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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHC INVESTMENTS, LLC, Plaintiff-Below, Appellant, v. FIRSTSUN CAPITAL BANCORP, WILLIAM D. SANDERS, WILLIAM P. SANDERS, Respondents-Below, Appellees,	)	Case No. 146, 2020 Court Below: Court of Chancery of the State of Delaware; C.A. No. 2018-0353-KSJM **PUBLIC VERSION** **Filed July 17, 2020**

APPELLEES' ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

The Court of Chancery held that both of Plaintiff/Appellant's fraud claims against Defendants/Appellees, one for "willful and knowing fraud," and the other for a violation of Texas Business & Commercial Code § 27.01, are time-barred because Delaware's statute of limitations applies, and Plaintiff failed to timely bring its claims.[1] The Court below granted Defendants' motion to dismiss.

This case is neither complicated nor difficult. CHC's claims arise out of events that allegedly took place in Texas. There is no dispute that the plain text of Delaware's borrowing statute provides that those claims were subject to whichever state's (Texas's or Delaware's) statute of limitations is shorter. There is similarly no dispute that Delaware's three-year limitations period is shorter than Texas's four-year period. CHC waited more than three years before initiating its lawsuit; thus, its claims were properly dismissed because the claims were not brought before the expiration of the limitations period. That is exactly what the Court of Chancery held, and its decision should be affirmed.

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[1] The Memorandum Opinion of the Court of Chancery dated March 23, 2020, granting Defendants' motion to dismiss, is cited herein as "Op. __." CHC's Opening Brief is cited herein as "OB __." The Appendix filed by CHC is cited herein as "A__." The Appendix in Support of Appellees' Answering Brief, filed herewith, is cited herein as "B__."

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that Delaware's borrowing statute requires application of Delaware's statute of limitations to CHC's common law fraud claim. In its decision below, the Court of Chancery correctly followed this Court's precedent in *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1 (Del. 2005), which held that the borrowing statute mandates application of the shorter limitations period unless "borrowing" the shorter period would result in an unfair, unjust, or absurd result. Because no such circumstances are present here, the Court of Chancery properly held that the *Saudi Basic* exception to the borrowing statute does not apply.

2. Denied. The Court of Chancery correctly held that, like its common law fraud claim, CHC's claim for statutory fraud under Texas Business & Commercial Code § 27.01 ("§ 27.01") is subject to Delaware's borrowing statute. The court further (and correctly) held that Delaware's three-year limitations period for fraud bars that claim, and that the exception to the borrowing statute articulated in *Pack v. Beech Aircraft*, 132 A.2d 54 (Del. 1957), does not apply because § 27.01 does not have a "built-in" limitations period that could supersede the borrowing statute.

STATEMENT OF FACTS

A. CHC's Investments in SG Bancorp

CHC is a Delaware limited liability company owned by Christopher Cole. A30. Since at least April 5, 2013, CHC has been a minority shareholder of SG Bancorp and SG Bank, which merged into Defendant FirstSun in 2017.[2] A30-31.

In March 2014, SG Bancorp sought to raise $100 million through a sale of common shares (the "March Offering"). A36. To that end, Bill Sanders and Pablo Sanders met with Mr. Cole, provided a presentation to CHC (the "Management Presentation") regarding SG Bancorp's "Integrated Business Plan," A34-35, and solicited an additional investment by CHC in SG Bancorp, A34.

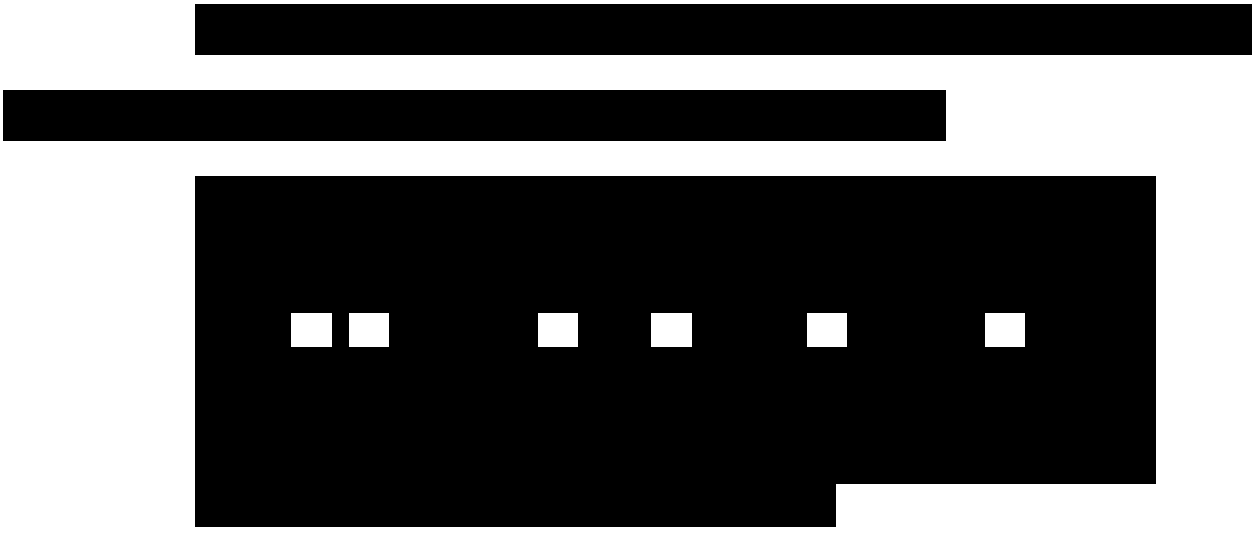
In connection with the March Offering, CHC and SG Bancorp entered into a subscription agreement pursuant to which CHC purchased 2,008,033 shares of SG Bancorp stock at the price of $12.45 per share for a total price of $25 million (the "Subscription Agreement"). A38. In the Subscription Agreement, CHC expressly disclaimed reliance on any representation outside of the Agreement itself in connection with its purchase of shares in the March Offering:

[2] The Second Amended Complaint names FirstSun Capital Bancorp as a defendant, as successor by merger to SG Bancorp and SG Bank. A30.

(g) 

B13 (the "Reliance Disclaimer") (emphasis added).

B. The December 2014 Exchange Offer and the May 2015 Audited Financials



A53-54 (the "November 14 Letter").

Subsequently, in December 2014, [redacted] CHC chose not to participate in the December Exchange Offer. A58.

C. CHC Released Its Claims in July 2016

In July 2016, CHC voted to approve a merger in which SG Bancorp was merged into Sunflower Bancorp, and signed Consent and Support Agreements with broad releases in favor of SG Bancorp and SG Bank (together, the "2016 Release").[3] Specifically, [redacted]

[3] B86-97; B98-108.

[redacted]

D. CHC Filed Four Complaints Against Defendants

CHC filed its first complaint against these defendants in the Court of Chancery on May 17, 2018. (Verified Compl., C.A. No. 2018-0353-KSJM (May 17, 2018) (Dkt. 1) (the "Original Complaint").) While the Original Complaint remained pending, CHC served FirstSun with a books and records demand pursuant to 8 *Del. C.* § 220 (the "Demand"). A84-85. The Demand's sole and stated purpose was to investigate the claims that CHC had asserted in the Original Complaint. A85. On January 24, 2019, the Court of Chancery dismissed the Section 220 Complaint because CHC lacked a proper purpose, given the pendency of the Original Complaint. *CHC Invs., LLC v. FirstSun Capital Bancorp*, 2019 WL 328414, at *5 (Del. Ch. Jan. 24, 2019). No appeal was taken from that decision.

After losing its Section 220 action, CHC filed its First Amended Complaint on February 12, 2019. (First Am. Verified Compl., C.A. No. 2018-

0353-KSJM (Feb. 12, 2019) (Dkt. 26).) In the First Amended Complaint, CHC asserted six causes of action against 23 of the 24 defendants named in the Original Complaint. *Id.* ¶¶ 16-31, 129-89. Defendants moved to dismiss the First Amended Complaint on April 12, 2019. (Defs.' Br., C.A. No. 2018-0353-KSJM (Apr. 12, 2019) (Dkt. 39).)

Three weeks after Defendants filed their motion to dismiss the First Amended Complaint, CHC, with new Delaware counsel, sought to amend its complaint a second time. Defendants consented to CHC's filing pursuant to Court of Chancery Rule 15(a). (Stipulation and Order Governing the Filing of Pl.'s Sec. Am. Compl., C.A. No. 2018-0353-KSJM (June 6, 2019) (Dkt. 44).) CHC served its Second Amended Complaint on June 7, 2019, nearly 13 months after filing the Original Complaint. A25-68.

In the Second Amended Complaint, CHC abandoned five of the seven causes of action it had asserted in the Original Complaint, and four of the six causes of action it had asserted in the First Amended Complaint. (*See* Verified Compl. ¶¶ 21-35, 86-153; First Am. Verified Compl. ¶¶ 16-31, 129-89.) CHC similarly abandoned its claims against 21 of the 24 defendants named in the Original Complaint, and 20 of the 23 defendants named in the First Amended Complaint. (*See id.*) CHC's two remaining causes of action in the Second

Amended Complaint are for "willful and knowing fraud" and for statutory fraud in violation of Texas Business & Commercial Code § 27.01 (the "Statutory Fraud Claim"). A64, 66. [redacted]

E. Defendants Moved to Dismiss CHC's Second Amended Complaint

On August 9, 2019, Defendants moved to dismiss CHC's Second Amended Complaint on a variety of grounds, including that: CHC's claims were time-barred; the 2016 Release had extinguished CHC's Statutory Fraud Claim; the Reliance Disclaimer barred CHC's claims based on statements allegedly made outside of the Subscription Agreement; CHC failed to allege any actionable false statement or omission; and CHC failed to allege fraud with respect to the individual defendants, Bill and Pablo Sanders. A69-108; A168-210.

F. The Court of Chancery's Decision

On March 23, 2020, the Court of Chancery issued its Memorandum Opinion granting Defendants' motion to dismiss. The Court of Chancery held that both of CHC's claims were time-barred because they were not brought within the three-year limitations period in Delaware. Op. 7.

The Court of Chancery's analysis applied Delaware's "borrowing statute," which addresses "the scenario where a plaintiff's claim arises under foreign law." *Id.* at 10. The court noted that "the borrowing statute was intended to eliminate forum-shopping incentives, [and therefore] the statute is most true to its purpose when applied to claimants who choose to litigate in Delaware." *Id.* at 11. The court then considered this Court's decision in *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1 (Del. 2005), in which the "Delaware Supreme Court crafted an exception to the borrowing statute" where a defendant "[did] not choose to litigate in Delaware," but was forced to bring counterclaims in Delaware after plaintiff filed a declaratory judgment action in Delaware in order to eliminate the threat of those counterclaims, which were time-barred in Delaware, but not in Saudi Arabia, where the cause of action arose. Op. 11-12.

The Court of Chancery noted that although *Saudi Basic* "appears to have engendered some uncertainty" about when the borrowing statute applies, *id.*

at 12 (quoting *TrustCo Bank v. Mathews*, 2015 WL 295373, at *7 (Del. Ch. Jan. 22, 2015)), most decisions have narrowly applied the Saudi Basic exception to the borrowing statute, *id.* at 15. After evaluating two competing "approaches" to interpreting *Saudi Basic* (a "narrow" approach and a "broad" approach), *id.* at 12-16, the Court of Chancery chose the "narrow" approach, which it found "least offend[ed] principles of statutory construction and best target[ed] the statute's purpose," *id.* at 17. The Court of Chancery described its approach as follows:

> [T]he court first applies the plain language of the borrowing statute. If Delaware's limitations period applies, the court next determines whether the party asserting the underlying claim was forced to file in Delaware. If the party asserting the underlying claims was forced to file in Delaware, then the court applies the foreign limitations period.

Id.

Applying this approach to CHC's claims, the Court of Chancery found that Delaware's statute of limitations applies because CHC—unlike the defendant in *Saudi Basic*—was not forced to bring its claims in Delaware; rather, CHC filed here pursuant to the forum selection clause in the Subscription Agreement, to which CHC voluntarily agreed. *Id.* Accordingly, the Court of Chancery held that Delaware's three-year statute of limitations applies to CHC's

claims, *id.* at 18, and that the claims must be dismissed because they were not filed within three years, *id.* at 19-20.

In addition, the Court of Chancery rejected CHC's argument that its claims were tolled by the doctrine of fraudulent concealment. *Id.* at 19-20. The Court of Chancery found that CHC was "on inquiry notice—and, indeed, had actual notice—of the facts pertaining to the alleged misrepresentations as of December 2014 when SG Bancorp issued the Exchange Offer Memorandum." *Id.* at 19. Therefore, the Court of Chancery concluded that CHC's claims accrued in December 2014, more than three years before CHC filed the Original Complaint, and are accordingly time-barred. *Id.* at 19-20.

This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT CHC'S CLAIMS ARE BARRED BY THE DELAWARE LIMITATIONS PERIOD.

A. Question Presented.

Did the Court of Chancery correctly hold that CHC's claims are subject to the Delaware limitations period, and that the narrow exception to Delaware's borrowing statute, as articulated in *Saudi Basic*, does not apply to CHC's claims?

B. Scope of Review.

Whether a complaint should be dismissed pursuant to Court of Chancery Rule 12(b)(6) is a matter subject to *de novo* review. *See Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013).

C. Merits of the Argument.

The Court of Chancery's decision dismissing CHC's claims is correct. CHC's claims are subject to Delaware's borrowing statute, subject to Delaware's three-year limitations period for fraud, and therefore untimely. The court was also correct that the exception to the borrowing statute as articulated in *Saudi Basic* has no application here. That is because the *Saudi Basic* exception applies only in unusual circumstances, where enforcing the borrowing statute as written would

result in unfair, unjust, or absurd results. That is the only instance in which *Saudi Basic* contemplates disregarding the borrowing statute's clear mandate. Because applying Delaware's statute of limitations to CHC's claims does not generate any unjust or absurd results, it applies as directed by the statute. *Saudi Basic* does not apply.

CHC's argument—that *Saudi Basic* effectively rewrote the borrowing statute so that it presumptively does not apply absent evidence of forum shopping—is wrong. That cannot be what this Court held in *Saudi Basic* because it would contravene the borrowing statute's plain text. Rather, and as explained below, *Saudi Basic* is correctly understood as a narrow exception to the borrowing statute that applies in only the most unusual of situations. This is not one of those situations.

1. CHC's Claims Accrued in Delaware, So Delaware's Limitations Period Applies.

As an initial matter, CHC is registered in Delaware, A30, so its claims must be found to have arisen in Delaware. *Wavedivision Holdings, LLC v. Highland Capital Mgmt. L.P.*, 2011 WL 5314507, at *8 (Del. Super. Nov. 2, 2011); *see also Chandler v. Ciccoricco*, 2003 WL 21040185, at *11 n.46 (Del. Ch. May 5, 2003). That fact alone requires application of Delaware's statute of

limitations. *See* 10 *Del. C.* § 8121 ("Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply."); *see also Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 896 (Del. 2009) ("Because [plaintiff's] cause of action arose in Delaware, title 10, Section 8121 of the Delaware Code does not apply.").

CHC does not dispute that the borrowing statute requires application of Delaware's statute of limitations in these circumstances. Rather, CHC argues only that the "state of formation is not determinative *if the borrowing statute does not apply*." OB 15 n.5 (citing *Saudi Basic*, 866 A.2d at 17-18 (emphasis added)). But as explained below, the borrowing statute applies because *Saudi Basic* has no relevance to CHC's claims. This Court should therefore apply Delaware's limitations period pursuant to the second sentence of the borrowing statute, which mandates dismissal of both of CHC's claims.

2. The *Saudi Basic* Exception to the Borrowing Statute Applies Only Where Application of the Borrowing Statute Would Generate an Absurd Result.

Saudi Basic stands for the following proposition: in unusual circumstances, where application of the borrowing statute would generate an unfair, unjust, or absurd result, the court may deviate from the borrowing statute's

plain text and apply a different limitations period than the statute would otherwise mandate. Those circumstances are not present here.

In *Saudi Basic*, the plaintiff brought a claim in Delaware state court to force the defendant to assert a mandatory counterclaim that would be time-barred by application of Delaware's borrowing statute and statute of limitations. The plaintiff's decision to file in Delaware was purely tactical: its claims arose under Saudi Arabian law and could have been litigated there, but the plaintiff sought to take advantage of Delaware's limitations period to prejudice the defendant's anticipated counterclaims, which would have been timely if brought in a Saudi court, but not in a court of this state. *Saudi Basic*, 866 A.2d at 17-18.

The Superior Court "recognized that to apply the borrowing statute to [the defendant] would subvert the statute's fundamental purpose, by enabling [the plaintiff] to prevail on a limitations defense that would never have been available to it had [its] claims been brought in the jurisdiction where the cause of action arose, *i.e.*, Saudi Arabia." *Id.* This Court affirmed, holding that adopting the plaintiff's position would "subvert the statute's underlying purpose" insofar as it would reward the plaintiff's forum shopping. *Id.* at 16.

The circumstances in *Saudi Basic* were highly unusual. Indeed, in its decision, the Superior Court noted that the plaintiff's choice to litigate in Delaware

"to obtain a shorter statute of limitations" was "somewhat of a twist." *Id.* at 15. And that "twist" required the Supreme Court to look to the borrowing statute's purpose, rather than its text. It implicitly invoked the "absurd result principle" and crafted a narrow exception to the borrowing statute that it does not apply where it would reward, rather than discourage, forum-shopping. *Saudi Basic*, 886 A.2d at 17 (eschewing "literal application of the borrowing statute" where such application would unjustly reward the plaintiff's forum shopping); *see also Trustco*, 2015 WL 295373, at *7 ("The Supreme Court did not mention the absurdity principle in *Saudi Basic*. The language of that decision, however, suggests that the Court concluded that literal application of the Borrowing Statute to the facts before it would render an absurd and unjust result.").

As the Court of Chancery recognized, there appear to be two competing "approaches" to interpreting *Saudi Basic*: a "narrow" approach and a "broad" approach. Op. 12. But the fact is that the two "approaches" are far more similar than they are different. Both lines of cases nearly uniformly presume that the borrowing statute applies, and that *Saudi Basic* is relevant only when ordinary application of the borrowing statute would subvert its purpose. And it is not surprising that both "approaches" have gravitated towards a similar understanding of *Saudi Basic*. The text of the borrowing statute is crystal clear, it identifies in

exactly what situations it applies, and application of its text is straightforward. CHC's interpretation of *Saudi Basic*—that the borrowing statute does not apply absent evidence of forum shopping, OB 16—finds no support in that case's holding or in the text of the statute. Indeed, CHC's interpretation subverts the General Assembly's clear legislative intent because it introduces a presumption into a statute where no such presumption exists. CHC's interpretation cannot be right because it would require this Court to have rewritten the General Assembly's statute, which, of course, it cannot do. *Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806, 816 (Del. 2016).

3. The *Saudi Basic* Exception Applies Only Where Literal Application of the Borrowing Statute Would Generate an Unfair, Unjust, or Absurd Result.

An unambiguous statute is to be interpreted according to its ordinary meaning. *Reddy v. PMA Ins. Co.*, 20 A.3d 1281, 1288 (Del. 2011) (the "golden rule" of statutory interpretation is to effectuate the "ordinary meaning of the words used by the legislature"). Delaware's borrowing statute reads as follows:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause

> of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.

10 *Del. C.* § 8121. The statute is unambiguous, *Huffington v. T.C. Grp.*, 2012 WL 1415930, at *4 (Del. Super. Apr. 18, 2012) (referring to the "clear and unambiguous terms of the Delaware borrowing statute"), and therefore must be construed according to its plain meaning, unless doing so would lead to an absurd result, *Reddy*, 20 A.3d at 1288 (ascribe "ordinary meaning of the words used by the legislature" unless there are "specific exceptions where absurdity or some other similar consequence would result from a strict interpretation of the legislature's words").

For the most part, the decisions interpreting *Saudi Basic* have recognized that its holding is narrow (as the Court of Chancery did). Those cases share a common understanding of the decision—that the borrowing statute presumptively applies, and that the *Saudi Basic* exception may come into play only where application of the borrowing statute would generate an unjust or absurd result. The court in *TrustCo* held just that:

> [T]he *Saudi Basic* case has been read as delivering a fairly narrow holding that the Borrowing Statute does not apply when a litigant engages in the very practice that the statute sought to prevent—*i.e.*, forum shopping—and would benefit unjustly from the Borrowing Statue's application. This reading

> recognizes that courts have a duty to apply statutes faithfully and that the literal language of a statute will be set aside only in extraordinary circumstances. Presumptively, therefore, the Borrowing Statute does apply when a plaintiff's cause of action arose out of state, irrespective of whether the plaintiff is forum shopping. Thus, only on a set of facts similar to *Saudi Basic*, where an absurd outcome or a result that subverts the Borrowing Statute's fundamental purpose otherwise would occur, will a party be able to avoid the Borrowing Statute's unambiguous language.

2015 WL 295373, at *8.[4] The court in *Huffington* understood *Saudi Basic*'s holding similarly:

> *Saudi Basic* did not create a broad rule banning the use of the borrowing statute in all situations except for the "typical" scenario. Rather, it demonstrates the Delaware Supreme Court's unwillingness to allow the borrowing statute to be abused by a party shopping for a forum to avoid an adversary's counterclaims. . . . At most, *Saudi Basic* provides a very narrow

[4] CHC's attack on *Trustco*, that it "never explains why [its understanding of *Saudi Basic*] should be the preferred result," OB 24, is puzzling. It is not the court's function to interpret the law so as to generate "preferred results." *See, e.g.*, *Dambro v. Meyer*, 974 A.2d 121, 139 (Del. 2009) (Delaware Supreme Court cannot "rewrite clear statutes . . . to provide exceptions"); *Rafferty v. Hartman Walsh Painting Co.*, 760 A.2d 157, 160 (Del. 2000) (court "cannot rewrite the statute"). Rather, it is the court's responsibility to apply statutes as they are written. *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 331 (Del. 2012) ("It is well established that courts have no authority to vary the terms of a statute of clear meaning or ignore mandatory provisions. If a statute is not reasonably susceptible to different conclusions or interpretations, courts must apply the words as written . . . .") (internal citation omitted). That the *Trustco* court did not label its result as "preferred" speaks to the impartiality with which it faithfully applied the law.

> holding with respect to borrowing statute jurisprudence in that the Supreme Court recognized that applying the borrowing statute in that scenario would "basically turn the borrowing statute on its head for the purpose for which it was enacted."

2012 WL 1415930, at *9 (quoting *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 2003 WL 22016813 (Del. Super. Aug. 26, 2003), *aff'd*, 866 A.2d 1 (Del. 2005));[5] *see also TL of Florida, Inc. v. Terex Corp.*, 54 F. Supp. 3d 320, 327 (D. Del. 2014) ("Here, unlike in *Saudi Basic*, a literal construction of the borrowing statute would not subvert the statute's underlying purpose. Unlike in *Saudi Basic*, application of the borrowing statute here does not unfairly prejudice a party other than the party that chose to file suit here in Delaware.").

The court in *Machala v. Boehringer Ingelheim Pharms., Inc.* likewise understood that *Saudi Basic*'s holding was limited in scope and purpose: "[t]he *Saudi Basic* court thus crafted an exception that rejected [the plaintiff's] attempt to use Delaware and Delaware law for the sole strategic purpose of insulating itself

[5] While it is true that forum-shopping concerns were present in *Huffington*, OB 23, and that the court held that under such circumstances, the "borrowing statute most certainly applies," *id.*, the court did not adopt the "broad approach" to *Saudi Basic* that CHC espouses. The mere fact that the *Huffington* court applied the borrowing statute where forum-shopping concerns were present does not mean that the court should *not* apply the borrowing statute *absent* such concerns. Indeed, the court articulated its understanding of *Saudi Basic* as "provid[ing] a very narrow holding" that was relevant to that case's "scenario" and others like it. *Huffington*, 2012 WL 1415930, at *9.

from [the defendant's] counterclaims." 2017 WL 2814728, at *4 (Del. Super. June 29, 2017); *see also In re Asbestos Litig.*, 2015 WL 5168121, at *3 (Del. Super. Sept. 1, 2015) ("*Saudi Basic*'s narrow holding applies only where a literal application of the statute would actually reward a forum-shopping party—a nonsensical result contrary to one of the statute's primary purposes."); *Lambda Optical Sols., LLC v. Alcatel-Lucent USA Inc.*, 2015 WL 5470210, at *6-7 (D. Del. Aug. 6, 2015) (holding that the borrowing statute applied to plaintiff's claims even absent evidence of forum shopping because no "extraordinary circumstances" existed that would warrant setting aside the borrowing statue's literal language).

As these cases demonstrate, *Saudi Basic*'s holding is widely understood as crafting a narrow exception to the borrowing statute's presumptive application. Indeed, affording the decision that interpretation is the only way to effectuate the legislature's intent without effectively rewriting the borrowing statute. *Clark*, 131 A.3d at 816 ("[T]he Judiciary cannot substitute its own judgment for that of the legislative branch."). Adopting CHC's interpretation of *Saudi Basic* would violate the pinnacle canon of statutory construction: "to determine and give effect to legislative intent, and the unambiguous language of the statute is paramount when discerning that intent." Op. 14 (citing *Eliason v.*

Englehart, 733 A.2d 944, 946 (Del. 1999); *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989)).[6]

The cases that CHC cites are, for the most part, not to the contrary. In *Furnari v. Wallpang, Inc.*, 2014 WL 1678419 (Del. Super. Apr. 16, 2014), the plaintiff had attempted to bring two actions in Florida that were dismissed because the Florida court lacked jurisdiction over the defendants. *Id.* at *5. The plaintiff was forced to bring his action in Delaware, and application of the borrowing

[6] Delaware courts have also applied the borrowing statute as it is written in at least a dozen decisions issued since *Saudi Basic*, without mentioning that case. Those decisions all implicitly recognize that the borrowing statute presumptively applies where a cause of action accrues in a foreign jurisdiction, and that *Saudi Basic* did nothing to alter that presumption. *See, e.g.*, *Stephen G. Perlman, Rearden LLC v. Vox Media, Inc.*, 2015 WL 5724838, at *12 (Del. Ch. Sept. 30, 2015); *Millien v. Popescu*, 2014 WL 463739, at *15 (Del. Ch. Jan. 31, 2014); *de Adler v. Upper N.Y. Inv. Co.*, 2013 WL 5874645, at *13 (Del. Ch. Oct. 31, 2013); *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 42 (Del. Ch. 2012); *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 WL 3201139, at *16 (Del. Ch. Aug. 7, 2012); *Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2011 WL 2623991, at *15 (Del. Ch. July 1, 2011); *Wilmington - 5190 Brandywine Parkway, LLC v. Acadia Brandywine Holdings, LLC*, 2020 WL 603859, at *13 (Del. Super. Feb. 7, 2020); *Schmidt v. Washington Newspaper Publ'g Co.*, 2019 WL 4785560, at *4 (Del. Super. Sept. 30, 2019), *amended on reconsideration*, 2019 WL 7000039 (Del. Super. Dec. 20, 2019); *Rahaman v. J.C. Penney Corp.*, 2016 WL 2616375, at *5 (Del. Super. May 4, 2016); *McGinnes v. State Farm Mut. Auto. Ins. Co.*, 2013 WL 5347136, at *6 (Del. Super. Sept. 24, 2013); *In re Asbestos Litig.*, 2011 WL 676179, at *1 (Del. Super. Feb. 14, 2011); *May v. Remington Arms Co.*, 2005 WL 2155229, at *1 (Del. Super. Aug. 31, 2005).

statute (by interposing Delaware's shorter limitations period on claims that related purely to acts that took place in Florida) would have rendered the plaintiff's claims untimely. *Id.* at *4. The court in *Furnari* was faced with a similar situation to that in *Saudi Basic*, where one party was forced to litigate in Delaware, and where Delaware's borrowing statute would have rendered that party's claims untimely. Relying on *Saudi Basic*, the court held that application of the borrowing statute would "subvert [its] underlying purpose" and declined to apply it so as to avoid rendering the plaintiff's claims untimely through no fault of his own. *Id.* at *5. CHC's reliance on *Furnari* is misplaced: its holding is consistent with the "narrow"—and correct—approach to *Saudi Basic*, that the borrowing statute does not apply only where its application would subvert its intent. Unlike the plaintiff in *Furnari*, CHC sat on its hands for well over three years before bringing its claims. It should not be rewarded for its delay.

In *Juran v. Bron*, 2000 WL 1521478 (Del. Ch. Oct. 6, 2000), much like *Saudi Basic*, the facts represented a set of "unusual" or "special" "circumstances where the Court, as a Court of Equity, should not look to the applicable statute of limitations at law for guidance." *Id.* at *11. According to the court, the case was a

> California case. The parties were California residents at all relevant times to [the] action. The Employment Agreement was executed in California and the performance of the contract was to be in California. The contract specifies that it is subject to California law. Finally, the alleged breach of this agreement occurred in California. The cause of action accrued in, and has the most significant ties to, California.

Id. In holding that the California limitations period would apply, the court noted that "[h]ad the special circumstances not been present, or had this been an action at law, this Court believes that . . . [the] Delaware limitations period would apply. This includes Delaware's borrowing statute." *Id.* at *11 n.36.

In re Mervyn's Holdings, LLC, 426 B.R. 488 (Bankr. D. Del. 2010), does not even purport to apply *Saudi Basic*. Rather, there, the court held that the internal affairs doctrine required application of California's statute of limitations to the debtor-plaintiff's breach of fiduciary duty claim. *Id.* at 503. While the court noted in passing that the borrowing statute is designed to prevent forum shopping, that comment was irrelevant to the court's determination and the case does not even purport to read into the borrowing statute a presumption that it does not apply absent evidence of forum shopping.

Only two decisions have interpreted *Saudi Basic* as holding that the borrowing statute does not presumptively apply unless there is evidence of forum shopping. In the first, *Bear Stearns Mortg. Funding Tr. 2006-SL1 v. EMC Mortg.*

LLC, the court noted that it was required to find evidence of forum shopping before applying the borrowing statute even though the plain language of the borrowing statute did not include such a predicate finding. 2015 WL 139731, at *9 (Del. Ch. Jan. 12, 2015). The only other case to similarly interpret *Saudi Basic* did so in complete reliance on *Bear Stearns*. *See B.E. Capital Mgmt. Fund LP v. Fund.com Inc.*, 171 A.3d 140 (Del. Ch. 2017) (adopting the reasoning in *Bear Stearns* to hold that the borrowing statute applies only where a claim arose in a foreign jurisdiction with a shorter limitations period than Delaware's, without considering the borrowing statute's plain text or analyzing *Bear Stearns* or *Saudi Basic*). These cases are outliers and should not be followed. They ignore the borrowing statute's plain text and admittedly deviate from the General Assembly's clear direction in the borrowing statute.

CHC's interpretation of *Saudi Basic* is problematic for an additional reason. According to CHC, every time the borrowing statute may apply, the court must ascertain the plaintiff's motivation for filing its action in Delaware, including whether it did so for any reason that could be considered forum shopping. But distinguishing forum shopping from strategizing is inherently subjective, as CHC acknowledges, *see* OB 21 ("a jurisdiction may be selected because it is *perceived* to be more plaintiff-oriented, or particularly burdensome to the defendants")

(emphasis added)), and requires evidence, *see id.* (noting that identifying forum shopping requires evidence), from plaintiffs and their counsel. There is no mechanism in place for the court to gather such evidence, nor is there any mandate from the General Assembly directing the courts to do that. CHC's position is not only inconsistent with the statute, it is also unworkable as a practical matter.

As the Court of Chancery's opinion noted, the vast majority of cases interpreting *Saudi Basic* understand that where a cause of action accrues outside of Delaware, the borrowing statute presumptively applies, and that *Saudi Basic* is relevant only where application of the borrowing statute would lead to absurd or unjust results.

4. Delaware's Statute of Limitations Bars CHC's Claims.

For two independent reasons, Delaware's statute of limitations bars CHC's claims.

First, as explained *supra* at p. 13, CHC's registration in Delaware requires application of Delaware's statute of limitations because Delaware is the forum in which the cause of action arose.

Second, even if CHC's claims accrued in Texas, and the first sentence of the borrowing statute therefore applied, Delaware's three-year limitations period

would still control because it is shorter than Texas's limitations period. *See* 10 *Del. C.* § 8106; *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, at *6 (Del. Ch. Jan. 27, 2010) ("A three year statute of limitations applies in Delaware to claims 'arising from a promise,' including . . . fraud." (citing 10 *Del. C.* § 8106(a))); *Slater v. Nat'l Med. Enters., Inc.*, 962 S.W.2d 228, 233 (Tex. App. 1998) ("Common law fraud claims have a four-year statute of limitations."); *see also Cent. Mortg.*, 2012 WL 3201139, at *16 (applying Delaware's three-year statute of limitations for breach of contract actions instead of New York's longer six-year limitations period).

There is no dispute that a plain reading of the borrowing statute mandates that result. CHC submits only that *Saudi Basic* introduced an unwritten presumption into the borrowing statute that limits its application to instances of forum shopping. As explained above, CHC's interpretation of that case is incorrect. *Saudi Basic* stands for the unremarkable proposition that in the highly unusual case where Delaware's borrowing statute would generate an absurd result—generally because a party has engaged in forum shopping to take advantage of a shorter Delaware limitations period—the court need not apply the statute.

No circumstances here warrant deviating from the borrowing statute. In fact, it would be grossly unfair ***not*** to apply the borrowing statute as it is written.

CHC and FirstSun are Delaware entities (as were SG Bancorp and SG Bank). A30. The Subscription Agreement, to which CHC is a party, is governed by Delaware law and contains an exclusive forum selection clause that provides that any litigation arising out of CHC's purchase must be brought in Delaware state court. A135; B43-44. In that same agreement, CHC represented that it had [redacted] B12. If CHC had any concerns about what limitations period would apply to any claims arising out of its purchase, it could have and should have addressed them in the negotiations of the Subscription Agreement. It did not, and should not, be permitted to effectively renegotiate that agreement to avail itself of a more generous limitations period.

And more generally, any decision by this Court that CHC's claims are subject to Texas's limitations period would introduce tremendous uncertainty into all agreements that contain Delaware forum selection clauses. Parties to such agreements reasonably anticipate that Delaware's borrowing statute will dictate which statute of limitations may apply to any claims prosecuted in this state's court system. If, as CHC suggests, this Court were to rewrite the borrowing statute so that the borrowing rule does not apply absent evidence of forum shopping, it would be nearly impossible to reasonably predict what limitations period will govern

potential claims. That would be contrary to the purpose of statutes of limitations, which are designed to provide parties with certainty and finality. *Morton v. Sky Nails*, 2005 WL 2156423, at *4 (Del. Super. Feb 16, 2005) ("Statutes of limitations exist to provide certainty and finality to the law . . . .").

The core of CHC's argument is that *Saudi Basic* precludes application of the borrowing statute because there is no evidence of forum shopping here. *See, e.g.*, OB 22. As explained above, CHC misunderstands *Saudi Basic*'s holding. Although CHC contends that "there is nothing in this Court's *Saudi Basic* holding that lends support to this so-called 'narrow' approach," OB 22, that is demonstrably false. In *Saudi Basic*, this Court did not purport to introduce into the borrowing statute an unwritten presumption that the statute does not apply absent evidence of forum shopping. To the contrary, *Saudi Basic* was clear that under the unique circumstances of that case, a "literal construction of the borrowing statute . . . would subvert the statute's underling purpose . . . [and that Delaware] case law eschews such a construction." *Saudi Basic*, 866 A.2d at 16. The court's holding was admittedly narrow and based on its unusual facts.

CHC also submits that the Court of Chancery never explained why it would be "any less absurd to apply the borrowing statute to bar [CHC's] claims here when there is no evidence of forum shopping." OB 22. CHC's argument

makes little sense. CHC prospectively agreed to litigate this case in Delaware. It knew that Delaware's limitations period could therefore apply to its claims. If it had any concern about the timeliness of its claims, it could have brought them at any point during the three-year period between their accrual and the expiration of the limitations period, especially given that CHC was on actual notice of its claims by no later than December 2014. Op. 19-20. If anything, it would be absurd to reward CHC for its years-long delay in bringing this action.

And finally, CHC argues that the cases "that have applied [the] so-called 'narrow' approach fail to articulate a compelling reason why it should be the default position of Delaware courts." OB 23. The reason is simple, and it is most compelling: it is the law. The General Assembly directed that the borrowing statute applies in *all* cases when a cause of action accrues in a foreign state. There can be no more compelling reason than that the legislature decreed it so.

As a result, Delaware's statute of limitations applies to, and bars, CHC's claims. Indeed, there is no dispute that CHC's claims accrued more than three years before it filed its Original Complaint. And while CHC had argued to the Court of Chancery that the doctrine of equitable tolling tolled the statute of limitations, the Court of Chancery correctly held otherwise, Op. 19-20, and CHC has waived that argument on appeal. *Roca v. E.I. du Pont de Nemours & Co.*, 842

A.2d 1238, 1242 (Del. 2004) (finding that appellant who failed to raise an argument in the body of his opening brief waived that argument on appeal in light of Supreme Court Rule 14(b)(vi)(2), which provides that "[t]he merits of any argument that is not raised in the body of the opening brief [is] deemed waived and will not be considered by the Court on appeal"), *reargument denied* (Feb. 25, 2004).

II. THE COURT OF CHANCERY CORRECTLY HELD THAT CHC'S TEXAS STATUTORY FRAUD CLAIM IS UNTIMELY.

A. Question Presented.

Did the Court of Chancery correctly hold that CHC's Statutory Fraud Claim is subject to the borrowing statute and, therefore, untimely?

B. Scope of Review.

As noted above, whether a complaint should be dismissed pursuant to Court of Chancery Rule 12(b)(6) is a matter subject to *de novo* review. *See Allen*, 72 A.3d at 100.

C. Merits of the Argument.

The Court of Chancery correctly held that CHC's Statutory Fraud Claim is subject to the borrowing statute and therefore untimely.

Defendants had argued to the trial court that CHC's Statutory Fraud Claim was untimely pursuant to Texas's four-year statute of limitations. A189. The Court of Chancery, however, properly applied Delaware's borrowing statute to that claim and found it untimely under Delaware's three-year statute of limitations.

1. Delaware's Borrowing Statute Applies to CHC's Statutory Fraud Claim.

Delaware's borrowing statute applies to both common law and statutory claims that accrue in a foreign jurisdiction. While, as explained *supra* at

p. 13, CHC is a Delaware limited liability company and its claims therefore accrued in Delaware and are subject to this state's limitations period, even if CHC's claims accrued in Texas, its Statutory Fraud Claim (like its common law fraud claim) is still subject to Delaware's limitations period because that statute of limitations is shorter than Texas's four-year statute of limitations. *See supra* at p. 27.

The borrowing statute does not differentiate between common law and statutory claims. Nor do courts applying it. *See, e.g.*, *Huffington*, 2012 WL 1415930, at *9 (applying Delaware's borrowing statute and shorter limitations period to plaintiff's claims brought under the Massachusetts "Blue Sky" securities fraud statute); *Vichi*, 62 A.3d at 42 (applying Delaware's borrowing statute and limitations period to claims brought pursuant to Italian and Dutch law, including Italian statutory fraud claim); *see also Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, 2015 WL 11120934, at * 3 (Del. Super. Jan. 4, 2016) (noting that even where another state's substantive law may apply, "the 'general rule is that the forum state's statute of limitations applies'" (quoting *Furnari*, 2014 WL 1678419, at *4)).

The Court of Chancery also correctly held that the exception to the borrowing statute's application to foreign statutory causes of action does not apply

here. Op. 9 n.26. That exception applies only where the "foreign limitations period is a substantive 'built-in' aspect of the statutory right rather than a procedural issue." *Id.* (quoting *Natale v. Upjohn Co.*, 236 F. Supp. 37, 40 (D. Del. 1964) (citing *Pack v. Beech Aircraft*, 132 A.2d 54, 67 (Del. 1957))). Because § 27.01 does not include a specific limitations period, there is no "built-in" limitations period that applies here. *Id.* As a result, CHC's Statutory Fraud Claim is to be treated like any other claim for purposes of the borrowing statute.

CHC does not argue that Delaware's borrowing statute does not apply to its Statutory Fraud Claim because it is statutory in nature. Rather, CHC argues that "there is no analogous Delaware statutory fraud action that sets a different limitations period, so the trial court should have simply applied the only statute of limitations applicable to the § 27.01 claim – Texas' four-year statute." OB 28-29. But that is not the law. The borrowing statute contains no exception for claims that lack a perfectly analogous Delaware counterpart. Nor are Defendants aware of any instance in which any Delaware court has applied a foreign jurisdiction's statute of limitations because it could not identify an analogous Delaware cause of action (nor does CHC cite any such case in its brief). Rather, absent a perfectly analogous Delaware limitations period, the court merely identifies the most similar Delaware cause of action and applies the applicable limitations period. Here, the

limitations period is three years, whether the Court relies on the applicable limitations period for common law fraud or Delaware's securities fraud statute. *Sunrise Ventures*, 2010 WL 363845, at *6 ("A three year statute of limitations applies in Delaware to claims 'arising from a promise,' including claims for breach of fiduciary duty and fraud." (citing 10 *Del. C.* § 8106(a))); *Huffington*, 2012 WL 1415930, at *4 ("Delaware's [securities fraud] statute provides for a three year statute of limitations." (citing 6 *Del. C.* § 73-605(e))).[7]

CHC ignores the borrowing statute in arguing that "the 'most significant relationship' test [] determine[s] which state's law to apply." OB 29 (citing *Clinton*, 977 A.2d at 895). There, the plaintiff was injured in Delaware, such that the borrowing statute did not apply. *Clinton*, 977 A.2d at 896 ("As [plaintiff] concedes, prior to [March 2, 2005], there was no cause of action. Thus, [plaintiff's] injury arose in Delaware. Because [plaintiff's] cause of action arose in Delaware, [the borrowing statute] does not apply."). As noted *supra* at p. 3, CHC is a Delaware limited liability company, so its injuries occurred in this state, and

[7] CHC acknowledges that "Delaware has a statutory cause of action for securities fraud" but argues that its "analog . . . [is] Texas' own securities fraud statute." OB 29 n.9. But CHC does not cite a single case or offer any other legal authority for its argument that two "distinct cause[s] of action," *id*., may not share the same analog cause of action in another state.

like in *Clinton*, the first sentence of the borrowing statute therefore does not apply. *Clinton*, 977 A.2d at 896. If, alternatively, CHC's injury accrued in Texas, as CHC submits, then the borrowing statute applies and CHC's claims are time-barred. Either way, CHC is without any remedy for its stale claims.[8]

[8] Neither *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542 (Del. Ch. Aug. 5, 2009), nor *Caballero v. Ford Motor Co.*, 2014 WL 2900959 (Del. Super. June 24, 2014), have anything to do with which state's statute of limitations applies. In *Sokol*, the court noted that "[t]he parties [had] not [even] burdened the court with briefing on which state's law applies to th[e] case. But, a necessarily preliminary analysis suggests that Colorado bears the most significant relationship to the events at issue because the representation occurred in Colorado, involved attorneys licensed to practice law by the state of Colorado, involved responding to an order of a court sitting in Colorado, and involved a client, Sokol, with a principal place of business in Colorado." 2009 WL 2501542, at *2 n.4. Similarly, in *Caballero*, the court's inquiry focused on which state's substantive law applied to the claims, not which state's statute of limitations applied. 2014 WL 2900959, at *5 (holding that Michigan, as the location of "Defendant's principal place of business and world headquarters, [] has an interest in preventing misconduct occurring in the state, and in determining the nature of the punishment it will impose on corporations within its borders").

CONCLUSION

For the reasons stated herein, the Court of Chancery's Memorandum Opinion should be affirmed.

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CERTIFICATE OF SERVICE

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