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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
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 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 The Honorable Vivian L. Medinilla

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

I. DELAWARE LAW REQUIRES THE EXISTENCE OF AN AVAILABLE ALTERNATIVE FORUM IN WHICH THE MOVING DEFENDANT MAY BE SUED

Defendants argue that "Delaware's FNC test is 'well-established' and does not require the actual availability of the forum the moving defendant says is superior. Defendants restate the familiar "*Cryo-Maid* factors," and indeed it is instructive to begin with *Cryo-Maid* itself.

In that case, Cryo-Maid, a "small, locally-established corporation with its sole plant in Illinois," entered into an agreement with General Foods. *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964). A dispute arose about the agreement, and General Foods filed a declaratory judgment action in Delaware. Two days later, Cryo-Maid filed its own declaratory judgment action in Illinois. The chancery court refused to enjoin Cryo-Maid's prosecution of its Illinois actions, and granted Cryo-Maid's motion to stay General Foods' Delaware action. General Foods appealed. *Id.* at 682.

This Court analogized Cryo-Maid's motion to a *forum non conveniens* motion:

> The motion is not unlike a motion based upon the doctrine of *forum non conveniens*. While the application of this doctrine would require the dismissal of an action, in principle we can see no difference between a stay based upon similar grounds and an actual dismissal of the action itself. In *Winsor v. United Air Lines, Inc.*, 2 Storey 161, 154 A.2d

> 561, an action pending in the Superior Court of this State was dismissed on the doctrine of *forum non conveniens*, by applying the rules laid down in ***Koster v. Lumbermens Mutual Casualty Co***., 330 U.S. 518, 67 S.Ct. 828, 91 L.Ed. 1067.
>
> Thus proper to be considered are the following matters: (1) the relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of the view of the premises, if appropriate, and (4) all other practical problems that would make the trial of the case easy, expeditious and inexpensive. We add a further factor-whether or not the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction.

Id. at 683-84. This Court thus "appl[ied] the rules laid down in *Koster"* by the United States Supreme Court.

In *Koster,* a Lumbermens policyholder brought a derivative action in New York, where he lived. Lumbermens' "home and principal place of business" were in Illinois; its directors lived there and all of its records were there. Lumbermens obtained a *forum non conveniens* dismissal on "the view that the case should not be tried in New York as there was ample remedy available in the state and federal courts of Illinois." *Koster, supra,* 330 U. S. at 521. The Supreme Court upheld this dismissal, noting that "a similar derivative action was begun against substantially the same defendants and on the same causes of action" in federal court in Illinois, that would ensure that "this controversy will not be barred from judicial hearing for lack of prosecution within the statutory period." *Id.* at 524 n. 3.

In *Koster*, then, there was no question that the moving defendant would be amenable to jurisdiction in the asserted alternative forum, since that was its home. The same was true in *Cryo-Maid*. *Koster* was relied on by the Supreme Court in its later, definitive *forum non conveniens* holding, *Piper Aircraft Co. v. Reyno*, 454 U. S. at 249, 255-56. This Court, of course, has recognized *Piper* as the Supreme Court's seminal *forum non conveniens* case. *See Ison v. E.I. Dupont de Nemours & Co.*, 729 A.2d 832, 839 (Del. 1999).

Piper, of course, made clear that "[f]irst, the defendant must be amenable to process in the alternate forum." *Id.* at 839. Nor has any case from this Court ever held to the contrary, which is the fundamental problem with defendants' argument. In *Mar-Land Ind. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.* 777 A.2d 774 (Del. 2001), for example, defendant was headquartered in Puerto Rico, the forum for which it contended. *Id.* at 776. In *Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34 (Del. 1991), also cited by defendants, the moving defendant was already litigating a "mirror-image" suit in the other forum. *Id.* at 35.

To summarize: in *Cryo-Maid*, the defendant was obviously amenable to process in the asserted alternative forum. *Cryo-Maid* "appl[ied] the rules laid down in *Koster*," in which the defendant was also obviously suable in the foreign forum, its home. *Koster* laid the groundwork for *Piper*, in which the Supreme Court made clear that this is a threshold requirement. Nothing in *Cryo-Maid* would suggest that

a defendant moving for a *forum non conveniens* dismissal need not be amenable to suit in the foreign forum. That was simply taken as a given, and the federal doctrine embraced by this Court in *Cryo-Maid* clearly so requires.

The simple fact is that defendants cannot cite any Delaware case that has held that a moving defendant can complain that trial would not be convenient in Delaware, because witnesses are located in another forum or because that forum should more appropriately decide the dispute, yet not have to actually show up there. The cases cited by defendants at p. 27 of their brief certainly contain no such holding. In *Ison,* this Court noted that defendant had offered "to waive any jurisdictional or statutes of limitations defenses that it might possess in the alternate fora. *This removes any doubt that the plaintiffs would be able to assert their claims in their home countries.*" *Id.* at 846 (emphasis added).

Defendants also cite *IM2 Merchandising and Manufacturing, Inc. v. Tirex Corp.,* 2000 WL 1664168 (Del. Ch. Nov. 2, 2000). That case plainly supports plaintiffs, however: then-Vice Chancellor Strine noted that defendants, who sought dismissal to Quebec, were Quebec corporations, and held that "I can envision no undue burden to the plaintiffs if they have to file a new suit in Canada." *Id.* at *11. Needless to say, it would be an undue burden on plaintiffs here if defendants don't even have to appear in Argentina: no suit will be possible at all. In this regard, then-vice Chancellor Strine cited an earlier Superior Court case, *Nash v. McDonald's*

Corp., 1997 WL 528036, * 3 (Del. Super. Feb. 27, 1997), describing its holding as "[the] fact that no action is pending elsewhere is no bar to a FNC dismissal if there was no obstacle that prevented the plaintiffs from pressing the action in the appropriate forum."[1]

Defendants rely most heavily on this Court's decision in *Martinez v. E. I. DuPont de Nemours & Co.*, 86 A.3d 1102 (Del. 2014) ("*Martinez* II"), but they strive mightily to muddle its holding. *Martinez* II never held that a moving defendant need not be subject to jurisdiction in the foreign forum. The trial court had dismissed the DuPont American parent defendant on the merits. *See Martinez* I, 82 A.3d 1 at 14 ("Plaintiff has failed to demonstrate that the complaint pleads a viable direct claim against DuPont as the corporate great-great grandparent of Rocha's employer, DASRL, under either Delaware or Argentine law."), as well as on *forum non conveniens* grounds. Next, the claim against the Argentine DuPont subsidiary, DASRL—plaintiffs' employer—was dismissed on *forum non conveniens* grounds.

On appeal, this Court upheld the *forum non conveniens* dismissal, and did not reach the dismissal of the American parent on the merits at all. Thus, there was no need for this Court to reach the issue of whether the American parent, as a defendant

[1] In a footnote, defendants also cite *Miller v. Phillips Petroleum Co.*, 529 A.2d 263 (Del. Super. 1987). There, however, the moving defendants were clearly subject to jurisdiction in Norway, the alternate forum, since they themselves had already instituted proceedings there against the plaintiffs. *Id.* at 268.

seeking dismissal on *forum non conveniens* grounds, needed to submit to Argentine jurisdiction, because that defendant was already out on the merits. Nowhere in the opinion does this Court say anything on the subject at all.

No doubt recognizing this, defendants make much of a question at oral argument by Chief Justice Strine (then-Chancellor Strine, sitting by designation). Chief Justice Strine asked counsel for the plaintiffs why the American parent would need to stipulate to jurisdiction in Argentina, when DuPont denied in the first place "that they did anything in Argentina" sufficient for Argentine courts to exercise jurisdiction over it. In fact, however, the briefing and argument in M*artinez* II support plaintiffs' position that this Court never held that a moving defendant need not be subject to jurisdiction in the asserted alternate forum.

DuPont's entire argument on *forum non conveniens* consisted of five pages out of a 46-page brief. Within those five pages, the discussion of the "alternative available forum" requirement consisted of one paragraph. In that paragraph, DuPont never contended that it was not necessary for it to be subject to jurisdiction in Argentina. Rather, it contended that the "alternative available forum" requirement was in fact satisfied:

> Second, Plaintiff's contention that her claims should not have been dismissed because "there is not another available forum for [her] claim against DuPont" (Appellant's Brief at 28) is unsupported. While Plaintiff advanced this argument below, she submitted no evidence regarding Argentine law on this point. See Opinion at 62 [B890]. In contrast, DuPont's expert explained that "Argentine jurisdictional rules

> are not framed in terms of 'personal jurisdiction' as they are in common law countries in general and the United States in particular. Whether an Argentine court can and will exercise jurisdiction ('competence') in any given case, does not hinge on the presence or citizenship of the defendant." Supplemental Declaration of Alejandro M. Garro, dated November 2010, at ¶¶ 5-7 [B410-B412]. Thus, the Argentine courts offer an adequate, alternative forum.

See DuPont's answer brief at 43.[2] In a similar vein, in the very limited discussion of this issue at oral argument, Chief Justice Strine never suggested that Argentina need not have available as a forum in which plaintiffs could sue DuPont. Instead, again, Chief Justice Strine was of the view that in fact DuPont's own proof had established that if plaintiffs could "make out [their] cause of action before the Argentina court to show acts by DuPont in Argentina, then the Argentine principles of personal jurisdiction would be sufficient to—for the courts to exercise personal jurisdiction. . . ." Transcript at 39.

In sum, the moving defendant in *Martinez* never contended that Delaware *forum non conveniens* law does not require that there be an alternate forum in which the defendant may be sued by the plaintiff, nor did Chief Justice Strine make such a statement at oral argument. Most importantly, of course, the *Martinez* opinion itself says nothing of the kind. To the contrary, it is clear that both DuPont and Chief Justice Strine believed the requirement to have been satisfied as a factual matter. In

[2] The relevant pages of DuPont's brief, and the cited excerpts of the oral argument transcript, are included here in the addendum.

the present case, by contrast, defendants have never contended or acknowledged that Argentine jurisdiction would exist over them at all.

Thus it is utterly unfair and incorrect for defendant to analogize to *Martinez* II, or to a question posed by Chief Justice Strine at oral argument the substance of which never appeared in the opinion, to argue that plaintiffs are attempting "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 and inconsistent with due process." Answering Brief at 37. This assertion is baseless on every level.

First, it could not possibly be "inconsistent with due process" to require a defendant seeking dismissal on *forum non conveniens* grounds to stipulate to jurisdiction in the alternative forum. If there were the slightest authority for such an outlandish claim, defendants would have cited it, but there is none. To the contrary, this is a universal rule applied for decades by the Supreme Court, the lower federal courts, and the state courts.[3] No court has ever departed from this rule on the basis suggested by defendants.

[3] In response to plaintiffs' contention that stipulation to jurisdiction in the alternate forum is a uniform rule in all federal and state courts, defendants cite two cases from one state, New York. A case involving the nation of Iran suing the former Shah, *Islamic Republic of Iran v. Pahlavi*, 467 N.E. 2d 245 (N.Y. 1984) might be the classic "bad facts make bad law" exception. In the more recent case cited by defendants, *Huani v. Donziger*, 11 N.Y.S. 3d 153 (N.Y.A.D. 2015), the moving defendant was obviously subject to jurisdiction in the alternate forum, Ecuador, because he had conducted the extensive underlying litigation there. *Id.* at 154. Even in New York, "[t]he availability of an alternative forum for plaintiff, although no longer controlling,

Second, defendants are not being asked to "surrender crucial defenses." The only condition plaintiffs request are a stipulation to jurisdiction, and a waiver of limitations defenses that did not already exist when this case was filed. It must be borne in mind that defendants sought a *forum non conveniens* dismissal as a *litigation choice*—a strategic decision reflecting their own forum preferences. The Philip Morris defendants never raised any claim of hardship at all in this case for two years, but instead filed motions seeking an adjudication on the merits. Then, two years in, they decided as a matter of strategic preference to seek a transfer of this litigation to Argentina, and to ask the court below to rule on that motion first. Defendants are of course free to raise their substantive defenses in the forum where they say they should be heard.

Third, defendants' argument elides the critical difference between personal jurisdiction and *forum non conveniens*. Chief Justice Strine recently recognized the distinction between the two doctrines in *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 291 (Del. 2016), noting that "principles of personal jurisdiction [are not] the only way to address the burden to nonresident fiduciaries of addressing litigation in our state . . . . [T]he doctrine of *forum non conveniens* remains a viable tool for even Delaware residents, including corporations, when sued on claims that have little

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remains one of the primary considerations in determination of a *forum non conveniens* motion." *Highgate Pictures, Inc. v. DePaul*, 549 N.Y.S. 2d 386, 388 (N.Y.A.D. 1990).

connection to Delaware. . . ." Had Philip Morris objected to personal jurisdiction in Delaware, and argued that it would be a denial of its due process rights to have to defend in Delaware, it would not have been required to stipulate to jurisdiction in Argentina or anywhere else. *Forum non conveniens* is different from personal jurisdiction; it assumes that jurisdiction is proper in the initial forum, but raises the possibility that it may be more suitable or appropriate elsewhere. Defendants did not make a personal jurisdiction argument, but only a *forum non conveniens* one.[4]

Finally, perhaps recognizing the lack of support for their position, defendants quite remarkably ask the Court not to decide this appeal if it is going to rule against them. Instead, they argue that the Court should remand to the Superior Court so that their substantive defenses can be heard. Answering brief at 37-38. But it is defendants who belatedly asked the Superior Court to rule on *forum non conveniens* before hearing their *already-raised* substantive defenses. The court below did exactly as defendants requested; they do not get a do-over now. Moreover, it hardly need be pointed out that in light of the *forum non conveniens* ruling, it would be inconsistent and hypocritical in the extreme to ask the Superior Court to address

[4] Defendants now apparently suggest, in a footnote, that Philip Morris USA could be dismissed by this Court on personal jurisdiction grounds. Answering brief at 37 n. 14. Needless to say, Philip Morris USA never made such a request in the lower court and cannot ask for such relief here. Any personal jurisdiction objection has long since been waived in any event.

substantive Argentine law, when under the defendants' and the court's own logic, the proper place to evaluate Argentine law is Argentina!

II. THE ISSUE OF A WAIVER OF JURSIDCTIONAL AND LIMITATIONS DEFENSES WAS TIMELY RAISED BELOW

Defendants contend at pp. 31-33 that plaintiffs waived any request for conditions. The trial court found to the contrary, not least because *defendants strenuously argued below that plaintiffs had in fact timely requested such conditions.* *See* excerpts of May 10, 2016 hearing included in the addendum here, for instance defendants' counsel's statement at p. 43:

> MR. DENNIS: We did not offer in our briefs, we did not offer in oral argument to waive jurisdiction. We did not offer to waive statute of limitations. *So those points were squarely raised before Your Honor. And Your Honor came to a different conclusion, contrary to what they would like, but that was decided. It was decided on November 30th.* So it's not a proper argument in a Rule 59 motions.

Similar statements are included in the attached excerpts at pp. 45-47, 51 and 58. Having successfully argued below that plaintiffs timely raised these contentions, defendants cannot argue to the contrary now.

CONCLUSION

Wherefore, premises considered, plaintiffs respectfully pray that the decision below be vacated, and that this matter be remanded to the Superior Court 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: April 28, 2017

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CERTIFICATE OF SERVICE

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