EFiled: Apr 10 2017 05:53PM EDT
Filing ID 60452954
Case Number 526,2016 C

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,	*(All Consolidated Under No. 526, 2016)* No. 525, 2016 Court Below: Superior Court of the State of Delaware in and for New Castle County C.A. No. 13C-03-068 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 in and for New Castle County C.A. No. 12C-02-171 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 in and for New Castle County C.A. No. 14C-01-021 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 in and for New Castle County C.A. No. 12C-04-042 The Honorable Vivian L. Medinilla
Clarisa Rodriguez da Silva, *et al.*, Plaintiffs Below, Appellants, v. Philip Morris USA Inc. and Philip Morris Global Brands, Inc., Defendants Below, Appellees,	No. 529, 2016 Court Below: Superior Court of the State of Delaware in and for New Castle County C.A. No. 12C-10-236 The Honorable Vivian L. Medinilla
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 in and for New Castle County C.A. No. 13C-08-092 The Honorable Vivian L. Medinilla

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Dated: April 10, 2017

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NATURE OF PROCEEDINGS

This appeal arises from the Superior Court's decision to dismiss Philip Morris USA ("PM USA") and Philip Morris Global Brands ("PM Global") on *forum non conveniens* ("FNC") grounds from six personal injury lawsuits filed in Delaware by hundreds of Argentine farmers and their children, who claim they were harmed on their Argentine tobacco farms through exposure to herbicides that allegedly cause birth defects. PM USA and PM Global are not manufacturers or distributors of herbicides. Instead, Plaintiffs' claims against them, which arise under *Argentine* law, are largely based on the alleged wrongdoing of *Argentine* tobacco companies, Tabacos Norte ("Tabacos") and Massalin Particulares ("Massalin"), which are neither parties to this litigation nor subject to suit in Delaware.

The parties agreed to proceed on the first of these six cases, *Hupan*, while staying the others.[1] After the Superior Court decided choice of law issues, Defendants brought motions to dismiss, including on FNC grounds.[2] Applying this Court's recent and highly analogous decision in *Martinez v. E.I. DuPont de*

[1] The five other matters ("Related Matters") involved virtually identical complaints, filed by the same attorneys, against the same group of defendants, resulting in a total of 406 Argentine plaintiffs in all actions. AOB Ex. B at *1.

[2] "Defendants," unless otherwise specified, will hereinafter refer to PM USA and PM Global. Monsanto Company ("Monsanto") separately moved to dismiss pursuant to Rules 9(b) and 12(b)(6), B235-B270, but elected not to move on FNC grounds, A456, and thus is not a party to this appeal.

Nemours and Co., Inc., 86 A.3d 1102 (Del. 2014) ("*Martinez II*"), the Superior Court correctly found that Defendants should be dismissed because they would suffer overwhelming hardship if forced to defend in Delaware against claims from Argentine citizens about alleged harms that occurred in Argentina at the hands of non-party Argentine companies.

In this appeal, Plaintiffs do not challenge the Superior Court's underlying decision that Defendants are entitled to dismissal on FNC grounds. Nor could they, given that this Court reached the same conclusion on analogous facts in *Martinez II*. Instead, Plaintiffs claim that the Superior Court erred by (1) not examining—as a threshold matter—whether Argentina was an adequate alternate forum, and (2) dismissing Plaintiffs' claims on FNC grounds without imposing conditions requiring Defendants to waive all jurisdictional and statute of limitations objections in Argentina. Plaintiffs' arguments fail for two principal reasons.

First, the Superior Court correctly followed this Court's clear direction in *Martinez II* by applying the familiar *Cryo-Maid* factors in conducting its FNC analysis and ultimately finding that Defendants would suffer overwhelming hardship if forced to litigate in Delaware. Plaintiffs' contention that Delaware FNC law requires a "threshold" inquiry into the existence of an adequate alternate forum is wrong. This Court has *never* required such a threshold analysis. The

Cryo-Maid analysis assesses the hardship a *defendant* will suffer *in Delaware*; it is not, as Plaintiffs argue, a point-by-point comparison of the relative convenience of two jurisdictions—an approach that this Court has expressly forbidden. Regardless, the Superior Court properly considered and determined the existence of an adequate alternate forum as part of its detailed *Cryo-Maid* analysis.

Second, despite having more than a year to do so during FNC briefing and argument, Plaintiffs never requested that the Superior Court impose conditions on the FNC dismissal of Defendants. Instead, Plaintiffs waited until *after* Defendants won their FNC arguments and then filed a Motion for Clarification, or Alternatively Reargument, in which they improperly attempted to use Rule 59 to attach conditions to the court's dismissal. The Superior Court correctly denied Plaintiffs' request for conditions as both untimely at the Rule 59 stage and inconsistent with Delaware law, which does not require a defendant to waive potential defenses in another forum as the price for avoiding the "overwhelming hardship" of litigating here.

SUMMARY OF ARGUMENT

Response to Plaintiffs' Summary of the Argument

1. Denied.

2. Denied.

Defendants' Summary of the Argument

1. The Superior Court correctly held that the proper Delaware test for FNC determinations is the *Cryo-Maid* analysis, which focuses on whether Defendants will suffer an overwhelming hardship if forced to litigate in Delaware. The Superior Court also correctly held that an adequate alternate forum is not a threshold requirement under Delaware FNC law, but at most is *part* of the *Cryo-Maid* analysis.

2. The Superior Court correctly held that Plaintiffs waived their arguments for imposing conditions on the dismissal of Defendants when Plaintiffs waited until a Rule 59 motion to request the conditions. In any case, as the Superior Court also correctly held, Delaware law does not require the imposition of conditions on an FNC dismissal.

STATEMENT OF FACTS

I. Factual Background[3]

The initial case, *Hupan*, was filed by fifteen Argentine parents and their eight minor children against thirteen separate U.S. and foreign corporations. A114-A116. Plaintiffs' counsel subsequently filed the five Related Matters on behalf of 383 additional Argentine citizens against the same defendants.[4] Before any substantive proceedings occurred, however, Plaintiffs agreed to dismiss ten of the defendants from all six cases based on lack of jurisdiction, leaving PM USA, PM Global, and Monsanto as the only remaining defendants. B9-B10. Plaintiffs and the remaining defendants agreed to stay the Related Matters pending the resolution of choice of law issues and motions to dismiss in *Hupan*. B6.

Plaintiffs, tobacco farmers and their children, allege they were exposed to Roundup, a glyphosate-based herbicide, and other unidentified pesticides, while cultivating tobacco on their individually owned farms in Misiones, Argentina. A117, A130, A133 (Compl. ¶¶ 2, 4, 58, 74, 76); Appellants' Opening Brief

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[3] The facts here are taken from the *Hupan* complaint, but are similar to the facts alleged in the complaints in the Related Matters. "Plaintiffs," unless otherwise specified, will refer to the 23 plaintiffs who brought the *Hupan* complaint.

[4] Those additional complaints were: *Aranda v. Alliance One International, Inc.*, No. 13C-03-068; *Biglia v. Alliance One International, Inc.*, No. 14C-01-021; *Chalanuk v. Alliance One International, Inc.*, No. 12C-04-042; *Da Silva v. Alliance One International, Inc.*, No. 12C-10-236; and *Taborda v. Alliance One International, Inc.*, No. 13C-08-092.

("AOB") Ex. A at 3-4. The parent Plaintiffs claim that their children, born over a 12-year period between 1996 and 2008, had birth defects and other injuries as a result of the alleged exposure to these pesticides, both *in utero* and after birth. A117-120, A130-139, A148 (Compl. ¶¶ 4-27, 58-108, 151-53); AOB Ex. A at 3-4.

Plaintiffs' Complaint focuses mostly on the acts and omissions of defendant Monsanto, which is not a party to this appeal,[5] and two non-party Argentine tobacco companies, Tabacos and Massalin. A131, A134, A139, A143-144 (Compl. ¶¶ 64, 83, 111, 136-37); AOB Ex. A at 4. These two Argentine companies allegedly oversaw and directed the farmers' use of Roundup and other unidentified products during the relevant time period. A131, A134, A143-144 (Compl. ¶¶ 64, 83, 136-37); AOB Ex. A at 4.

Monsanto, along with its Argentine subsidiary,[6] is the alleged developer, manufacturer, marketer, and supplier of glyphosate-based herbicides and related products, including Roundup. A133, A139-142 (Compl. ¶¶ 74, 76, 109-127); AOB Ex. A at 7. Plaintiffs allege that Monsanto knew of glyphosate's dangerous characteristics and knew, or should have known, that it would be used in close proximity to the farmers' homes, but failed to warn Plaintiffs or to properly test

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[5] The Superior Court's decision granting Monsanto's motion to dismiss under Rule 9(b), *see* AOB Ex. A at 32, is not challenged in this appeal.

[6] Monsanto Argentina S.A.I.C. was one of the ten original defendants voluntarily dismissed by plaintiffs. B9-B10; *see* AOB Ex. A at 7.

and study the product. A140-A141 (Compl. ¶¶ 118, 122-24); *see* AOB Ex. A at 7. Though Plaintiffs do not dispute that they owned their tobacco farms, they allegedly sold some of their tobacco to Tabacos, which Plaintiffs claim required them to use Roundup in a prescribed (and excessive) amount as a purchasing condition. A130-131 (Compl. ¶¶ 58-64); AOB Ex. A at 4.

Rather than name Tabacos or Massalin as defendants and pursue their claims in Argentina, where Plaintiffs live and allege they were harmed, Plaintiffs instead seek to hold Defendants liable in Delaware state court. Plaintiffs initially alleged that some combination of *eleven* separate U.S. and foreign corporations (grouped together and labeled in the Complaint as the "Carolina Leaf Defendants" and the "Philip Morris Defendants"[7]) managed and controlled Tabacos's Argentine parent, non-party Massalin. A125-130 (Compl. ¶¶ 44-57, 61); AOB Ex. A at 5. However, as noted, Plaintiffs dismissed all of the so-called "Carolina Leaf Defendants" and "Philip Morris Defendants" (except PM USA and PM Global) in 2012. B9-B10.

Defendants

PM USA is a Virginia corporation with its principal place of business in Virginia, and it is registered to do business in Delaware. AOB Ex. A at 6; A121 (Compl. ¶ 29). PM Global is a Delaware corporation, which had its principal place

[7] "Philip Morris Defendants" is defined in the Complaint as Philip Morris International Inc., Philip Morris Brands S.A.R.L., Philip Morris Products S.A., Altria Group, Inc., PM Global, and PM USA. A123 (Compl. ¶ 34).

of business in Virginia at the time this suit was filed. AOB Ex. A at 6. PM USA is an operating company of Altria Group, Inc.—a dismissed defendant—that manufactures and markets PM USA brands to adult tobacco consumers. B217. PM Global—a subsidiary of dismissed defendant Philip Morris International Inc.—"licenses intellectual property and provides financial and accounting services to certain U.S. incorporated affiliates of Philip Morris International, Inc." AOB Ex. A at 6.

The Complaint is devoid of any direct factual allegations against either of the Defendants. Although the Complaint makes nearly 100 references to the conduct of non-party Argentine companies Tabacos and Massalin, it refers to PM USA in only four paragraphs and PM Global in only one background paragraph. A121, A125, A128-A130 (Compl. ¶¶ 29, 45, 52, 57 (referring to PM USA)); A122 (Compl. ¶¶ 32 (referring to PM Global)).

Instead, Plaintiffs make collective allegations throughout the Complaint against the "Philip Morris Defendants," a fictional group defined by Plaintiffs to include six distinct companies, four of which Plaintiffs voluntarily dismissed from the lawsuit years ago. A123 (Compl. ¶ 34); B9-B10; *see* AOB Ex. A at 5-6. There is no direct connection alleged between Defendants and Plaintiffs' claimed injuries. Plaintiffs' claims depend entirely upon the alleged wrongdoing of

Monsanto and the non-party Argentine companies, Tabacos and Massalin. *See* AOB Ex. A at 6.

II. Procedural History

Plaintiffs filed the *Hupan* complaint on February 14, 2012, and subsequently filed five additional suits alleging identical causes of action against the same group of defendants on behalf of other Argentine farmers and their families. A114; *see* notes 1, 4 *supra*. The parties then agreed upon and obtained court approval for a schedule to brief issues concerning choice of law before addressing any motions to dismiss. B2-B5. Plaintiffs subsequently sought and obtained extensions to the agreed-upon choice of law briefing schedule. B13-B15. And Plaintiffs also filed a sur-reply on choice of law issues, delaying matters even further. B18-B19.

By August 2013, the parties had fully briefed choice of law issues, with both sides presenting opinions from Argentine law experts. After conducting a hearing in November 2013, B50-B176, the Superior Court issued a letter to the parties on February 28, 2014. That letter concluded that Argentine law governed all substantive claims, with the exception of negligence and punitive damages, about which there was disagreement, and which the parties agreed to address through motions to dismiss. B177-B181.

A. The Superior Court's Order On *Forum Non Conveniens*

After the Superior Court's choice of law ruling, Defendants notified Plaintiffs and the court of their intent to file dispositive motions. Defendants indicated that they would move pursuant to Rule 12 and potentially on FNC grounds, given this Court's then just-issued *Martinez II* decision. B182-B183. The parties then agreed and stipulated to a schedule for those motions. B212-B214.

On April 29, 2014, Defendants filed motions to dismiss based on Rules 12(b)(1) and 12(b)(6) and on FNC grounds. They argued, among other things, that they were not the right parties, that Plaintiffs failed to allege a single claim against them, and that it would be an overwhelming hardship for Defendants to defend themselves in Delaware. A162-A187 (PM Global); A188-A229 (PM USA). Defendant Monsanto separately moved to dismiss pursuant to Rules 9(b) and 12(b)(6). B235-B270.

Subsequently, Plaintiffs requested and received two time extensions to file their responsive briefs, thus adding five more months to the briefing schedule. B271-B276; B277-B282. On May 4, 2015, the Superior Court heard several hours of oral argument on the motions to dismiss. A281-A452 (hearing transcript). On November 30, 2015, the Superior Court rendered a detailed 33-page decision, granting the motions to dismiss from Defendants and Monsanto on various grounds. *See* AOB Ex. A.

The court granted Defendants' FNC motions and found it unnecessary to reach Defendants' Rule 12(b)(1) and 12(b)(6) arguments. AOB Ex. A at 3, n.1. Relying on this Court's "clarification and guidance" in *Martinez II*, the court found that Defendants had satisfied their burden under Delaware FNC law to prove that they would suffer an "overwhelming hardship if forced to litigate . . . in Delaware." AOB Ex. A at 11, 26. The Superior Court conducted a detailed analysis of each of the six *Cryo-Maid* factors, *see General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964), and made findings of fact regarding each:

Factor 1: Relative ease of access to proof. The court found "both legal and practical limitations on Defendants' access to sources of proof," namely that "all of this evidence"—including medical records, manuals and guides provided to farmers, records regarding crops grown near Plaintiffs' farms, and records regarding herbicide and pesticide use near Plaintiffs' farms—required by Defendants to defend against the action "is located outside the jurisdictional authority of this Court." AOB Ex. A at 14-15. The court added that "there is nothing to suggest that any evidence is located in Delaware and, except for one of PM Defendants' incorporation status, this case has no Delaware connection." *Id.* at 15-16.

Factor 2: Availability of compulsory process for witnesses. The court found that "there is no compulsory process to bring witnesses to Delaware because all of the witnesses are located in Argentina" and that "it is not likely that PM Defendants will receive the same level of voluntary cooperation as Plaintiffs will receive" regarding third-party witnesses crucial to mounting a defense, "such as Plaintiffs' medical providers, employers or co-workers, lifestyle witnesses, [and] record custodians." *Id.* at 16-17. The court concluded it would not "have the means to grant access to documents, real property, or non-party witnesses in Argentina." *Id.* at 14.

Factor 3: The possibility of the view of the premises. The court found that, because of the nature of Plaintiffs' claims, "the inability to view the premises or obtain information about other possible sources of exposure represents a hardship" to Defendants. *Id.* at 18.

Factor 4: Application of Delaware law. The court found that "the majority, if not all, of the issues in the case are dependent upon the application of Argentine law . . . [which] is set forth in Spanish." *Id.* at 18. Relying on this Court's guidance in *Martinez II*, the court found that it was "being asked to decide complex and unsettled issues of Argentine law based on expert testimony and affidavits expressed in Spanish," and that "[t]he laws of Delaware have no rational

connection to the causes of action in this case . . . [which are] not dependent upon the application of Delaware law." *Id.* at 22.

Factor 5: Pendency or non-pendency of a similar action. Acknowledging disagreement among the parties on this point, and that it was unclear whether similar actions were pending elsewhere, the court "accept[ed] Plaintiffs' position that this factor weighs in [their] favor." *Id.* at 23.

Factor 6: Other practical considerations. The court considered the location of necessary parties and Argentina's availability as a forum in which to litigate the parties' dispute, and found both factors favored dismissal. Specifically, the court found that (i) "the presence of essential actors in another forum, and the inability to join them in these proceedings, is a factor that favors dismissal"; and (ii) Argentina is an available forum to litigate this dispute, has its own courts and court rules, and "has a strong and distinct interest in legal determinations regarding the safety of products that are affecting [Argentine] children and families." *Id.* at 24-25.

After finding that the *Cryo-Maid* factors called for dismissal, the court rejected Plaintiffs' argument that dismissal did not "make sense" because Monsanto had not joined the FNC motions, finding that "there is no requirement that all defendants join [an FNC] motion." *Id.* at 26-27. It explained that the claims against Monsanto and Defendants were fundamentally "separate," and therefore, splitting them was reasonable. *Id.* Finally, the court also granted

Monsanto's motion to dismiss the Complaint on Rule 9(b) grounds, with leave to amend. *Id.* at 31-32. It found that Plaintiffs had engaged in improper group pleading by failing to distinguish between Monsanto and Monsanto Argentina; had failed to specify what agricultural chemicals were at issue; and had failed to specify the time frame of any alleged chemical exposure. *Id.* at 32.

B. The Superior Court's Order On Clarification and Reargument

On December 7, 2015, Plaintiffs filed a Motion for Clarification, or Alternatively Reargument, pursuant to Rule 59 ("Rule 59 Motion"). A491-A508. Plaintiffs sought "clarification" on two issues related to the FNC portion of the court's November 30, 2015 decision. The first was whether Delaware courts must address, as a threshold matter, whether there is an "adequate alternate forum" before applying the *Cryo-Maid* factors. A493-A495. The second was whether the court should impose four conditions on the FNC dismissal, including that: (i) Defendants waive all defenses they have in Argentina relating to jurisdiction, statutes of limitations, or laches; (ii) Defendants stipulate they will satisfy any Argentine judgment; (iii) the Superior Court allow Plaintiffs to conduct merits discovery in the United States before presenting their claims in Argentina; and (iv) the Superior Court permit Plaintiffs to reinstate their claims in Delaware if an Argentine court refuses to hear them. A495-A497. After further briefing and oral argument, the court issued an order on August 25, 2016, denying Plaintiffs' motion

and finding that Plaintiffs' arguments were improperly raised under Rule 59 and were also meritless. *See* A509-A568 (transcript of May 10, 2016 hearing); AOB Ex. B (Order).

Specifically, the court found that none of the four Delaware Supreme Court decisions on which Plaintiffs relied—*Ison v. E.I. DuPont de Nemours and Co., Inc.*, 729 A.2d 832 (Del. 1999), *Mar-Land Industrial Contractors, Inc. v. Caribbean Petroleum Refining L.P.*, 777 A.2d 774 (Del. 2001), *Candlewood Timber Group, LLC v. Pan American Energy, LLC*, 859 A.2d 989 (Del. 2004), or *Cryo-Maid*—imposed (or indeed even mentioned) a "threshold" requirement that Delaware courts must first determine if there is an adequate alternate forum when conducting an FNC analysis. AOB Ex. B at *5-*9.

After a "comprehensive review of the case law leading up to *Martinez II*," the court concluded that the existence of an adequate alternate forum is not "a prerequisite in Delaware to dismissal on FNC grounds." *Id.* at *8. Instead, "Delaware's FNC standard is concerned with the overwhelming hardship facing *the defendant* if forced to litigate in *this* forum." *Id.* (emphases in original).

The court also explained that it had in fact considered—as had other Delaware courts—whether there was an adequate alternate forum as part of its analysis of the sixth *Cryo-Maid* factor. *Id.* at *9. The court found Plaintiffs had simply "re-styled [their arguments] to reiterate previous positions" and "[had] not

demonstrated a change in the law, newly discovered evidence or manifest injustice that would otherwise cause this Court to reconsider its decision [under Rule 59]." *Id.*

With respect to the four dismissal conditions Plaintiffs now sought, the court noted that Plaintiffs had failed to ask for the conditions during over a year of FNC briefing and argument, and therefore were improperly raising them for the first time at the Rule 59 stage. *Id.* at *11.

The court also considered the merits of Plaintiffs' requested conditions, but rejected them, finding they were "not logically implicated in an analysis focusing on a moving defendant's overwhelming hardship." *Id.* In rejecting Plaintiffs' request for permission to reinstate their claims in Delaware if the Argentine courts refuse to hear them, the court reasoned that "[t]o accept Plaintiffs' request would effectively serve to invalidate the *Cryo-Maid* analysis whenever a foreign court decided, for whatever reason, not to hear the matter." *Id.* at *10.

In closing, the court explained that "Plaintiffs made their strategic choice to litigate in Delaware . . . cho[osing] to sue in a place that has no connection to where they were allegedly injured." *Id.* at *11. It noted that it had weighed each of the *Cryo-Maid* factors, including reviewing "legal, medical, geographical, geological, social and cultural barriers that would have to be faced if this matter remained in Delaware." *Id.* Giving "great weight to the novelty and importance of

the Argentine legal issues presented in this case," and given the lack of any Delaware connection, it found that Plaintiffs failed to meet their burden under Rule 59. *Id.*

A few weeks before the Superior Court heard Plaintiffs' Rule 59 Motion, this Court issued its decision in *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016), changing the law of personal jurisdiction in Delaware. PM USA promptly submitted a letter to the Superior Court explaining the import of *Genuine Parts* on the claims against it and arguing that it should be dismissed for lack of personal jurisdiction if the court revisited its FNC dismissal. B283-B332. In its order denying the Rule 59 Motion, the Superior Court determined that PM USA had "reserved this jurisdiction defense," but that it did not need to reach that issue. AOB Ex. B. at *3 n.14.

After the court denied Plaintiffs' Rule 59 Motion, Defendants sought dismissal in *Hupan* and the Related Matters. B333-B343. On September 29, 2016, the court granted Defendants' motion for judgment in all six cases and entered judgment in *Hupan* and the Related Matters. B344-B346. Plaintiffs thereafter filed this appeal for all six cases, which were later consolidated by Stipulated Order. B347-B350.

ARGUMENT

I. The Superior Court Correctly Held That The Existence Of An Adequate Alternate Forum Is Not A Threshold Requirement In Delaware And Instead May Be Considered As Part Of The *Cryo-Maid* Analysis

A. Question Presented

Did the Superior Court correctly hold that an adequate alternate forum is not a threshold requirement under Delaware law when it denied reargument of its decision dismissing Defendants on FNC grounds? This issue was preserved in PM USA's Reply Brief in Support of its Motion to Dismiss Based on FNC, Dkt. 176 (Jan. 13, 2015), at 16-20. *See also* A366-A368, A550-A555, AOB Ex. B at *4-*9.

B. Scope of Review

Whether the Superior Court applied the appropriate legal standard in ruling on an FNC motion is reviewed *de novo*. *See Mar-Land*, 777 A.2d at 777; *Ison*, 729 A.2d at 847. Any review of the Superior Court's findings under *Cryo-Maid* is based on the abuse of discretion standard. *See Mar-Land*, 777 A.2d at 777.

C. Merits of Argument

Plaintiffs contend that the Superior Court erred by not conducting a "threshold" inquiry into whether there was an adequate alternate forum for their lawsuit. Plaintiffs' argument flies in the face of decades of Delaware precedent, and most importantly, this Court's opinion in *Martinez II*, which is on all fours with the present case and reiterated that the Delaware FNC analysis is governed by

the *Cryo-Maid* factors. *See* 86 A.3d at 1104, 1106. These factors focus on whether litigating *in Delaware* will cause undue hardship to *the defendant* and not the ease with which *the plaintiff* could bring suit in another forum.

Put simply, Delaware will not ignore overwhelming hardship to a defendant. As Plaintiffs all but admit, no Delaware court has ever held that the *Cryo-Maid* analysis can be mooted by a preliminary inquiry into the existence of an adequate alternate forum. To the extent it has any relevance to the Delaware FNC inquiry, Delaware law permits consideration of an adequate alternate forum as *part* of the *Cryo-Maid* analysis, which is precisely what the Superior Court did here. Thus, the Superior Court used the proper legal standard and applied it correctly.

1. Delaware *Forum Non Conveniens* Law Turns On The Hardship Faced By Defendants

a. Delaware Uses The *Cryo-Maid* Test For *Forum Non Conveniens* Determinations

Delaware's FNC test "is well-established." *Martinez II*, 86 A.3d at 1104. A trial court may dismiss a defendant on FNC grounds when it concludes that the defendant will face "overwhelming hardship" under the well-defined *Cryo-Maid* factors if forced to defend itself in Delaware. *Id.*; *see Mar-Land*, 777 A.2d at 779 ("[T]he 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.").

Under *Cryo-Maid*, six factors are used to examine the hardship to defendants in Delaware and determine whether a plaintiff's selection of a Delaware forum is appropriate: (1) the relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of viewing the premises; (4) whether or not Delaware law will be applied; (5) the pendency or non-pendency of similar actions in another jurisdiction; and (6) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive. *Martinez II*, 86 A.3d at 1104 & n.5 (citing *Cryo-Maid*, 198 A.2d at 684).

On numerous occasions, this Court has used the *Cryo-Maid* factors to assess whether FNC dismissal is warranted; yet it has never suggested, let alone held, that those factors should be considered *only after* a threshold inquiry into the existence of an adequate alternate forum for a plaintiff's claims. *See, e.g.*, *Martinez II*, 86 A.3d at 1104; *Candlewood*, 859 A.2d at 994-96, 1000-04; *Mar-Land*, 777 A.2d at 777-81; *Ison*, 729 A.2d at 843-47; *Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 37-38 (Del. 1991).

Indeed, just three years ago in *Martinez II*—on facts strikingly similar to those presented here—this Court conducted a comprehensive analysis of the FNC doctrine guided by the *Cryo-Maid* factors. 86 A.2d at 1104. That decision (which similarly dealt with an Argentine plaintiff, alleged acts and injuries occurring in Argentina, and an alleged non-party Argentine tortfeasor) is particularly instructive

here because this Court emphasized that the *Cryo-Maid* factors demonstrated the unfairness to a defendant that has to litigate "novel[]" issues of Argentine law in Delaware. *Id.* at 1107-08. This Court never suggested in *Martinez II* that analysis of the *Cryo-Maid* factors is contingent on a threshold inquiry into the existence of an adequate alternate forum. *Id.* at 1104.

b. Plaintiffs' Arguments For A Threshold Inquiry Into An Adequate Alternate Forum Are Meritless

Despite the wealth of authority establishing that Delaware's FNC doctrine is governed solely by the *Cryo-Maid* factors, Plaintiffs contend Delaware "precedent" supports the imposition of a "threshold" inquiry into an adequate alternate forum. AOB at 8. Yet Plaintiffs conceded during their Rule 59 Motion oral argument that "[t]here is no Supreme Court case that says [courts] must do this"—*i.e.*, that courts "must first ascertain that the [proposed alternate forum] is available." A518. Significantly, Plaintiffs admitted that they filed their Rule 59 Motion not because the Superior Court's opinion was contrary to precedent, but rather because they had "sort of assumed" that Delaware courts must conduct such a threshold inquiry. A518-A519.

As the Superior Court explained, Plaintiffs' argument is unavailing. Plaintiffs cite *Ison*, 729 A.2d at 839, for the proposition that courts confronted with an FNC motion must first be "satisfied" with the existence of an adequate alternate forum before balancing the equities. AOB at 9. But, as Plaintiffs concede, this

portion of the *Ison* opinion describes the *federal* FNC test. *Id.* *Ison* went on to explain and apply the separate *Delaware* FNC test, which focuses on whether litigating in Delaware would impose an overwhelming hardship on the defendant. *See Ison*, 729 A.2d at 837-38, 842-47. Far from supporting Plaintiffs' position, *Ison* "confirm[ed] that Delaware jurisprudence *diverges* from the federal standard." AOB Ex. B at *6 n.40 (emphasis added).

Nor do the other Supreme Court cases discussed in Plaintiffs' Opening Brief—*Martinez II* and *Mar-Land*—impose a threshold inquiry into an adequate alternate forum. Instead, each case expressly—and exclusively—points to the *Cryo-Maid* factors as the only basis for the proper Delaware FNC analysis.[8] *Martinez II*, 86 A.3d at 1104-09; *Mar-Land*, 777 A.2d at 777-81.

[8] Similarly, the three Superior Court decisions cited by Plaintiffs, *see* AOB at 10-11, do not support their claim that Delaware courts have "routinely assumed" the existence of the threshold inquiry Plaintiffs seek. The first decision—*Pipal Tech Ventures Private Limited v. MoEngage, Inc.*—did not conduct any threshold inquiry into an alternate forum, and in fact cited favorably to this Court's decision in *Martinez II* and the Superior Court's decision *in this case*, noting that Delaware's FNC methodology had "recently been clarified." 2015 WL 9257869, at *5 & n.50 (Del. Ch. Dec. 17, 2015). The second decision—*Sumner Sports, Inc. v. Remington Arms Co., Inc.*—also did not conduct or prescribe any such threshold inquiry. 1993 WL 67202, at *3 (Del. Ch. Mar. 4, 1993). To the extent these two decisions noted the availability of another forum, it was in passing or as part of the *application* of the *Cryo-Maid* factors. The third decision—*Abrahamsen v. ConocoPhillips Co.*—does hint at a threshold inquiry, but both parties there had argued without debate that Norway was an adequate alternate forum. 2014 WL 2884870, at *1-*2 (Del. Super. Ct. May 30, 2014). Moreover, the lawsuit at issue in *Abrahamsen* was not first-

Because they cannot rely on this Court's decision in *Martinez II*, Plaintiffs heavily emphasize the Superior Court's decision in *Martinez v. E.I. DuPont de Nemours and Co., Inc.*, 82 A.3d 1 (Del. Super. Ct. 2012) ("*Martinez I*"). Plaintiffs contend the Superior Court there "appl[ied] the requirement that the defendant actually be amenable to suit in the foreign forum." AOB at 17. Leaving aside that this Court's decision in *Martinez II* controls, the Superior Court in *Martinez I* simply observed that Argentine courts would have jurisdiction not over the Delaware defendant, DuPont, but over DASRL, ***a non-party Argentine entity*** that was the deceased plaintiff's employer. 82 A.3d at 29. In other words, *Martinez I* emphasized that an FNC dismissal was appropriate in part because the non-party Argentine entity which was the "proper defendant," based on allegations in the complaint, was amenable to suit in Argentina. *Id.* That reasoning is on all fours with this case. As Defendants have repeatedly explained, the proper defendants in this case are the Argentine companies who, according to the Complaint, allegedly had responsibility for the use of Roundup on Plaintiffs' farms.

Left without a single Delaware case to support their position, Plaintiffs argue that the existence of a threshold requirement is "a matter of logic." AOB at 8. Plaintiffs contend that because *forum non conveniens* means "inconvenient forum,"

(Cont'd from previous page)

filed in Delaware and therefore, as the court properly noted, Delaware's traditional "overwhelming hardship" standard was inapplicable. *Id.*

a determination that one forum is "inconvenient" necessarily requires a comparison to another forum that is "more 'convenient.'" *Id.* But this Court has expressly rejected that Delaware's FNC inquiry should involve weighing the *relative* convenience of different forums, and has instead held that Delaware's FNC inquiry turns on the *absolute* magnitude of hardship that a defendant will face if forced to litigate in Delaware. In *Mar-Land*, this Court explained:

> 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.

777 A.2d at 779 (emphasis added) (internal citation removed).

Plaintiffs also contend that the *Cryo-Maid* factors "make no sense if there will not be a case in the other forum." AOB at 20 (emphasis removed). To the contrary, the *Cryo-Maid* factors directly address the key inquiry under Delaware FNC law—whether the defendant would face overwhelming hardship if forced to litigate in Delaware. In cases like this one and *Martinez*, where the defendant would not have access to evidence and witnesses in a foreign country, and where any Delaware proceeding would be greatly complicated by the need to apply unsettled foreign law, the answer to that question is "yes." *See Martinez II*, 86

A.3d at 1106. Delaware does not—and should not—force defendants to litigate an unfair proceeding in the state simply because plaintiffs claim the existence of an alternate forum is in doubt.

Finally, Plaintiffs argue that Delaware courts must undertake a threshold inquiry into an adequate alternate forum because that inquiry is part of the *federal* FNC doctrine. *See* AOB at 9; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *see also* Charles Alan Wright et al., 14D *Federal Practice and Procedure* §§ 3828.1, 3828.3 (4th ed. 2017) (describing the federal test).[9] But as this Court recognized, "[s]tate courts traditionally have formed their own FNC laws" and "[a]bsent federal statutory law preempting state FNC standards, many states have deviated from the [federal] standard set in *Piper Aircraft*." *Ison*, 729 A.2d at 840; *see, e.g.*, *Espinoza v. Evergreen Helicopters, Inc.*, 376 P.3d 960, 981 (Or. 2016) ("Federal precedent . . . does not control our interpretation of [FNC]."); *Myers v. Boeing Co.*, 794 P.2d 1272, 1280 (Wash. 1990) (noting that *Piper Aircraft* "is not binding on this court"). For example, the New York Court of Appeals has long held that although an available alternate forum may be a pertinent factor, it is not "a prerequisite for applying the [FNC] doctrine." *Islamic Republic of Iran v.*

[9] Plaintiffs' Opening Brief correctly notes that Defendants cited to federal cases in their Superior Court briefs. AOB at 9 & n.2. However, Defendants cited to these cases for the limited purpose of showing that many courts have concluded that Argentina is an adequate and available forum—a point confirmed in each case cited. Defendants never suggested that the federal FNC test is the same as the Delaware test or that Delaware should adopt the federal FNC test.

Pahlavi, 467 N.E.2d 245, 249 (N.Y. Ct. App. 1984). *See also Huani v. Donziger*, 11 N.Y.S.3d 153, 154 (N.Y. App. Div. 2015) ("New York does not require an alternate forum for a *non conveniens* dismissal."). Similarly, as discussed below, Delaware treats the existence of an adequate alternate forum as an issue the trial court may consider with all the *Cryo-Maid* factors. In light of this well-developed and Delaware-specific body of case law, Plaintiffs' stubborn reliance on federal FNC jurisprudence is entirely inappropriate.

2. The Superior Court Considered The Existence of An Adequate Alternate Forum As *Part* Of The *Cryo-Maid* Analysis

To the extent that the existence of an adequate alternate forum has relevance in the Delaware FNC analysis, the trial court may consider that issue as *part* of the *Cryo-Maid* analysis. In this way, Delaware law allows a trial court to consider whether the plaintiff could bring suit in another forum, while not making that factor dispositive. That is precisely what the Superior Court did here. AOB Ex. A at 24-25. Plaintiffs do not contend that the Superior Court abused its discretion in concluding that Argentina was an adequate alternate forum to hear their claims. *See* AOB at 5. Nor have Plaintiffs explained why it would be insufficient for them to pursue Tabacos and Massalin, the Argentine tobacco companies alleged to have caused their harms, in Argentina. *Cf. Martinez I*, 82 A.3d at 29 (noting that plaintiff could pursue the non-party Argentine entity, DASRL, in Argentina).

Various Delaware courts have considered the existence of an adequate alternate forum as part of the *Cryo-Maid* analysis. For example, in *Ison*, this Court considered the relative costs to plaintiffs of pursuing the action in the United Kingdom or New Zealand within its analysis of the sixth *Cryo-Maid* factor. *Ison*, 729 A.2d at 846-47. Likewise, in *IM2 Merchandising and Manufacturing, Inc. v. Tirex Corp.*, the Court of Chancery analyzed jurisdictional issues within the sixth *Cryo-Maid* factor, with then-Vice Chancellor Strine finding that Canada was an available and convenient forum for the plaintiffs' claims. 2000 WL 1664168, at *11 (Del. Ch. Nov. 2, 2000).[10]

Here, the Superior Court expressly considered whether Argentina was an adequate alternate forum as part of its analysis of the sixth *Cryo-Maid* factor. AOB Ex. A at 24-25; *see* AOB Ex. B at *8 ("Just as in *Ison*, this Court addressed jurisdictional and statute of limitations issues within the sixth *Cryo-Maid* factor but *not* as a threshold consideration or prerequisite to FNC dismissal."). The Superior Court found that, "[b]ecause Argentina has a forum in which to litigate these types

[10] Other Delaware courts have also considered the existence of an adequate alternate forum under the sixth *Cryo-Maid* factor. *See, e.g.*, *Miller v. Phillips Petroleum Co.*, 529 A.2d 263, 270 (Del. Super. Ct. 1987) (finding that the sixth *Cryo-Maid* factor weighed in favor of dismissal because the matter had "strong contacts with an available alternative forum" in Norway). And some Delaware courts have considered the existence of an adequate alternate forum within the fifth *Cryo-Maid* factor, which examines the pendency or nonpendency of a similar action or actions in another jurisdiction. *See* AOB Ex. B at *9 n.57.

of claims, the sixth and final *Cryo-Maid* factor weighs in favor of PM Defendants." AOB Ex. A at 25.

On appeal, Plaintiffs do not challenge this finding, nor could they. As the Superior Court explained, Argentina is a preferable forum for Plaintiffs' claims because "[u]nlike Delaware, Argentina has a strong and distinct interest in legal determinations regarding the safety of products that are affecting [Argentine] children and families." *Id.* The court also explained that Plaintiffs would face "no cultural or language barriers" in Argentina because "[t]heir cases would be heard in their native language with a proper understanding of the parties' interests at stake." *Id*.

This Court has applied the *Cryo-Maid* analysis when making FNC determinations for over fifty years. In that time, this Court has *not once* held that the existence of an adequate alternate forum is a threshold consideration—a fact that Plaintiffs admit. Moreover, as part of its *Cryo-Maid* analysis, the Superior Court expressly concluded that Argentina was an adequate alternate forum, and Plaintiffs do not contend that conclusion was an abuse of discretion. *See* AOB at 5. Accordingly, this Court should affirm the Superior Court's ruling.

3. Even If The Superior Court Erred By Not Considering Whether Argentina Is An Adequate Alternate Forum As A Threshold Inquiry, The Error Was Harmless

Even assuming *arguendo* that the Superior Court needed to consider Argentina's availability as a *threshold* inquiry rather than considering it within the *Cryo-Maid* framework, any such error was harmless. The Superior Court expressly concluded *twice*—in its order granting FNC dismissal of Defendants and its order denying Plaintiffs' Rule 59 Motion—that Argentina was an adequate alternate forum. AOB Ex. A at 24-25; AOB Ex. B at *9. Plaintiffs' Opening Brief does not point to any countervailing evidence, testimony, or case law that undermines that conclusion, let alone demonstrates why it would be an abuse of discretion. The Superior Court's holding is in line with *Martinez I*, where the court held that "it is satisfied that Argentina has well developed standards and processes to address and provide compensation for meritorious [personal] injury claims arising within its borders" and that "[t]he Argentine Courts clearly have jurisdiction over the Plaintiff and over [non-party] DASRL, the . . . proper defendant in [the] case." 82 A.3d at 29. Thus, even if the Superior Court had been required to consider whether Argentina is an alternate forum at the outset of its analysis (and it was not), its conclusion would have been the same, making any such error harmless. *See Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140 (Del. 1997) (holding that any error in determining the pleading standard was

"harmless" because, "even under the proper pleading standard, the complaint fails to state a claim for damages").[11]

[11] *In re Walt Disney Co. Derivative Litigation* is also instructive. 906 A.2d 27 (Del. 2006). There, appellants argued the trial court had erred by assessing the defendants' alleged fiduciary breaches individually instead of collectively. *Id.* at 55. This Court faulted the appellants for failing to explain why their preferred rule would have changed the outcome below. This Court held that, even if the appellants were correct that "a due care analysis of the board's conduct must be made collectively, *it is incumbent upon them to show how such a collective analysis would yield a different result*. The appellants' failure to do that dooms their argument." *Id.* (emphasis added).

II. Plaintiffs' Request For Conditions On The *Forum Non Conveniens* Dismissal Is Waived And Meritless

A. Question Presented

Did the Superior Court abuse its discretion when it denied Plaintiffs' request to require Defendants to waive jurisdictional and statute of limitations defenses in Argentina as conditions of FNC dismissal, even though Plaintiffs waited until their Rule 59 motion to first request these conditions, and even though Delaware law does not require a court to condition FNC dismissal in this manner? This issue was preserved in Defendants' Joint Opposition to Plaintiffs' Rule 59 Motion, Dkt. 206, (Dec. 14, 2015), at 2-6. *See also* AOB Ex. B at *4, *10-*11.

B. Standard of Review

Contrary to Plaintiffs' assertion that *de novo* review applies to their requested conditions, AOB at 26, those conditions were first raised on a Rule 59 motion, and this Court reviews a trial court's decision on a Rule 59 motion for abuse of discretion. *Parker v. State*, 768 A.2d 470 (Del. 2001) (table order), 2001 WL 213389, at *1 & n.6; *see Bennett v. Andree*, 252 A.2d 100, 103 (Del. 1969).

C. Merits of the Argument

After spending the bulk of their Opening Brief contending that the Superior Court should have conducted a threshold inquiry into the existence of an adequate alternate forum, Plaintiffs then argue that the Superior Court erred by failing to impose two conditions that Plaintiffs never requested during the *sixteen months* of

FNC briefing and argument. According to Plaintiffs, the Superior Court should have required the Defendants to (1) "submit to jurisdiction in Argentina" (AOB at 5-6), and (2) "waive any statute of limitations defenses" in Argentina (AOB 26).

Plaintiffs' argument fails, however, because they waived any argument for conditions on the Defendants' FNC dismissal. As the Superior Court explained, Plaintiffs did not seek the imposition of any conditions on an FNC dismissal until they filed their Rule 59 Motion. AOB Ex. B at *9. The Superior Court did not abuse its discretion in finding a waiver under these circumstances, and its refusal to impose conditions can and should be affirmed for that reason alone. In any case, Plaintiffs' argument fails because their request for conditions here is also meritless.

1. Plaintiffs Waived Any Opportunity To Request Dismissal Conditions By Waiting To Request Them Until After They Lost The *Forum Non Conveniens* Motions

In a strategic gambit, Plaintiffs waited until the Superior Court dismissed Defendants on FNC grounds and then claimed—for the first time in their Rule 59 Motion—that the court erred by failing to impose dismissal conditions that Plaintiffs never requested. But it is well-settled that Rule 59 is not a vehicle for courts to "consider new arguments that the movant could have previously raised." *Reid v. Hindt*, 2008 WL 2943373, at *1 (Del. Super. Ct. July 31, 2008); *see also The Ravenswood Inv. Co. L.P. v. Estate of Winmill*, 2016 WL 3635574, at *2 (Del.

Ch. June 29, 2016) (Delaware courts "will not permit Plaintiff[s] to employ Rule 59 as a vehicle to present arguments that [they] should have raised before.").

The Superior Court correctly held that Plaintiffs could have requested and argued for these conditions in the alternative in their FNC briefing. *See* AOB Ex. B at *9 n.58 ("Plaintiffs had every opportunity to argue in the alternative during the previous proceedings."). The Superior Court emphasized that "a Rule 59(e) motion is not the appropriate vehicle to raise them for the first time." *Id.* at *9. It also correctly found that Plaintiffs' "attempt to argue that these conditions were somehow subsumed in their opposition to dismissal on FNC grounds" was "unavailing." *Id.*

On appeal, Plaintiffs do not even *mention*, let alone rebut, the Superior Court's finding that their request for FNC dismissal conditions was waived. Plaintiffs had every opportunity to argue for the imposition of dismissal conditions as part of their FNC briefing. Plaintiffs chose not to do so, instead adopting a wait-and-see strategy. This Court should affirm the FNC dismissal because the Superior Court was well within its discretion to find that Plaintiffs' argument for conditions had been waived.

2. The Superior Court Did Not Abuse Its Discretion By Declining To Impose Meritless And Unwarranted Conditions

Even apart from its finding on waiver, the Superior Court correctly found that the imposition of FNC dismissal conditions was meritless and unwarranted. *Id.* at *10-*11. Delaware simply does not require a defendant to waive potential defenses in another forum as the price for avoiding the "overwhelming hardship" of litigating here. The very point of Delaware's FNC analysis is to ensure that a defendant is not forced to suffer the "undue hardship and inconvenience" of litigating in an unfair forum. *Martinez II*, 86 A.3d at 1106. As the Superior Court explained, "this Court is hard-pressed to understand the logical connection of such conditions to FNC dismissals in a jurisdiction like Delaware, which focuses on a moving defendant's overwhelming hardship if forced to litigate here." AOB Ex. B at *10.[12]

[12] Plaintiffs attempt to make a fairness point with regard to their request that Defendants waive statute of limitations defenses in Argentina, arguing that such a condition is necessary because of the time spent securing a ruling on FNC grounds. AOB at 27-28. And they appear to accuse Defendants of having intentionally and unduly delayed their FNC motions to prejudice Plaintiffs. AOB at 27. But contrary to Plaintiffs' claims that Defendants delayed, the Superior Court found Plaintiffs agreed to, or themselves controlled, the timing of this litigation at *every step*. *See* AOB Ex. A at 10 n.15 ("[D]elays in this case have resulted from extensions sought by both parties, and never objected to by either. While significant time and expense may have been expended in reaching this stage of the litigation, such time and expense was necessary in order to narrow the issues; the Court acknowledged as much in *Martinez I*, as similar expenses were borne in that case prior to the [FNC] dismissal, as well."). *See also* B13-B15; B271-B276; B277-B282 (Plaintiffs seeking various extensions).

Plaintiffs cannot cite any Delaware law that requires Delaware courts to impose conditions on an FNC dismissal. In *Martinez II*, this Court affirmed an FNC dismissal on very similar facts without any mention of dismissal conditions, despite a nearly identical request from the plaintiff there. *See* 86 A.3d at 1106. As here, the *Martinez* plaintiff had insisted that FNC dismissal was improper because there was "no evidence to support a finding that [defendant] DuPont would be subject to jurisdiction" in Argentina. Brief for Appellant at 29, *Martinez II* (No. 669, 2012), 2013 WL 1194985, at *29 (Mar. 12, 2013). DuPont "did not concede . . . that it is subject to the Argentine court system, or that it would voluntarily submit to [] Argentine jurisdiction." *Id.* Although the *Martinez II* opinion did not expressly discuss its rationale for denying conditions on the dismissal, at oral argument Chief Justice Strine[13] explained why it would be inappropriate to impose conditions on defendant DuPont in order to avoid litigation in an unfair forum:

> Why does DuPont have to consent [to Argentine jurisdiction]? That's a different question than whether you have a fair opportunity if you can plead out your case before the Argentine courts for there to be legal principles where they can exercise jurisdiction over DuPont. Because then what you're saying is in order for DuPont to win their motion, they have to consent to something that they may not even agree to, which is that they did anything in Argentina that is sufficient to—for the Argentine courts to exercise personal jurisdiction over them.

B32. Precisely the same reasoning applies here.

[13] Then-Chancellor, sitting by designation pursuant to Article IV, § 12 of the Delaware Constitution and Supreme Court Rules 2 and 4.

Put simply, whether Defendants have valid defenses in Argentina is not related to the overwhelming hardship they would suffer if forced to litigate in Delaware. Moreover, any dispute about Defendants' Argentine legal defenses should be resolved by an Argentine court applying Argentine law. Delaware law does not require the trial court to foreclose Defendants' ability to raise important defenses in Argentina in order to grant their FNC motions in Delaware. Thus, the Superior Court did not abuse its discretion by rejecting Plaintiffs' Rule 59 request for it to impose conditions on its FNC dismissal.

Additionally, after engaging in the required *Cryo-Maid* analysis, the Superior Court concluded that Defendants will lack a full and fair opportunity to present a meaningful defense if forced to litigate in Delaware. It would be particularly unfair for this Court to require Defendants to waive their Argentine defenses as the price for escaping this potential due process violation, and no such waiver is required under Delaware law. Moreover, these due process concerns stem directly from Plaintiffs' choice to sue Defendants in Delaware, rather than sue Tabacos and Massalin in Argentina. *See* AOB Ex. A at 24 ("[I]t is not lost on this Court that litigating this suit in Delaware may circumvent corporate separateness

and omit parties who may bear direct or indirect responsibility for the alleged harm in this case.").[14]

As Chief Justice Strine has noted, it would be unfair for Plaintiffs to use Delaware courts to create a situation where "in order for [Defendants] to win their motion, they have to consent to something that they may not even agree to." B32. The Superior Court here voiced similar concerns, stating that it would be "illogical to order a party to voluntarily submit to what is obviously disputed." AOB Ex. B at *10. In essence, Plaintiffs are attempting, on appeal, to leverage Defendants' Delaware hardship by having this Court force Defendants to surrender crucial defenses in a yet-to-be-filed Argentine lawsuit. Using the courts to extract this sort of concession is unfair and inconsistent with due process.

Finally, if it determines dismissal conditions may be imposed under Delaware FNC law, before any such conditions are imposed, this Court should remand the case to the Superior Court so that the court can determine whether

[14] Plaintiff's choice of forum is all the more problematic in light of *Genuine Parts*, 137 A.3d at 137-44, which altered Delaware's law of personal jurisdiction by overruling *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988). PM USA is a Virginia corporation with its principal place of business in Virginia, and it is registered to do business in Delaware; PM USA's contacts with Delaware have nothing to do with Plaintiffs' claims. AOB Ex. A at 6; B217; A121 (Compl. ¶ 29). Under *Genuine Parts*, PM USA did not consent to general personal jurisdiction merely by registering to transact business in Delaware, and it can be dismissed on that ground alone. *See* 137 A.3d at 148.

Defendants should be dismissed on alternative grounds based on Rules 12(b)(1),[15] 12(b)(2), and 12(b)(6). The Superior Court did not reach Defendants' arguments on these topics because its dismissal on FNC grounds was dispositive. AOB Ex. A at 3 n.1; *see* AOB Ex. B. at *3 n.14. As Defendants argued in the Superior Court, they should also be dismissed because: (1) the Complaint is bereft of any factual allegations specifically addressing the conduct of PM USA and PM Global; (2) Plaintiffs' theories of liability rest on unprecedented and unsupported expansions of Argentine law[16]; and (3) under recent Supreme Court precedent, PM USA is not subject to personal jurisdiction in Delaware. Accordingly, before forcing Defendants to decide whether to accept FNC dismissal conditions that would seriously prejudice Defendants' ability to defend themselves in Argentina, this Court should permit the Superior Court to consider Defendants' Rule 12 arguments

[15] According to Plaintiffs, they have abandoned the veil-piercing claim incorporated into their Complaint. B96. Defendants nevertheless moved to dismiss that claim in the Superior Court for lack of subject matter jurisdiction. A199; *see* PM USA's Opening Brief in Support of its Motion to Dismiss Based on Rules 12(b)(6) and 12(b)(1), Dkt. 152 (Apr. 29, 2014), at 35.

[16] Plaintiffs' distortions of Argentine law reinforce the striking similarity between this case and *Martinez*, where the plaintiff chose not to proceed against the Argentine entity that allegedly harmed her and chose to rely on theories of liability that were unsupported by Argentine law. *Martinez I*, 82 A.3d at 3, 9-10. Plaintiffs purport to distinguish *Martinez* because there, the plaintiff sought to "make an end run around . . . normal doctrines of corporate separateness" by bringing claims directly against the corporate great-great grandparent of the Argentine entity that caused the plaintiff's harm. AOB 13. But Plaintiffs attempt that exact same maneuver here.

and determine whether there are alternative grounds for an unconditional dismissal of Defendants.

CONCLUSION

The Superior Court correctly applied this Court's precedent in *Cryo-Maid* and *Martinez II* when it concluded that Defendants would suffer overwhelming hardship if forced to defend against Plaintiffs' claims in Delaware. Plaintiffs' request for conditions on the Superior Court's FNC dismissal of Defendants was waived and is meritless. The Superior Court's dismissal of Defendants on FNC grounds should therefore be affirmed.

Dated: April 10, 2017

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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,	*(All Consolidated Under No. 526, 2016)* No. 525, 2016 Court Below: Superior Court of the State of Delaware in and for New Castle County C.A. No. 13C-03-068 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 in and for New Castle County C.A. No. 12C-02-171 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 in and for New Castle County C.A. No. 14C-01-021 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 in and for New Castle County C.A. No. 12C-04-042 The Honorable Vivian L. Medinilla
Clarisa Rodriguez da Silva, *et al.*, Plaintiffs Below, Appellants, v. Philip Morris USA Inc. and Philip Morris Global Brands, Inc., Defendants Below, Appellees,	No. 529, 2016 Court Below: Superior Court of the State of Delaware in and for New Castle County C.A. No. 12C-10-236 The Honorable Vivian L. Medinilla
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 in and for New Castle County C.A. No. 13C-08-092 The Honorable Vivian L. Medinilla

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. The foregoing Answering Brief complies with the typeface requirement of Supreme Court Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Office Professional Plus 2013.

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CERTIFICATE OF SERVICE

I, Donald E. Reid, hereby certify that on the 10th day of April, 2017, a copy of the Appellees' Answering Brief was served via File and Serve XPress upon all counsel of record:

/s/ Donald E. Reid
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