of the first-filed action), and did not address other situations.

fraud in the sale of a company interest, and the Delaware action alleged unlawful efforts to frustrate judgment in the Florida case. 993 A.2d at 1045, 1047-48. Because the Florida Court dismissed the case with prejudice, in order to entertain the Delaware action, the *Lisa* Court would have had to effectively override the Florida decision, *id.* at 1048; obviously, the Delaware defendants could not be liable for attempting to avoid judgment in Florida absent a viable claim in Florida, which the Florida Court had determined did not exist. *Lisa* held that proceeding in Delaware would "ignore the binding effect of the Florida adjudication, and create the possibility of inconsistent and conflicting rulings. That is precisely the outcome *McWane*'s doctrine of comity seeks to prevent." *Id.* Thus, this Court did not decide *Lisa* by merely consulting a calendar to determine which case was first-filed. It examined whether the policies underpinning *McWane* applied.[5]

Defendants contend that a plaintiff's first choice of forum is sacrosanct, but subsequent choices are entitled to little, if any, deference. (AIB17; BAEF19.) But there is no reason to respect a plaintiff's first forum choice more than its second, except insofar as a court perceives that the second choice is the product of an attempt to gain improper advantage (*i.e.*, *actual* "forum-shopping").[6] Particularly

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[5] AIB correctly notes that the *Lisa* Court was concerned with comity. (AIB17.) As noted above, that concern was the product of the risk of inconsistent rulings on the merits.

[6] BAEF refers to the difference between procedural dismissal and dismissal on the merits as mere "happenstance." (BAEF19.) As *McWane*, *Lisa*, and the

where (as here) the first forum was selected in good faith based on incomplete information (Plaintiffs could not have discovered Defendants' Delaware forum selection clause before initiating litigation), according a plaintiff's second choice of forum less respect than its first is based on nothing more than arbitrary numerical sequence.[7] Consequently, *Trinity* and *Asbestos Litigation* deferred to plaintiffs' ***second*** choice of forum. (PB14-16.)[8]

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doctrines of collateral estoppel and *res judicata* illustrate, that distinction is monumental.

[7] This point is starkly illustrated by cases cited by AIB (AIB18-19), where courts' refusals to defer to a second forum choice were based on more than sequential order. In *Fennell*, the plaintiff was blatantly forum-shopping. Plaintiff's initial action in Mississippi was dismissed *with leave to refile there*, but plaintiff filed in Illinois rather than refiling in Mississippi, where the case had suffered a setback on the merits. 2012 IL 113812, ¶25. AIB's other three cases, *Lusby*, *Kawamoto*, and *Wright*, are not *forum non conveniens* cases. They apply the federal transfer statute, 28 U.S.C. §1404(a), which accords less deference to plaintiffs' forum choice and imposes a lower dismissal standard than *forum non conveniens* because the consequences of a Section 1404(a) motion—transfer to another federal court where a plaintiff's case is guaranteed to be heard--are far less severe. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (Section 1404(a) "was designed as a federal housekeeping measure, allowing easy change of venue within a unified federal system" and has "relaxed standards" compared to *forum non conveniens*); *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (Section 1404(a) standard lower because "harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated.").

The Section 1404(a) cases are unpersuasive for additional reasons. *Lusby* was a classic case of forum-shopping. 297 F.R.D. at 405-406 (plaintiff sought Section 1404(a) transfer to his ***third*** choice of forum to evade an adverse order). In *Wright* and *Kawamoto*, the courts' statements regarding deference to plaintiffs' second forum choices were equivocal. *Kawamoto*, 225 F. Supp. 2d at 1216 (indicating plaintiff's second choice of forum may be given same deference as first, but such deference "is not automatic[]…"); *Wright*, 1999 WL 354516, at *4

Defendants erroneously characterize Plaintiffs as contending that "preclusion" (*i.e.*, *res judicata* and collateral estoppel) determines whether the comity doctrine applies in Delaware after dismissal of a first-filed case elsewhere. (AIB16-17, AIB19 n.6.) As *Lisa* recognized, 993 A.2d at 1048 n.19, there is no need to decide whether dismissal of the first action technically precludes the later Delaware action. There need only be a "possibility of inconsistent and conflicting rulings." *Id.* at 1048. Regardless of whether the dismissal of the Florida action in *Lisa* was legally preclusive of the Delaware suit, here there is no risk of "inconsistent and conflicting rulings" because the Illinois courts never reached any of the merits of Plaintiffs' claims. Because Plaintiffs do not claim that "preclusion" is the key inquiry, BAEF's discussion of "grave administrability problems" is irrelevant. (BAEF20-22.)[9]

(stating only that "plaintiffs have failed to identify any authority indicating that courts ***generally*** defer" to plaintiff's second choice) (emphasis added).

[8] BAEF's attempt to distinguish *Trinity* and *Asbestos Litigation* (BAEF23-24) was fully addressed in Plaintiffs' opening brief (PB15-16).

[9] Although *Lisa* is consistent with *McWane*'s policy of avoiding inconsistent judgments, the Court might consider whether *Lisa* should be revisited to provide clearer guidance to the lower courts. The instant case does not call for standard application of the first-filed doctrine, in which there are two substantially similar cases pending simultaneously, and the court must merely decide whether the case before it should proceed, or whether it should be stayed or dismissed. Nor does this litigation fall into the category of "forum shopping" cases, in which litigants voluntarily dismiss (or, in *Fennell*, fail to take advantage of leave to refile) their own actions, in order to pursue their claims in a new jurisdiction that they believe will rule more favorably ***on the merits***, after having suffered an initial setback on the merits in the first-filed forum. In rare cases such as this one, where defendants

Defendants note that *Lisa* targeted forum-shopping (BAEF17, BAEF19; AIB17) in addition to duplicative litigation and inconsistent judgments on the merits. That is irrelevant. Plaintiffs who file suit outside Delaware and then re-file in Delaware while the first case is pending or after it has been dismissed on *non-procedural* grounds are likely engaged in true forum-shopping. Typically, such

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raise the first-filed doctrine after dismissal of the initial case ***on procedural grounds***, *McWane* does not apply. The relevant question—in any instance in which plaintiffs re-file a previously dismissed case (and where plaintiffs have not voluntarily dismissed or ignored leave to re-file their first filed action)—is whether the first-filed dismissal is *res judicata* of the second action. Indeed, that was the ruling of the Third Circuit Court of Appeals sitting *en banc* in *Chavez*, 836 F.3d at 221-222. (Although Defendants contend that *res judicata* is too complicated to apply in this context (BAEF20), the assembled wisdom of the Third Circuit disagrees.) A loosely-defined discretionary analysis of the type discussed in *Lisa*, 993 A.2d at 1047, makes little sense where the first-filed action has been dismissed on procedural grounds. The first-filed action is either *res judicata* of the second, or it is not. If the latter, it should be analyzed like any other case and the overwhelming hardship standard should be applied on a *forum non conveniens* motion. Further, it is unclear why *Lisa* was not simply decided on mootness grounds. As this Court acknowledged, the Delaware action was entirely dependent on the Florida action because it alleged unlawful efforts to evade judgment in Florida. 993 A.2d at 1045, 1047-48. ("The 1998 Florida Action was what propped up this Delaware action."). Once the Florida case was dismissed with prejudice, it was clear that there would never be any judgment for the plaintiffs in Florida, and therefore the Delaware case was moot. *See Gen. Motors Corp. v. New Castle Cty.*, 701 A.2d 819, 823 (Del. 1997) ("According to the mootness doctrine…the action will be dismissed if [a justiciable] controversy ceases to exist."). In any event, whether the Court rules that *Lisa* permits application of the overwhelming hardship standard where a first-filed action was dismissed on procedural grounds, or whether it clarifies that the first-filed doctrine was not the optimal analytical construct for *Lisa*, lower courts will have better guidance, and the Court will have drawn a clear line of demarcation between the first-filed doctrine and the overwhelming hardship standard.

litigants have received indications of defeat on the merits in their first forum, or have received an unfavorable decision on the merits in the initial forum and seek a different outcome in Delaware. Thus, the policies underlying *McWane* (avoiding duplicative litigation and inconsistent outcomes on the merits) discourage true forum-shopping.[10] Defendants, however, cannot establish that Plaintiffs are engaged in misconduct that courts deem improper forum-shopping. (PB21-26.) Defendants concede that Plaintiffs' motives in re-filing in Delaware are pure. (AIB25 n.9 ("Defendants are not attacking Plaintiffs' subjective or strategic motivations.").)[11]

Defendants contend that Plaintiffs' position, if accepted, would allow Plaintiffs to file and suffer procedural dismissal in forty-nine States, file in

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[10] So does the overwhelming hardship test. Litigants who cannot satisfy that lenient standard are likely engaged in improper forum shopping.

[11] AIB contends Plaintiffs overlook the irrelevant cases of *Chaverri* and *Abrahamsen*. (AIB17-18.) In *Chaverri*, the court noted *Lisa* authorized dismissal "under the *McWane* doctrine" because plaintiffs' first-filed action had been *"**adjudicated to conclusion in a court of competent jurisdiction***." 2013 WL 5977413, at *2 (emphasis added). That holding is clearly distinct from the Illinois courts' procedural dismissal here. *Abrahamsen* is even further afield. The plaintiffs filed their first cases in Norway, and they *remained pending at the time of the decision*. 2014 WL 2884870, at *1 n.16. Thus, *Abrahamsen* was an unexceptional application of *McWane*. Moreover, *Abrahamsen* was based on defendants' showing of overwhelming hardship; the "first-filed" ruling was *dicta*. *Id.* at *4. Additionally, the *Abrahamsen* plaintiffs (Norwegian citizens injured in Norway) were engaged in true forum-shopping. The plaintiffs admitted selecting Delaware based on their belief that the "sky's the limit" on damages awards in the United States, and had filed and withdrawn two prior U.S. actions. *Id.* at *1 & n.16.

Delaware as a last resort, and still enjoy the overwhelming hardship standard (AIB19)—a *reductio ad absurdum* the lower court dubbed "facetious." (A3396:10-21.) In most cases, there are only a handful of potentially viable fora. Litigants who repeatedly sued in jurisdictions with no ties to the litigation would soon exhaust their resources and incur sanctions. Defendants cannot cite any instance in which litigants attempted to re-file a case dismissed on procedural grounds in more than one or two fora. Additionally, litigants contemplating a Delaware action after two or three prior dismissals in other fora presumably recognize that their case has scant ties to Delaware (otherwise, they would have already filed in Delaware). Such litigants are, therefore, unlikely even to *attempt* a Delaware suit, and would likely lose if they did. Moreover, plaintiffs engaged in true forum-shopping, such as suing in multiple fora without a colorable basis, might properly forfeit the overwhelming hardship standard.

Defendants discuss whether and to what extent a *forum non conveniens* ruling in one jurisdiction can be preclusive in another, but never explain how this supports their interpretation of *Lisa*. (BAEF 21-22; AIB19 n.6.) It does not. *First*, the Illinois decision was not preclusive of the *forum non conveniens* issue. (Op-30; A3381:20-24.) S*econd*, a *forum non conveniens* ruling in another State is not preclusive of that issue in Delaware. *See Trinity*, 2001 WL 1221080, at *2 (New York court's *forum non conveniens* dismissal of first action "was a jurisdictional

decision" and thus not preclusive). *Third*, although a *forum non conveniens* ruling in one jurisdiction can *sometimes* be preclusive in another, it cannot be here because the relevant facts and legal standard in Illinois are completely different from those applicable in Delaware. (A2427-A2430; A3730:24-A3732:17; A3432:19-A3434:16.) *Fourth*, the Illinois "rulings" that BAEF claims apply in Delaware (BAEF22) are irrelevant. (A3632-3634; PB20.)[12]

B. This Case Should Be Deemed First-Filed.

Even if the Court finds that *McWane* applies, this action should be deemed first-filed because Plaintiffs would have filed here first had they discovered Defendants' Delaware forum selection clause. In Delaware, courts often accord second-filed cases what amounts to first-filed status based on equitable considerations. For example, defendants expecting an imminent suit in a disfavored jurisdiction may bring a preemptive declaratory judgment in its desired forum. Although the preemptive action is technically "first-filed," Delaware courts deny it first-filed status in favor of a later-filed action by the "natural plaintiff." *See, e.g., Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 40913, at *2,*4-*6 (Del. Super. Apr. 25, 1989) (overwhelming hardship standard applied where Delaware

[12] As to the Illinois courts' supposed "finding" that the Bulgarian judiciary is not corrupt under the inapplicable federal "adequacy" test, *see* (A2019-22, A3631-A3632), and Section III.A, *infra*. As to the purported "finding" that Bulgarian law applies, *see* A3632-A3633 and Section IV.A, *infra*. As to the alleged Illinois "findings" concerning the location of documents and witnesses, *see* (A2386-2404, A3633-A3634), and Section IV.C, *infra*.

action was second-filed; although defendant Columbia's Illinois action was first-filed, Columbia was not the natural plaintiff and filed in anticipation of Playtex's suit).

Here, equitable considerations should allow Plaintiffs' technically second-filed action to be deemed first-filed (thus entitling them to the overwhelming hardship standard) because they acted in good faith and would have filed first in Delaware had they enjoyed access to all the pertinent facts.[13] Thus, this case should be treated as first-filed under settled law, not a "case specific exception" to *McWane*.[14]

C. Plaintiffs Are Not Forum-Shoppers or "Serial Litigators."

BAEF contends that Plaintiffs are forum-shopping and engaged in serial litigation, simply because they filed in Illinois before Delaware. (BAEF27.) BAEF fails to disprove Plaintiffs' assertion that they would have filed first in

[13] Thus, Defendants are incorrect in their assertion that *Lisa* and *McWane* imposed a "bright-line" rule that first-filed cases are entitled to the overwhelming hardship standard, and second-filed cases are not. (BAEF25.) Further, those cases assess the motives of the first-filer, despite BAEF's suggestion that such an inquiry is untenable. (BAEF26-27.) BAEF's call for "administrative simplicity" in "jurisdictional tests" (BAEF26) is risible, given the 116 pages of briefing submitted to the lower court explicating the six *Cryo-Maid* factors. (A0068-A0083; A0124-A0142; A2382-A2424; A3091-A3111; A3186-A3202.)

[14] Defendants mischaracterize Plaintiffs' arguments concerning forum-shopping and "serial litigation" as "case-specific" exceptions. (BAEF25-27.) The lower court, not Plaintiffs, introduced those factors by using them to justify its interpretation of *Lisa*. (Op-20, 29.) Plaintiffs' brief merely refutes the lower court's reasoning by showing that forum-shopping and "serial litigation" are not valid concerns where plaintiffs re-file in Delaware after dismissal on procedural grounds in another jurisdiction.

Delaware had they known of Defendants' Delaware forum selection clause, and to address the arguments and authorities in Plaintiffs' brief establishing that they are neither forum-shopping nor engaged in "serial litigation."[15]

Plaintiffs' opening brief likened Plaintiffs to litigants who re-file in a second jurisdiction after a personal jurisdiction dismissal in another. No court has ever suggested that such litigants are engaged in "forum shopping" or "serial litigation," or should face a different legal hurdle upon re-filing. AIB unsuccessfully attacks Plaintiffs' analogy, arguing that unlike a personal jurisdiction dismissal, factors considered by the Illinois courts in their *forum non conveniens* analysis are also relevant here. (AIB20.) That is, at best, an argument that Delaware courts should be bound by certain findings in Illinois; it does not establish that Defendants should not have to show overwhelming hardship. Further, the Illinois decisions turned on *Illinois* law and ties between this case and *Illinois*. Here, the analysis turns on Delaware *forum non conveniens* law (which is vastly different from Illinois law (A2427-A2430, A3730:24-A3732:17, A3432:19-A3434:16)) and the

[15] BAEF contends that Plaintiffs threatened to file in a third U.S. jurisdiction (BAEF27), but cites no words uttered by Plaintiffs. AIB *attempts* to attribute this "threat" to Plaintiffs (AIB25), but the language it references notes in the abstract that if the lower court's concern was successive re-filings after an initial procedural dismissal, it should simply apply the overwhelming hardship standard, and thereby maximize the chances that Delaware will be the last stop.

extensive ties between this case and *Delaware*.[16] That a handful of marginal factors might be similar in both fora does not demonstrate that Plaintiffs are engaged in misconduct warranting a stricter *forum non conveniens* standard. More fundamentally, each of the bullet-point issues that AIB claims the Illinois courts "decided" (AIB20) are either mischaracterized or irrelevant. To the extent the Court considers those issues germane, Plaintiffs address them in the chart in Section IV.C, *infra*.[17]

AIB also contends that this matter differs from a personal jurisdiction case because Plaintiffs have "not come to a better potential forum…." (AIB21.) That argument begs the question, and Delaware *is* a superior forum, given Defendants' Delaware forum selection clause; the parties' Delaware citizenry; and the Delaware Secretary of State certifications necessary to close the Transaction. As for AIB's charge that Plaintiffs are "avoid[ing] Bulgaria" (AIB22), that merely proves that Plaintiffs are rational. Bulgaria's judiciary is corrupt, congested, and inefficient. (P31-36.) No sensible person would choose to litigate in Bulgaria, as evidenced by

[16] These include the Delaware forum selection and choice-of-law clauses, the parties' Delaware residency, and the Delaware Secretary of State's certifications, without which the Transaction could not have closed. (A2582, A2608, A2664-A2672.)

[17] The sixth bullet point on page 20 of AIB's brief, pertaining to the Illinois courts' analysis under the federal "adequate alternative forum" test, which has no application in Delaware, is addressed in Section III.A, *infra*.

Defendants' decision to litigate all disputes related to the Transaction in *Delaware*.[18] (A2608.)

AIB argues that, unlike a personal jurisdiction dismissal, the Illinois dismissal was in favor of a specific forum (Bulgaria). (AIB22.) Attempting to cast Plaintiffs as "serial litigators," AIB asserts that the Illinois court transferred this case to Bulgaria, or that it decided that Bulgaria is a better forum for this case than *any* U.S. jurisdiction, or that Plaintiffs must obey the Illinois ruling by re-filing in Bulgaria. (AIB19, AIB25.) Obviously, Illinois courts have no power to "transfer" cases to Bulgaria. *See Fennell*, 2012 IL 113812, ¶13 ("[A]n Illinois circuit court lacks the power to transfer the action to the court of another state."); *Miller v. Am. Dredging Co*., 595 So. 2d 615, 616 n.5 (La. 1992) (unlike federal courts, "[o]ur

[18] Although irrelevant, AIB expends a half-page on a footnote attempting to show that it did not collude with BAEF. (AIB21 n.7.) Plaintiffs invite the Court to review the evidence uncovered in Illinois, which shows that Defendants decided to exercise joint control over BACB, allowing AIB to circumvent POSA's tender offer requirement. (A1925-1937, A2358-A2359, A2617-A2621, A2642-A2650.) For example, Defendants reference a January 2008 email in which BAEF's counsel questioned the need for a shareholders' agreement (A2643), but ignore another email dated ***two months later*** from the ***same individual*** confirming that Defendants secured financing by agreeing to exercise ***joint control over BACB***. (A2646.) And the Illinois courts expressly noted that Plaintiffs could not be expected to prove Defendants' conspiracy based on limited *forum non convieniens* document discovery. (A0492 ¶23 ("[D]iscovery is not complete because 'requiring extensive investigation prior to deciding a *forum non conveniens* motion would defeat the purpose of' the motion."); A0475 ("Of course Plaintiffs are not required to prove their case at the motion to dismiss stage….").) The Illinois courts merely opined that Plaintiffs had not yet demonstrated that Defendants forged their alleged collusive voting agreement ***in Illinois***. (A0492 ¶23 ("No one conclusion about the location of the injury can be drawn from the evidence produced thus far.").)

state courts have no…mechanism to transfer the case out of the state, and their only option [on a *forum non conveniens* motion] is dismissal of the case."). Nor could Illinois courts decide whether Bulgaria is a superior forum to any U.S. jurisdiction other than Illinois. *See Cook v. Soo Line R. Co.*, 198 P.3d 310, 315 (Mont. 2008) ("Although the Illinois Circuit Court ordered Cook to re-file in Indiana…the Illinois order did not preclude Cook from filing his…claim in Montana…."). The Illinois ruling merely decided that, under ***Illinois law*** and ***Illinois-specific*** facts, Bulgaria was preferable to "***Cook County, Illinois***." (A0482 (emphasis added).) The Illinois court explicitly noted that Plaintiffs are not Illinois residents and suggested that they might find an appropriate U.S. forum in a jurisdiction (like Delaware) where they reside. (A0491 ¶21.)

The Illinois decision is narrow and irrelevant outside that jurisdiction. It is no more "serial litigation" or "forum-shopping" for Plaintiffs to re-file in Delaware than for any litigant to re-file elsewhere after dismissal on personal jurisdiction grounds. (PB21-22.) Nor did Plaintiffs "ignor[e]" the Illinois ruling (AIB23, AIB25)—to do so they would need to re-file *in Illinois*. Plaintiffs' re-filing in Delaware is consistent with the Illinois courts' decision that, under Illinois law, as between Cook County and Bulgaria, Bulgaria was preferable. Defendants seek to give the Illinois ruling *de facto res judicata* effect (while conceding the lack of *actual res judicata* effect (AIB22)) by arguing that Plaintiffs should be penalized

for not heeding the Illinois courts' non-existent and unenforceable "directive to file their action in Bulgaria." (AIB25 n.9)[19]

AIB endorses the lower court's belief that applying the overwhelming hardship standard would encourage litigants to pursue other jurisdictions for "strategic reasons" and, if unsuccessful, later benefit from a deferential standard in Delaware. (AIB24.) However, neither the lower court nor Defendants define "strategic reasons." Delaware recognizes that "strategic reasons" are often legitimate. (PB22-23.) Nor does AIB explain why plaintiffs should not be permitted to pursue *valid* "strategic reasons" elsewhere and, if unsuccessful, avail themselves of Delaware's overwhelming hardship standard. If such plaintiffs are successful, they obtain their preferred forum, and Delaware courts avoid unnecessary motion practice. If they are unsuccessful, Delaware courts are no worse off than if those plaintiffs initially filed here.[20] The lower court's analysis

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[19] AIB echoes the lower court's view that this case would have been dismissed if the Illinois action were pending, and the Illinois dismissal should not change that fact. (AIB23.) Actually, the case would have properly been *stayed*, not dismissed. (PB13 n.2); *Chavez*, 836 F.3d at 220 ("[I]n the vast majority of cases, a court exercising its discretion under the first-filed rule should stay or transfer [instead of dismiss] a second-filed suit."). Further, it is not "incongruous" that the Illinois ruling leads to application of the overwhelming hardship standard. (AIB24.) Because Illinois dismissed on procedural grounds, *McWane* does not apply, and the overwhelming hardship standard must.

[20] To the extent the lower court meant *illegitimate* "strategic reasons," courts have the power to sanction, and can withhold the overwhelming hardship standard, where litigants engage in ***improper*** forum-shopping.

also overlooks litigants like Plaintiffs who are forced to make an initial forum selection based on incomplete information.

AIB fails to adequately address Plaintiffs' observation that the lower court's rule effectively coerces plaintiffs who legitimately prefer another forum to file in Delaware, even where Delaware is a less appropriate forum. (PB25-26.) AIB essentially responds, without basis, that the overwhelming hardship standard was designed to coerce litigants to file first in Delaware, regardless of their genuine interests, even if Delaware is less appropriate than other fora. (AIB24.) AIB clarifies that the overwhelming hardship standard only encourages plaintiffs to first file in Delaware "when it is a proper forum…." (*Id.*) In fact, the deferential standard (coupled with the lower court's ruling) encourages litigants to seek a Delaware forum even where it may not be "proper," secure in the knowledge that they can try a more "appropriate" forum without risk if Delaware rejects them.

This case illustrates the point. When Plaintiffs chose Illinois, they knew that Delaware had a lenient *forum non conveniens* standard and that there were Delaware citizens on both sides (but were unaware of the critical Delaware-centric terms of the Purchase Agreement). Plaintiffs could have (and likely would have) tried Delaware first. The lower court would have applied the overwhelming hardship standard. Plaintiffs would have discovered the Delaware-specific terms of the Purchase Agreement in *forum non conveniens* discovery, and based on

Candlewood, Defendants' motion would have been denied. (Section II, *infra*.) Even if the Delaware court dismissed on *forum non conveniens* grounds and Plaintiffs re-filed in Illinois, the Illinois *forum non conveniens* standard would have been the same as if Plaintiffs had filed there first, as no Illinois cases apply a different standard under those circumstances. Instead of "test[ing] their ties to [Delaware] for strategic reasons" (Op-30 n.122), Plaintiffs decided to file in Illinois, where BAEF was headquartered (A1958); where BAEF's President resided (A0477, A0562); where AIB had recently litigated (A0522) and maintained a major office (A3682); and where events integral to Plaintiffs' claims occurred (PB17). For that, the lower court punished Plaintiffs. The lesson to future litigants is clear: "Never file in the jurisdiction you believe in good faith to be most appropriate. Never take into account the convenience of defendants. *Always* take your chances in Delaware first." It is impossible to conceive a valid policy reason for such a rule.

II. DEFENDANTS CANNOT SHOW OVERWHELMING HARDSHIP UNDER *CANDLEWOOD*.[21]

The overwhelming hardship standard applies. (Section I, *supra*.) Under *Candlewood*, Defendants cannot satisfy that or any lesser standard because the Delaware forum selection clause in their contract proves that they face no inconvenience litigating here. Accordingly, there is no need to remand for further proceedings on *forum non conveniens*.

Emphasizing the phrase "against any Party hereto," Defendants claim that the forum selection clause only applies to suits between them. (AIB26.) They ignore that Plaintiffs' suit is an action "against any Party" to the Purchase Agreement that "aris[es] out of or relat[es] to [that] Agreement or any transaction contemplated [t]hereby…." (A2608 §8.13.) Defendants seek to rewrite "against any Party hereto" to read "between the Parties hereto."

Regardless, Plaintiffs have never asserted a *contractual right* to enforce the forum selection clause, as the lower court acknowledged. (A3350:10-A3352:2.) Plaintiffs contend, as *Candlewood* holds, that parties who agree to litigate in

[21] The standard of review for this argument is *de novo*. *LG Electronics* (cited at AIB26) states that under *McWane*, this Court "review[s] *de novo* any issues of law applied in reaching that decision." 114 A.3d at 1252. Whether a case is controlling, like *Candlewood* here, is such an issue. *Roadway Express v. Folk*, 817 A.2d 772, 775 (Del. 2003) (reviewing *de novo* whether this Court's ruling in previous case controlled). Furthermore, this Court "review[s] de novo…the trial court's formulation and application of legal concepts to undisputed facts." *Turner v. State*, 957 A.2d 565, 572 (Del. 2008). Here, the facts concerning the Purchase Agreement's forum selection clause are undisputed; the parties' dispute is entirely legal.

Delaware all disputes regarding a transaction cannot plausibly contend (under any standard) that it is inconvenient to litigate a dispute regarding that same transaction in Delaware.[22] Indeed, this case is even stronger than *Candlewood*, because the forum selection clauses in that case pertained to various U.S. jurisdictions, not just Delaware specifically. Defendants parrot the lower court's contention that unidentified "issues, burdens, and considerations" implicated by the forum selection clause are different when applied to third-party suits involving tort claims and foreign law. (AIB28.) Plaintiffs, however, established that Defendants' forum selection clause encompasses suits involving third-parties and Bulgarian witnesses, documents, and law—the very same "issues, burdens, and considerations" purportedly at issue here. (PB29-30.) Defendants ignore this argument.[23] Moreover, the plaintiff in *Candlewood also* was not a party to the forum selection clauses that defeated that motion. Unspecified differences in "issues, burdens, and considerations" did not alter the outcome.

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[22] AIB speculates that the contracts in *Candlewood* may have lacked provisions limiting third-party beneficiary rights. (AIB28.) However, *Candlewood* did not base its holding on the plaintiffs' ability to enforce contractually the forum selection clauses. Rather, it relied on forum selection clauses in agreements unrelated to the dispute.

[23] AIB claims that Defendants' forum selection clause was merely an effort by two entities of "different nationalities" to select a "neutral forum." (AIB27.) When Defendants executed the Purchase Agreement, BAEF was a Delaware entity headquartered in Illinois. (A1631, A1958, A2607.) AIB was an Irish company. Bulgaria would have been a "neutral forum" and, according to Defendants, the most appropriate one. Yet Defendants chose Delaware rather than the corrupt, congested, and inefficient Bulgarian judiciary. (PB31-36.)

Unable to deny that they selected Delaware as the single most appropriate and convenient forum to litigate all disputes related to the Transaction, Defendants scramble to distinguish *Candlewood*, but fail, as illustrated below:

Defendants' Purported Distinction of *Candlewood*	**Plaintiffs' Response**
Candlewood applied the overwhelming hardship standard. (BAEF30)	The same standard applies in this case (Section I, *supra*) and regardless, *Candlewood* did not state that U.S. forum selection clauses would not have been dispositive under a lesser standard.
Defendants do not customarily litigate in Delaware, and a U.S. court once dismissed BAEF on *forum non conveniens* grounds. (BAEF30.)	AIB has litigated and engaged in numerous business activities in Delaware. (A2361-A2363.) The U.S. court that BAEF references was a federal court applying federal law; located in Illinois, not Delaware; and expressly noted that BAEF—which was not a party to the contract at issue—had little involvement with the case and was joined to manufacture a U.S. tie to the case. (A2421 n.67); *infra*, n.27. Here, BAEF's conduct (much of which took place in, and was directed at, the U.S.) is directly involved in Plaintiffs' claims.
No potential witnesses, documents, or evidence were outside the defendant's control in *Candlewood*. (BAEF30-31.)	Defendants have failed to identify any evidence they could not adduce in Delaware, any witness whose testimony they could not present in Delaware, or any Bulgarian witness who would not appear voluntarily at trial in Delaware. (A2389-2391; A3407:18-A3417:2.) Under Delaware law, this failure is fatal to their argument. *See Aveta, Inc. v. Colon*, 942 A.2d 603, 613 (Del. Ch. 2008).
This case involves a third-party asserting tort claims under foreign law.	*Candlewood* also involved a non-party to U.S. forum selection clauses asserting

(AIB28.)	tort claims under foreign law. 859 A.2d at 992, 1004. Moreover, all of Plaintiffs' claims are grounded in Delaware law. (A2409-2414.) There is only one black-letter issue of foreign law in this case – Article 149(2) of POSA. In *Candlewood*, *every* legal issue was governed by Argentine civil law. 859 A.2d at 996, 1002.

Defendants also ignore many other factors that rendered *Candlewood* a far better candidate for dismissal than this case:

- Defendants' Delaware forum selection clause appears in a contract that relates directly to Plaintiffs' claims. In *Candlewood*, the Court relied on forum selection clauses, including some that did not designate Delaware, in contracts completely unrelated to the dispute. 859 A.2d at 1004 ("Pan American's operations cause it frequently to enter into oil and gas supply contracts that contain forum selection clauses which require Pan American to litigate in the United States. Those facts are flatly inconsistent with Pan American's claim of hardship…").

- Although the *Candlewood* plaintiff acted through an Argentine subsidiary, *id.* at 991, Plaintiffs did not act through a Bulgarian entity.

- In *Candlewood*, all evidence and witnesses were in Argentina. *Id.* at 995, 1000. Here, the most relevant witnesses and much of the evidence are located outside of Bulgaria. (A2389-2397.)

- In *Candlewood*, the critical witnesses spoke "minimal English." 859 A.2d at 995. Here, all relevant witnesses (even those in Bulgaria) speak English. (A2391-92, A2395.)

- In *Candlewood*, all relevant documents were in Spanish. 859 at A.2d 995. Here, less than 1% of the documents are solely in Bulgarian. (A2418.)

- Unlike *Candlewood*, no foreign action is pending. 859 A.2d at 996.

In *Candlewood*, some agreements relevant to the dispute had Argentine forum selection clauses. *Id.* Here, the only relevant forum selection clause designates Delaware. BAEF suggests that litigants will "think twice" about Delaware forum selection clauses if they can require them to litigate unrelated third-party claims in Delaware under foreign law. (BAEF31.) But that is essentially what happened in *Candlewood*. The defendant signed contracts featuring U.S. forum selection clauses with various counterparties. 859 A.2d at 993-94, 1001, 1004. The plaintiff, a stranger to those contracts, sued in Delaware based on Argentine law, and this Court held that the unrelated forum selection clauses required denial of the *forum non conveniens* motion. *Id.* at 996, 1001. Thirteen years later, the "breathtaking consequences" predicted by BAEF have not come to pass.[24]

[24] AIB notes that *Candlewood* was decided before *Martinez* (AIB28), but fails to identify any aspect of *Martinez* that addresses the significance of forum selection clauses.

III. THE LOWER COURT IGNORED EQUITABLE FACTORS.[25]

Although the analysis the lower court applied in lieu of overwhelming hardship was purportedly based on "justice" (Op-5), its opinion is silent on all the equitable factors Plaintiffs raised below.[26]

A. Corruption in the Bulgarian Judiciary

Rather than address evidence that Bulgaria's judiciary is corrupt (A2371-2373, A2900-3046, A3217-3294, A3749-68), Defendants seek to divert the Court's attention with *federal* cases applying the *federal* test for whether a proposed alternative forum is "adequate." (AIB33-34.) That analysis is heavily skewed toward a finding of "adequacy." Even if the facts demonstrate that a plaintiff has little hope of a fair hearing, the alternative forum is "adequate" if its laws, on paper, afford the *theoretical possibility* of relief. *See Piper Aircraft*, 454 U.S. at 254 (alternative forum adequate unless "remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all"); *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 803 (7th Cir. 1997) (alternative forum adequate so long as it offers "some potential avenue for redress"). Unlike Illinois courts

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[25] Because this Court "reviews the trial court's application of legal precepts involving issues of law *de novo*," it reviews whether "the trial court erred in not explicitly considering the competing interests at stake." *Newmark v. Williams*, 588 A.2d 1108, 1115 (Del. 1991).

[26] Defendants quote the lower court's off-the-cuff assertion that Plaintiffs' motion would "turn on the ability of the Bulgarian courts to render justice" (AIB31), a statement made following argument on a *discovery* motion, before the *forum non conveniens* motion was briefed, and before the court had read or heard *any* argument on the applicable standard.

(A0493-A0494 ¶¶ 26-27), however, no Delaware court has adopted the federal "adequacy" test. *Hupan v. Alliance One Int'l Inc.*, 2016 WL 4502304, at *5-*6 (Del. Super. Aug. 25, 2016) (rejecting argument that Delaware has adopted federal "adequate alternate forum" inquiry, noting Delaware *forum non conveniens* standard differs from federal standard).[27]

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[27] Even if the Court were to consider Defendants' inapposite authorities (AIB33-34)—***all of which involved foreign plaintiffs***—this case is distinguishable. In *Stroitelstvo*, a Bulgarian company brought claims related to a Bulgarian loan contract against ***a foreign defendant*** (BACB) and BAEF, alleging injuries suffered in Bulgaria. 598 F. Supp. 2d at 882. The plaintiffs initially filed in the District of Columbia, but the case was transferred to Illinois on a motion by BAEF. *Id.* at 881. BAEF, the only nexus between the case and Illinois (and the U.S.), was "only tangentially involved in the dispute," was not a party to the loan agreement at issue, and clearly was added to increase the plaintiffs' chances of securing a U.S. venue. *Id.* at 883 & n.3. Additionally, the parties' contract provided for Bulgarian law (as opposed to Delaware law here), and *all* witnesses and documents were in Bulgaria. *Id.* at 889; 589 F.3d at 425-26. The Seventh Circuit found that the litigation was "***two Bulgarian companies' dispute over a Bulgarian loan contract***." 589 F.3d at 426 (emphasis added). In contrast, this case is brought by two U.S.-based Delaware companies and a U.S.-based Cayman Islands company against another Delaware company and an Irish company with a significant U.S. presence, regarding a transaction actively solicited by the U.S. Congress, embodied in a contract containing Delaware choice-of-law and forum selection clauses, and contingent on multiple certifications from Delaware's Secretary of State.

Similarly, *Zeevi* was brought by an Israeli company against Bulgaria to confirm a foreign arbitration award, where the parties' agreement contained exclusive Bulgarian forum selection and choice-of-law clauses. 2011 WL 1345155, at *1; *see also Asenov*, 2012 WL 1136980, at *2 (plaintiff was Bulgarian individual and defendant was Bahamaian corporation; parties had executed exclusive forum selection clause in favor of Bulgaria). The courts found that the plaintiffs failed to meet the extremely high standard to rebut the presumption that forum selection clauses are enforceable—an issue distinct from the "adequate alternative forum" analysis. *See* 2011 WL 1345155, at *9.

The relevant issue in Delaware is *fairness*, not the skewed federal "adequacy" test. The record contains reports of reputable international organizations and news sources attesting to rampant corruption in Bulgarian courts. (PB32-34.) No objective person could review that evidence and conclude that Plaintiffs will receive a fair hearing in Bulgaria. Defendants know that if Delaware courts refuse to provide a forum, it is a death sentence for this case. Defendants' choice of Delaware, not Bulgaria, as the forum to resolve all disputes concerning the Transaction speaks far louder than their tepid defense of the Bulgarian judiciary.

Defendants note that Plaintiffs' expert stated that Bulgarian judges are trained as lawyers. That is the lowest conceivable criteria for a judiciary, and does not address corruption. Defendants also raise Plaintiffs' expert's statement that Bulgarian law provides redress for Plaintiffs' claims. (BAEF39; AIB32.) That statement was issued in connection with a choice-of-law dispute, and merely asserts that Plaintiffs' claims technically fit within provisions of the Bulgarian civil code. (A2444-A2450.) It says nothing about corruption, nor can a Bulgarian lawyer interested in retaining his license (and perhaps his life) be expected to confirm the extensive corruption in the Bulgarian courts.

B. The Congressional Origins of BAEF, BACB, and Plaintiffs' Investment.

AIB does not address Plaintiffs' argument that it is unfair and counterproductive to deny them a forum in their home country to redress a wrong directly related to a transaction created and actively encouraged by Congress. (PB34-35.) BAEF feebly asserts that although the U.S. has an interest in this case, Bulgaria has an interest in ensuring that its laws are observed. (BAEF40.) The same can be said of any of the numerous cases Delaware courts accept involving foreign law. But very few directly implicate express Congressional policy preferences as this one does. Further, because Bulgarian authorities made no effort to investigate Gramercy's claims of a secret voting agreement (A0195-0197)—claims later confirmed during discovery in Illinois (A1925-1937, A2357-59)—this Court might well question whether Bulgaria actually is interested in enforcing POSA (at least where U.S. investors are involved).

C. Excessive Filing Fees

Defendants rely on cases applying the inapplicable federal "adequacy" standard in an effort to dismiss the massive filing fees in Bulgaria. (AIB33; BAEF37-38.) While seven-figure fees by themselves might pass muster under that test, the question here is whether it is *equitable* to banish Plaintiffs to a forum where onerous and unreasonable fees are coupled with massive judicial corruption. Plaintiffs respectfully submit that it is not. In reality, any filing fee paid by

Plaintiffs in Bulgaria would be forever lost immediately upon remittance, regardless of whether it is nominally "refundable."

D. Congestion in Bulgarian Courts

BAEF unpersuasively cites *Stroitelstvo* for the proposition that very recent and well-documented congestion problems in Sofia City Court (A2376, A2924, A3027-3030, A2440) are a "wash." *Stroitelstvo* is almost a decade old and has nothing to do with Delaware.

IV. THE LOWER COURT'S PARTIAL *CRYO-MAID* ANALYSIS WAS ERRONEOUS.

The lower court did not determine whether Defendants have shown overwhelming hardship using the *Cryo-Maid* factors. (AIB35; BAEF37.) It offered a partial advisory opinion on how it *might* apply *Cryo-Maid* on remand, to suggest that Plaintiffs might lose. Plaintiffs had to respond. To be clear, Plaintiffs contend that the overwhelming hardship standard applies, *Candlewood* is dispositive, and therefore this Court should resolve *forum non conveniens* in their favor. But if the Court finds remand for consideration of the *Cryo-Maid* factors appropriate, the issues addressed here may allow the Court to provide proper guidance to the lower court.

A. There Are No "Important and Novel" Issues of Foreign Law.

Citing *Martinez*, Defendants claim this case involves "important and novel" issues of foreign law. (AIB37; BAEF34-35.) However, the circumstances that led the *Martinez* Court to introduce the concept of "important and novel" foreign law were far beyond anything presented by this case. (PB40-42.) Delaware courts have repeatedly expressed confidence in their ability to apply foreign law. *See, e.g.*, *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1200 (Del. 1997) ("The application of foreign law is not sufficient reason to warrant dismissal under the doctrine of forum non conveniens"; refusing to dismiss case where foreign law applied); *Candlewood*, 859 A.2d at 1002-03; *Warburg, Pincus Ventures, L.P. v. Schrapper*,

774 A.2d 264, 271 (Del. 2001). Yet Defendants argue that Delaware courts should hesitate to apply Article 149(2) of POSA – a short, simple statutory provision written in plain English. (A0663-0661.)

Unlike *Martinez*, where the parties disputed whether the "direct participant" theory of liability *existed* under Argentine law, 82 A.3d at 6-7, 17-18, here Defendants ***acknowledge*** the applicable Bulgarian legal principle – they are liable if they agreed to manage BACB jointly through a secret voting agreement. (BAEF7; AIB8.) Unable to dredge up any lack of clarity in that regard, Defendants offer the anemic hypothetical that Delaware courts might have to decide if Defendants' voting records, standing alone, establish a voting agreement (even though Plaintiffs take no such position). (BAEF34; AIB38.) If this fabricated issue is "important and novel," it is difficult to imagine an issue of foreign law that is not. AIB also asserts that Delaware courts would have no Bulgarian precedent to guide them in answering this irrelevant question. It overlooks the fact that, ***any time*** Delaware courts apply foreign civil law (as they have often done (PB38-39)), they have no precedent to guide them on ***any*** issue. Nor is precedent ***supposed*** to be consulted when applying civil law; every decision is *sui generis*, and understood to have no effect beyond the parties to each individual case. *Id.*

Defendants also press the lower court's assertion that it might have to apply Bulgarian doctrines of deference to regulators[28] and exhaustion of administrative remedies, but offer no evidence that either doctrine exists under Bulgarian law. (In fact, Plaintiffs have consulted their Bulgarian law expert and confirmed that Bulgaria does not recognize ***either*** doctrine.) Defendants also fail to explain why, even if those doctrines *did* exist in Bulgaria, they are "important and novel."

Plaintiffs' opening brief (PB39-40) also noted *Martinez*'s holding that important and novel issues of foreign law might justify dismissal *only* where: (1) the plaintiff is a citizen of the foreign country whose law applies, and (2) the injury occurred in that foreign country. Those criteria do not apply here. Defendants concede Plaintiffs are not Bulgarian citizens, and fail to refute Plaintiffs' authority establishing that their injuries occurred in Delaware and Connecticut, not Bulgaria.

B. Delaware Has a Strong Interest in This Case.

Defendants contend that, other than the Delaware citizenry of two Plaintiffs, and BAEF, the Purchase Agreement's Delaware forum selection and choice-of-law clauses, and the fact that the Transaction would never have closed without multiple certifications from the Delaware Secretary of State, this case has nothing to do

[28] The Bulgarian regulators (one of whom is currently under indictment for official corruption (A3056)) did nothing to investigate Plaintiffs' claims. Rather, they responded that the Transaction had not yet taken place and that if Defendants forged an illegal agreement to circumvent the tender offer requirement, they would likely report it. (A0195-0197.) The evidence Plaintiffs uncovered in Illinois proves otherwise. (A1925-1937, A2357-59.)

with Delaware. (AIB29-30 & n.12, BAEF35.) That argument answers itself. Further, this Court has refused to dismiss numerous cases on *forum non conveniens* grounds that had far less to do with Delaware. *See Candlewood*, 859 A.2d at 996, 1002-03 (all witnesses, physical evidence, and documents were located in Argentina; documents were Spanish; Argentine civil law applied; Argentine action was pending); *Warburg*, 774 A.2d at 267, 270 (German plaintiff alleged that contract with defendant's U.K. subsidiary required defendant to finance acquisitions of German healthcare facilities; all negotiations, evidence, and witnesses were in Germany and England; foreign law applied); *Mar-Land Indus. Contractors, Inc. v. Caribbean Petrol. Refining L.P.*, 777 A.2d 774, 779 (Del. 2001) (Puerto Rican plaintiff sued Puerto Rican defendant; all evidence and witnesses were in Puerto Rico); *Taylor*, 689 A.2d at 1199-1200 (Canadian plaintiff sued California corporation concerning share price of Canadian corporation headquartered in Canada; Canadian law applied).

Defendants ignore the authorities cited by Plaintiffs for the propositions that Delaware has a strong interest in providing a forum to entities formed under Delaware law, and in ensuring that entities it charters are not used as vehicles for fraud. (PB42-43); *Pipal*, 2015 WL 9257869, at *9. AIB cites four cases that it claims hold that a defendant's state of formation has "little relevance to the *forum non conveniens* inquiry." (AIB29.) The first three (*Nash*, *IM2*, and *Oryx*) are

unpublished lower court cases, none of which state that Delaware citizenry has little relevance. Indeed, *Oryx* acknowledges that "some consideration must be given to the fact that both corporations are Delaware corporations." 1990 WL 58180, at *5. Further, all three cases are readily distinguishable. In *Oryx* and *IM2*, the courts had no jurisdiction over multiple defendants. *IM2*, 2000 WL 1664168, at *4; *Oryx*, 1990 WL 58180, at *4-*6. In *Nash*, the ***only*** Delaware nexus was the fact that the defendant was incorporated here. 1997 WL 528036, at *3. In *IM2*, the lone Delaware tie was that *one* defendant had a *parent* company incorporated in Delaware. 2000 WL 1664168, at *4 & n.15. Further, the Canadian defendants in *IM2* were so small and financially unstable that litigation in Delaware threatened their existence. *Id.* at *9, *11; (A2384-2385, A2424 n.70). The fourth decision Defendants cite, *Hazout*, is not a *forum non conveniens* case, and the only Delaware nexus was that the defendant (a foreign resident) was a director of a Delaware company.[29] 124 A.3d at 292.

C. AIB's Discussion of *Cryo-Maid* Factors Not Addressed in the Lower Court's Opinion is Irrelevant and Erroneous.

The parties agree that the lower court did not decide the issue of overwhelming hardship. Plaintiffs' opening brief discussed only those *Cryo-Maid*

[29] AIB fails to distinguish *Pipal*. (AIB30 n.13.) The court noted that the relevant asset was held by a Delaware entity only in a "metaphysical" sense, and virtually every other aspect of the case related entirely to India. 2015 WL 9257869, at *1. The fact that one claim in *Pipal* might have implicated the Uniform Trade Secrets Act hardly assists Defendants—most if not all of Plaintiffs' claims are governed by Delaware law. (A2409-2414.)

factors expressly addressed in the Court of Chancery's opinion. Despite acknowledging that this Court should not apply the *Cryo-Maid* factors (AIB35), AIB addresses all of them. (AIB36-42.) Because Plaintiffs agree that the case should be remanded for full consideration of the *Cryo-Maid* factors – unless this Court finds overwhelming hardship lacking under *Candlewood* – AIB's discussion is irrelevant. Accordingly, Plaintiffs respond to AIB's points in summary fashion below.

***Cryo-Maid* Factor**	**Response to AIB's Argument**
Location of Documents (AIB20; AIB30; AIB39-40)	-Modern technology renders the location of documents largely irrelevant.[30] -Defendants produced "extensive" documents in Illinois, and thus their relevant documents are in the U.S. (A1981-82, A2037, A3392:14-20.) -Defendants admit that additional relevant documents are in the Illinois offices of the counsel that represented them for the Transaction. (A0500, A0552.) -Any remaining documents held by AIB are in Ireland, not Bulgaria. (A3152.) -BACB voting records are publicly available in English. (A3153.) -The location of documents is irrelevant unless Defendants can identify relevant

[30] *See In re Asbestos Litig.*, 929 A.2d at 384 (location of evidence largely irrelevant "in an age where air travel, express mail, electronic data transmissions and videotaped depositions are part of the normal course of business").

	records that are only accessible from Bulgaria. *Candlewood*, 859 A.2d at 991-92, 1002-04. They have not done so.
Translation of Documents (AIB20; AIB30; AIB39-40)	-Of the "extensive" documents produced in Illinois, less than 1% were solely in Bulgarian. (A2418, A3393:2-5.) Thus, trial in Delaware would require little, if any, translation, while trial in Bulgaria would require a massive translation effort.
Location of Witnesses and Availability of Compulsory Process (AIB20; AIB28; AIB30; AIB40-41)	-Defendants ignore numerous U.S.-based witnesses, including Bauer, Falk, Fillo, Miller, and Fiehler. (A2494-2496, A2504.) None can be compelled to testify in Bulgaria. (A2401-2404.) All of Plaintiffs' personnel are U.S. residents. -Defendants have not proven with particularity that the individuals on their heavily-padded list of foreign witnesses are relevant and non-cumulative. (A3410-3415.) -Nine of Defendants' witnesses are current or former AIB employees living *outside* Bulgaria; at least seven of whom are accustomed to U.S. travel; and one is under AIB's control. (A0526-0527 A2495-2496, A2512-2513, 2521, 2534-2535, 2542, A3411:17-21.) None can be compelled to testify in Bulgaria. (A2401-2404.) AIB does not deny that these witnesses have contractual agreements to cooperate in litigation, or that they will appear voluntarily for videotaped testimony in their home countries or at trial in the U.S. (A2396, A3408:3-3409:2, A3411:4-3412:1.) All

	these witnesses can be deposed through the Hague Convention or letters rogatory, which is all that Delaware law requires. *See* Ch. Ct. R. 28(b); *Pipal*, 2015 WL 9257869, at *6; *Reid v. Spazio*, 2012 WL 2053323, at *1, *5-*6 (Del. Ch. May 25, 2012). -BAEF has failed to deny that current or former BACB witnesses will appear voluntarily at trial in the U.S. or for videotaped testimony in Bulgaria. (A2396, A3408:3-3409:2, A3411:4-3412:1.) All can be deposed through the Hague Convention, which is all that Delaware law requires. -The location of the parties' Bulgarian law experts is irrelevant, as they are paid to appear where required.
Remaining Factors (AIB41-42)	-Delaware law applies to most, if not all, of Plaintiffs' claims, and this case involves one straightforward sub-provision of the Bulgarian civil code. (A2409-2413.) -All or nearly all the foreign witnesses identified by Defendants speak English. None of the U.S.-, Ireland-, or Poland-based witnesses speak Bulgarian. Accordingly, a Delaware trial would require no witness translation, while trial in Bulgaria would require extensive translation. (A2354-2355, A2496-2498, A2523-2525, A2535-2536, A2543-2546.)

V. IF THIS COURT ADOPTS THE LOWER COURT'S INTERPRETATION OF *LISA*, THAT RULING SHOULD APPLY PROSPECTIVELY ONLY.

The *Chevron* factors favor prospective application of the lower court's decision. *First*, while Defendants insist that this case presents a straightforward application of *Lisa*,[31] they and the lower court concede it is a case of first impression. (A3701:5-9; A3717:3-4; Op-29.) No Delaware court (including *Abrahamsen* and *Chaverri*, *see supra*, n.11) has held the overwhelming hardship standard inapplicable following a procedural dismissal in another action. In contrast, *Trinity* and *Asbestos Litigation* found the overwhelming hardship standard applicable in such circumstances. *Second*, it is too late to deter Plaintiffs from re-filing their case and litigating *forum non conveniens* here – the avowed purpose of the lower court's ruling, which focuses on "forum-shopping" and "serial litigation." (Op-29 n.5, 30.) It is sufficient that *future* litigants will have a clear understanding of the new ground rules. Finally, given numerous equitable factors (congestion, excessive filing fees, extreme corruption in Bulgaria, and the Congressional interest in affording Plaintiffs a U.S. forum); the clear ties between this case (and the parties) and Delaware; and the fact that Plaintiffs would have filed first in Delaware had they been aware of Defendants' Delaware forum

[31] *Lisa* was scarcely mentioned during the initial oral argument on Defendants' motions to dismiss. (A3361.) Only after the lower court *sua sponte* raised the issue of changing or shifting the applicable standard did Defendants "discover" that this is a routine "first-filed" case. (A3689:1-10.)

selection clause, it would be patently unfair to dismiss this case. *See Gen. Motors*, 701 A.2d at 822 (holding new case law regarding standing rule could not be applied retroactively because party could not have reasonably anticipated that precedent would be overruled).

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