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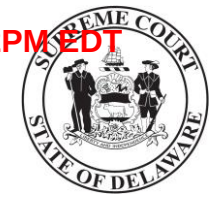

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERMANINVESTMENTS AG, and RICHARD HERRLING, individually and on behalf of AHMR GmbH,	)	No. 291, 2019
Plaintiffs Below, Appellants,	)	Court Below: Chancery Court of the State of Delaware C.A. No. 2018-0666-JRS
v.	)	
ALLOMET CORPORATION and YANCHEP, LLC,	)	
Defendants Below, Appellees.	)	

DEFENDANTS BELOW-APPELLEES ALLOMET CORPORATION AND YANCHEP, LLC'S ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

This is an appeal from the Court of Chancery's order granting Defendants' Allomet Corporation ("Allomet") and Yanchep, LLC ("Yanchep," and together, "Defendants") Motion to Dismiss Plaintiffs' Germaninvestments AG ("Germaninvestments") and Richard Herrling ("Herrling," and together, "Plaintiffs") Verified Complaint under Court of Chancery Rule 12(b)(3). The Court's decision below was issued on May 23, 2019. A0002. Plaintiffs moved for reargument on May 31, 2019, and the Court below denied that motion on June 27, 2019. A0001-2. The Court's decisions should be affirmed.[1]

This dispute arises from the parties' failed discussions to form a venture to expand Allomet's business into Europe. As the Court below observed, the "gravamen of the [C]omplaint is that certain parties to this litigation contemplated the formation of a joint venture and that, in the midst of their negotiations, Plaintiffs caused loans to be extended to one of the Defendants under the [Restructuring & Loan ("R&L)"] Agreement." Op. 1. But when the parties'

[1] The trial court's memorandum decision is in the record as Exhibit A to the Notice of Appeal (Dkt. 1) and Exhibit A to Plaintiffs-Appellees' opening brief. It will be referred to herein as "Op. ___." The trial court's letter decision denying Plaintiffs' motion for reargument is attached as Exhibit B to the Notice of Appeal (Dkt. 1) and Exhibit B to Plaintiffs-Appellees' opening brief. It will be referred to herein as "Rearg. Op. ___." Plaintiffs-Appellants' opening brief is referred to as "POB ___."

discussions "reached an impasse," they "stopped all joint venture discussions" (*id*. 11-12), and a dispute on the repayment of the loans arose (*id*. 12). Thus, as the Court below found, "[t]he construction and application of the R&L Agreement and related agreements will inform whether the contemplated joint venture was consummated and, if so, what rights the parties possess under the operative agreements." *Id. at* 25. Because the parties agreed the R&L Agreement would be governed by Austrian law and the Agreement contained a mandatory forum provision designating jurisdiction in Vienna, Austria, the case was dismissed. Op. 25.

On appeal, Plaintiffs attempt to recast their claims as arising under Delaware's corporation law, asserting a parade of horribles if the decision stands. POB 27-31. Principally, Plaintiffs argue Count I can stand apart from their other claims and thus avoid the parties' contractually chosen forum, arguing it arises under a stock purchase agreement ("SPA"), which Plaintiffs imply is in full force and effect. According to Plaintiffs, such a claim should be divorced from the parties' broader dispute under the R&L Agreement and maintained under Section 168 ("Section 168") of the Delaware General Corporation Law ("DGCL"). Plaintiffs then assert their Section 168 claim ***must*** be pursued in the Court of Chancery—not Austria—pursuant to Section 115 of the DGCL ("Section 115").

The fundamental error with Plaintiffs' argument is it ignores their own allegations and rests on a false narrative. As the Court below correctly observed, the SPA is among "a series of non-binding documents" housed under a "Supplementary Agreement." *Id*. 10 (emphasis added); A0090-92. The Supplementary Agreement made expressly clear those non-binding documents had not yet "been legally signed," were not yet "legally binding," and did not represent the "full legal implementation" of the venture. *Id*. 11.

Now, despite the substance of the Complaint and its incorporated documents, Plaintiffs ask the Court to assume there was a meeting of the minds and all conditions precedent to the venture's implementation were fulfilled such that Plaintiffs can specifically enforce the aspects of a venture it likes. *See* Op. 1 ("Plaintiffs seek specific performance of various aspects of the R&L Agreement[.]"). According to Plaintiffs, this Court can (1) skip over the parties' foundational dispute under the R&L Agreement, which includes whether the SPA is even binding, (2) ignore that the parties to the SPA are not before the Court, (3) ignore that Plaintiffs have not alleged (and cannot allege) they have authority to act on behalf of AHMR (questions of Austrian law), and (4) order Allomet to issue AHMR new stock certificates for 100% of Allomet's common stock as a result of Plaintiffs' $3.2 million unsecured loan to Allomet.

Even ignoring that Plaintiffs raise arguments regarding the SPA that were not fairly raised below, Plaintiffs' claim fails. Section 168 was never intended to function in the manner Plaintiffs urge, and the Court below correctly recognized that none of Plaintiffs' claims can be divorced from the R&L Agreement. The R&L Agreement is referenced no less than 50 times in the Complaint,[2] and, as the Court below correctly observed, "[e]ach count for relief relates directly to the R&L Agreement." Op. 16 n.71. Accordingly, the Court's conclusion to enforce the forum provision in the R&L Agreement was inevitable:

> There is no dispute to resolve under the SPA if the R&L Agreement's conditions precedent were not fulfilled (Count I). If the obligations under the R&L Agreement were not triggered, there could be no specific performance of those obligations (Count II). And, until a court determines that the loans Herrling and Germaninvestments made to Allomet are not governed by the R&L Agreement, there is likely no claim for unjust enrichment (Count III).

Id.

Thus, the Court below correctly found "this is a dispute grounded in contract, not the DGCL[,]" (*id.* 24) so "Section 168(a) does not fit here." (*id.* 23). Likewise, the Court below correctly rejected Plaintiffs' Section 115 arguments because "[s]tockholders can expressly waive Delaware venue in a contract between

[2] A0017-A0102; A0491 n.14.

stockholders and the corporation." *Id*. 24-25. In short, the Court of Chancery's decision to enforce the parties' contractually-chosen forum was not in error.

As a final matter, the Court of Chancery's application of foreign law should be affirmed. As the Court below observed, Plaintiffs arguments to the contrary "begin[ ] with a gross mischaracterization of the Opinion." Rearg. Op. 5 n.10. Plaintiffs' claim of error rests on the mistaken assertion that the Court was required to consider expert testimony, even though the Court's analysis was thorough and it determined expert testimony was not necessary. The *per se* rule Plaintiffs espouse finds no support in Court of Chancery Rule 44.1 ("Rule 44.1"). Relatedly, the Court below did not place the burden of establishing foreign law on Plaintiffs; it simply rejected their arguments and refused to consider an affidavit submitted more than ***4 months after*** briefing closed and more than ***3 months after*** the argument. Plaintiffs' belated expert's arguments were primarily arguments that were already rejected, and Plaintiffs had ample opportunity to timely proffer expert testimony. Rearg. Op. 6 n.13. The Court below correctly concluded Plaintiffs' belated submission should not be "countenanced." *Id.* Defendants respectfully urge this Court to conclude the same and affirm the Court of Chancery's decision in all respects.

SUMMARY OF ARGUMENT

I. Denied. Although Plaintiffs assert Count I under Section 168, the claim is a recast of their claim of breach of the R&L Agreement. The two cannot be divorced. Indeed, Plaintiffs' expressly allege their Section 168 claim rests on a "breach of the ***[R&L] Agreement*** and SPA[.]" A0039 ¶ 83 (emphasis added). And, as the Court below found, "[t]here is no dispute to resolve under the SPA if the R&L Agreement's conditions precedent were not fulfilled (Count I)." Op. 16 n.71.

The Court of Chancery did not ignore Plaintiffs' arguments under *Castro v. ITT Corp.*, 598 A.2d 674 (Del. Ch. 1991). It rejected them because the facts and holdings in *Castro* bear no resemblance to this case. A0730-33; A0495-98. The Court below correctly found Section 168 provides for the administrative replacement of a lost, stolen, or destroyed stock certificate and never was intended as a vehicle to address contractual disputes regarding stock ownership. Op. 23-24. This holding is apt because Plaintiffs have not alleged (nor can they) they have authority to act on AHMR's behalf.

Furthermore, Plaintiffs' desire to expand Section 168 into a vehicle for a plenary trial to resolve contractual disputes that may touch upon stock ownership runs counter to this Court's holding in *Genger v. TR Investors, LLC*, 26

A.3d 180 (Del. 2011). A0497-98. There, this Court found the Court of Chancery may only adjudicate litigants' property interest in disputed stock in a plenary proceeding before a court that has personal jurisdiction over ***all*** claimants to the stock. *Id.* at 201-02. The owner of Allomet's stock, Fobio, is not named here.

Lastly, because "this is a dispute grounded in contract, not the DGCL," Section 115 has no application; particularly here where Plaintiffs are not stockholders of a Delaware corporation and did not agree to the R&L Agreement in that capacity. Op. 24.

Regardless, the Court below properly held Section 115 only limits forum selection clauses in a corporation's charter or bylaws and does not reach other contracts between a corporation and its constituents. *Id.* Indeed, Section 115 was enacted in the wake of public debate on curtailing stockholder litigation to one forum through forum provisions in charters and bylaws. But extending Section 115 through judicial fiat to all private agreements among stockholders and their corporations would make no sense. The contract-of-adhesion-concerns animating Section 115's enactment do not exist when parties privately order their affairs via contract.

II. Denied. The Court below properly held the forum provision in the R&L Agreement was mandatory under applicable law. *See* Op. 18; A0170

§ 25(1) ("[J]urisdiction shall be exclusive unless the parties have agreed otherwise."). Plaintiffs' attempt to cast doubt on that holding by citing a separate forum provision in the ***non-binding*** SPA is both procedurally improper and factually wrong. As the Court below found, Plaintiffs' new-fangled argument was not fairly raised in the briefs or at oral argument. The afterthought nature of the argument is clear as the Court below noted that it was inconsistent with Plaintiffs' Section 168 claim. Rearg. Op. 6 n.15. Having not fairly raised the issue below the argument is waived. *Id.* 6-7, n.15; A0735-36 (admitting Plaintiffs' argument with respect to the SPA's forum provision as evidence of relevant, contrary intent under the Austrian Civil Code "didn't come through clearly in the briefs").

Regardless, Plaintiffs' Complaint makes clear the SPA was (1) drafted eight months after the R&L Agreement was signed; (2) not intended to be binding; and (3) is solely between AHMR (who is not a party to the R&L Agreement) and Fobio (who has not been named in this lawsuit). That Fobio and AHMR considered in a draft agreement that arbitration might someday be used to resolve disputes that may someday arise after a venture was consummated does not undermine the unambiguous intent of the six parties who agreed to the R&L Agreement and designated Vienna, Austria as the mandatory forum. Again, as the

Court below found, "[t]here is no dispute to resolve under the SPA if the R&L Agreement's conditions precedent were not fulfilled (Count I)." Op. 16 n.71.

Finally, the Court of Chancery thoroughly considered and correctly found Defendants met their burden of establishing Austrian law. Op. 16 n.73. Defendants provided Plaintiffs with early notice that Austrian law would be raised and supplied the governing foreign law with their opening brief, which Plaintiffs had ample opportunity to rebut. B007 ¶ 17; B011 ¶ 25; A0139-41; A0159-91; A0479-90; A0512-672. Rule 44.1 does not require the Court to consider an expert's opinion in ruling on foreign law. Op. 16 n.73; A0749. And here, the Court expressly considered whether to require additional submissions on foreign law and concluded it not necessary. *Id.*; A0775-79. Plaintiffs' belated submission simply rehashed arguments the Court rejected, and it was untimely. The Court properly refused to consider it. A0836; Rearg. Op. 6 n.13.

STATEMENT OF FACTS

A. The Players Discuss a Venture.

Allomet is a Delaware corporation with a duly-constituted board of directors, officers and employees. A0020-21 ¶¶ 12-13. Defendant Yanchep is a Delaware LLC that leases real property to Allomet for its headquarters. A0019 ¶ 7; A0030 ¶ 45; A0071 § 4.7.

Non-party Fobio, a wholly-owned Hong Kong entity, is Allomet's majority stockholder. A0020 ¶ 11; A0029 ¶ 41. As of December 31, 2017, Fobio had loaned Allomet ***$42,525,475.25***. A0024 ¶ 29. Dr. Hannjörg Hereth ("Dr. Hereth") is Allomet's Chairman, and he controls Fobio. A0020 ¶ 10; A0021 ¶ 14.

In mid-2016, Dr. Hereth was advised by Tanja Hausfelder ("Hausfelder") that Plaintiff Herrling was looking for investment opportunities, and Hausfelder connected Dr. Hereth and Herrling. A0021 ¶ 17. Herrling owns Plaintiff Germaninvestments as a holding company for his family's assets. A0019 ¶¶ 4.

In October 2016, Herrling and Dr. Hereth contemplated forming an Austrian holding company to own (i) the intellectual property rights of Allomet, (ii) the outstanding stock and interests in Allomet and Yanchep, respectively, and (iii) all property held by Yanchep. A0022 ¶¶ 18-20. They considered assigning Fobio's debt-claims against Allomet to the venture. *Id.* ¶ 20; A0054 ¶ 4.

Before the execution of any agreement, in 2017, Herrling loaned Allomet $500,000 on January 31, $150,000 on March 3, and $200,000 on May 10. A0022-23 ¶ 21.

B. The R&L Agreement.

On May 29, 2017, a Restructuring and Loan Agreement between Herrling, Dr. Hereth, Dr. Hereth's wife, Allomet, Fobio, and Yanchep was exchanged. A0023 ¶ 22; *see* A0053. The R&L Agreement stated, "***unless the parties decide otherwise***, an Austrian holding company is to be established in which [specified] assets of Allomet and Yanchep shall be incorporated[.]" A0054 ¶ 4 (emphasis added).

The R&L Agreement (1) memorialized the terms of the small loans Herrling had provided to Allomet (and an additional $100,000 loan to be contributed at an "unknown" date), totaling $950,000; and (2) outlined a framework for continued discussions regarding a venture, including that Herrling must pay EUR 10 million plus USD $250,000 to become a partner and Dr. Hereth must first receive USD $30 million of distributable profits of Allomet. A0054-55 ¶ 4.

The R&L Agreement expressly acknowledged its non-binding and contingent nature with respect to consummation of the venture by providing, "[i]f

the aforementioned steps have not been implemented by 31/07/2017, the loan shall become due for repayment immediately or the one-time [six month] extension may be agreed mutually between HH and RH." A0055 ¶ 4.

Most importantly, the R&L Agreement subjects all disputes to litigation in Vienna, Austria, to be decided under Austrian law: "The agreement is subject to Austrian law. The place of jurisdiction is Vienna." A0056 ¶ 9.

C. The Formation of AHMR

The Austrian company contemplated was formed on July 3, 2017, as AHMR. A0025 ¶ 31. The AHMR stockholders are Dr. Hereth (owning 49%), Germaninvestments (owning 49%), Biedermann (owning 1%), and Hausfelder (owning 1%). A0025-26 ¶ 34.

AHMR is managed by two groups. A0026 ¶ 35. Group A is Dr. Hereth, his son-in-law (Biedermann), and his wife Mirta Hereth (by proxy). *Id.* Group B is Herrling, his wife Anja Herrling (by proxy), and Hausfelder. *Id.*

Plaintiffs concede any action taken by AHMR must be agreed upon by a member of Group A and a member of Group B in accordance with AHMR's governance documents and Austrian law. *Id.* Plaintiffs also concede no agreement was reached between Group A and Group B to bring this action "on behalf of

AHMR[,]" despite their repeated references to AHMR as a nominal plaintiff. A0039 ¶ 82; A0146-50; A0716.

D. Herrling Ultimately "Walks" from Venture.

From May 2017 to January 2018, the parties continued discussions regarding a potential joint venture, but disagreement was mounting as to the tax implications and verification of Herrling's net worth.[3] A0033 ¶ 61. Herrling ultimately loaned Allomet a total of $3,665,000 (A0026 ¶ 36) and alleges he unilaterally "book[ed]" those loans as if made under "the terms of the [R&L] Agreement." A0027 ¶ 37. Yet, the R&L Agreement only references $950,000 of loans, and the parties never executed an agreement with respect to additional loans. A0054 ¶ 1; A0023-24 ¶¶ 24-26; A0092 ¶ 4.

The parties needed tax advice. A0033 ¶ 61. To that end, the AHMR shareholders executed the Supplementary Agreement on January 29, 2018. *Id.*; A0090-92. As set forth therein, the parties engaged advisors and prepared a series of non-binding documents outlining the contemplated transaction structure. A0032-33 ¶ 60; A0059-67; A0069-76; A0078-83; A0086-88.

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[3] Tax implications for the potential venture were so central that Plaintiffs remarkably reserved the right to reject its own prayer for relief if implementation of a joint venture would result in negative tax implications. A0043 § C, n. 4.

The Supplementary Agreement specifically listed the contracts that represented "the entire transaction structure" for the purpose of obtaining advice. A0033 ¶ 61; A0090. Included in the potential transaction structure was the SPA signed by Dr. Hereth (on behalf of Fobio) and the Interest Purchase Agreement ("IPA") signed by Mirta Hereth (on behalf of Yanchep). A0090; A0059-67; A0069-76. Both agreements purported to transfer the assets of Allomet and Yanchep, respectively, to AHMR. A0059-67; A0069-76. Both agreements also contained identical Delaware dispute resolution provisions. A0062 § 8.2; A0072 § 8.2.

Yet, the Supplementary Agreement made clear "[t]he existing transaction structure serve[d] as the basis for the ongoing [tax] investigations by [the advisors]" so that they could "answer all the outstanding issues" and make amendments to the structure as necessary, "especially with regard to the hedging of adverse tax effects." A0090-91 ¶ 1.

The Supplementary Agreement expressly acknowledged the listed contracts—including the SPA—were not "legally signed," and were not yet "legally binding." A0092 ¶ 4. The Supplementary Agreement suspended the parties' funding obligations and expressly acknowledged other key terms of the venture were still undecided. For example, "a Loan Agreement between

Germaninvestments AG and the Allomet Corporation" and "a further Supplementary Agreement" were to be agreed to by the AHMR shareholders. *Id*. ¶¶ 3, 4. Plaintiffs concede the Supplementary Agreement is express evidence that the venture had not been consummated. *See* A0043 n.4.

By mid-April 2018, the parties had reached an impasse in negotiations. A0036 ¶ 71. By May 30, the parties ceased discussions. A0100. Then, as Plaintiffs allege, Herrling offered to "walk away from the [R&L] Agreement with Dr. Hereth[.]" A0037 ¶ 75.

E. Plaintiffs Engineer a Claim in Delaware.[4]

On September 7, 2018, Plaintiffs filed their Complaint containing three counts based on the R&L Agreement: Count I, invoking 8 *Del. C.* § 168 to compel Allomet to reissue its stock certificates in AHMR's name (A0038-40 ¶¶ 80-85); Count II, seeking specific performance of the R&L Agreement's purported terms to reissue Allomet's stock certificates and convey Allomet's and Yanchep's assets to AHMR (A0040-41 ¶¶ 87-95); and Count III, alleging unjust enrichment as a result of Defendants' failure to transfer title to AHMR in contravention of the R&L Agreement (A0042 ¶¶ 97-102).

[4] To avoid burdening the Court, the entire procedural history is of this action is not recounted here.

F. The Court Grants Defendants' Motion to Dismiss.

Defendants filed their motion to dismiss on December 10, 2018, and briefing was completed on February 8, 2019. A0113-269; A0003. Argument was heard on the motion to dismiss on March 5, 2019. A0003; A0683-780. On May 23, 2019, the Court issued its Opinion, granting Defendants' motion to dismiss in all respects. Op. 28; A0002.

G. Plaintiffs Move for Reargument and Proffer an Untimely Affidavit on Foreign Law.

Plaintiffs unsuccessfully moved for reargument on May 31, 2019, by rehashing arguments already presented. A0782-94. Plaintiffs also proffered—quite belatedly—an Austrian law expert affidavit. A0795-812.

The Court rejected the motion for reargument, as well as the late submission of new evidence, on June 27. Rearg. Op. 4-7. This appeal followed. A0845-46.

ARGUMENT

I. THE COURT BELOW PROPERLY DISMISSED PLAINTIFFS' BREACH OF CONTRACT CLAIM UNDER A FORUM SELECTION PROVISION AND PROPERLY REJECTED PLAINTIFFS' ATTEMPT TO AVOID THAT RESULT BY INVOKING SECTIONS 168 AND 115 OF THE DGCL.

A. Questions Presented.

1. Whether the Court of Chancery correctly dismissed Count I of the Complaint because the facts alleged and the incorporated documents demonstrated "[t]here is no dispute to resolve under the SPA if the R&L Agreement's conditions precedent were not fulfilled (Count I)," (Op. 16 n.71) and therefore "th[is] is a dispute grounded in contract, not the DGCL" (*id.* 24). *Preserved* A0139-41; A0144-45; A0490-93; A0494-95; A0500; A0839. By so holding, did the Court below correctly reject Plaintiffs' arguments under *Castro* when it concluded "Section 168(a) does not fit here" (Op. 23)? *Preserved* A0142-44; A0494-98. Finally, was it correct to honor the parties' contractually-chosen forum, recognizing parties are free to privately order their affairs and concluding the proscriptions on forum provisions found in Section 115 only apply to charters or bylaws? *Preserved* A0498-500; A0840-41. The answer to each question is yes.

B. Scope of Review.

The Court of Chancery's statutory construction is reviewed *de novo*. *CML V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011), *as corrected* (Sept. 6, 2011). Plaintiffs' general policy arguments are questions of law subject to plenary review. *Worldwide Ins. Grp. v. Klopp*, 603 A.2d 788, 790 (Del. 1992). The Court of Chancery's decision to grant a motion to dismiss is reviewed *de novo*. *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001).

C. Merits of the Argument.

Plaintiffs wrongly contend the Court of Chancery erred "when it determined that it could not adjudicate the ownership of a Delaware corporation." POB 19. That is not a fair account of the Court's holding. The Court recognized, as pled, Plaintiffs' Section 168 claim attempted to compel performance of "aspects" of the R&L Agreement. Op. 1. However, divorcing aspects of the R&L Agreement from the parties' broader dispute—whether all conditions precedent to formation of the venture had been met—is not possible.

Thus, the Court properly rejected Plaintiffs' invitation to ignore their Complaint and assume that certain aspects (but not others) of a non-finalized deal could nonetheless be enforced. Rather, the Court correctly held "[t]he construction and application of the R&L Agreement and related agreements will inform whether the contemplated joint venture was consummated and, if so, what rights the parties

possess under the operative agreements." *Id.* 25. And because the parties' foundational dispute arose under the R&L Agreement, it was proper to give effect to that contract's forum provision and dismiss the case. *Id.* 16 n.71.

Plaintiffs advance three claims of error. Each is without merit.

1. The Court of Chancery Properly Found Section 168 Inapplicable to This Dispute.

As the court below properly found, "Section 168 … is not and never was intended to address disputes regarding stock ownership, the resolution of which would require the issuance of new stock, not replacement stock." *Id.* 23. In so holding, the Court below relied on Section 168's requirement (made clear by the statute's language and case law) that a claimant be able to assert she was the registered or beneficial owner of the shares ***prior to*** the shares becoming lost, stolen or destroyed. *See In re Metro. Royalty Corp.*, 62 A.2d 857, 858 (Del. Super. Ct. 1948) (explaining under Section 168, "[t]he burden is upon the petitioner to establish with reasonable certainty that the certificates were owned by him and that they had become lost or destroyed."); *Ohrstrom v. Harris Trust Co. of New York*, 1998 WL 13859 (Del. Ch. Jan. 9, 1998).

Plaintiffs try to plead around Section 168's requirement by alleging they attached the non-binding SPA to the Complaint and the shares are "***effectively***" lost stolen or destroyed. POB 23 (emphasis added). But the

Complaint clearly alleges the disputed shares are not lost; they are sitting in an identifiable lockbox with the record owners' name still on them (*i.e.* non-party Fobio). A0368-419; A0035 ¶ 69. And when Plaintiffs say "effectively[ ] lost," they are really saying they want the Court to ignore the SPA's non-binding nature and the parties' dispute under the R&L Agreement:

> THE COURT: Are you saying that if we stripped away all of the rest of the claims that you raised in the complaint and we just focused in on Count I, that the answer -- we withdraw this motion to dismiss, the answer would be filed that admits that your client owns the stock, and the only issue we would be joined on is whether or not the company should be compelled to issue certificates, either release them from the vault or issue new certificates, that that's where we would be?
>
> MR. MARTIN: Precisely. And the only --

A0728-29. This cannot be done.

Section 168 is a narrow "show-cause" proceeding. It is not intended as a vehicle for a plenary trial to resolve contractual disputes with respect to stock ownership, which—if successful—would not result in an order to ***replace*** certificates. It would divest one party of its stock and require the issuance of ***new*** certificates to a different party, contrary to this Court's holding in *Genger v. TR Investors, LLC*, 26 A.3d 180, 201-02 (Del. 2011) (holding that a litigants' property

interest in disputed stock cannot be resolved in an *in rem*[5] proceeding but only in a plenary proceeding before a court that has personal jurisdiction over all claimants). Such a result would be particularly unfair here where neither of the relevant parties (AHMR and Fobio) are properly before the Court.

Plaintiffs nonetheless argue *Castro* vindicates their Section 168 claim, and the Court below erred in not considering it. But the Court did not ignore the *Castro* decision; it simply rejected Plaintiffs' interpretation of it:

> THE COURT: [T]he *Castro* case was a case where there were ***undisputed members of an entity*** that was being held hostage by the Cuban government. And the Court, invoking equity, said it's dissolved. There was no dispute then what was going to happen as a result of that dissolution. The members' ownership in the entity, not disputed. Right? Here, what your friends on the other side are saying is "No, no. They are not 50 percent owners here. They have no equity interest in this."

A730-31 (emphasis added); *see also Castro*, 598 A.2d at 675-76.

Nothing in *Castro* supports Plaintiffs' contention that Section 168 can be stretched to fit here. *Castro* concerned a dispute regarding stock in ITT Corporation held by a Cuban partnership. Unlike here, at all times the Cuban partnership was the undisputed record owner of the stock. *Castro,* 598 A.2d at 675. But following the communist revolution in Cuba, the Cuban government

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[5] *Castro*, 598 A.2d at 683 (noting Section 168 is an *in rem* action).

seized all physical assets of the Cuban partnership. *Id*. After the United States Treasury Department issued a license to unblock the partnership's assets and distribute them to the partnership's general and limited partners, those partners brought an action under Section 168 to compel the issuance of ITT stock in their names. *Id*. at 676. In so doing, the partners did not seek to litigate a dispute as to who the owner of the ITT shares was. Rather, the partners urged the Court to treat the partnership as dissolved by reason of the Cuban government's seizure and deem the assets of the partnership held in stock (*i.e.*, the ITT stock) as having devolved upon them by operation of law. *Id*. There were no competing claimants to the ITT stock.

The Court accepted this argument and listed commonly occurring situations in which "a person other than the registered owner will, upon appropriate proof, be recognized as the owner of lost certificates," including "death, dissolution, [and] merger of the registered owner or transfer by it."[6] *Id*. at 678. Notably absent from the Court's analysis was the effect of a bilaterally negotiated stock purchase agreement. The reason is the Court was not determining a

[6] The Court's reference to "transfer" related to an undisputed transfer pursuant to a Court-ordered sale. *See Castro*, 598 A.2d at 678 (citing *Bartlett v. General Motors Corp.*, 127 A.2d 470 (Del. Ch. 1956) (following entry of divorce decree, corporation was required to cancel stock and issue new certificate in different name following the execution sale)).

contractual dispute as to who the registered owner was in the first instance (like Plaintiffs implore here) but was instead determining whether the Cuban government's seizure of the partnership's assets in Cuba should be deemed a dissolution of the partnership such that the ITT shares would devolve on the partners ***by operation of law*** and replacement certificates would be appropriate.

This dispute does not remotely touch on the facts or rationale underlying *Castro*. Plaintiffs do not claim the Allomet shares have devolved upon them by operation of law; they claim non-party Fobio is under a contractual obligation to transfer its shares to AHMR. The Court below was correct: "Section 168(a) does not fit here."[7] Op. 23.

2. The Court of Chancery Properly Found The Forum Selection Provision Does Not Violate Section 115.

a. No Internal Affairs Claim Exists.

Plaintiffs next contend Section 115 should prohibit "the corporation itself" from waiving "rights in a contract that it is prohibited from waiving by

[7] In addition, in 2016, 8 *Del. C.* § 111 ("Section 111") was amended to vest the Court of Chancery with jurisdiction to enforce an agreement pursuant to which one or more stockholders agrees to sell shares of stock, provided the corporation (the issuer of the stock) is a party to such agreement. *See* 8 *Del. C.* § 111(a)(2). Had Section 168 already been intended to resolve a bilateral contractual dispute regarding the transfer of shares, Section 111's amendment would have been superfluous.

statute in its charter or bylaws." POB 24. According to Plaintiffs, because Allomet is a party to the R&L Agreement, the forum selection provision is prohibited under Section 115. Plaintiffs' argument is without merit.

Section 115 is not implicated here, as the statute provides:

> ***The certificate of incorporation or the bylaws*** may require, consistent with applicable jurisdictional requirements, that **any or all internal corporate claims** shall be brought solely and exclusively in any or all of the courts in this State, and no provision of ***the certificate of incorporation or the bylaws*** may prohibit bringing such claims in the courts of this State.

8 *Del. C.* § 115 (emphasis added); *see* Op. 24.

This dispute does not concern an "internal corporate claim." POB 4. It concerns the repayment of a little over $3 million in loans and whether the conditions precedent for a venture were fulfilled under the R&L Agreement according to Austrian law. No shares could be transferred if no venture was formed. And, if that transfer is someday determined to be required under Austrian law, and the shares are not then transferred, the aggrieved party can pursue whatever purported rights it allegedly holds.

Plaintiffs' stubborn insistence that the Court below should have ignored this reality is unfounded. "[T]h[is] dispute is grounded in contract, not the DGCL," and Section 115 has no application. Op. 24.

b. Plaintiffs' Argument is Foreclosed by the Text of Section 115 and the Legislature's Intended Scope.

Even if this Court determines the dispute concerns an internal corporate affair (and it does not), Section 115 only limits forum provisions in a corporation's charter or bylaws. Op. 24. This limitation was intentional. It prevents the deprivation of Delaware as a forum for litigating internal governance issues through a stockholder's mere act of purchasing shares, *i.e.* through adhesion. *See Sciabacucchi v. Salzberg*, 2018 WL 6719718, *14 (Del. Ch. Dec. 19, 2018); *see also Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 950-51 (Del. Ch. 2013).

Here, Allomet[8] did not unilaterally impose a forum selection provision in its governing documents on anyone, much less Plaintiffs (who are not even Allomet stockholders).[9] Instead, the R&L Agreement—which concerns a potential

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[8] If the Delaware legislature intended to exclude corporations from the corporate constituents permitted to execute "other writings" with such forum provisions, it knew how to do so. *See, e.g.*, 8 *Del. C.* § 203 (prohibiting a corporation from engaging in a business combination with an interested stockholder for a period of three years absent certain approvals); 8 *Del. C.* § 173 (prohibiting a corporation from paying dividends other than in accordance with the DGCL).

[9] Any argument that Herrling is not a party to the R&L Agreement because he did not sign the copy attached to the Complaint (A0056) is meritless. Plaintiffs brought this action seeking to enforce the R&L Agreement and

venture, not an internal affairs question—was negotiated between multiple parties and entered into voluntarily. As the Court below correctly held, Section 115 "does not reach other contracts between the corporation's constituents[,]" and "[s]tockholders can expressly waive Delaware venue in a contract between stockholders and the corporation." Op. 24-25.

Realizing the plain language of Section 115 contradicts their position, Plaintiffs argue "Section 115 creates a mandatory right, which cannot be waived[.]" POB 26. Plaintiffs further argue "[l]imiting Section 115 to only the bylaw and charter also violates the hierarchy of governing documents of a corporation," (*id.* 27) and the charter and bylaws "should not be avoided by some lesser ancillary contract" (*id.* 26).

These arguments were correctly rejected by the Court below. And, though not disclosed in their briefing, Plaintiffs' counsel peddled a near identical argument in a separate dispute that was roundly rejected. *See Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 2019 WL 3814453 (Del. Ch. Aug. 14, 2019) (rejecting "mandatory" rights and hierarchy argument and enforcing a stockholders agreement that waived appraisal rights).

(. . . continued)

their purported rights thereunder, which they expressly allege over 50 times in the Complaint. *See* A0491 n.14 (listing relevant Complaint allegations).

This Court has long held that even "mandatory" rights can be waived:

> Clearly, our legal system permits one to waive even a constitutional right . . . ; and, [a] fortiori, one may waive a statutory right. This Court so held in Components, Inc. v. Western Electric Company, Del. Supr., 267 A.2d 579, 582 (1970), when Chief Justice Wolcott wrote that all rights "to which a person is legally entitled under a contract which are intended for his sole benefit, may be waived whether those rights are secured by contract or conferred by statute."

Baio v. Commercial Union Ins. Co., 410 A.2d 502, 508 (Del. 1979) (citation omitted). Thus, there can be no bar to contracting away a Delaware forum in an ancillary agreement simply because some aspect of a dispute might someday concern the transfer of stock between one foreign national and another. *See Ashall Homes Ltd. v. ROK Entm't Grp. Inc.*, 992 A.2d 1239, 1241 (Del. Ch. 2010) (enforcing English forum selection clauses in investment agreements to adjudicate dispute over ownership of Delaware corporation); *see also Libeau v. Fox*, 880 A.2d 1049, 1056-58 (Del. Ch. 2005) (*quoting Kuck v. Cropper*, 1978 WL 22465, at *3 (Del. Ch. Dec. 5, 1978)) (noting the "right to partition has been called an 'absolute' one,'" but nevertheless concluding the contracting parties had waived that "absolute" right).[10]

[10] *Accord Huatuco v. Satellite Healthcare*, 2013 WL 6460898, at *1, *5-6 (Del. Ch. Dec. 9, 2013) (enforcing waiver of statutory dissolution rights), *aff'd*, 93 A.3d 654 (Del. 2014) (TABLE); *R&R Capital, LLC v. Buck & Doe*

Likewise, Plaintiffs' reliance on *Sinchaeronkul v. Fahnemann*, 2015 WL 292314 (Del. Ch. Jan. 22, 2015), is misplaced. *Fahnemann* only addresses the hierarchy among (i) the [DGCL], (ii) the certificate of incorporation, and (iii) the bylaws." *Id.* at *6. With respect to other writings, however, the General Assembly has already spoken:

> Although Section 115 does not directly address forum selection provisions located in shareholder agreements and other contracts, a synopsis included in the bill enacting Section 115 states the following . . . "***Section 115 is not intended, however, to prevent the application of any such provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.***"

Bonanno v. VTB Holdings, Inc., 2016 WL 614412, at *15 (Del. Ch. Feb. 8, 2016) (quoting Del. S.B. 75 syn., 148th Gen. Assem. (2015) (emphasis added)). Thus, as the synopsis makes clear, "Section 115 . . . does not purport to impose th[e] same restriction on forum selection provisions located outside [a Delaware

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(. . . continued)

Run Valley Farms, LLC, 2008 WL 3846318, at *3 (Del. Ch. Aug. 19, 2008) (permitting waiver of right to seek judicial dissolution and appointment of a liquidator); *Benchmark Capital Partners Vii, L.P v. Kalanick*, C.A. No. 2017-0575-SG , at 54 (Del. Ch. Aug. 31, 2017) (TRANSCRIPT) (Attached hereto as Exhibit A) (enforcing parties' agreement to send 225 claim to arbitration).

corporation's] two governing documents."[11] *Id.* Accordingly, Plaintiffs' argument that "Section 115 creates a mandatory right, which cannot be waived by a Delaware corporation" (POB 26) is contrary to the plain text of Section 115, the legislature's intent, and case law.

3. The Trial Court's Ruling Does Not Offend Public Policy.

In Plaintiffs' final attempt to avoid the Forum Clause, they march a parade of horribles. For instance, Plaintiffs contend the Court's decision "guts the effectiveness of Section 115" and leads to the "real potential for inconsistency and confusion with respect to the ownership and control of Delaware Corporations as well as an opportunity for abuse by Delaware corporations that can avoid its impact by side agreements with investors." POB 27-28. And, if the decision stands, Plaintiffs say parties will be "unable to avail [themselves] of any of the other protections of the DGCL . . . and instead would be forced to first undertake extensive litigation in a foreign jurisdiction before courts without a background in Delaware's corporate law[.]" *Id.* 28. This Court should remain unimpressed.

[11] Plaintiffs erroneously make reference to the Corporation Law Counsel's comments to the 2015 DGCL amendments, attributing those comments to the adoption of Section 115. POB 26. The comments referenced, however, were made with respect to mandatory fee shifting provisions—not Section 115.

First, Plaintiffs cite no Delaware corporate law interest implicated by the underlying dispute. *Id.* 4-5, 19-31. Although Plaintiffs invoke Sections 168 and 115, those provisions are relied upon solely to support Plaintiffs' arguments regarding the correct forum for this dispute. Plaintiffs concede the R&L Agreement and rights thereunder are governed by Austrian law. Op. 15.

Second, affirming the decision below is in accord with the policy of this State, not against it. As the Court below held, "th[is] is a dispute grounded in contract," (*id.* 24) and "Delaware is a freedom of contract state, with a policy of enforcing the voluntary agreements of sophisticated parties in commerce." *Pers. Decisions, Inc. v. Bus. Planning Sys., Inc.*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008), *aff'd,* 970 A.2d 256 (Del. 2009) (TABLE). Plaintiffs, who are both foreign nationals, voluntarily contracted with Delaware entities and other foreign nationals concerning loans and a potential venture through an Austrian entity to expand Allomet's business in Europe. A0053-57. Austria—as the chosen forum to resolve disputes among parties scattered around the globe—made perfect sense. *See Heartland Payment Sys., LLC v. Inteam Associates, LLC*, 171 A.3d 544, 557 (Del. 2017) (commending a contractual interpretation that looks at the transaction from a "distance" "giving sensible life to a real-world contract") (quoting *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 913-15

(Del. 2017)). If Plaintiffs did not want to litigate disputes arising under the R&L Agreement in Austria, they could have contracted otherwise.

In short, public policy implores giving effect to the parties' contractual choice. *Ashall*, 992 A.2d at 1245 (citation omitted) ("The courts of Delaware defer to forum selection clauses and routinely 'give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation.'").

II. THE TRIAL COURT PROPERLY FOUND THAT THE FORUM SELECTION CLAUSE IS EXCLUSIVE.

A. Questions Presented.

1. Was the Court below correct in applying Austrian law to a dispute arising under a contract that concerns the expansion of Allomet's business into Europe among multi-national parties' who selected Austrian law? *Preserved* A0139-41; A0479; A0488-90; A0834-36.

2. Was the Court below correct in rejecting Plaintiffs' attempt to recast their dispute as solely arising under a non-binding SPA and instead relying on Plaintiffs' allegations, which made reference to the R&L Agreement at least 50 times, to conclude "the construction and application of the R&L Agreement and related agreements will inform whether the contemplated joint venture was consummated and, if so, what rights the parties possess under the operative agreements" (POB 25)? *Preserved* A0135-37; A0139-41; A0490-93; A0839. Relatedly, was the Court correct in refusing to consider arguments regarding a non-binding SPA that were not fairly raised below and concluding "[t]here is no dispute to resolve under the SPA if the R&L Agreement's conditions precedent were not fulfilled (Count I)" (Op. 16 n.71)? *Preserved* A0135-37; A0139-41; A0490-93; A0839.

3. As the Court below stated, Plaintiffs' description of its work to resolve the question of foreign law is a "gross mischaracterization." Rearg. Op. 5 n.10. Was the Court below correct to hold Plaintiffs' attempt to submit an expert report 4 months after briefing closed and 3 months after argument would not be countenanced, particularly when the belated submission retread arguments that had already been rejected? *Preserved* A0836.

4. Was the Court below correct in rejecting Plaintiffs' attempt to convince it Article 25 of the Brussels Regulation (the "BR") does not "mean what it says" (Op. 20)? *Preserved* A0479-88; A0836-38.

The answer to each question is yes.

B. Scope of Review.

"In an appeal from the Court of Chancery's interpretation of a written agreement," like the R&L Agreement, this Court should review the trial court's "conclusions of law *de novo*." *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999). The Court of Chancery's ruling as to Austrian law is "treated as a ruling on a question of law" and is subject to *de novo* review. Del. Ct. Ch. R. 44.1; *see also Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010) ("A judge's ruling on foreign law is a question of law we review *de novo*.").

C. Merits of the Argument.

1. Austria Has a Material Relationship to the R&L Agreement.

Plaintiffs argue the Court below erred by applying Austrian law—instead of Delaware law—to the forum provision because Austria does not bear a material relationship to the transaction. POB 35-37. Plaintiffs' argument suffers from the same fallacy that infects their Sections 168 and 115 arguments—*i.e.*, they recast their claims as solely concerning alleged rights under a non-binding SPA between parties who are not before this Court. In doing so, Plaintiffs hope this Court ignores that the purpose of the R&L Agreement was to conduct business in Europe through an ***Austrian*** entity. The Court below correctly rejected Plaintiffs' fallacy, and this Court should too.

Plaintiffs incorrectly assert the *Deuley* material relationship test is conjunctive and argue AHMR's "state of formation" is not sufficient to constitute a "material relationship." POB 36. However, the *Deuley* test is disjunctive:

> Despite Plaintiffs assertion that all three factors must be met to determine a material relationship with the selected forum, it is clear to the Court from the case law cited by the Court in *Deuley v. DynCorp*. that satisfaction of just one of these factors is sufficient to establish a material relationship.

Reads, LLC v. WBCMT 2006-C29 NC Office LLC, 2015 WL 13698545, at *3 n.15 (Del. Super. Feb. 3, 2015). Thus, under Delaware law, a material relationship

exists "where a party's principal place of business is located within the foreign jurisdiction" or solely if "a majority of the activity underlying the action occurred within the foreign jurisdiction." *Deuley*, 8 A.3d at 1161; *Reads*, 2015 WL 13698545, at *3 n.15.

Plaintiffs nonetheless contend "a plaintiff's state of formation alone is not sufficient to constitute a 'material relationship.'" POB 36 (citing *Matter of Anta Corp.*, 1987 WL 7956, at *3 (Del. Ch. Mar. 16, 1987)). But in *Anta*, no forum selection clause was even at issue. *Id.* The court was deciding where to allow two already-filed actions to proceed under *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970). *Id.* at *2. The *Anta* court's finding that a plaintiff's state of formation alone is not determinative of ***the McWane analysis*** does not affect the material relationship test under *Deuley*.

The Court below was correct in its application of the material relationship test. Op. 16. It properly recognized "[t]he gravamen of the complaint is that certain parties to this litigation contemplated the formation of a joint venture and that, in the midst of their negotiations, Plaintiffs caused loans to be extended to one of the Defendants under the R&L Agreement that remain unpaid and outstanding." *Id.* 1. The Court carefully considered the allegations of the complaint and determined "[e]ach count for relief relates directly to the R&L

Agreement." *Id.* 16 n.71. Based on the allegations in the Complaint, the Court correctly determined the parties' transaction bears a material relationship to Austria. Indeed, the Complaint made clear the R&L Agreement and the conduct alleged in the Complaint all stem from the parties' discussion regarding the formation of an Austrian company and expanding Allomet's business into Europe. A0022 ¶ 19.[12]

2. Plaintiffs' New-Fangled Arguments Concerning the Non-Binding SPA Were Not Fairly Raised Below and are Wrong.

Again, Plaintiffs want this Court to ignore their own Complaint so they can argue the Court below should have considered the non-binding SPA's arbitration provision as evidence that the parties to the R&L Agreement did not intend the forum provision in that agreement to be exclusive. POB 32, 37, 43. That argument was not fairly raised below. Indeed, as the Court of Chancery observed, "Plaintiffs' apparent rediscovery of the SPA's arbitration clause (***not invoked before now***) is puzzling given that one of their showcase arguments in opposition to the motion to dismiss was that the Court should sidestep the SPA by applying [Section 168]." Reorg. Op. 6-7 nn. 14-15 (emphasis added).

[12] Because Austrian law applies, Delaware law with respect to interpretation of mandatory forum selection provisions is irrelevant. POB 37-38.

Relying on a single cite to the transcript of the argument, Plaintiffs' claim the argument was preserved. A0334-42. But Plaintiffs themselves have acknowledged their new argument "didn't come through clearly in the briefs." A0735. And "[i]t is settled Delaware law that a party waives an argument by not including it in its brief." *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003).

Regardless, the non-binding SPA is solely among Fobio and AHMR (which did not exist at the time the R&L Agreement was entered into[13]) and was drafted months after the R&L Agreement became effective. The subject matter of the SPA is narrow and only relevant if there is in fact a consummated venture. That AHMR and Fobio may have ultimately agreed on Delaware arbitration to resolve any future dispute as solely among them concerning a narrow subject

[13] Because AHMR did not exist at the time of the R&L Agreement, it had no intent for the R&L Agreement. Moreover, Plaintiffs argue that because Defendants have disputed whether the R&L Agreement is enforceable, the SPA's forum selection provision must be operative. POB 36. This makes no sense. If the R&L Agreement is unenforceable, then the SPA is a nullity. In all events, under the BR, the validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid. A0170 § 25(5). This rule is familiar in Delaware as well. *Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 380 (Del. 2013) (holding under Delaware law that "a party cannot escape a valid forum selection clause . . . by arguing that the *underlying contract* was invalid for a reason unrelated to the forum selection . . . clause itself[.]").

matter does not undermine the intent of the six parties to the R&L Agreement for their foundational disputes concerning the formation of the venture to be resolved in Austria under the R&L Agreement. Indeed, if Plaintiffs truly believed the argument they now make, they would have at least tried to comply with the SPA's dispute resolution provisions prior to filing suit. They did not.

The Court below observed the Supplementary Agreement's express language demonstrated the SPA was not a standalone contract and was among multiple draft agreements being contemplated by the parties that were never legally signed and are not legally binding. A0092; Op. 11, 16 n.71. Thus, the Court below correctly held "this action ***is undeniably*** about Plaintiffs' claims to enforce the Austrian law-governed R&L Agreement" and "[t]here is no dispute to resolve under the SPA if the R&L Agreement's conditions precedent were not fulfilled." Op. 16 n.71. Thus, even if this Court considers Plaintiffs' untimely argument, nothing in the non-binding SPA undermines the Court's conclusion.

3. The Court of Chancery Did Not Improperly Shift the Burden to Establish Foreign Law; It Simply Rejected Plaintiffs' Arguments, Which, Despite Being Thoroughly Developed, Were Wrong.

Plaintiffs incorrectly contend Defendants did not meet their burden of establishing Austrian law and the Court erred in ruling on the substantive foreign law without an expert opinion. POB 39-41. These arguments should be rejected.

First, Defendants clearly satisfied their burden. Rule 44.1 only requires "[a] party who intends to raise an issue concerning the law of a foreign country [to] give notice in his pleadings or other reasonable written notice." Defendants' first written submission to the Court (their motion to stay discovery) stated, "the underlying dispute involves a contract containing a forum selection clause for a foreign jurisdiction," and "the Motion to Dismiss will present strong jurisdictional and legal challenges to the Complaint[, including that] . . . [t]he R&L Agreement contains a Vienna forum selection clause and an Austrian choice of law provision." B004-05 ¶ 9; B011 ¶ 25. Defendants followed through and, as set forth in their opening brief, made clear the plain language of the BR governs the analysis of the forum provision in the R&L Agreement. A0139-41. Defendants provided Plaintiffs with a copy of the relevant statute and demonstrated that an Austrian Court is bound by the BR. A0160-91; A0479; A0482-83.

In response, Plaintiffs associated with a law firm located in Austria (A0341) and made numerous arguments not limited to Article 25 of the BR, citing Austrian local law, the Hague Convention and the Lugano Convention. A0334; A0342-44; A0344 n.13; A0345-49. Given the breadth of Plaintiffs' response, of course Defendants had to rebut those arguments. But it is the very breadth of Plaintiffs' response that demonstrates they were very much on notice that a determination on foreign law would be made.

Plaintiffs' statement they "were not given a chance to rebut with any affidavit or expert" is false. POB 41. Plaintiffs are represented by an international law firm with offices located in Vienna, Austria. A0477. They also associated with a separate Austrian law firm in connection with compiling materials for their answering brief and their belated expert affidavit was prepared in eight days. A0002; A0341 n.12. There is simply no credible basis to argue such a report could not have been prepared in a timely fashion and submitted in connection with their answering brief.

Plaintiffs nonetheless argue that because the Court can loosen rules of admissibility under Rule 44.1, the Court was bound to accept Plaintiffs' untimely submission. POB 3, 5-6. Simply because evidence need not be admissible to be considered under Rule 44.1 does not give Plaintiffs license to make untimely

submissions, and they cite no authority otherwise. The Court properly refused to consider Plaintiffs' untimely affidavit.[14] Rearg. Op. 6 n.13. "[R]eargument under Court of Chancery Rule 59(f) is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion." *inTEAM Associates., LLC v. Heartland Payment Sys., Inc.*, 2016 WL 6819734, at *1 (Del. Ch. Nov. 18, 2016) (internal quotations omitted).

Second, the Court of Chancery did not err by finding Defendants adequately established the substance of the foreign law without an expert opinion. The court below is best positioned to decide what it needed to resolve the issue,

[14] It would work manifest prejudice to consider Plaintiffs' untimely expert submission at this stage of the proceedings, but even if the Court did, the submission can be rejected for at least three reasons. First, the submission is internally inconsistent, inferring at times that the BR has universal application (*i.e.* Article 24 bars this Court from finding jurisdiction lies in Austria) (A0807-08), while inferring at other times that the BR applies only to Member States (*i.e.* this Court cannot enforce the parties' contract because Article 25 does not apply outside of the EU) (A0809-11). Second, relying on Article 24 of the BR, the submission contends that the case should proceed in Delaware because Defendants are incorporated here. A0806. But the plain text of Article 24 makes clear that it is addressed to internal affairs disputes or actions *in rem* that arise under a Member State's local laws (*i.e.* companies incorporated under a Member State's law or real property located in a Member State). A0485-86. Neither is implicated here. Finally, the submission assumes an Austrian court would resist answering questions concerning Delaware internal affairs question. But that concern is not real as "th[is] dispute is grounded in contract, not the DGCL." Op. 24; A0834-35.

and it properly determined it had enough information to rule in accordance with Rule 44.1. *See* Rearg. Op. 5 n.10 ("[The Court] considered 'extensive foreign authority and affidavits [submitted by the parties] interpreting that authority.'"). Indeed, the record demonstrates the Court below was deliberate in its choice not to accept additional evidence:

> The last thing we'd have to wrestle with is, looking at the materials that have been supplied, is the law of Austria clear, in my mind, one way or the other, or are there questions or nuances? ***If I decide that there are***, then there are two approaches that can be taken [with respect to obtaining additional expert opinions].

A0775. Then, having taken the matter under advisement and considering the extensive record, the Court below determined:

> Here, the parties have provided extensive foreign authority and affidavits interpreting that authority. While the Court could convene a hearing to take testimony regarding the parties' competing views of the governing foreign law, there is no need to put the parties or the Court through that added burden because the law, in my view, is clear.

Op. 16 n.73.

The Court of Chancery committed no error by not requiring additional submissions, and its ruling should be upheld. Plaintiffs have not (and cannot) cite to any authority holding that a court ***must*** consider an expert opinion in

determining foreign law,[15] and Rule 44.1 does not ***require*** it. Del. Ch. Ct. R. 44.1. ("The Court, in determining foreign law, ***may*** consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43.").

4. The Trial Court Did Not Err in Its Application of Austrian Law.

Plaintiffs last two pages of their opening brief are devoted to yet another "gross mischaracterization" of the Court of Chancery's opinion. Rearg. Op. 5 n.10. The Court's decision below was not limited to a "single law review article and a law firm's advocacy piece." A0160-91; A0518-69; A0571-74; A0616-22. On the contrary, the Opinion demonstrates a thoroughly developed record on which the Court rendered its decision. There is no dispute that Article 25 of the BR provides:

> If the parties, **regardless of their domicile**, ***have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal***

[15] *See Pallano v. AES Corp.*, 2012 WL 1664228, *1 n.2 (Del. Super. May 11, 2012) (noting the court "felt it necessary to appoint its own Dominican Law expert"); *Parlin v. Dyncorp Intern., Inc.*, 2009 WL 3636756, at *2 (Del. Super. Sept. 30, 2009) ("Under Rule 44.1, the court ***may*** consider any relevant material, which ***here*** includes the various legal experts' submissions." (emphasis added)); *Kostolany v. Davis*, 1995 WL 662683, at *2 (Del. Ch. Nov. 7, 1995) (finding that the "issues of foreign law [were] adequately developed by affidavit and argument").

> ***relationship, that court or those courts shall have jurisdiction***, unless the agreement is null and void as to its substantive validity under the law of that Member State. ***Such jurisdiction shall be exclusive*** unless the parties have agreed otherwise.

Op. 17-19 (emphasis added). Moreover, there is no dispute that as long as the "agreement conferring jurisdiction . . . [is] in writing or evidenced in writing[,]" it is valid and enforceable. *Id.* 18. Based on the plain language of Article 25 and the record the parties submitted below, the Court of Chancery properly concluded: (1) parties can include a forum provision in their commercial agreement; (2) under the BR, a forum provision is mandatory unless the parties' expressly agree otherwise (reversing the presumption understood in Delaware); (3) Austria is bound by the BR and the BR supplants Austrian national law on the subject; (4) Austrian courts do in fact apply Article 25, thus demonstrating that Austria honors the BR; (5) the default provisions in the BR that internally regulate jurisdictional disputes among Member states do not trump the parties' ability to contractually select forum under Article 25;[16] and (6) Article 25 applies regardless of where the parties are domiciled, even if all parties are outside the EU. Plaintiffs have in this regard also failed to provide any substantial evidence that a literal reading of the provision is not correct or that any (Austrian) court has ever

[16] A phenomenon known in the EU as "Torpedo Suits."

deviated from the literal understanding of the BR, and consequently that the Court erred in its analysis.

Despite the Court's clear analysis, Plaintiffs argue the Court erred because the BR "does not apply to courts in the United States." POB 42. Plaintiffs made a similar argument below, and it was properly rejected. The record demonstrates that Article 25 can be contractually invoked "regardless of [the parties'] domicile." Op. 20. And the question of enforcement is not whether Delaware is bound by the BR, but whether the Court should honor the parties' contractual choices. Clearly it should as enforcement of the clause is a matter of contract, not comity.[17] *Id.* 18 n.77 (quoting *Nat'l Indus.*, 67 A.3d at 381) ("The enforcement of an international forum selection clause is not an issue of comity. It is a matter of contract enforcement and giving effect to substantive rights that the parties have agreed upon.").

Plaintiffs' final argument is "[w]hen the Brussels Regulation is not applicable, the jurisdiction of the courts in Austria is governed by the domestic law of Austria this case the Jurisdictional Act." POB 43. This argument, however, demonstrates Plaintiffs concede the primacy of the BR over the Austrian

[17] This is precisely why Plaintiffs' reference to the Hague Convention (A0344 n.13) is irrelevant.

Jurisdictional Act. A0479; A0486-88; Op. 17. And Plaintiffs' basis for ignoring that primacy has no merit for the reason set forth above—*i.e.* (1) Article 25 applies "regardless of domicile" and (2) Plaintiffs' reference to the non-binding SPA is wrong (for the reasons set for above) and thus irrelevant. As the trial court correctly found, the provision in the R&L Agreement is exclusive and binding. Op. 19-22.

CONCLUSION

Defendants respectfully request the Court affirm the Court of Chancery's order granting its motion to dismiss and vacating the status quo order in all respects.

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September 23, 2019

CERTIFICATE OF SERVICE

I hereby certify this 23rd day of September, 2019, that I caused to be served a copy of Appellees' Answering Brief upon the following in the manner indicated:

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