IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IM2 MERCHANDISING AND MANUFACTURING, INC., and DAVID SINCLAIR Plaintiffs, v. TIREX CORPORATION, TIREX CORPORATION CANADA, INC., TERENCE C. BYRNE, JOHN G. THRESHIE, LOUIS SANZARO, JOHN G. HARTLEY, HENRY MEIER, and LOUIS V. MURO, Defendants.	)	Civil Action No. 18077

MEMORANDUM OPINION

Date Submitted: September 18, 2000
Date Decided: November 2, 2000

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Terence C. Byrne, Westmount, QC, Canada, *Pro Se* Defendant.

STRINE, Vice Chancellor

In this opinion, the court addresses a motion to dismiss a complaint that arises out of the breakdown in a contractual relationship among corporations whose headquarters are located in Quebec, Canada. All of the relevant negotiations and the contractual course of performance among the corporations occurred in Quebec, Canada. The major claims raised by the complaint are governed by the laws of Canada and may involve subtle distinctions between the law of tort and contract. The defendants have sought to dismiss the complaint on several grounds, including on grounds of forum *non conveniens.*[1] They argue that this case should not proceed in Delaware, but should be brought by the plaintiffs in Quebec, Canada.

In order to dismiss plaintiffs' complaint for forum *non conveniens,* the court must conclude, after a consideration of the relevant "*Cryo-Maid*" factors,[2] that the procession of the litigation in the plaintiffs' chosen forum would subject the defendants to "'overwhelming hardship and inconvenience.'"[3] Here, I conclude that the defendants have met this exacting standard by demonstrating that the *Cryo-Maid* factors weigh heavily and decisively — i.e., overwhelmingly — in favor of dismissal.

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[1] At times, I refer to this term in parentheticals by the initials "FNC."

[2] *General Foods Corp. v. Cryo-Maid, Inc.,* Del. Supr., 198 A.2d 68 1,684 (1964).

[3] *Ison v. E.I. DuPont De Nemours & Co.,* Del. Supr., 729 A.2d 832, 838 (1999) *(quoting Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. Partnership,* Del. Supr., 669 A.2d 104, 108 (1995)).

Under the case law from which the short-hand phrase "overwhelming hardship" emerged, such a strong showing that this forum is unduly inconvenient is sufficient to merit dismissal.

I. Factual Background

The following recitation of the facts is drawn from the complaint and its attached exhibits.

Plaintiff IM2 Merchandising ("IM2") is a Canadian corporation headquartered in Quebec, Canada. Plaintiff David B. Sinclair is IM2's Chief Executive Officer and principal stockholder. Sinclair resides in Quebec, Canada. IM2 developed and owns a process for recycling tire rubber for use in consumer products.

In mid-1998, IM2 entered into an agreement to produce rubber mats for a corporation called Akro. Under the contract, Akro was responsible for marketing and selling the rubber mats in the United States.

IM2, however, needed to find a partner to fulfill its production obligations because IM2 did not possess any manufacturing capability. Therefore, it entered into negotiations with defendants Tirex Corporation ("Tirex") and Tirex Corporation Canada, Inc. ("Tirex Canada"), Tirex's wholly-owned subsidiary. Collectively, I will refer to the two defendant corporations as the "Tirex Companies." Tirex is a Delaware corporation but

its headquarters is in Montreal, Canada. Tirex Canada is both headquartered and incorporated in Canada.

IM2, through Sinclair, sought out the Tirex Companies because Tirex was developing a patented scrap tire recycling system called the "TCS-1 Plant." The system was designed to produce crumb rubber out of recycled tires.

According to the complaint, the Tirex Companies assured IM2 that they were in the process of completing the manufacture of a TCS-1 Plant in -Quebec and that the plant would be capable of producing the rubber mats IM2 had contracted to sell to Akro. On December 11, 1998, IM2 signed an agreement with Tirex Canada that obligated Tirex Canada to manufacture rubber mats for IM2 on a contractually agreed upon schedule (the "Agreement"). The parties chose "the internal laws of the Province of Quebec" as the governing law of the Agreement.[4]

In the Agreement, Tirex Canada acknowledged that it had or would shortly have the capacity to enable IM2 to meet its obligations under the Akro contract. Tirex Canada also undertook to be in a position to manufacture 10,000 mats per week on or before February 15, 1999 and 20,000 mats per week by March 15, 1999. But as might be expected, the

[4] Compl. Ex. E at Art. 28.1.

Agreement also contained provisions that gave IM2 remedies in the event that Tirex Canada failed to meet these production requirements.

Although Tirex was not a signatory to the contract, the contract defined the operative term "manufacturer" as meaning Tirex Canada, Tirex, and "all other corporations, partnerships and such other entities now or in the future control [sic] by, under common control with, or in control of' Tirex.' Tirex's Chairman and Chief Executive Officer, defendant Terence Byrne, signed the agreement on behalf of Tirex Canada. Byrne is a resident of Quebec.

Problems arose almost immediately between IM2 and the Tirex Companies. Tirex Canada was unable to meet its February 15, 1999 target of 10,000 mats a week.

IM2 and the Tirex Companies then began negotiations about how to go forward in view of Tirex Canada's failure. The negotiations were conducted by defendant Byrne and he used Tirex, rather than Tirex Canada, letterhead to conduct the written aspect of this process. By late February, the Tirex Companies offered to develop a plan by March 19, 1999 to begin

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[5] Compl. Ex. E at Art. 2.2.

production at the 20,000 mat a week level! Byrne also agreed to present a delivery schedule to IM2 for an 8,000 mat order it had already received.

Plaintiff Sinclair's response pointed out that the Tirex Companies' offer was a concession of default under the contract. He sought firm guarantees that Tirex Canada would be able to meet its obligations to IM2. Rather than terminate IM2's relationshipwith Tirex Canada as IM2 could have done, however, Sinclair opted for a "'wait and see' approach" regarding Tirex Canada's ability to meet a revised production schedule.' In the interim, Sinclair demanded certain payments from the Tirex Companies as a result of the default.

According to the complaint, Tirex Canada was unable to meet even the relaxed requirements contained in its own compromise proposal. Despite this, IM2 continued to try to reach a compromise that would allow the relationship to continue and enable it to fulfill its obligations to deliver rubber mats to Akro.

On May 2 1, 1999, the Tirex Companies and IM2 reached accord on a formal amendment to the Agreement. The amendment continued to require Tirex Canada to meet the manufacturing requirements of IM2 under the

[6] Compl. Ex. F.

[7] Compl. Ex. H & Ex. I, ¶ E (stating March 3 1, 1999 as the date of issuance of the 88,235 shares, the same date as the deadline set forth in Ex. H for the receipt of $15,000 in cash or Tirex stock).

Akro contract. The amendment required IM2 to acknowledge that Tirex Canada had never been in default under the Agreement and to waive a licensing fee it was owed by Tirex Canada. The two reasons for these concessions were set forth in the amendment: 1) IM2's interest in "establishing and maintaining a stable and harmonious business relationship between the parties" and 2) the issuance to IM2, on March 3 1, 1999, of 88,235 shares (or $15,000 worth) of Tirex Common stock.[8]

By the end of the summer of 1999, IM2's hopes were dashed by Tirex Canada's failure to live up to its revised contractual obligations. In a last-ditch effort to salvage something, IM2 considered purchasing Tirex Canada's manufacturing facility so that it could make the mats for Akro itself. Upon doing due diligence to that end, however, Sinclair learned that the manufacturing facility was uninsurable, that Tirex Canada's creditors were repossessing equipment, that taxes and rent on the facility were overdue, and that the plant was encumbered by liens. Thus, the sale did not go forward.

The complaint alleges that as a result of the Tirex Companies' failure to live up to their contractual promises, IM2 never received the product necessary for it to meet its own duties to Akro.

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[8] Compl. Ex. I.

II. The Claims Pled In The Comnlaint

The complaint is grounded in one multifaceted theory:

- The officers and directors of the Tirex Companies knew that the Companies did not and would not possess the capability to manufacture the rubber mats required by IM2 under its contract with Akro.

- While knowing that they did not have the capacity to perform, the Tirex Companies induced IM2 to enter into a manufacturing contract with Tirex Canada that compromised IM2's relationship with Akro.

- Even after Tirex Canada's initial default, the Tirex Companies continued to make representations to IM2 that led IM2 to continue the relationship, even though those new representations were also false.

- At the same time that the Tirex Companies were making these false representations, Tirex was publicly disclosing Tirex Canada's Agreement with IM2 and thus leading the market to believe that Tirex's TCS-1 Plant technology was far more market-ready than it was.

- According to the complaint, these disclosures were designed to increase the market price of Tirex stock and enable the directors and officers to sell their stock at a favorable price.

The complaint's many counts all arise out of these core allegations. The various theories under which the plaintiffs contend this misconduct may be litigated include: equitable fraud (Count II); unjust enrichment (Count III); fraud (Count IV); breach of contract (Count V); breach of fiduciary duty (Count VI); negligent misrepresentation (Count VII); and innocent

misrepresentation (Count VIII). The plaintiffs seek recovery from the Tirex Companies, and several of the directors and officers of Tirex.

III. The Grounds For The Defendants' Motion To Dismiss

The defendants have brought a motion to dismiss the complaint for a variety of reasons. The most important aspect of the defendants' motion centers on their argument that this lawsuit should be dismissed on forum non *conveniens grounds.*'

The other aspects of the defendants' motion to dismiss, however, are relevant to their forum *non conveniens* arguments. The first such argument is that the plaintiffs have failed to set forth a basis for this court's exercise of personal jurisdiction over Tirex Canada as to the claims against it. Likewise, the defendants argue that the individual defendants are not subject to personal jurisdiction in this court with respect to the non-fiduciary duty claims raised by the complaint. In the face of this latter argument, the plaintiffs chose not to dispute the issue and have withdrawn all but their fiduciary duty claim against the individual directors. But the plaintiffs do assert that this court may exercise personal jurisdiction over Tirex Canada.

The defendants also argue that the fiduciary duty claim in the complaint must be dismissed under Court of Chancery Rules 12(b)(6) and 23.1.

I address these arguments now, starting with the questions of whether personal jurisdiction exists over Tirex Canada and whether the complaint's fiduciary duty claim should be dismissed. Then I will address the defendants' forum non *conveniens* motion.

IV. Legal Analysis

A. This Court Lacks Personal Jurisdiction Over Tirex Canada

At this stage, 'the plaintiffs bear the burden to articulate a non-frivolous basis for this court's assertion of jurisdiction over Tirex Canada.[9] If the plaintiffs can articulate such an argument, the court will deny Tirex Canada's motion and permit the plaintiffs to take discovery to support a final determination that personal jurisdiction can be exercised over Tirex Canada."

The plaintiffs primarily base their argument on a single jurisdictional fact: Tirex Canada's parent corporation is a Delaware corporation. According to the plaintiffs, Tirex controlled Tirex Canada directly and thus Tirex Canada's separate corporate identity should not be respected."

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[9] *Hart Holding Co., Inc. v. Drexel Burnham Lambert Inc.,* Del. Ch., 593 A.2d 535,539 (1991).

[10] *Id.*

[11] *The* plaintiffs have not burdened me with much in the way of legal analysis or pled facts to support their argument that a vague "hybrid" of "agency" and "veil piercing" principles justifies reverse veil piercing in this case. Pls.' Br. at 4. Much less have they focussed on what jurisdiction's law applies to this question involving a Canadian subsidiary corporation. *Cf. Sternberg v. O'Neil,* Del. Supr., 550 A.2d 1105, 1124 (1988) (noting the strong interest a

The problem with this theory, however, is quite fundamental. Tirex Canada is subject to personal jurisdiction, if at all, pursuant to 10 Del. C. § 3 104. Section 3 104 enables this court to exercise personal jurisdiction over a non-resident defendant who "through an agent" conducts specific forum-directed activities. The statute has been utilized to exert this state's judicial power over corporate defendants who were found to be "alter egos," "co-conspirators," or "principals" of other corporations over whom jurisdiction in Delaware was proper.[12]

However denominated, the core inquiry under any of these theories requires a showing of two "critical elements: 1) that the out-of-state defendant over whom jurisdiction is sought has no real separate identity from a defendant over whom jurisdiction is clear based on actual domicile or satisfaction of Delaware's long-arm statute; and 2) the existence of acts in Delaware which can be fairly imputed to the out-of-state defendant and which satisfy the long-arm statute and[] federal due process requirements."[13]

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jurisdiction has in not allowing a foreign corporation to use a subsidiary created in the jurisdiction to become a "shield for unfair business dealing") (quotation and citations omitted).

[12] *HMG/Courtland Properties, Inc. v. Gray,* Del. Ch., 729 A.2d 300, 306-10 (1999) (discussing this caselaw).

[13] Id. at 308.

It is the second prong of this test that the plaintiffs clearly cannot satisfy here.[14] The plaintiffs admit that none of the conduct that is at issue in this case occurred in the State of Delaware. Rather, the conduct of Tirex that the plaintiffs complain of took place in Quebec, Canada.

Thus, there is no Delaware act of Tirex's that can be imputed to Tirex Canada, other than Tirex's Delaware identity itself. Here, Tirex's incorporation as a Delaware citizen long predated IM2's involvement with the Tirex Companies. That is, Tirex's act of incorporating itself in Delaware had nothing to do with the underlying claims of the plaintiffs and is not alleged to have been in furtherance of a conspiracy to unlawfully injure IM2.[15]

If the plaintiffs' stark theory was accepted, the courts of Delaware would have personal jurisdiction over the non-Delaware subsidiary of a

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[14] I assume for the sake of argument but do not hold that the first prong is satisfied.

[15] The mere fact that a non-Delaware corporation owns a Delaware subsidiary is not sufficient in itself to justify this State's exercise of personal jurisdiction over the non-Delaware parent. *Crescent/Mach I Partners, L. P. v. Turner,* Del. Ch., C.A. No. 17455, mem. op. at 19 & n.24, Steele, V.C. (Sep. 29, 2000); *Papendick v. Robert Bosch GmbH,* Del. Supr., 410 A.2d 148, 152 (1979); *Computer People, Inc. v. Best International Group, Inc.,* Del. Ch., C.A. No. 16648, mem. op. at 24-25, Jacobs, V.C. (April 27, 1999).

In the *Crescent/Mach I, Papendick,* and *Computer People* cases, the defendants allegedly created corporations in Delaware for the purpose of facilitating the wrongful activity in question. I see no reason to discriminate against non-Delaware corporate "children" in the application of these legal principles. Where a corporate child's only relation to Delaware is that its parent is domiciled here, the cases cited above suggest that the exercise of personal jurisdiction by this State over the corporate child is improper. In this case, the plaintiffs obviously do not and could not contend that Tirex Canada's parent incorporated in Delaware many years ago so that Tirex Canada, a Canadian Corporation, could enter a contract in Canada in December 1998 with IM2, another Canadian Corporation.

Delaware parent corporation whenever such a subsidiary engages in joint conduct with its Delaware parent ***outside of Delaware.*** To accept this theory would be to rewrite § 3 104 and to pass the limits of this state's authority under the federal constitution.

Because the plaintiffs have failed to show any statutory basis for exercising personal jurisdiction over Tirex Canada, the complaint must be dismissed as against it.

B. The Plaintiffs Breach Of Fiduciary Duty Claim Must Be Dismissed

The plaintiffs have attempted to construct a breach of fiduciary duty claim against the directors of Tirex. The claim has its foundation in the same events that form the basis for each of the plaintiffs' other claims.

As previously noted, IM2 and the Tirex Companies amended the original December 1998 Agreement during the course of their contractual relationship. The amendment resulted from Tirex Canada's failure to meet the original manufacturing targets. In the amendment, the Tirex Companies agreed to a new schedule and represented that their "manufacturing capacity is, or shortly will be, sufficient to meet [IM2's] delivery obligations under the Akro Contract and more particularly the delivery schedule set forth in Exhibit D thereof."[16] In exchange for IM2's agreement to amend the

[16] Compl. Ex. I (emphasis deleted).

original Agreement, IM2 received 88,235 shares of Tirex stock.[17] This was an amount of stock designed to provide IM2 with $15,000 in value in United States dollars.‘*

Between the time of receiving the Tirex shares on March 3 1, 1999 and the time of this lawsuit, IM2 apparently transferred the shares to its President and controlling stockholder Sinclair, who now possesses them. As a result of their possession (in sequence) of these shares, both plaintiffs attempt to state a claim for fiduciary duty based on the following allegations:

> 109. Upon information and belief, the individual Defendants have been aware at all relevant times that Defendants Tirex and Tirex Canada were totally unable to satisfy their contractual obligations.
>
> 110. Nevertheless, the individual Defendants have promoted the commercial relationship with IM2 intentionally to drive up the market value of Tirex.
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> 111. At all times during which the individual Defendants acted as a [sic] principals, officers, directors or counsel of Tirex and Tirex Canada, each owed a fiduciary duty to Tirex, Tirex Canada and their shareholders.
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> 112. Plaintiff Sinclair was and is a shareholder in Tirex.
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> 113. The individual Defendants conduct as more fully described above jeopardizes the ongoing viability of Tirex

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[17] *Id.*

[18] Compl. Ex. H (stating March 3 1, 1999 as the deadline for receipt of $15,000 in cash or Tirex stock) & Ex. I (stating March 3 1, 1999 as the date of issuance of the 88,235 shares of Tirex Stock).

> and Tirex Canada, and consequently seriously jeopardizes the alienability and ultimate value of Sinclair's shares.
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> 114. The conduct described above constitutes a breach of the individual Defendants' fiduciary duty.

The broad brush nature of these allegations did not give way to more precise strokes .at oral argument. At that time, plaintiffs' counsel stood by its claim that the entire creation and operation of Tirex has essentially been a fraud, whereby its creators raised capital based on technology that they knew had no genuine potential for success. For a variety of reasons, I must dismiss this claim.

Initially, I note that IM2 no longer owns any shares of Tirex. Thus, it has no standing to assert its fiduciary duty claim. That leaves Sinclair's claim to address.

Next, the fiduciary duty claim as pled suggests a derivative characterization, alleging as it does that the defendants' behavior "jeopardizes the ongoing viability of Tirex and Tirex Canada ...."[19] The complaint is wholly devoid of particularized allegations supporting demand excusal under Court of Chancery Rule 23.1. For that reason alone, the

[19] Compl. ¶¶ 109-l 14.

complaint is properly dismissed.*' Likewise, because Sinclair did not own his shares until sometime after May of 1999, the continuous ownership requirement of 8 Del. C. § 327 would bar him for attacking misconduct that occurred before he became a Tirex stockholder.

Furthermore, to the extent that the plaintiffs have tried in their brief to focus on the fact that they relied on Tirex's representations in entering into the contractual amendment, they highlight their obvious attempt to turn an ordinary commercial dispute between arms-length parties into a fiduciary duty claim. IM2 was not a stockholder of Tirex or Tirex Canada at the time it agreed to accept value of $15,000 in cash or Tirex stock as part of a contract amendment. IM2 was another commercial entity attempting to forge a new agreement in order to allow the manufacturing of its products to proceed.[21] If it did not receive what it was promised under the contract, it has potential claims against Tirex and Tirex Canada under common law contract and tort theories, but not against their directors for breach of fiduciary duty.

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[20] *Malone v. Brincat,* Del. Supr., 722 A.2d 5, 14 (1998) (affirming dismissal of complaint that alleged intentional understatement of earnings by management for failure to plead demand excusal).

[21] The Agreement itself buttresses this conclusion by stating that the "parties aclmowledge and agree that they are independently contracting parties and that no joint venture, partnership or incorporated association is established hereby." Compl. Ex. E. at Art. 24.1.

That the plaintiffs' claim is really one based on contract or tort law, rather than the law of fiduciary duty, is proven by the fact that the plaintiffs argue that the shares IM2 received were valueless at the time of receipt, but that they were somehow injured by the failure of the defendant directors to acknowledge that fact publicly. If the shares IM2 received were valueless upon receipt, however, accurate post-receipt disclosures that would inform other market participants of that fact would have injured, not helped, IM2. What IM2 needed was pre-receipt disclosures that would have led IM2 to insist upon receiving cash and/or to avoid deepening its relationship with the Tirex Companies. Such pre-receipt disclosures would have occurred at a time when IM2 was not a stockholder and the Tirex board was not its fiduciary.

Finally, the plaintiffs' complaint is pled so cursorily that a dismissal without prejudice is also in order so that the defendants and the court would have the chance to grapple with an understandable claim. The complaint alleges "upon information and belief' that the defendant directors knew that Tirex could not meet its obligations to IM2 but nonetheless promoted the commercial value of Tirex's commercial relationship with IM2 so as to drive up Tirex's market value. There are scant to no facts pled to buttress these serious allegations of fraud other than the fact that Tirex did not live up to its

obligations under the Agreement — a risk that the Agreement itself acknowledges was present. For example, despite the fact that the plaintiffs have access to a great deal. of information about the Tirex Canada-IM2 manufacturing arrangement, the complaint gives the reader no information regarding whether Tirex Canada was able to produce any rubber mats for IM2 or simply too few to satisfy IM2's obligations to Akro. Likewise, the complaint and plaintiffs' answering brief fails to address the fact that Tirex's public statements regarding the IM2 Agreement were tempered by cautionary statements regarding the viability of Tirex's technology and were followed by public disclosures regarding the problems that arose under the Agreement.[22] For all the foregoing reasons, plaintiffs' claim for breach of fiduciary duty is dismissed without prejudice.

C. The Forum *Non Conveniens* Factors Weigh Overwhelmingly In The Defendants' Favor And Thus Dismissal Of The Comnlaint Is Appropriate

The defendants argue that it is highly inconvenient and burdensome for them to litigate this action in Delaware. They point out that all of the corporate parties — including plaintiff IM2 — have their principal places of business in Quebec, Canada. All of the conduct at issue in this case occurred in Quebec,. Canada. Plaintiff Sinclair and defendant Byrne, who represented IM2 and the Tirex Companies respectively in negotiating the

[22] These disclosures were attached as exhibits to the complaint.

Agreement and the amendments to it, both live in Quebec. The plant used by Tirex Canada under the Agreement is located in Quebec, Canada. All of the parties that the plaintiff has sued are more likely to be subject to the personal jurisdiction of the courts of Quebec than the courts of Delaware, because Quebec is the place where both of the Tirex Companies actually conducted their activities in connection with this lawsuit. Not least of all, the defendants point out that IM2 and Tirex Canada expressly chose the laws of Quebec, Canada to govern their relationship.

Because IM2 admits that the financial health of the Tirex Companies is suspect, the defendants contend that they should not have to suffer the burden of litigating this case in Delaware given the extremely weak connection between this State and the claims at issue in this case. Rather, IM2 and Sinclair should be required to litigate in the courts of their own home: the courts of Quebec, Canada.

There is no litigation pending elsewhere among the parties. Thus, this case is the first-filed and only suit. Therefore, to prevail under the forum non *conveniens* doctrine, the defendants must meet the high burden of showing that the traditional forum *non conveniens* factors tilt so heavily

against suit in Delaware that the defendants will-face “overwhelming hardship” if this suit proceeds in Delaware.[23]

The overwhelming hardship requirement involves a somewhat subjective determination that has bedeviled our state’s trial courts in attempting to come to sensible determinations of forum non *conveniens* motions. Because the determination of this motion largely turns on the meaning of the “overwhelming hardship” standard, it is necessary to dilate on its meaning.

Our Supreme Court has recently held that defendants can meet the overwhelming hardship standard by convincing the trial court that this “is one of those rare cases where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in this forum is so severe as to result in manifest hardship ....”[24] Although a motion to dismiss on grounds of forum *non conveniens* is supposedly addressed to the sound discretion of the trial judge,[25] on three recent occasions the Supreme Court has reversed a trial court which had held that the overwhelming hardship standard was met.[26]

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[23] *Ison*, Del. Supr., 729 A.2d 832, 835.

[24] *Id.*

[25] *Parvin v. Kaufmann*, Del. Supr., 236 A.2d 425,427 (1967).

[26] *Ison, 729* A.2d at 834-35; *Taylor LSI Logic Corp.,* Del. Supr., 689 A.2d 1196, 1198-99 (1997); *Chrysler First,* Del. Supr., 669 A.2d 104. See *also Friedman v. Alcatel Alsthom,* Del.

While the outcomes in recent cases and the term "overwhelming hardship" itself may suggest an insurmountable burden that can only be met if a defendant were to be rendered impecunious by the procession of litigation in Delaware, a more restrained meaning is at the essence of the standard. As the Supreme Court recently pointed out in *Ison,* the overwhelming hardship standard is not intended to be "preclusive" but is intended to be a stringent one that holds defendants who wish to deprive a plaintiff of its chosen forum to a fittingly high burden.[27]

The migration of our courts' usage of the adjective "overwhelming" in this context is supportive of such an interpretation. As the Supreme Court recently noted in *Ison,* the overwhelming hardship standard arose out of the Supreme Court's earlier decision in *Kolber v. Holyoke Shares, Inc.*[28] *In* that case, the *Kolber Court* articulated the forum *non conveniens* dismissal standard as follows: "The dismissal of an action on the basis of the [forum *non conveniens]* doctrine, and the ultimate defeat of the plaintiffs choice of forum, may occur only in the rare case in which the combination and weight

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Ch., 752 A.2d 544,552 (1999) ("Despite occasional references to the trial court's discretion, little room for exercising that discretion exists . . . .").

[27] *Ison,* 729 A.2d at 843.

[28] Del. Supr., 213 A.2d 444 (1965).

of the factors to be considered balance overwhelmingly in favor of the defendant ."[29]

Likewise, in *Williams v. Gas Supply Co. v. Apache Corp.*,[30] the Supreme Court affirmed a dismissal of a first-filed Delaware action on forum *non conveniens grounds,* stating: "[T]he Superior Court placed the burden upon [the defendant] to prove inconvenience and hardship by demonstrating that the combination and weight of the appropriate factors in a traditional forum *non conveniens* analysis weighed overwhelmingly in favor of its motion to dismiss or stay [the plaintiffs] first filed Delaware action. By placing that burden of proof upon [the defendants], we have concluded that the Superior Court did, in fact, give [the plaintiffs] first filed Delaware action the deference to which a valid first filed action is entitled."[31]

Ison itself is consistent with these prior articulations of the overwhelming hardship standard. In explaining the origins and purposes of that standard, the Supreme Court specifically considered certain other cases as being consistent with its approach. One of the cases was a "well-

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[29] *Id.* at 447.

[30] Del. Supr., 594 A.2d 34 (1991).

[31] *Id.* at 36.

reasoned"[32] opinion of the Connecticut Supreme Court, *Picketts v. Internat'l Playtex, Inc.*[33] *The Picketts* case states in pertinent part that the plaintiffs "choice of forum ... should be respected unless equity weighs strongly in favor of the defendant."[34] The *Ison* Court expressly stated that *Picketts'* description of the defendant's burden is "consistent with the 'overwhelming hardship' language of the Delaware jurisprudence."[35] Similarly, *Ison* noted that the earlier *Parvin* decision had relied on the United States Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*,[36] which required that a plaintiffs choice of forum be respected "unless the balance is *strongly* in favor of the defendant ...."[37]

In accordance with this precedent, I will proceed to determine this motion by evaluating whether the defendants have met their burden to show that the forum *non conveniens* factors weigh so overwhelming in their favor that this litigation must be dismissed to avoid undue hardship and inconvenience to them. In evaluating whether the defendants have met their burden, I cannot give excessive weight to any particular factor, but must

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[32] *Ison*, 729 A.2d. at 841.

[33] 576 A.2d 5 18 (Conn. 1990).

[34] *Ison*, 729 A.2d at 841 *(quoting Picketts, 576* A.2d at 524-25) (quotations omitted).

[35] *Id.* at *842.*

[36] *330 U.S. 501* (1947).

[37] *Ison*, *729* A.2d at 842 *(quoting Gulf Oil Corp. v. Gilbert, 330* U.S. at *508)* (emphasis added in *Ison).*

consider the weight of all the relevant factors, being mindful of the heavy burden borne by the defendants.[38] With these thoughts in mind, I turn to the consideration of the traditional forum *non conveniens* factors.

Those factors are:

> (1) the relative ease of access to proof;
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> (2) the availability of compulsory process for witnesses;
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> (3) the possibility of a view of the premises;
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> (4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction;
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> (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and
>
> (6) all other practical problems that would make the trial of the case easy, expeditious and inexpensive.[39]

Before I examine each of the factors, it is important to focus on two considerations that do not fit neatly within any particular category, but which nonetheless bear importantly on my decision. The first is the fact that the plaintiffs arecitizens of Quebec, Canada who chose to engage in

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[38] *Id.* at 838 *(quoting Chrysler First, 669* A.2d at 105).

[39] *Id. (quoting Taylor* v. *LSI Logic Corp.,* Del. Supr., 689 A.2d 1196, 1198-99 (1997). All but the fifth factor listed above were set forth in the *Cryo-Maid* decision. 198 A.2d at 684. The fifth factor originated in the *Parvin* case. 236 A.2d at 427.

commercial relations with the Tirex Companies in Quebec, Canada.[40] Although the Supreme Court has emphasized that the plaintiffs' domicile is not a factor that in isolation comes close to helping a defendant bear its burden to show overwhelming hardship to itself,[41] common sense indicates that a court should be somewhat less hesitant to dismiss for forum non *conveniens* when the defendants contend that the proper forum is in the backyard of the plaintiffs. Certainly, that seems so if the focus is on convenience alone.[42] Put simply, if the defendants are seeking to displace a plaintiffs chosen forum in favor of the forum where plaintiff lives, the ramifications to the plaintiff are far less drastic than if a grant of the defendant's motion will force the plaintiff to litigate someplace distant from the plaintiffs domicile.

A more directly relevant and important factor in this case is the condition of Tirex itself. By plaintiffs' own admission, Tirex and Tirex Canada are hardly in the pink of financial health. Indeed, Tirex has lost a good deal of money and is apparently in default on its tax obligations to this

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[40] *Taylor v. CSI Logic Corp.,* Del. Supr., 689 A.2d 1196, 1200 (1997) ("this could be a factor in a proper case").

[41] *Ison*, 729 A.2d at 839 (distancing itself from the contrary approach of the United States Supreme Court).

[42] *Piper Aircraft v. Reyno, 454* U.S. 235, 255-56 (1981).

State.[43] Unlike a large multinational corporation that has its principal place of business here,[44] Tirex's only connection to Delaware is that it is incorporated (although not in good standing) here.[45]

Although that connection can be quite important in many cases, it is not important here because the heart of the plaintiffs case is based on commercial law claims arising out of the laws of Quebec, Canada. But the fact that this is Tirex's only connection does contribute to its inconvenience in litigating here. None of its officers or directors lives or works here. None of the evidence is located here. Thus, the corporation will bear markedly increased litigation costs to litigate this case here — costs that it is not in an advantageous position to easily bear. This reality must be kept in mind as the following ***Cryo-Maid*** factors are considered.

The relative ease of access to proof. There is no question that it is easier in every respect to obtain access to the relevant proof in Quebec, Canada rather than Delaware. Two of the key witnesses will undoubtedly be plaintiff Sinclair and defendant Byrne, both of whom live in Quebec,

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[43] Pls.' Br. at 2 n.1 & Ex. A.

[44] *Compare Ison*, 729 A.2d 832 (company seeking dismissal had its principal place of business in this State, its legal department and relevant parts of its research and development department were located in Delaware, and relevant evidence was present here).

[45] *Compare Cryo-Maid*, 198 A.2d 681 (affirming a stay of a first-filed Delaware case where the defendant was a small Delaware corporation whose only real tie to Delaware was incorporation and that factor was not relevant to the claims raised).

Canada. The defendants have identified several other witnesses who live in Quebec and who would be subject to compulsory process there.[46] If the case were to proceed in Delaware, the depositions of those witnesses who are third parties could be sought through appropriate means, but the third parties could not be compelled to testify at trial. Some of the other possible witnesses do not live in either Delaware or Canada and thus proceeding in either forum raises that same problem. On balance, however, Quebec, Canada is easily the forum where the trial court will have the easiest time holding a trial at which most of the material witnesses are present to testify.[47]

As for document discovery, it is clear that most, if not all, of the proper discovery will involve records located in Quebec, Canada. By contrast, none of the relevant evidence is located in Delaware. Although it is not uncommon for Delaware courts to adjudicate cases where the evidence is located elsewhere, the inescapable reality remains that easier access to documentary proof can be had in Quebec, Canada.

From the perspective of the burden on Tirex, this *Cryo-Maid* factor takes on great force. It is true that this court has procedures that will enable

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[46] Defs.' Br. Ex. B.

[47] *Cryo-Maid,* 198 A.2d at 684.

the defendants to gain access to the relevant proof. But it is equally true that it will be more cumbersome and costly for the defendants to gain that access if this litigation proceeds here.

The availability of compulsory process for witnesses. Without dilating again on this point which overlaps with the first *Cryo-Maid* factor, it is clear that it wouid be much easier to obtain the trial testimony of the key witnesses in Quebec, Canada. As important, it would cost all of the parties (including the plaintiffs) far less money if tial witnesses did not have to incur travel expenses in order to testify. If the trial is held here, Tirex will undoubtedly have to reimburse any of its officers and directors for such expenses, costs which when taken in totality could be quite burdensome.

The possibility of a view of the premises. Although this factor is not relevant in many cases, it might be in this case where the capability of Tirex Canada's plant is in issue and where the plaintiffs themselves are seeking inspection. While I do not give this factor any real weight because of the possibility of videotaping, this factor weighs in favor of Quebec as a forum.

The applicable law. At most, this case involves a Delaware law question that means $15,000 to the plaintiffs. As discussed previously, the fiduciary duty claim as pled is deficient and has been dismissed without

prejudice. And even if the plaintiffs are able to reformulate that claim in a cognizable form, it would remain at best a miniscule part of this case.[48]

The heart of this case involves a commercial dispute arising under the tort and contract laws of Quebec, Canada.[49] I recognize that the Delaware courts are called on to apply the laws of other states and nations on a more than sporadic basis. A due respect for the presumed capability of the courts of other nations and states to fairly adjudicate cases, however, counsels that this consideration be accorded some worth, even when no prior action is pending in their courts. The great weight given to a plaintiffs interest in having novel Delaware law questions decided in our own courts under the *Cryo-Maid* test[50] suggests that a defendant's interest in having the courts of the jurisdiction of the governing law decide important legal issues ought also

[48] In this regard, the vague claim pled hardly raises novel or important questions of Delaware law. In addition, the plaintiffs do not seek to litigate this claim as a class action on behalf of Tirex's other stockholders nor could they given IM2's general adversity to Tirex's interests.

[49] Delaware resolves choice of law questions for both tort and contract claims using the "most significant relationship" test from the Restatement (Second) of Conflicts. *The Travelers Indemnity Co. v. Lake,* Del. Supr., 594 A.2d 38, 40 (1991) (adopting the Restatement rule for tort cases); *Cannon v. Dorr-Oliver, Inc.,* Del. Supr., 394 A.2d 1160, 1166 (1978) (adopting the Restatement rule in contract cases). Because the parties explicitly contracted under the laws of Quebec, Canada and all the relevant events transpired in Quebec, Canada, the most significant relationship test suggests that the laws of Quebec, Canada govern the plaintiffs tort and contract claims.

[50] *Cf. Sternberg v. O 'Neil,* Del. Supr., 550 A.2d 1105, 1124 (1988) (noting that this State had a strong interest in having its own courts apply Delaware law to a claim relating to the internal operations of a wholly owned Delaware subsidiary of an Ohio corporation).

be given some weight? This is especially so when the plaintiffs themselves chose the laws of that jurisdiction to govern their relations with the defendants.

Furthermore, the plaintiffs' approach of pleading multiple theories of their case suggests that the trial court will have to engage in a careful policing of the boundaries between tort and contract law. These boundaries can be different depending on the law of the relevant jurisdiction.[52] The Agreement also contains very specific provisions detailing IM2's rights in the event of a breach by Tirex Canada of its manufacturing obligations. Thus, nice questions regarding whether IM2 is limited to the remedies that the Agreement itself sets forth will likely arise. Modesty and consistency in approach suggests that the evaluation of these issues may best be accomplished by the courts in the jurisdiction of the governing law.[53]

This *Cryo-Maid* factor weighs in favor of litigating this case in Quebec, Canada.

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[51] I recognize and do not mean to suggest that this court may dismiss "merely because an issue of foreign law is presented." *Taylor v. LSI Logic Corp.,* Del. Supr., 715 A.2d 837,842 (1998).

[52] *Cf. Iotex Communications, Inc. v. Defies,* Del. Ch., Cons. C.A. No. 15817, 1998 Del. Ch. LEXIS 236, at * 17-* 18, Lamb, V.C. (Dec. 2 1, 1998) (discussing the fact that a party may not state a fraudulent inducement claim under New York law merely by alleging that the other party to the contract never intended to meet its contractual obligations).

[53] *Cf. MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.,* Del. Ch., C.A. No. *8 126,* slip. op. at 3, Walsh, J., 1985 WL 21129, at *2 (October 9, 1985) (cases raising "novel and substantial issues of Delaware corporate law" are best decided by Delaware courts).

The pendency or nonpendency of an action elsewhere ***Because the*** plaintiffs chose to file here, no action is pending in Quebec, Canada. That means that there is no risk of overlapping proceedings that would result in imposing the burdens of duplication on the defendants.

On the other hand, because this case is at an early stage and no discovery has been undertaken, I can envision no undue burden to the plaintiffs if they have to file a new suit in Canada.[54] Indeed, the obvious advantages of Quebec, Canada from a pure convenience perspective in my view renders this factor irrelevant in this case.[55]

All otherpracticalproblems that would make the trial of the case easy, expeditious, and inexpensive. In Quebec, Canada, the following would be the case: (1) both Tirex and Tirex Canada would be subject to suit;[56] (2) the plaintiffs would have the potential to obtain personal jurisdiction over defendant Byrne and the other individual defendants over whom plaintiffs concede Delaware cannot exercise jurisdiction on plaintiffs'

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[54] *Ison,* 729 A.2d at 845 (directing court to consider the stage of litigation in assessing this factor); see *also, Nash v. McDonald's Corporation,* Del. Super., 96C-09-045-WTQ, 1997 WL 528036, at *3, Quillen, J., (Feb. 27, 1997) (fact that no action is pending elsewhere is no bar to a FNC dismissal if there was no obstacle that prevented the plaintiffs from pressing the action in the appropriate forum).

[55] The defendants have presented an *unrebutted* affidavit from a Canadian lawyer that describes the basic procedures used in Quebec. Defs.' Br., Ex. B. The affidavit suggests that proceeding in Quebec should not prejudice the plaintiffs in any discernable respect.

[56] *Parvin, 236* A.2d at 463-64 (ability to obtain jurisdiction over parties is a relevant FNC factor).

contract and tort claims; and (3) IM2 and the Tirex Companies could minimize the costs of getting witnesses to testify at depositions and at trial, the expense of evidence gathering, and the time witnesses would have to spend away from their regular duties at the corporations which are parties. By contrast, in Delaware: (1) Tirex Canada — the direct party to the Agreement — is not subject to personal jurisdiction; (2) the individual directors are not subject to personal jurisdiction on plaintiffs contract and tort claims; and (3) a trial would be much more inconvenient and expensive to the parties and require witnesses and individual parties to divert more of the time away from their regular jobs[57] than if this case was litigated in the plaintiffs' own backyard.

Taking all these *Cryo-Maid* factors together, I conclude that the defendants have met their stringent burden. The *Cryo-Maid* factors overwhelmingly point to one common sense conclusion: the procession of this litigation in Delaware rather than Quebec, Canada will result in the imposition of significant and undue costs on the defendants that are unjustified by any countervailing public or legitimate private interest served by conducting this case here. The defendants are being subjected to this

[57] See Compl. Ex. M. (Tirex Form S-8 indicating that its key employees were important to its viability).

inconvenience solely because Tirex is a Delaware corporation even though that fact has little, if any, importance to the plaintiffs claims?

V. Conclusion

For the foregoing reasons, the plaintiffs' claims against Tirex Canada are dismissed without prejudice for lack of personal jurisdiction; the plaintiffs' breach of fiduciary duty claim (Count VI) is dismissed without prejudice; and plaintiffs' remaining claims are dismissed for forum non *conveniens* without prejudice. IT IS SO ORDERED.

[58] *Cf. Ison*, *729* A.2d at 842-43. ("This is not a case of weighing the foreign plaintiffs' choice of forum ... against a defendant whose only connection is that it is incorporated in Delaware. We need not express an opinion on such a case because it is not before us."); *Nash,* 1997 WL 528036, at *3 (granting forum *non conveniens* dismissal where "the only real nexus between [the] litigation and this forum is that all three defendants are incorporated here in Delaware.").