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IN THE SUPREME COURT OF THE STATE OF DELAWARE

Alfredo Aranda, et al., Plaintiffs Below, Appellants, v. Philip Morris USA Inc. and Philip Morris Global Brands, Inc., Defendants Below, Appellees	No. 525,2016 Court Below: Superior Court of the State of Delaware The Honorable Vivian L. Medinilla
Antonio Emilo Hupan, et al., Plaintiffs Below, Appellants, v. Philip Morris USA Inc. and Philip Morris Global Brands, Inc., Defendants Below, Appellees	No. 526,2016 Court Below: Superior Court of the State of Delaware The Honorable Vivian L. Medinilla
Maria Noemi Biglia, et al., Plaintiffs Below, Appellants, v. Philip Morris USA Inc. and Philip Morris Global Brands, Inc., Defendants Below, Appellees	No. 527,2016 Court Below: Superior Court of the State of Delaware The Honorable Vivian L. Medinilla

Pabla Chalanuk, et al, Plaintiffs Below, Appellants, v. Philip Morris USA Inc. and Philip Morris Global Brands, Inc., Defendants Below, Appellees	No. 528,2016 Court Below: Superior Court of the State of Delaware The Honorable Vivian L. Medinilla
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Ondina Taborda, et al., Plaintiffs Below, Appellants, v. Philip Morris USA Inc. and Philip Morris Global Brands, Inc., Defendants Below, Appellees	No. 530,2016 Court Below: Superior Court of the State of Delaware The Honorable Vivian L. Medinilla

PLAINTIFFS'/APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This is a consolidated appeal from dismissals entered in six cases. In each case, groups of plaintiffs brought claims for damages for severe birth defects suffered by the "children plaintiffs." The "parent plaintiffs" worked on small farms in Argentina, cultivating tobacco for purchase by defendants. They allege that this work involved regular and heavy exposure to toxic substances, and that such exposures caused the birth defects in their children.

Threshold motion practice took place in one of the cases, *Hupan v. Alliance One Int'l, Inc.*, No. N12C-02-171 in the Superior Court for New Castle County, and the parties agreed that the rulings on these motions would apply in all cases. The trial court, the Honorable Vivian Medinilla, J., granted certain defendants' motion to dismiss on *forum non conveniens* grounds, and thereafter denied plaintiffs' motion for clarification or reargument. This appeal followed.

SUMMARY OF ARGUMENT

1. The trial court erred in dismissing plaintiffs' claims on *forum non conveniens* grounds, when the moving defendants refused to submit to jurisdiction in the alternate forum, and the trial court did not otherwise ensure that defendants could in fact be sued there. The ability to actually sue the defendant in the asserted alternate forum is a fundamental threshold requirement for any *forum non conveniens* dismissal. The standard factors for evaluating *forum non conveniens* dismissals in Delaware make no sense if the defendant will never appear in the foreign forum. The trial court should have required submission to Argentine jurisdiction as a condition of dismissal.

2. The trial court erred in declining to require defendants to waive any statute of limitations defenses that may have arisen during the pendency of this action. Defendants did not even make a *forum non conveniens* motion at all, or otherwise challenge the suitability of litigation in Delaware, until over two years after the case was filed. Plaintiffs have been gravely prejudiced by this delay, and the formal legal prejudice, at least, should be obviated by defendants' being required to waive any such defenses they might assert in Argentina. This is a common condition of *forum non conveniens* dismissals.

STATEMENT OF FACTS

Plaintiffs in these consolidated cases are citizens of Argentina. They seek damages for severe birth defects alleged to have been caused by exposure to toxic substances, including but not limited to Roundup, a glyplosate-based pesticide developed and supplied by defendant Monsanto Co. The "parent plaintiffs" were exposed to these substances while cultivating tobacco for sale to Philip Morris USA, and/or its affiliates. The "children plaintiffs" have suffered severe birth defects, including spina bifida and other neural tube defects, as a result of their parents' exposure to these substances during their work. Defendant Philip Morris USA is alleged to have strictly controlled the growing practices, including the use and application of Roundup and other toxic substances, that caused the parent plaintiffs' exposure.

Plaintiffs filed their original complaint in the *Hupan* matter on February 14, 2012, naming as defendants the two appellees here, other affiliated entities, and Monsanto Co. and its Argentine subsidiary.[1] A112-17. Early discussions and exchanges of information between counsel led to the voluntary dismissal of the Philip Morris affiliates and Monsanto's Argentine unit, ultimately leaving three

[1] The *Hupan* matter is one of the six cases that have been consolidated for purposes of this appeal. Motion practice was held in this matter, and the parties agreed that the rulings in *Hupan* would apply to the other cases. References in the brief are to materials filed in *Hupan.* The docket sheets for the other cases, but not pleadings, are included in the Appendix.

defendants: Philip Morris USA, Inc., Philip Morris Global Brands, Inc., and Monsanto Co.

In 2013, the parties filed briefing concerning choice-of-law issues. They broadly agreed that Argentine law would govern most issues, and also agreed to a substantial extent on the content of relevant Argentine law, but differed on certain points. A hearing was held on such issues on November 18, 2013.

Then, on April 29, 2014, each of the remaining defendants filed motions to dismiss under Rule 12(b)(1) and 12(b)(6), seeking dismissal on the merits. On the same date, the two Philip Morris defendants, but not Monsanto, filed new motions to dismiss on *forum non conveniens* grounds. The Philip Morris *forum non conveniens* motions were fully briefed, and oral argument was held on both the *forum non conveniens* motions and the merits motions on May 4, 2015.

One of the arguments plaintiffs had made against a *forum non conveniens* dismissal was that since Monsanto had not moved for dismissal on this basis, sending the claims against the Philip Morris defendants to Argentina would simply multiply proceedings, since the case would still be proceeding against Monsanto in Delaware anyway. Dividing the case up in this manner would needlessly present a host of practical difficulties. *See* plaintiffs' combined response to the *forum non conveniens* motions at pp. 8-12, A244-48. Recognizing this problem, the superior court sent a letter to counsel for Monsanto, inviting it to make its own motion to

dismiss on *forum non conveniens* grounds. A453-55. Monsanto declined to do so. A456.

Despite the practical problems engendered by having plaintiffs' claims proceed both here and in Argentina, the trial court granted the Philip Morris defendants' *forum non conveniens* motions on November 30, 2015. A458-90 (this opinion is included as exhibit A at the end of the brief). Plaintiffs filed a motion for reconsideration or clarification, noting that the trial court's order was silent on the question of whether the Philip Morris defendants were in fact subject to jurisdiction in Argentina, such that they could be sued there at all. Plaintiffs asked that defendants be required to stipulate to jurisdiction in Argentina, and to agree to certain other conditions as well. A491-508. This motion was heard on May 10, 2016, and the Court issued its opinion denying it on August 25, 2016. A569-593 (this order is also included as exhibit B at the end of this brief). This appeal followed. A594. The claims against Monsanto remain pending.

In this appeal, plaintiffs do not seek reversal of the trial court's underlying decision to dismiss the claims against the Philip Morris defendants on *forum non conveniens* grounds. Although plaintiffs obviously opposed such a dismissal, they recognize that Delaware trial courts enjoy broad discretion in this regard. Plaintiffs do challenge, however, the trial court's refusal to condition its dismissal on the moving defendants' submission to the jurisdiction of Argentina courts, and its

refusal to require defendants to waive any statute of limitations defenses that may have arisen during the pendency of this action.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING THESE CASES ON *FORUM NON CONVENIENS* GROUNDS, WHEN IT IS NOT CLEAR THAT THE MOVING DEFENDANTS CAN EVEN BE SUED IN THE ALTERNATE FORUM

A. Question Presented

May a trial court grant a dismissal on *forum non conveniens* grounds, when the record does not establish that the moving defendant may be sued in the asserted alternate forum, and the defendant refuses to submit to jurisdiction there? This question was preserved at A265-67; *see also* the transcript of the hearing on defendant's motions, A281, at A428-30.

B. Scope of Review

A trial court's legal determinations are reviewed *de novo.* *New Cingular Wireless PCS v. Sussex Cty. Bd. of Adjustment*, 65 A.3d 607, 611 (Del. 2013). While rulings on *forum non conveniens* motions are generally reviewed for abuses of discretion, "[w]hether the trial court applied the appropriate legal standard in considering a motion to dismiss [on *forum non conveniens* grounds], however, presents this Court with a question of law that is reviewed *de novo.*" *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 777 (Del. 2001), *citing Ison v. E.I. DuPont de Nemours & Co.*, 729 A.2d 832, 847 (Del. 1999). In this appeal, plaintiffs contend that the trial court failed to enforce a

threshold legal requirement for all *forum non conveniens* motions, and so applied the wrong standard for considering such motions. This ruling is reviewed *de novo.*

C. Merits of Argument

1. A fundamental, universal threshold requirement for a *forum non conveniens* dismissal is that the defendant be amenable to suit in the alternate forum.

As a matter of logic and precedent, a threshold requirement for any *forum non conveniens* motion is that the moving defendant be amenable to suit in the suggested foreign forum. *Forum non conveniens* means "inconvenient forum," and a contention that the forum is an "inconvenient" one for the defendant in which to defend the suit necessarily means that there is another forum that would be more convenient.

If the suggested alternative court will not hear the case or take jurisdiction over the parties, however, then logically it cannot be more "convenient" than the plaintiff's chosen forum. More fundamentally, a defendant's complaints about the "overwhelming hardship" of defending a case in Delaware, and the established Delaware test for evaluating those complaints, are meaningless and irrelevant if the defendant is not going to have to defend the case at all in the place where, says defendant, the case should be brought.

Thus it is a standard threshold requirement of the *forum non conveniens* doctrine that the moving defendant be subject to jurisdiction in the suggested

foreign court. The United States Supreme Court, the lower federal courts, and all other state courts apply this simple, obvious fundament. This Court has described the United States Supreme Court rule as follows:

> The United States Supreme Court first considered the doctrine of FNC as applied to foreign plaintiffs in *Piper Aircraft v. Reyno*. In *Piper Aircraft*, the Supreme Court set up a three-part analysis for dismissing such cases under FNC. First, the defendant must be amenable to process in the alternate forum. Second, the remedy offered by the alternate forum must not be "clearly inadequate or unsatisfactory." Third, *if these prongs are satisfied*, the trial court must balance certain private and public interest factors to determine whether dismissal is appropriate.

Ison v. E.I. DuPont de Nemours & Co., 729 A.2d 832, 839 (Del. 1999) (emphasis added), *citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (footnote omitted). The rule is of course routinely enforced in the lower federal courts. *See, e.g.*, the cases involving Argentina cited by defendant Philip Morris Global Brands in its motion to dismiss.[2] And it is a universal requirement in state courts as well.

[2] *See* A173-74, citing *Pacheco v. Ford Motor Co.*, 2006 WL 6013522, * 1 (S.D. Fla. May 26, 2006) (defendant agreed to stipulate to Argentine jurisdiction, to pay any Argentine judgment, and to treat the Argentine action as having been filed on the day the American action was filed); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001) (defendant "consented to the jurisdiction of the Argentine courts" and so "its amenability to suit there was not an issue."); *Abad v. Bayer Corp.*, 531 F. Supp. 2d 957, 960 (N.D. Ill. 2008) ("Defendants stipulate that if we grant their motion they will subject themselves to the process of the Argentine courts. . . ."); *In re Bridgestone/Firestone, Inc.*, 2007 U.S. Dist. LEXIS 98929 (S.D. Ind. Jan. 31, 2007) (indicating that defendants stipulated to jurisdiction in Argentina and finding that "[a] forum is 'available' if 'all parties are amenable to process and are within the forum's jurisdiction.'" (citation omitted)); *Warter v. Boston Sec., S.A.*, 380 F. Supp. 2d 1299, 1306 (S.D. Fla. 2004) ("A movant asserting *forum non conveniens* must demonstrate that … the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice."); *Lewis v. Pike*, 2004 WL 595105 (D. Me. Mar. 23, 2004) ("the testimony … supports a finding that the defendant is amenable to process in Argentina."); *Hidrovia, S.A. v. Great Lakes Dredge & Dock Corp*., 2003

See, e.g., State ex rel. Almond v. Rudolph, 794 S.E.2d 10, 20 (W. Va. 2016); *Pantuso v. Wright Med. Tech. Inc.*, 485 S.W.3d 883, 891 (Tenn. App. 2015) (defendants waived jurisdiction and limitations defenses in the asserted alternate forum); *Lumenta v. Bell Helicopter Textron, Inc.*, 2015 WL 5076299, * 5 (Tex. App. Aug. 27, 2015) ("Ordinarily, an alternate forum is shown if the defendant is 'amenable to process' in the other jurisdiction.") (*quoting General Elec. Co. v. Richards*, 271 S.W.3d 681, 688 (Tex. 2008), in turn *quoting Piper Aircraft Co. V. Reyno*, 454 U.S. 235, 254 n. 22 (1981)); *Northern Leasing Systems, Inc. v. French*, 13 N.Y.S.3d 855 (N.Y.A.D. 2015).

Indeed Delaware trial courts themselves have routinely assumed that this is a logical precondition to a *forum non conveniens* dismissal. *See, e.g. Pipal Tech. Ventures Private Ltd. v. MoEngage, Inc.*, 2015 WL 9257869, * 1 (Del. Ch. Dec. 17, 2015) ("The defendant Delaware Corporation, MoE, has moved to dismiss on *forum non conveniens* grounds. It concedes that it is not subject to process in India, but agrees to waive that defect."); *Abrahamsen v. Conoco Phillips Co.*, 2014 WL 2884870, * 2 (Del. Super. May 30, 2014) (FNC "presupposes at least two forums in which the defendant is amenable to process . . . . The first step the Court must take . . . is to determine wether an alternative forum is available to hear the case."); *Sumner Sports Inc. v. Remington Arms Co.*, 1993 WL 67202, * 5 (Del.

WL 2004411, at *2 (N.D. Ill. Apr. 28, 2003) ("An alternative forum is available if all parties are amenable to process and are within the forum's jurisdiction.") (citation omitted).

Ch. Mar. 4, 1993) ("All defendants have appeared in, and are prepared to defend, the Canadian action.").

2. The lower court erroneously applied this Court's *forum non conveniens* precedent to dispense with the requirement that the moving defendant actually can be sued in the other forum.

Notwithstanding the above uniform authority, the superior court held squarely that a defendant seeking dismissal on *forum non conveniens* grounds need not be subject to jurisdiction in the asserted alternate forum. Exhibit B, *Hupan,* 2016 WL 4502304 at * 7-8. The court relied on language from earlier cases from this Court, and from another recent Chancery Court ruling. None of these opinions, however, announces any such rule.

The court below first examined *Mar-Land Ind. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774 (Del. 2001). There, plaintiff brought suit on contracts under which it supplied labor and materials to defendant for use in constructing defendant's refinery in Puerto Rico. Defendant filed a motion to dismiss on *forum non conveniens* grounds which the superior court granted. *Id.* at 777. On appeal, plaintiff contended that "the trial court applied the wrong standard[,]" in that it "improperly employed a balancing test in reviewing the factors pertinent to a *forum non conveniens* motion and erred in determining that, as compared to Delaware, Puerto Rico would be a better forum for this

dispute." *Id.* This Court reversed, holding as follows in the language quoted by the trial court here:

> Our jurisprudence makes clear that, on a motion to dismiss for *forum non conveniens*, whether an alternative forum would be more convenient for the litigation, or perhaps a better location, is irrelevant. In determining whether to grant or deny a motion to dismiss on *forum non conveniens* grounds, **the trial court is not permitted to compare Delaware, the plaintiff's chosen forum, with an alternate forum and decide which is the more appropriate location for the dispute to proceed.** Rather, the trial court must focus on whether the defendant has demonstrated with particularity, through the *Cryo-Maid* factors, that litigating in Delaware would result in an overwhelming hardship to it.

Id. at 779 (emphasis the superior court's in the present case).

This Court did *not* hold in *Mar-Land* that a *forum non conveniens* dismissal may be granted without any assurance that the defendant will appear in its preferred forum. This concern was not an issue in the case, for defendant was headquartered in Puerto Rico, the forum it sought. *Id.* at 776. Rather, the language emphasized by the superior court in the present case merely confirms that it is not enough for a defendant simply to demonstrate that litigation might be easier in the other forum; rather, the defendant must show that it is an overwhelming hardship to defend in Delaware even if it might be easier elsewhere. This Court made this clear by reiterating that "the [trial] court erred because it required Caribbean merely to demonstrate that Puerto Rico was a better forum in which to proceed as compare to Delaware. As discussed above, our jurisprudence requires more of a

defendant seeking to have a complaint dismissed on the grounds of forum non conveniens." *Id.*

The superior court then came to the primary support for its holding: this Court's decision in *Martinez v. E.I. DuPont de Nemouors & Co.*, 86 A.3d 1102 (Del. 2014). In *Martinez*, employees of a DuPont entity in Argentina, DASRL, sued for damages arising from asbestos exposure while working for DASRL's predecessor beginning in the early 1960s. In 24 of the 25 cases, plaintiffs apparently made no allegations at all against DuPont, beyond claims that it was the ultimate owner of the Argentine subsidiary. DuPont moved to dismiss these cases, contending "[i]n essence . . . that the claims . . . amount impermissibly to veil-piercing, over which the Superior Court has no jurisdiction." *Martinez v. E.I. DuPont de Nemours & Co.*, 82 A.3d 1, 3 (Del. Super. Ct. 2012) ("Martinez I").

In the *Martinez* case, alone among the 25 complaints, plaintiffs also pled a theory of liability premised on the notion that DuPont had been a "direct participant" in the affairs of its Argentine remote subsidiary, DASRL. Plaintiffs did not sue DASRL, a "great-great grand subsidiary of DuPont," *id.* at 1103, but rather sued DuPont itself. *Id.* Judge Ableman however, pointedly rejected this attempt to make an end run around the normal relationship of employee to employer, and the normal doctrines of corporate separateness. She sounded this theme repeatedly throughout her opinion, and it was clearly the decisive factor in the case:

- "First, Counts III, IV, V, and VII assert claims against DuPont as if it was Rocha's employer, when in fact his employer was DASRL. Thus, Plaintiff has sued the wrong party.

  Secondly, Plaintiff has failed to establish that her "new" legal theory of liability of the parent corporation for the actions of its indirect subsidiary, the direct participant liability theory, as stated in Counts I and VI, is recognized under Argentine law. Even if it was a viable basis for liability, plaintiff has failed to allege the necessary predicate facts that would support such a theory." *Martinez* I at 13.

- "Reasoning that if the direct participant doctrine exists at all in Argentina, it would be in the Argentine Code, both of DuPont's Argentine legal experts, Professor Keith Rosenn and Professor Alejandro Garro, conducted extensive statutory research. Neither was able to find any provision establishing existence of the doctrine. They also conducted thorough research in an effort to find Argentine case law that might recognize the contempt, but no such cases were found." *Id.* at 18.

- "Plaintiff's minimal factual support for its efforts to hold DuPont liable for its 'own direct, separate and distinct' wrongful conduct is either irrelevant or hardly distinguishable from the ordinary conduct of any parent corporation. But even more notably, the allegations in Plaintiff's Complaint refer directly to Rocha's employer, DASRL, and not to its corporate great-great grandparent." *Id.* at 21.

- "Moreover, since Plaintiff is demanding monetary relief for damages caused solely as a result of Rocha's employment at DASRL, the Court concludes that DASRL, although an indirect subsidiary of DuPont, has a paramount interest in the subject of this litigation. Its

presence is crucial to the determination of the important issue of liability. Without its joinder, DASRL's ability to protect that interest may be impaired. DASRL is more than a witness to the activities at issue in this case—it is an active participant." *Id.* at 21.

- "Neither Plaintiff nor the Rocha Estate will be prejudiced if this action is dismissed for nonjoinder of an indispensable party. *If the claims asserted by Plaintiff have any merit, it is DASRL's misconduct that is really at issue in this case, as it is the real party in interest, and the immediate wrongdoer in this litigation.*" *Id.* at 25 (emphasis added).

- "*The fact of the matter is that DuPont should not be placed in the position of having to defend this type of lawsuit in Delaware or Argentina or anywhere.* DuPont is wrongly identified as Rocha's former employer and as being directly responsible for and in control of the conditions of the Berazategui plant when it was not and never has been. The majority of Plaintiff's claims treat DuPont as though it stood in the shoes of DASRL. In essence, forcing DuPont to defend these claims at all in Delaware—or in any other forum—is plainly wrong under any standard of fairness.

  The real reason DuPont would be subject to overwhelming hardship if forced to litigate this case, and others like it, in Delaware is not because of the problems relating to access to proof or in translating most of the testimony and documents from Spanish to English. It is because it is not DuPont—but DASRL—who employed Rocha and who owned and operated the plant and premises where he was allegedly exposed to asbestos. *This circumstance, which is addressed more thoroughly in other sections of this Opinion, is at the very heart of this Court's forum non conveniens analysis, and allows this case to fit the category of one of the "rare cases*

> *where the drastic remedy of dismissal is warranted." Viewed in this way, the burden of litigating in this forum is so severe as to result in manifest hardship to DuPont because it should not have been named as a defendant in the first place.*" *Id.* at 36 (emphasis added).

These passages demonstrate, of course, what really troubled Judge Ableman about the *Martinez* cases. But if there were any doubt, she made it very plain, at the close of her opinion, that she was employing the *forum non conveniens* doctrine simply as another way of disposing of what she saw as meritless claims—because she felt DuPont should not be sued in Delaware or anywhere else:

> Thus, when all is said and done, even the seemingly insurmountable burden of proving "overwhelming hardship" to justify dismissal in a case involving a nominal Delaware corporation can in fact be met when the circumstances are sufficiently unique as they are here. This is so because the type of hardship facing DuPont if it is forced to litigate this case (and others like it) in Delaware is sufficiently unusual to make it the exception. *The fact of the matter is that DuPont should not be placed in the position of having to defend this type of lawsuit in Delaware, or in Argentina, or anywhere.* DuPont has been wrongly identified as Rocha's former Employer, and is being charged with direct responsibility for, and control of, the conditions at the Berazategui textile plant, when it was not and never has been in such a position. The bulk of Plaintiff's claims treat DuPont as though it stood in the shoes of DASRL. *Forcing DuPont to defend these claims at all—in Delaware or in any other forum—is plainly wrong under any standard of fairness. Viewed in this context, the burden of litigating in this forum is so severe as to result in overwhelming hardship to DuPont.*

Id. at 39-40 (emphasis added).

Judge Ableman simply felt, very strongly, that plaintiffs should not have sued DuPont. She did not believe that DuPont was a proper defendant in Argentina any more than it was in Delaware. She not only dismissed the case on *forum non conveniens* grounds; she also dismissed plaintiffs' claims on the merits, and further found that DASRL, the indirect Argentine subsidiary, was an indispensable party. Again, the traditional *forum non conveniens* concerns—location of witnesses, access to documents, etc.—did not motivate her decision, for she found that "the real reason DuPont would be subject to overwhelming hardship . . . in Delaware is *not* because of the problems relating to access to proof or in translating most of the testimony. . . ." *Id.* at 36 (emphasis added). It was simply because plaintiffs had sued the wrong party.

Judge Ableman did, however, apply the requirement that the defendant actually be amenable to suit in the foreign forum. She held that "[t] Argentine courts clearly have jurisdiction over the plaintiff and over DASRL, the actual employer and proper defendant in this case . . . . Significantly, Argentina has a well-developed legal procedure that provides both comprehensive workers' compensation and tort remedies for occupational injuries and illnesses such as those being pursued here." *Id.,* 82 A.3d at 29.

On appeal, this Court affirmed the *forum non conveniens* dismissal, and did not reach the trial court's other rulings. The Court endorsed "the Superior Court's proper focus on a difficult and open issue of Argentine law, as supportive of that court's repeatedly expressed concerns about the resulting hardship DuPont would face. Specifically, a Delaware court was being asked to decide complex and unsettled issues of Argentine tort law, based on expert testimony extrapolating from sources of law expressed in a foreign language, that do not arise out of factual contexts like those presented in these asbestos exposure cases." *Martinez* II, 86 A.3d at 1108. The Court homed in on Judge Ableman's observation that "none of the experts were able to point to any case law in Argentina supporting acceptance of [plaintiffs'] theory[,]" *id.* at 1109 n. 33, and again stressed that the case "turn[ed] on unsettled issues of foreign law." *Id.* at 1111. The Court found no abuse of discretion in the *forum non conveniens* dismissal. In so doing, the Court did not mention Judge Ableman's finding that DASRL, the Argentine DuPont entity, was subject to suit in Argentina.

The trial court here seized on that fact: "In stark contrast to the passing mention made by the trial court in *Martinez v. E.I. DuPont de Nemours & Co.* ("*Martinez* I"), the Delaware Supreme Court did not include any reference to an 'adequate alternate forum' requirement in its various reiterations of Delaware's FNC standard in *Martinez* II." Exhibit B, *Hupan*, 2016 WL 4502304 at * 7

(footnotes omitted). But neither, of course, did this Court reverse Judge Ableman on this point. The Court simply said nothing about this issue at all.

Finally, the court below cited a recent Chancery Court ruling, *VTB Bank v. Navitron Projects Corp.*, 2014 WL 1691250 (Del. Ch. Apr. 28, 2014). In this case, the Chancery Court denied a *forum non conveniens* motion; in a footnote, it "declined" to apply the requirement that the defendant be amenable to suit in the foreign forum, as it "found no language in our Supreme Court cases 'importing this additional element'" into the traditional *forum non conveniens* factors. *Hupan*, 2016 WL 4502304 at * 9, *quoting VTB Bank*, 2014 WL 1691250 at * 7 n. 68. This statement was dictum, however, because as the court noted in the very next two sentences, the foreign forum, Ukraine, would "likely be an adequate, alternate forum" because defendants "represented through their counsel that both entities will consent to jurisdiction in Ukraine." *Id.* at n. 68. While relying on this dictum, the court below waved away, in a footnote, more recent Superior Court cases applying the requirement. *See Abrahamsen*, *supra,* 2014 WL 2884870 at * 2, and *Pipal Tech, supra*, 2015 WL 9257869 at * 1, in which the court denied a motion to dismiss the case in favor of litigation in India. As to the threshold question of whether India was an available forum, the court stated that defendant "concedes that it is not subject to process in India, but agrees to waive that defect."

In sum, there is no holding that dispenses with the requirement that the moving defendant be subject to jurisdiction in the alternate forum. This Court has certainly never made such a holding. The trial court, again, based its decision on the fact that while the lower court in *Martinez* indeed enforced the requirement, this Court said nothing about it in its opinion in the case. But this Court's silence on an issue can hardly be taken as a *reversal* of a trial court on that issue!

3. This Court's *forum non conveniens* jurisprudence makes no sense, if the defendant need not actually defend in the other forum.

More instructive than silence are this Court's actual opinions on *forum non conveniens* over the years. In the Court's treatment of *forum non conveniens* appeals, there is always, of course, a discussion of the "*Cryo-Maid* factors" and an evaluation of the trial court's resolution of them.[3] The important point here is that *these factors, indeed the entire inquiry itself, make no sense if there will not be a case in the other forum.* The *Cryo-Maid* analysis is a meaningless waste of time if the defendant isn't actually going to be defending.

In *Ison, supra,* this Court reviewed the United States Supreme Court precedent noted above, and then examined differing approaches taken by various state courts. *See* 729 A.2d at 840-42. After describing the more defendant-friendly version of *forum non conveniens* applied by California, and the much more

[3] *See General Foods Corp. v. Cryo-Maid, Inc.,* 198 A.2d 681 (Del. 1964).

plaintiff-friendly version then in effect in Texas, this Court endorsed Connecticut's approach:

> The standard articulated by the Connecticut Supreme Court correctly accepts the somewhat lowered burden imposed on defendants attempting to use FNC in an action brought by foreign plaintiffs, but balances that against the important right of any plaintiff to litigate in his or her choice of forum. That approach recognizes the viability of the FNC doctrine in rare cases and the strong showing a defendant must make to justify the "drastic remedy" of dismissal, even though according less weight to the foreign plaintiff's choice of forum than that accorded a resident or other domestic plaintiff.
>
> Although *Picketts* turned on the issue of whether foreign plaintiffs deserve less deference than domestic plaintiffs in their choice of forum, the Connecticut Supreme Court's analysis of the defendant's burden is consistent with the "overwhelming hardship" language of the Delaware jurisprudence.

Id. at 842. Connecticut, of course, like every other state, requires that a moving defendant be subject to jurisdiction in the foreign forum. This is clear from the *Picketts* case itself, which this Court in *Ison* found embodied the proper approach to *forum non conveniens. See Picketts v. International Playtex, Inc.*, 576 A.2d 518, 526-28 (Conn. 1990). This requirement continues to be enforced today by Connecticut courts. *Aldi v. Morrone*, 2016 WL 7975761, * 6-7 (Conn. Super. Ct. Dec. 16, 2016).

After approving Connecticut's approach to *forum non conveniens*, this Court in *Ison* thoroughly reviewed the trial court's application of the *Cryo-Maid* factors. This review shows that any evaluation of these factors is an idle exercise, if the

defendant is not even actually going to defend in its asserted forum. Why would this Court set up an analytical framework for *forum non conveniens* that is needless and meaningless?

The first factor, "relative ease of access to proof," entails, by definition, a *comparison* of how easy it will be to obtain proof in Delaware as opposed to the other forum. What would the point of such a comparison be, if no proof will ever need to be accessed in the other forum because there won't ever be a case there? The same is true for the second factor, "the availability of compulsory process for witnesses." This factor typically addresses the moving defendant's complaint that, because the plaintiffs and their fact witnesses are located in their home countries, there will be no way to compel their presence to give testimony. This Court acknowledged that as a practical matter, plaintiffs will face similar obstacles, and so this issue "presents a mirror-image problem that does not necessarily predominate in favor of any particular forum . . . ." *Ison, supra,* 729 A.2d at 843. But again, if the defendant doesn't have to appear in the foreign court, it need not be concerned with the availability of witnesses at all.

The third factor, a "view of the premises," of course makes no sense without the defendant appearing in the foreign court. Why should a Delaware trial judge spend any time deliberating about whether a view of the premises is really necessary, or about how such a view could occur, if the jury in the foreign forum,

who would be the premises viewers, will never be seated because the defendant will never appear? Here, in fact, the trial court noted that defendants argued that a view of the premises "is essential to their defense," and indeed credited that factor as weighing in favor of dismissal. Exhibit A at 17. But this factor should not weigh in defendants' favor—indeed should not be a factor at all—if defendants don't really intend to use it.

The fourth factor, "choice of law and Delaware's interest in the litigation," perhaps best embodies the perverse illogic of the lower court's decision here. The superior court resolved this issue by holding that "[j]ust as we have substantial interests to have open questions of Delaware law decided by our courts, this Court weighs the importance of *defendants' interests in obtaining an authoritative ruling from the relevant foreign court on the legal issues that will determine its exposure to liability and damages, rather than a non-authoritative ruling form this Court."* Exhibit A at 22 (footnote omitted) (emphasis added). But how can defendants insist that an Argentine court must be the one to authoritatively determine their liability under Argentine law, but simultaneously refuse to appear before that court? Delaware courts should not indulge such contradictory positions. It should be plain that this fourth *Cryo-Maid* factor is rendered meaningless by the superior court's decision in this case.

The fifth *Cryo-Maid* factor is the pendency or non-pendency of similar actions. This Court described its significance as follows:

> Most jurisdictions, including Delaware, approach the "pending actions" analysis with a view toward judicial economy in cases with prior pending actions. As in *McWane Cast Iron Pipe*, courts are more likely to dismiss a cause of action based on FNC if other jurisdictions are hearing a similar case, because it would be a waste of judicial resources to prosecute the same action multiple times. By contrast, in cases where no prior actions are pending, we focus on the possible cost and delay to the plaintiff if dismissal forces a brand new action in an alternate forum.

Ison, supra, 729 A.2d at 845 (footnotes and citations omitted). As with the other factors, this one becomes pointless if defendant will not appear in the other forum. Why inquire into the existence of similar actions in the foreign forum if there will never be another similar one filed?

The final factor is "all other practical problems." *Ison, supra,* 729 A.2d at 846. Once again the trial court's resolution of this issue cannot logically co-exist with the court's holding. The court held that "the presence of essential actors in another forum, and the inability to join them in these proceedings, is a factor that favors dismissal." Exhibit A at 24. But the presence of third parties that might potentially be liable is of course of no consequence if there will be no foreign proceedings in which to implead them.

The traditional factors governing *forum non conveniens* determinations in this state simply don't make sense if the defendant doesn't actually intend to show

up in the foreign court. Should Delaware trial judges diligently assess the *Cryo-Maid* factors if the defendant's complaints about hardship are illusory? This would make *forum non conveniens* motions in this state "Kafkaesque," in the words of the United States Court of Appeals for the Second Circuit: when it is obvious that no case will be filed in the foreign forum, "discussion of convenience of witnesses takes on a Kafkaesque quality—everyone knows that no witnesses ever will be called to testify." *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta,* 739 F.2d 90, 91 (2d Cir. 1984). This is undoubtedly why other state courts, and the federal courts, enforce the common-sense rule that the defendant must actually agree to litigate in the forum it says is where the case should be litigated.

This Court should reverse the superior court on this point, and require the moving defendants to submit to jurisdiction in Argentina as a condition of a *forum non conveniens* dismissal.

II. THE TRIAL COURT ERRED IN NOT REQUIRING DEFENDANTS TO WAIVE ANY STATUTE OF LIMITATIONS DEFENSES THAT MAY HAVE ARISEN DURING THE PENDENCY OF THIS ACTION

A. Question Presented

Should the trial court have required defendants, as a condition of a *forum non conveniens* dismissal, to waive any statute of limitations defenses that may have arisen during the pendency of this action? This question was preserved at A264-65; *see also* transcript at A428-30.

B. Scope of Review

Plaintiffs contend that such waiver is a standard, accepted condition of *forum non conveniens* dismissals, and therefore the trial court's decision in this regard should be reviewed *de novo. Mar-Land, supra*, 777 A.2d at 777.

C. Merits of Argument

State and federal courts recognize that as a matter of basic fairness, moving defendants should be required to waive the assertion of statute of limitations defenses in the alternative forum. *E.g., Fischer v. Magyar Allamvasutak ZRT*, 777 F.3d 847, 862 (7th Cir. 2015); *Allianz Global Risks U.S. Ins. Co. v. Ershigs, Inc.*, 138 F. Supp. 3d 1183, 1190-91 (W.D. Wash. 2015); *Espinoza v. Evergreen Helicopters, Inc.*, 376 P.3d 960, 994 (Or. 2016); *In re Bridgestone/Firestone and Ford Motor Co. Tire Litig.*, 138 S.W.3d 202, 206-07 (Tenn. App. 2003).

In the present case, defendants did not move for a *forum non conveniens* case, defendants did not seek dismissal at all until more than two years after the case was filed. In these circumstances, it would be unfair to plaintiffs to prejudice their claims through the potential application of limitations defenses upon refiling in Argentina. As the federal district court in *Allianz Global, supra*, put it, "[t]he court is particularly inclined to condition dismissal when a defendant causes potential prejudice to the plaintiff by unduly delaying its motion to dismiss." *Allianz Global, supra*, 138 F. Supp. 3d at 1190-91.

The trial court's answer to this concern seemed to be that plaintiffs were responsible for their own problems, because they "made their strategic choice to litigate in Delaware . . . a place that has no connection to where they were allegedly injured." Exhibit B, *Hupan*, 2016 WL 4502304 at * 11. But this is not a fair description of the proceedings, for there was no "strategic choice" made by plaintiffs. Plaintiffs believe they have tort claims against the Philip Morris defendants, and those defendants deny that they are subject to jurisdiction in Argentina. There was no "choice" of Delaware over Argentina. Rather, plaintiffs sued these defendants in a forum in which they made no complaint at all about convenience for over two years. Instead, defendants sought judgment on the merits. Monsanto has never challenged the appropriateness of the forum, despite

the trial court's explicit invitation to do so, and wishes to litigate the merits in Delaware.

In such circumstances, it is inaccurate and particularly unfair to characterize the filing of this case in Delaware by plaintiffs as some sort of strategic choice that has backfired. It is likewise patently unfair not to require defendants to waive limitations defenses when plaintiffs refile in Argentina, assuming they are even able to sue them there at all.

CONCLUSION

Wherefore, premises considered, plaintiffs respectfully pray that the decision below be vacated, and that this matter be remanded to the Superior Court for New Castle County for an entry of an order requiring the Philip Morris defendants, as a condition of dismissal, to waive any objection to jurisdiction in Argentina, and to waive any limitations defenses to the extent they are based on the passage of time since this case was originally filed.

Dated: March 6, 2017

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