

No. 01-7492

(TO BE HEARD IN TANDEM WITH 01-7488 UPON COURT'S APPROVAL)

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

—————
SPRINGWELL NAVIGATION CORP.,

Plaintiff-Appellant,

v.

THE CHASE MANHATTAN BANK,

Defendant-Appellee.

—————

On Appeal from the United States District Court
for the Southern District of New York

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REPLY BRIEF OF APPELLANT SPRINGWELL NAVIGATION

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Conceding, by silence or avoidance, a host of flaws in the district court's analysis, Chase's focus on the narrow English slice of the facts and issues in this case, and disregard for the New York facts and issues, cannot save the decision below. Regarding deference, Chase expressly concedes that Springwell is entitled to the same deference as given the plaintiffs in *Iragorri*, and does not even attempt to refute Springwell's wholly valid reasons for leaving its own home fora to sue Chase at home in New York. Regarding the availability of compulsory process – the *only* private interest factor claimed to support dismissal – Chase still does not

assert, much less prove, that even a single witness would be unwilling to appear in New York, and effectively concedes that the lack of compulsory process is of minimal concern where relevant testimony can be obtained through letters rogatory and video depositions. Indeed, Chase itself claims that foreign depositions ordered by an English court can cure the potential absence of some of its own witnesses who, it turns out, are not in England after all. Finally, regarding the public-interest factors, Chase does not dispute that *Gilbert's* local interest factor is primarily a convenience consideration of having “localized” controversies tried within local view; that such limited interest does not favor England; and that where *either* forum would apply some foreign law, the foreign-law factor favors *neither* forum. Having conceded legal error on literally every factor that the district court deemed in its favor, it is untenable for Chase to claim that the court did not abuse its discretion. Chase's other arguments – doubtful even on their own terms – about English events, policy interests, and choice of law simply do not suffice to evade the consequences of Chase's concessions, or to deny the extensive involvement of Chase New York in the events, claims, and specific issues that will be litigated in this case. This Court should reverse and remand this case for trial in New York.

STATEMENT OF THE CASE

Chase would have this Court believe that Springwell's claims involve nothing more than the independent wrongful behavior of a single salesman in London. That convenient fiction ignores the extensive role of Chase New York in the wrongdoing alleged by Springwell.

The details of Chase's distortion of the facts will be addressed primarily in connection with the arguments to which they are relevant. But at the outset it is useful to keep in mind Chase's many concessions – either express or through total silence – regarding the role of Chase New York in this case. For example, Chase concedes that its various branches and subsidiaries around the world – including the wholly-owned subsidiary to which Justin Atkinson was supposedly assigned – acted jointly with and as agents for Chase New York. Whatever separate accounting existence Chase's foreign subsidiaries may have had, as an *operational* matter those subsidiaries are no different than any other divisions or groups within Chase New York's primary corporate structure.¹

¹ Chase's London branch, of course, *is* part of the Bank itself, controlled directly by Chase New York. Chase also admits that Atkinson, supposedly employed by CMIL, reported to Chase New York just as if CMIL were a "functional division" of Chase. Chase Br. 42. Atkinson likewise told Springwell that he reported to New York managers Cathy O'Donnell and Jorge Jasson, [A828], with no suggestion that it was through multiple layers of authority.

Chase also does not deny that during the critical period from 1996 through 1999, when Springwell made almost all the investments at issue in this case, Chase's Hellenic Group was headed from New York by Stuart Gager, that Chase, through Gager, encouraged Springwell's investments and undertook to oversee those investments for prudence, balance, and suitability, and that Gager played an active personal role in advising Springwell, managing its investments with Chase and interactions with Atkinson, and handling the post-collapse workout negotiations with Springwell. Springwell Br. 5, 10.

Finally, Chase does not deny that virtually all essential elements of the transactions regarding the Notes – including the correspondence actually creating the transactions, payment for the Notes, performance of the Notes, and Chase's preparation and transmittal of the misleading "Risk Disclosure Statement" – took place in New York and involved correspondence between New York and Greece. Springwell Br. 7-8.

Unable to deny such facts, Chase instead pretends they do not exist or cites facts relevant only to the separate Pollux appeal, No. 01-7488, which have no bearing on *this* case. For example, after discussing various Springwell contacts with Chase's London agents, Chase leaps to the remarkable conclusion – expressed in the misleading plural referring to both Springwell and Pollux – that, "*all* of Plaintiffs-Appellants' contacts at CMB are and always have been located in

London or elsewhere in Europe.” Chase Br. 7 (emphasis added) (citing only unsupported assertions of Chase trial counsel, [A84-85, A90]). As to Springwell, such an absolutist conclusion is pure fabrication, ignoring, rather than rebutting, voluminous evidence in the record to the contrary. *See, e.g.*, A56, A59, A801-03, A827-29 (Springwell contacts, specifically regarding its investments, with Gager, Heath, Zannos, O’Donnell, Jasson, Leininger, and Dominguez, all of New York).

Beyond rebutting such specific distortions, however, the more general point is that the activities and issues to be litigated in this case are *mixed* as between New York and London, as well as Greece, Moscow, and Jersey (Channel Islands). Such mixed conduct among several fora, including much critical conduct in New York, is more than sufficient to establish a *bona fide* connection and convenience interest in New York. That significant conduct *also* occurred in England does nothing to rebut the convenience and propriety of a New York forum.

ARGUMENT

I. THE DISTRICT COURT GAVE INADEQUATE DEFERENCE TO PLAINTIFF’S CHOICE OF FORUM, CONTRARY TO THE STANDARDS IN *IRAGORRI*.

Pretending that the district court gave more deference than it actually did, Chase merely repeats the court’s inappropriate bases for reducing deference and ignores the detailed analytical framework established by *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (*en banc*). Contrary to

Chase's assertion that the court "applied an elevated level of deference" to Springwell's choice of forum, Chase Br. 3, the court itself purported to apply only a bare "extra modicum" of deference, and in fact provided no deference at all. That the district court made passing references to deference no more demonstrates that it actually *applied* such deference than did the inadequate "passing reference to the weight entitled plaintiffs' choice" of forum made by the district court in *DiRienzo*. *DiRienzo v. Philip Servs. Corp.*, -- F.3d --, 2000 WL 33725106, at *5 (2d Cir. 2002); *see Hillger v. Phillips Services Corp.*, 49 F. Supp.2d 629, 634, 640 (S.D.N.Y. 1999) (boiler-plate references to deference), *rev'd*, -- F.3d at --, 2000 WL 33725106 (2d Cir. 2002).

A. The *Iragorri* Standards Require Greater Deference.

Claiming that this Court's *en banc Iragorri* decision was only a meaningless reaffirmation of prior decisions, Chase Br. 20-21 n.9, Chase argues that the district court's reliance on such prior decisions was, *ipso facto*, adequate. But the district court's "abrupt" and "arbitrary" emphasis on Springwell's non-residence cannot satisfy the *Iragorri* analysis, 274 F.3d at 72, and Chase does not even pretend that the district court considered *Iragorri*'s motive-centric factors. Indeed, Chase effectively concedes that those factors were *not* considered by the district court by chiding Springwell for discussing such new factors on appeal. Chase Br. 22. But given that the *Iragorri* analysis issued *after* the decision below, any lack of

evidence on such issues is reason for *remand*, not affirmance. Having opposed Springwell’s motion for remand, Chase is hardly in a position to object to this Court considering the *Iragorri* factors from scratch.²

Instead of accepting the consequences of the new *Iragorri* analysis, Chase ignores Springwell’s motivations and reiterates its substantive – and not-so-substantive – arguments on the convenience factors to seek a reduction in deference. Such double counting puts the *Gilbert* cart before the deference horse, and is non-responsive to the district court’s failure to apply the now-controlling *Iragorri* analysis.

1. Plaintiff’s Selection of the Home Forum of Either Party Should Receive Similar Deference.

Springwell identified in *Iragorri* an implicit supervening principle that suit in a *defendant’s* home forum should receive the same presumptive deference as a suit in a plaintiff’s home forum. Springwell Br. 21-22.

Chase irrelevantly objects that a defendant’s amenability to suit in the forum “is only one of five factors” identified in *Iragorri* as enhancing deference. Chase

² In any event, this Court can take notice on appeal of Springwell’s explanations of its motivations under the new *Iragorri* test, particularly given that Chase does not dispute that Springwell genuinely held such views and motivations and the explanations stem from basic background facts or inferences from facts that *are* in the record. This Court considered just such new factual inferences in *Iragorri*

Br. 27-28 n.15. But the principle of deference to *either* party's home forum derives not merely from the single amenability-to-suit factor, but also from the presumed-convenience rationale for deferring to a plaintiff's home forum and the symmetrical analysis suggested by this Court for examining the motives and potential forum shopping of *both* plaintiffs and defendants. And the principle also finds support in this Court's strong reluctance to dismiss suits in the home forum of either party where the alternative forum is home to neither party. Springwell Br. 18 (citing cases).

Chase's claim that the district court *did* consider Chase's residence when determining the level of deference, Chase Br. 27, is wishful thinking. The court's only mention of Chase's residence comes not in the deference discussion, but rather in the court's boilerplate conclusion that Chase "met its heavy burden of showing that New York, where defendant resides, is an inconvenient forum." [A978] That trifling mention does not constitute consideration, and the district court offered no explanation of what significance, if any, it attached to Chase's New York residence. Having extensively discounted deference based on Springwell's residence outside the forum, the court should have fully reversed that discount based on Chase's residence within the forum, but failed to do so.

itself. Furthermore, given the change in law, such facts, if necessary, simply could be treated as a proffer to demonstrate the necessity for a remand.

2. Springwell Had Valid Bases for Selecting a New York Forum.

Given Springwell's wholly proper motivations for coming to New York, it was entitled to deference at or near the top of *Iragorri's* sliding scale. The deference, if any, given by the district court instead scraped the bottom of any conceivable scale. The court thus abused its discretion through a fundamental error of law.

Residence with Respect to Forum. Because Springwell had legitimate reasons for eschewing its home fora, its foreign residence simply does not impugn its motives for choosing New York. Chase effectively concedes that Springwell's suit away from home raises no inference of improper motive, and instead merely questions Springwell's connections to New York. Chase Br. 21-23. Other than suggesting that Springwell *also* has connections with London, however, Chase does nothing to challenge Springwell's historical ties to New York and its sensible reasons for preferring a New York forum. Springwell Br. 23.³

In contrast to Springwell's valid motives for leaving its home forum, and its legitimate motives for selecting New York, Chase's desire to escape its home

³ That Adam Polemis lived and worked in England for a time, Chase Br. 23 n.12, certainly does not refute Springwell's valid motives for coming to New York. Adam now lives in Greece, and Spiros, with personal ties to New York, is handling this litigation for Springwell. Furthermore, that Springwell has connections to *both* fora does not suggest an improper motive in choosing *between* such fora.

forum has no such credible explanation and should trigger great skepticism of Chase's motion, and a corollary deference for Springwell's choice of forum. While conceding that "a defendant's motives in seeking a *forum non conveniens* dismissal may be relevant to a court's deference analysis," Chase's only defense of its suspicious desire to flee New York is the non-sequitur that the particular *evidence* of improper motive present in *DiRienzo* is not present here. Chase Br. 24-25. But *DiRienzo's* legal point is not limited to the specific factual details of that case, and the skepticism called for in *DiRienzo* is properly triggered by Chase's flight from its home forum and its tactic of resisting discovery regarding activities within its home forum.⁴ Unlike with Liberia or Greece, there is no obvious reason why this case cannot be held in New York, or why it would be inconvenient to Chase to do so.

⁴ Imputing to Springwell an argument made in the separate Pollux appeal, Chase claims that there is nothing "nefarious" about Chase conducting its business through wholly-owned foreign subsidiaries. Chase Br. 23-24. Insofar as Chase seeks to use such subsidiaries as justification for an English forum, those mere accounting devices have no *operational* separation from Chase New York itself, and this Court generally will not allow manipulation of residence to influence forum analysis. *Iragorri*, 274 F.3d at 72 n.3. Springwell, by contrast, does not deny its Greek roots and both Greece and Liberia have court-access treaties with the United States. Furthermore, Chase cannot seriously contend that *its* use of foreign subsidiaries – particularly in the Channel Islands – is above suspicion. See *J.P. Morgan, Citigroup Face Fresh Scrutiny in Work with Enron*, Wall Street Journal, July 2, 2002, at C1, C3 (recent admission by J.P Morgan Chase that transactions with Channel Island shell company were not as previously described).

Bona Fide Connection of Case to Forum. While conceding that a *bona fide* connection between this case and New York – even if not exclusive or predominate – would be sufficient to trigger substantial deference, *DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *5, Chase frivolously denies the existence of such a connection. Springwell, of course, has offered a plethora of such connections. Springwell Br. 5-10, 26-27, 46-52 (discussing phone calls, correspondence, conduct and misconduct by New York managers and employees, supervision and execution of Springwell’s investment, risk monitoring and suitability determinations, post collapse negotiations, and continuing wrongdoing in the handling of Springwell’s assets still in Chase’s possession).⁵

Chase ignores those connections and instead merely repeats the district court’s erroneous focus on New York’s connections with *Springwell*, rather than with this case, and its claim that *Springwell* had failed to show why New York was convenient. Chase Br. 3, 25 (citing district court opinion at A966, A977). The numerous New York activities (and omissions) discussed in Springwell’s opening

⁵ Chase’s denial, at 26-27, that post-collapse events create a *bona fide* connection to New York rings particularly hollow. Springwell’s extensive and predominant dealings with Chase New York for the 16 months between the collapse and the filing of this suit, and Chase New York’s continuing post-collapse violations, all provide a valid motive for Springwell to sue where Chase had centralized its continuing interactions with Springwell. By the time suit was filed, New York openly dominated events and England ceased to have substantial involvement.

brief all demonstrate a *bona fide* connection to New York as a threshold matter, regardless of any further connections to England or the ultimate balancing of *Gilbert*'s local interest factor. And by demanding that *Springwell* show New York to be convenient, rather than that Chase show the opposite, the district court and Chase, in echo, have improperly reversed the burden of proof. Placing such burden on *Springwell* is the antithesis of deference and constitutes an inexplicable abuse of discretion.

Witnesses, Amenability to Suit, and Appropriate Legal Assistance. These elements of the *Iragorri* analysis were not considered by the district court in determining deference – a legal error sufficient to undermine its decision. Each factor demonstrates *Springwell*'s valid motives for suit in New York, and thus the propriety of substantial deference. *Springwell* Br. 27-30. *Springwell*'s desire for greater access to hostile New York witnesses and its reasonable preference for more appropriate U.S. counsel are not credibly challenged. Chase's pretense that New York personnel are not implicated in this case merely seeks, without trial, to deny *Springwell*'s claims on the merits, but does not refute that *Springwell* will seek at trial to establish the culpability of Chase New York and its personnel. And the supposed virtues of English counsel in the context of the *adequacy* of an English forum, Chase Br. 32 n.18, misses the point: Mere adequacy of English counsel does not negate *Springwell*'s reasonable and valid preference for the

greater selection of U.S. lawyers who would be more “appropriate” for issues involving U.S. corporate and banking structures.

3. *Springwell’s Forum Selection Was Not Improperly Motivated.*

Unable to deny Springwell’s numerous valid reasons for suing in New York, Chase tries to suggest, based on a single innocuous footnote in Springwell’s brief before the district court, that Springwell was improperly motivated by the availability of discovery and punitive damages in New York. Chase Br. 21. That desperate suggestion, however, might more accurately be applied to *Chase’s* motivations in seeking to have the case dismissed in favor of England.

Notwithstanding the false assertion that Springwell made an “admission[]” below that it chose New York for broader discovery and punitive damages, Chase Br. 21, it was *Chase* that first raised the scope of discovery and lack of punitive damages in England. Springwell merely pointed out that those issues appeared to motivate Chase’s motion to dismiss. [A854] Identifying Chase’s own forum shopping to the court hardly constitutes an “admission” that Springwell was forum shopping in the opposite direction, and the district court made no such finding.

Furthermore, while Springwell’s interest in efficient and inexpensive discovery in New York is an entirely valid motive based on litigation *convenience*, Springwell Br. 41-42, Chase’s desire to hinder discovery through inconvenient and

restrictive English disclosure rules constitutes a tactical motivation that is the epitome of disfavored forum shopping. As for any difference between the fora regarding the law on punitive damages, such difference alone is hardly sufficient to impugn Springwell's motives and, at best, would provide an equal and opposite *potential* motivation for both Chase and Springwell to prefer different fora. It thus would have no net impact on the deference or skepticism to be applied in this case.

Finally, as for any other differences in *substantive* law, Chase does not deny that choice-of-law rules both here and in England would prevent any tactical advantage from bringing suit in New York. It likewise concedes that litigating this case in New York does not raise any concerns regarding overly generous juries, potential chauvinism against Chase, or any material inconvenience or expense to Chase. There is thus no basis for diminishing the strong deference that flows from Springwell's valid motivations for bringing suit in New York.

B. The Treaties with Greece and Liberia.

Chase concedes that non-resident treaty beneficiaries like Springwell "are entitled to the same ... deference given to the plaintiffs in *Iragorri*" and that "the appropriate level of deference is determined by a review of the plaintiff's motivations." Chase Br. 30. Chase argues, however, that even suits by American plaintiffs can be dismissed under *forum non conveniens*. *Id.* at 28. But Chase's concessions are still fatal given that Springwell received far less deference than

this Court required in *Iragorri*, and that the district court here relied on Springwell's residence to abandon deference without any consideration of motive. Furthermore, Chase begs the question of how much presumptive deference is provided by citizenship alone, independent of residence, and ignores Springwell's arguments as to why such deference must be significant. Springwell Br. 32-34.

Springwell does not claim that treaty rights *guarantee* a U.S. forum, as falsely imputed to it, Chase Br. 28-29, but rather that treaty rights "should accord a significant, though not dispositive, boost in deference, even absent residence within the forum," Springwell Br. 34. Chase's overblown claim that there are "countless cases where an American plaintiff's action is dismissed" on *forum non conveniens* grounds, Chase Br. 28, thus does not negate that deference should have been much greater in this case and, in any event, is unsupported by the cases. Chase cites to *Overseas Nat'l Airways, Inc. v. Cargolux Airlines, Int'l, S.A.*, 712 F.2d 11 (2d Cir. 1983), *Sussman v. Bank of Israel*, 801 F. Supp. 1068 (S.D.N.Y. 1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993), and *Capital Currency Exch., N.V. v. National Westminster Bank PLC*, 155 F.3d 603 (2d Cir. 1998), but in each of those cases the imbalance of convenience was overwhelmingly greater than the paltry supposed differential claimed by the district court in this case.

Indeed, in *Cargolux*, defendant sought transfer *to*, not *away from*, its home forum of Luxemburg, the claim alleged breach of a bailment agreement regarding

property damaged in Luxemburg, and literally *every* single aspect of the case was tied to Luxemburg. 712 F.2d at 12-13. *Sussman* likewise involved transfer to, rather than away from, defendants’ home forum of Israel, and the alleged conspiracy “was made in Israel by Israelis for Israeli consumption” with wrongful conduct occurring “entirely” in Israel. 801 F. Supp. at 1074. And in *Capital Currency*, the defendant again sought transfer to its home forum of England, the real parties in interest were *all* foreign corporations, and, unlike here, the *private* interest factors strongly favored England. 155 F.3d at 612.

In the end, treaty-based deference, though not controlling, should certainly exceed the minimal “some extra modicum” of deference to which the district court gave lip service. [A966]

II. THE DISTRICT COURT MISAPPLIED THE LEGAL AND FACTUAL ELEMENTS OF *FORUM NON CONVENIENS* ANALYSIS.

A. Private-Interest Factors.

1. *Ease of Access to Proof*

While Chase is correct that the district court did not weigh this factor in *favor* of dismissal, Chase Br. 49, because the court ignored the likely post-collapse transfer of English documents to New York, and denied discovery on that point,

the district court abused its discretion by not weighing this factor *against* dismissal.⁶

2. Cost of Willing Witnesses and Compulsory Process for Unwilling Witnesses

In balancing private interests, *Gilbert* instructs a court to consider the “availability of compulsory process for attendance of *unwilling*, and the cost of obtaining attendance of *willing*, witnesses.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (emphasis added). Chase still fails to show *any* unwillingness of friendly English witnesses to appear for trial in New York. Instead, Chase irrelevantly discusses the mere “whereabouts” of such supposed witnesses. Chase Br. 45. But whether Mellis, Ferrazzi, or Sheehan are within range of New York’s compulsion is non-responsive to whether such compulsion would be necessary. With no evidence anywhere in the case that Chase’s friendly witnesses would be unavailable or “unwilling to testify” in New York, *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996), “the district court committed a legal error by

⁶ Chase falsely suggests that Springwell does not challenge the denial of discovery. Compare Chase Br. 52 with Springwell Br. 36, 40-41, 47, 51-52. Chase’s claim, as against Pollux, of non-compliance with Fed. R. App. P. 10(c) is similarly disingenuous given that there is no transcript of the brief hearing on the discovery motion, and Rule 10(c) provides only that an appellant “may” prepare a statement of the evidence, not that it *must* do so. Here, the motion papers are sufficient for review and a statement of the brief hearing is unnecessary. The discovery sought

failing to hold” Chase to its “burden of proof” on the express elements of this *Gilbert* factor. *DiRienzo*, -- F.3d --, 2000 WL 33725106, at *6.

And as to the location of Chase’s claimed witnesses, Chase knows full well – despite its sly implication to the contrary, Chase Br. 46 – that Mellis and Brian Lazell are no longer in England, meaning that *neither* forum has the advantage of compulsion as to them.⁷

Even more devastating to Chase’s ultimate reliance on this private-interest factor is Chase’s own argument that Mellis and Lazell’s absence from England does not matter because their testimony can be obtained outside of England by deposition. Chase Br. 46. That argument is correct, but fatal to the decision below given that it concedes (indeed, adopts) *Springwell’s* argument that letters rogatory effectively eliminate the weight of this factor even considering the fanciful possibility that Chase’s friendly witnesses would resist a voluntary appearance in New York. *Springwell* Br. 38-39.⁸ Chase’s subsequent claim, at 48, that this

was plainly relevant to the motion to dismiss, went beyond the single request cited by Chase, and should have been granted.

⁷ Notwithstanding Chase’s complaints, that intervening change in the facts renders part of the decision below untenable. *Springwell’s* source for such changed facts – Bloomberg’s – is public information easily verified by Chase, undisputed as to accuracy, and well within this Court’s capacity for judicial notice.

⁸ When procedural differences between the fora are taken into account, this factor actually favors a New York forum. The only continuing significance of this factor is that it bears upon the trier-of-fact’s ability to assess witness demeanor. *Iragorri*,

factor “weighs strongly” despite such letters rogatory thus ignores its own arguments, as well as the five cases Springwell cites for precisely the contrary position. Springwell Br. 38-39.⁹

Finally, Chase’s only response to Springwell’s greater need for compulsory process over unfriendly witnesses is to repeat its false protestations regarding New York’s lack of involvement in the case and to complain when Springwell offers still more names and functional descriptions of significant New York witnesses. Having opposed the discovery that would have identified those and other witnesses in New York, Chase’s complaints are disingenuous. The greater need for process

274 F.3d at 75. But if one forum has an advantage in considering witness demeanor in any event, this factor should favor that forum. In New York, therefore, the ability to introduce video depositions effectively eliminates any disadvantage from the lack of trial process over foreign witnesses. Springwell Br. 38-39. By contrast, Chase provides no information on whether video, as opposed to written, depositions are admissible in English courts and Chase’s own expert suggests that virtually all “evidence in chief” or “direct evidence” from witnesses is introduced in the form of written statements. [A263] New York thus would afford greater opportunity to assess witness demeanor, either live or on tape, *regardless* of where the witnesses were located. Given that England may inevitably reduce its consideration of demeanor evidence even for live witnesses on direct, the district court balanced this factor exactly backwards.

⁹ Chase’s suggestion that *DiRienzo* is to the contrary ignores the opinion in that case. While this Court indeed allowed the lack of compulsory process to “weigh[] in favor of defendants,” the actual *weight* given was minimal and could not sustain the dismissal. -- F.3d at --, 2000 WL 33725106, at *7. Chase’s unelaborated citations, at 48, to *Alfadda v. Fenn*, 159 F.3d 41, 48 (2d Cir. 1998), and *Capital Currency*, 155 F.3d at 611, likewise do not support giving “heav[y]” weight to the

in New York thus weighs against dismissal, and it was an abuse of discretion for the district court to hold otherwise by blocking the development of the record regarding New York witnesses.

3. Other Practical Considerations

Chase does not claim any other considerations *favor* dismissal, and does not dispute that the efficiency and convenience of discovery is a valid practical consideration in the private-interest balance. Springwell Br. 41-42. Chase merely speculates that English disclosure may be likewise convenient. Chase Br. 22 n.10. That speculation ignores the case cited by Springwell and finds no support in the declaration cited by Chase, which broadly describes English procedures without comparing their scope to U.S. discovery. The district court thus should have weighed the greater convenience of New York litigation procedures *against* the motion to dismiss.

B. Public-Interest Factors.

Chase labors under two fundamental misconceptions regarding the public-interest factors. First, it ignores that these factors are primarily about public *convenience*, not about which forum *appears* more appropriate in some aesthetic

mere absence of compulsory trial process, and neither case so holds, or even discusses how video depositions can cure demeanor concerns.

sense. Second, it assumes that events and omissions in England somehow *preclude* comparable or more extensive events and omissions in New York. But the issues in this case do not come down to an either/or debate between England and New York. They instead involve *both* places, as well as Greece, Russia, and the Channel Islands. Chase's effort to frame this case as being exclusively about England simply ignores the Complaint, ignores the record, and ignores reality. When addressing multi-jurisdictional wrongdoing such as exists in this case, *both* competing fora have a valid interest, *both* will confront choice-of-law and foreign law, and consequently the public-interest factors generally favor *neither* forum.

1. *Jury Burden, Court Congestion, and Administrative Difficulties*

Genuine public convenience issues are trivial in this case, and Chase makes no serious claim otherwise. Even any slight jury burden is vastly overstated given that the primary impact of this case will be felt not in England, but in either New York or Greece. With Chase's massive presence in New York, it is no burden for it to be tried by a New York jury.

2. *Local Interest*

The interest described in *Gilbert* in having "localized" suits within "view and reach," 330 U.S. at 509, is an extremely limited consideration, unrelated to a forum's policy or regulatory interests, and either does not exist in this case, or

slightly favors trial in New York. Springwell Br. 44-45. Chase never contends otherwise. Instead Chase reiterates the supposed policy interests of England as compared to New York, all the while ignoring that the primary means to account for such interests is through choice-of-law analysis, not through *forum non conveniens*. *Id.* at 45. But even assuming some consideration of a more policy-oriented local-interest, Chase still gets it wrong.

For example, Chase’s assertion that Springwell’s Complaint fails to allege New York issues, and hence involves no New York policy interest, is frivolous. As Springwell discussed in its opening brief, its fiduciary duty, fraud, and negligence claims each allege omissions not merely by Atkinson, but by Chase New York as well. Springwell Br. 46 (citing four specific paragraphs of the Complaint, [A70-72, A74]). The omitted information was known, and should have been disclosed by, at a minimum, Gager, O’Donnell, and Jasson in New York, and likely by many others who could have been identified through discovery.¹⁰ Springwell also alleged direct fraud from New York in the misleading risk

¹⁰ Chase’s claim that O’Donnell and Jasson had only “social” contacts with Springwell is belied by the record. [A828] Similarly, the argument that the contacts with Chase New York personnel did not occur in New York is both incorrect, [A828], and irrelevant. New York personnel reaching out to or meeting persons abroad still create sufficient contacts with New York to preclude dismissal. *Manu Intern., S.A. v. Avon Products, Inc.*, 641 F.2d 62, 63-64, 66-67 (2d Cir. 1981) (travel); *Peregrine Myanmar*, 89 F.3d at 47 (faxes).

disclosure statement prepared and sent by Chase New York, and direct New York breaches of duty in connection with the unsuitability component of Claims I-VII. Springwell Br. 46-47 (citing seven specific paragraphs of Complaint, [A68-76]). In addition, as still-undisputed expert evidence made clear, the decisions regarding matters such as suitability, and the monitoring of the risks Chase failed to disclose, all would have occurred in New York. Springwell Br. 48-49.¹¹

Ignoring the wealth of New York acts, omissions, and decisions implicated in Springwell's Complaint, Chase pretends that this case is exclusively about England and Justin Atkinson, from whom it distances itself by coyly referring to him as an employee of a mere "affiliate." Chase Br. 6-7. But that "affiliate," CMIL, is wholly owned by Chase New York and Chase never disputes that it completely controlled CMIL in all matters material to this case. Chase even expressly concedes that personnel at that supposedly separate company ultimately reported to managers at the Chase Manhattan Bank in New York. Chase Br. 42.¹²

¹¹ While Chase attempts to avoid that expert evidence by continuing to assert the irrelevance of the creation, marketing, and continuing management of the Notes, Chase Br. 39-40, a review of the Complaint proves otherwise. Springwell Br. 47-48. Chase simply has no answer, and the rote repetition of Chase's absurd claims of irrelevance will not make those claims come true.

¹² Indeed, the true nature of Atkinson's supposed employer, CMIL, is not at all clear as of 1997. An annual report from that time, for example, identified the company as having a New York address. (Such information is, admittedly, not in the record, but was obtained through the rather laborious independent investigation

Beyond Chase New York's ownership and control of its foreign agents, Chase also continues to ignore that certain "London" activities consisted of simply retyping and signing materials prepared by persons in New York, thus creating a false front to mask activity by Chase New York. Springwell Br. 49-50.

Even extensive London activity and wrongdoing, however, simply does not refute the similarly extensive New York conduct and control, and hence does not undermine New York's own strong local "policy" interest in this case. While Chase and the district court ignore such New York involvement, and discount New York's policy interest, this Court in both *Iragorri* and *DiRienzo* has recognized that such cross-jurisdictional scheming and control is more than sufficient to establish a local policy interest in a U.S. forum. *Iragorri*, 274 F.3d at 75; *DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *3. Indeed, Chase's conduct underlying this case bears a striking resemblance to a hub-and-spoke conspiracy, with Chase as the hub. *Cf. United States v. Smith*, 223 F.3d 554, 567 (7th Cir. 2000) (discussing "hub-and-spoke style conspiracies" and the responsibility of a participant near the hub for the acts of other members).¹³ It is entirely appropriate to litigate such conspiracy-like

that Chase mocks, and can be deemed a proffer of what would have been in the record had the district court granted discovery as requested.)

¹³ That Chase acted in concert with its own subsidiaries may render conspiracy more of an analogy rather than a legal description. *Compare Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770 (1984) (no intracorporate conspiracy

behavior where the hub is located, regardless of whether other fora are also implicated in the conduct of the spokes. *Cf. United States v. Trapilo*, 130 F.3d 547, 549 (2d Cir. 1997) (prosecution in New York against hub of a conspiracy to deliver tax free liquor into Canada in avoidance of Canadian tax laws), *cert. denied sub nom. Pierce v. United States*, 525 U.S. 812 (1998).

Regarding the post-collapse wrongdoing by Chase New York, while the district court conceded a local New York interest in such conduct, and in Springwell's claim relating thereto, it underestimated the significance of that interest. If anything, such wrongful conduct, which is continuing to this day, generates a local interest in New York far greater and more immediate than the interests created by the remainder of the case in *either* England or New York.

Finally, discovery would have confirmed a stronger New York interest than credited by the district court. Chase does not deny that it marketed GKO Notes to persons in the United States and that discovery would have revealed direct evidence of such a practice. Springwell Br. 51-52. Nor does Chase deny that discovery would have allowed Springwell to demonstrate the role of New York

under antitrust law; corporation and wholly owned subsidiary treated as a "single enterprise") *with Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001) (distinguishing *Copperweld* doctrine in the context of civil RICO). But the principal point of Chase New York being the hub in multi-jurisdictional wrongdoing remains valid.

personnel in matters of risk monitoring and disclosure, suitability determinations, control of foreign subsidiaries, selection and approval of Russian bank counterparties for the currency forwards, and a host of other issues that will be litigated in this case.¹⁴ Because the district court denied such discovery, therefore, its factual analysis was made in willful blindness and was clearly erroneous as to any facts that could have been challenged or shown through discovery.

3. Application of Foreign Law

Chase does not dispute that both England and New York would apply comparable choice-of-law rules and that, to the extent that a New York court would apply a mixture of English and New York law to this case, so too would an English court. *Compare* Springwell Br. 53-55 *with* Chase Br. 42-44. Chase also does not – and cannot – deny the legal principle that insofar as both fora will be required to apply *some* foreign law and to engage in choice-of-law analysis at all, this *Gilbert* factor is a wash regardless of the greater or lesser proportions of New York or English law to be applied. *Compare* Springwell Br. 53-55 *with* Chase Br. 44; *see also DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *8 (foreign-law factor

¹⁴ Chase's suggestion, at 9, that *Springwell* selected the Russian banks is unsupported, frivolous, and particularly bold given that Chase claims to possess, yet adamantly refuses to produce, the supposed forwards that it entered into with such counterparties.

“[did] not favor either forum” notwithstanding imbalance in amounts of Canadian and U.S law to be applied).

Having no answer for those essential propositions, Chase is reduced to the untenable position of claiming that English law will apply to the entirety of this case and hence that this factor should favor dismissal. Chase Br. 43 n.26. Of course, not even the district court took such an extreme and erroneous view of the choice-of-law analysis, finding instead that New York law would apply to Springwell’s two claims regarding Chase New York’s negligent supervision of its agents and post-collapse behavior.¹⁵ And when, contrary to the approach of Chase or the district court, the particular issues to be tried are examined with particularity, it is apparent that New York law will apply to many issues in Springwell’s Complaint, including:

Whether the investment advice and recommendations of Gager and others in New York was affirmatively false or misleading (Counts II-IV [A69-74]);

¹⁵ Chase’s claim that Atkinson was supervised in London, rather than New York, Chase Br. 41-42, is contradicted by Atkinson’s own statement to Springwell that he was supervised by O’Donnell and Jasson in New York, [A828], and thus presents a factual issue that may have to be tried and would undoubtedly have benefited from discovery. In any event, that Atkinson may also have been supervised in some unexplained fashion in London does not rebut that he received extensive direction and control from higher-ups in New York, particularly with respect to Springwell – the single largest client of Chase’s Hellenic Group.

Whether the risk disclosure statement created in, sent from, and returned to New York was false or misleading (*id.*);

Whether personnel at Chase New York, including Gager, O'Donnell, and the various persons monitoring the Russian financial situation knew of the tremendous and specific risks concerning the Notes and fraudulently or negligently failed to disclose such risks (Counts I-VI [A68-76]);

Whether the New York personnel responsible for marketing and suitability decisions intentionally or negligently chose to sell unsuitable derivatives to Springwell and similar Private Bank clients (Counts I-V [A68-75]);

Whether the persons structuring the Notes and determining the pricing and risk allocation abused their fiduciary position by shifting all of the risk but providing only a fraction of the return to the investors, while keeping for Chase none of the risk and an unconscionable percentage of the return (*id.*);

The elements necessary to establish an agency relationship between Chase and its subsidiaries (Counts I-VII [A68-77]);

Responsibility for post-collapse breaches of fiduciary duty (Count VIII [A77-79]); and

An accounting of Chase's wrongful profits from its breach of fiduciary duties (Counts I-II, VIII [A69-71, 77-78]).

While English law may well apply to other aspects of Springwell's Complaint – most obviously Count VII on violation of English statutes, and likely the behavior of Justin Atkinson himself – Springwell's point is not, and has never been, that New York law will apply entirely and exclusively. Rather, the law in this case will

be mixed, New York law will apply to a more significant number of claims and issues than credited by the district court, and in such circumstances the application of foreign law will occur regardless of forum, and hence favors *neither* forum.

Finally, even assuming only a New York court would be required to apply foreign law, the need to apply foreign law is not a sufficient basis to dismiss a case not otherwise substantially inconvenient. *Springwell Br. 57* (citing cases). The weight to be accorded this factor is particularly limited where the foreign law is English – which is historically familiar and frequently applied in the Southern District of New York. *Byrne v. British Broadcasting Corp.*, 132 F. Supp.2d 229, 238 (S.D.N.Y. 2001).

C. Balancing the Factors.

An action should be dismissed only if the chosen forum is shown to be *genuinely* inconvenient *and* the selected forum *significantly* preferable.” *Iragorri*, 274 F.3d at 74-75 (emphasis added). In this case Chase has demonstrated neither. There is absolutely *nothing* in the private-interest factors that favors leaving Chase’s home forum and going to England, and there are several convenience considerations – ignored by the district court – that in fact favor New York. On the public-interest side, there is not even a credible pretense of a public *convenience* interest supporting dismissal. Because every single factor claimed to support the

district court's *Gilbert* balance is tainted by legal and factual error, the decision cannot be sustained.

CONCLUSION

The decision of the District Court should be reversed, or in the alternative remanded for discovery and further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief for Appellant complies with the word type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) in that it contains 6929 words, excluding the captions, table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word 2002. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

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