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

BRIEF OF APPELLANT SPRINGWELL NAVIGATION

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Springwell Navigation Corporation ("Springwell"), a Liberian corporation operating as an investment vehicle for two Greek citizens, appeals the dismissal, on *forum non conveniens* grounds, of this action for fraud, negligence, breach of contract, and breach of fiduciary duty by The Chase Manhattan Bank ("Chase"), a New York banking corporation having its world headquarters and primary operations in New York. The district court for the Southern District of New York (Wood, J.), in an unreported decision, dismissed this action by giving little or no deference to Springwell's choice of forum and by opining that the lack of

compulsory process over some witnesses, the local interest in the litigation, and the need to apply some foreign law favored England as a forum. Order, March 30, 2001 (reproduced in the Joint Appendix ("A"), at A954-81).[1] That decision was erroneous in that it grossly underestimated and ignored the deference due Springwell's choice of forum and misanalyzed both the law and the facts regarding the specific elements of the *forum non conveniens* balancing test.

JURISDICTION

Subject matter jurisdiction in the District Court was based upon 28 U.S.C. § 1332. Jurisdiction in this Court is based upon 28 U.S.C. §1291. Appeal is from the April 5, 2001 final judgment of the District Court, and preceding orders merged therein, disposing of all claims with respect to all parties. Notice of appeal was timely filed on April 25, 2001. [A983]

ISSUES PRESENTED

1. Did the district court fail to apply the proper standards for, and fail to accord the proper deference to, plaintiff's choice of forum?

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[1] The same decision granted Chase's motion to dismiss the Complaint in the related case of *Pollux Holding Ltd*. v. *The Chase Manhattan Bank*, 01-7488. With the permission of this Court, Springwell and Pollux have filed a Joint Appendix.

2. Did the district court apply the wrong legal standards to the *Gilbert* factors for *forum non conveniens*, unreasonably analyze those factors based on incomplete or misunderstood information, and unreasonably balance those factors in granting the motion to dismiss?

STATEMENT OF THE CASE

A. PROCEEDINGS AND DISPOSITION BELOW

Plaintiff-appellant Springwell filed this action in the Southern District of New York against defendant-appellee Chase, seeking damages for breach of fiduciary duty, breach of contract, and misrepresentation in connection with Chase's recommendation and sale to Springwell of various highly risky investments that were entirely unsuitable for Springwell's investment objectives. [A53-A79] Chase moved to dismiss based on *forum non conveniens*. After being denied discovery regarding forum issues [A491], Springwell opposed the motion to dismiss with such evidence as was available to it, and Chase replied. The district court, without having heard oral argument, granted Chase's motion to dismiss. [A954-81]

The district court held that Springwell, a foreign corporation, was due only "minimum" deference for its selection of Chase's home forum in which to bring suit. [A977] In conducting the *forum non conveniens* balancing, the court ruled

that although the private-interest convenience factors failed to demonstrate oppressiveness or vexation to Chase, two public-interest factors – local interest and application of some foreign law – and a limited private-interest concern regarding lack of compulsory process over several witnesses favored dismissal. [A967-78]

Springwell timely appealed. [A983] The appeal was stayed in anticipation of this Court's decision in *Iragorri* v. *United Technologies Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (*en banc*). Following the *Iragorri* decision, this Court denied Springwell's motion to remand for reconsideration and set this case for full briefing.

B. STATEMENT OF FACTS

Springwell is a Liberian corporation formed to hold and invest the profits earned by brothers Adam and Spiros Polemis, who are Greek Nationals engaged in the shipping business. Chase is a New York banking corporation with its world headquarters and principal place of business in New York City. Chase controls various branches and subsidiaries around the world, including in England, Jersey (Channel Islands), and Russia, which, as relevant to this case, acted jointly with and as agents for Chase New York. [A55]

Prior to this litigation, the Polemis family had an extensive and near-exclusive banking relationship with Chase dating back to 1951. [A53, A55-56, A825] With respect to investments, that relationship was managed by the Hellenic

and Maritime Industries Group (the "Hellenic Group") of Chase's Private Bank division in New York. At the relevant times the Hellenic Group was headed from either New York or London, and the activities of that group were supervised by Chase officers at the Private Bank in New York. [A56, A826]

Throughout its relationship with Springwell, Chase – through its successive heads of the Hellenic Group, Evangelos "Van" Mellis, Marco Ferrazzi, and Stewart Gager – encouraged Springwell's use of Chase's investment services and undertook to oversee Springwell's investment activities to assure that they were prudent, balanced, and suitable for Springwell. [A826] In the late 1980s, Chase introduced Springwell to Justin Atkinson, who Springwell understood to be an investment advisor, but who was in fact a salesperson at Chase Manhattan Investments Limited ("CMIL"), a wholly-owned Chase subsidiary in London. [A57-58, A826]

From 1996 to 1999 – the investing period central to this case – the Hellenic Group was headed, and Springwell's relationship with Chase was managed, by Gager, a New York-based Managing Director of Chase's Private Bank. [A337] Gager played an active role in managing Springwell's investments with Chase and its interactions with Atkinson, and he personally gave investment advice to Springwell on many occasions. [A349] During that period Springwell also frequently discussed its investment activities directly with Jorge Jasson and Kathy

O'Donnell, New York-based senior managers in Chase's Global Capital Markets Group who supervised Atkinson and helped manage Springwell's investment activities. [A828]

With Chase's and Atkinson's encouragement and advice, Springwell began to invest in emerging-market debt instruments issued in countries such as Mexico, Argentina, and Brazil, and to borrow funds from Chase to finance such purchases. [A10] In the later period relevant to this case, Chase recommended that Springwell make increasingly large investments in risky emerging market obligations and in complex Chase-created derivative products called GKO Linked (S Account) Notes ("GKO Notes" or "Notes"). [A58-59]

The GKO Notes were fixed-return derivative investment products payable in U.S. Dollars and issued by Chase Manhattan Securities (C.I.) Limited ("CMSCI"), a Chase subsidiary in the Channel Islands. [A54, A59] Their yields were linked, through some still undisclosed formula, to the performance of Russian Government short-term zero coupon Ruble bonds called Gosudarstvenniye Kratkosrochniye Beskuponniye Obligatsii ("GKOs"). [A61-62] The underlying GKO's were purchased by Chase or one of its affiliates, presumably for its own account, and the derivative Notes shifted the risks, and supposedly the rewards, of those bonds to Chase clients such as Springwell. The Notes included forward foreign exchange contracts with several Russian banks (including Chase's Moscow affiliate) in order

to hedge against the risk that the Ruble would be devalued by locking in a fixed rate between Dollars and Rubles. [A62, A519-20, A800] Though never disclosed to Springwell at the time, the underlying GKOs provided yields of in excess of 30% to 80%, whereas the Notes promised yields to Springwell in the range of only 11% to 20% yet shifted the entire risk of the GKOs to Springwell. [A66-67]

For most of the Notes purchased by Springwell, Chase encouraged Springwell to borrow 60% of the purchase price from Chase, which increased the number of Notes Springwell purchased and geometrically increased Springwell's exposure. [A800-01]. The financing was provided initially through a Master Forward Contract and later through a Global Master Repurchase Agreement ("GMRA"), signed by Springwell and Chase New York. Under the GMRA Springwell would sell to Chase, and later repurchase, the Notes for the 60% financing amount plus a finance charge paid to Chase. [A800-01, A178-212] Once the multiple transactions all resolved themselves, Springwell would be left with its initial investment plus a fixed return under the Notes less a finance charge paid to Chase, and Chase would be left with a finance charge plus additional fees and the remaining net yield from the underlying GKOs.

All of the essential transactions regarding this convoluted and complex derivative took place at Chase New York. The confirmations for the purchase of the Notes at issue in this case were sent to Greece by Chase in New York, and

were returned from Greece to Chase in New York. [A742-96] Payment for the Notes was made by transferring funds to Chase in New York. [A742-96, A829] Summary Terms & Conditions sheets regarding the Notes and inadequate and misleading "Risk Disclosure" statements were also sent to Springwell in Greece by Chase New York for all eleven Notes at issue in this case, and Springwell was instructed to direct any questions to Chase employees in New York. [A739, A742-96]

The Notes themselves provided that copies of all notices were to be sent to the attention of Global Emerging Markets-Structured Products Operations at Chase in New York, and that payment under the Notes could be demanded only at "the offices of The Chase Manhattan Bank in New York City." Notes §§ 7(a) and 7(b). [A410, A739] Also, the decisions to extend credit to Springwell to purchase the Notes (and other investments) were made in New York, confirmations relating to that financing were faxed from New York, and reconciliations of maturing and new Notes were sent from Chase New York. [A739, A828, A727-28]

During the same period that Springwell was following Chase's advice to invest in the GKO Notes, Chase was also recommending that Springwell increase its investment in other emerging market instruments, with Springwell again borrowing substantial amounts from Chase to finance those investments. [A58] As a result, by 1998, Springwell had a highly leveraged portfolio in which

hundreds of millions of dollars were invested in high-risk emerging-market paper. [A59] Gager, the Hellenic Group, and the other Chase managers in New York responsible for supervising Springwell's investments utterly failed in their duties to Springwell by encouraging and allowing it to purchase, and to have its portfolio dominated by, such unsuitable and imprudent investments, by failing to disclose the true nature of the risks, and by grossly overreaching and abusing Springwell's trust through the Chase-structured imbalance in the GKO Notes between the risks and rewards passed on to Springwell, and the excessive yields siphoned off of the underlying assets by Chase.

The precarious position into which Chase led Springwell eventually imploded. The Russian government's GKOs were, in essence, a "pyramid" scheme whereby more and more of the new GKOs were being used to pay off maturing GKOs. [A64] In August 1998, the scheme collapsed, and the Russian government suspended trading in GKOs, allowed the Ruble to devalue, and imposed a moratorium on various currency transactions. [A65] The GKOs were eventually restructured, and the Russian government resumed payments, though of reduced amounts and with considerably devalued Rubles. CMSCI, however, did not meet its New York payment obligations on any of the Notes maturing after the collapse. Other emerging market investments in Springwell's portfolio also plummeted in value and defaulted around this time period.

Notwithstanding the defaults, Chase demanded repayment on its financing, and Springwell eventually negotiated a term loan agreement with Chase, pledging its interest in the outstanding GKO Notes and other emerging-market investments to Chase as security for the loan. [A89, A223, A801] That loan has since been repaid in full.

As a result of those events, Springwell suffered more than $200 million in damages, including losses of more than $87 million on the GKO Notes alone. [A61, A64, A801]

Following the collapse, Chase New York made several proposals to Springwell in an attempt to resolve responsibility for the losses. Springwell received a variety of communications and proposals from key financial and legal personnel at Chase New York, including Gager, Russell Carter, and A.J. Heath. [A801-04, A430-02, A807-08, A436-42, A810-23] Those communications indicated that Chase New York was involved in settlement negotiations related to the GKO Notes with multiple parties, including Russian banks, and the communications required that acceptance of a particular settlement offer be sent to Chase New York and that questions concerning to such offer be addressed to Gager in New York. [A438-39, A802-03] Springwell did not accept any of these proposals and filed this suit in December 1999.

Springwell's Complaint, [A53-70], raises several causes of action against Chase, the essential elements of which are that:

1. Chase misled Springwell by misrepresentation and omission into falsely believing that the emerging market investments and GKO Notes it recommended to Springwell were safe, suitable, and appropriate in size for Springwell's portfolio;

2. Chase misrepresented and failed to disclose, with respect to the GKO Notes, that there was a high degree of risk that the Russian government would default on the GKOs and that the Russian Bank counterparties would not be able to perform the forward foreign exchange transactions if there was a substantial devaluation of the Ruble;

3. Chase overreached and abused its fiduciary trust in structuring the Notes so that the underlying GKOs paid interest rates much higher than the interest rates paid to purchasers of the Notes and that the Notes placed all of the risks of the underlying GKOs on the purchasers but paid to the purchasers only a small portion of the return;

4. Chase senior managers located in New York failed to adequately supervise Justin Atkinson in his dealings with Springwell and failed to adequately monitor Springwell's investments or carry out regular portfolio risk assessments with Springwell; and

5. Chase breached its fiduciary duty to Springwell to maximize Springwell's post-collapse return on the GKO Notes and the forward foreign exchange transactions entered into as part of them.

Since filing this suit, Springwell has continued to have frequent contact with Chase New York in an effort to monitor the current status of its investments and to get Chase to provide information and action necessary to mitigate Springwell's damages. Such contact has been contentious, to say the least, and has given rise to a parade of further violations of fiduciary duties by Chase that will be added to the Complaint once this case finally proceeds on the merits. The bulk of this recent activity and interaction with Chase over the last year and a half has been with Chase New York, either directly or, at Chase's insistence, through Chase's New York counsel.

SUMMARY OF ARGUMENT

Springwell was entitled to substantial deference for its choice to sue in defendant Chase's home forum, but received little or no deference from the district court. This Court's recent *en banc* decision in *Iragorri* sets the standard for deference even when plaintiff resides outside the forum, focusing on the validity of the reasons behind plaintiff's choice and the *bona fide* connections of the case to the forum. Implicit in the *Iragorri* standard is the principal that the selection of *either* plaintiff's or defendant's home forum does not signal any improper motive

and should receive substantial presumptive deference. Application of the specific *Iragorri* elements confirms that plaintiff had ample valid reasons for choosing a New York forum where defendant has its headquarters and principal operations, which has a *bona fide* connection to the case, where substantial evidence and witnesses exist, and where numerous significant acts and omissions occurred. Plaintiff's entitlement to the benefit of an international treaty granting it equal access to U.S. courts as have U.S. citizens also warrants significant deference.

The private interest factors in this case demonstrate no significant inconvenience to defendant in New York and, when properly analyzed, a balance of convenience that actually favors a New York forum. The only private-interest factor the district court considered significant was the absence of compulsory process for certain witnesses in England. And even that factor did not rise to the level of oppression or vexation. The court nonetheless gave undue weight to that factor and misanalyzed the facts. Upon proper analysis, this factor is of limited significance and actually favors plaintiff more than defendant.

The public interest factors likewise demonstrate no significant inconvenience to the courts or the forum. And even where some minor concerns or competing interests are present, they exist equally with respect to either forum or in fact favor New York as compared to England. The district court relied solely on a perceived local interest in England and the need to apply some foreign law. But

the court misanalyzed the nature of the interest in having localized controversies tried within view of local persons having an interest in the litigation – which does not exist in this case – and misconceived the facts and plaintiff's claims when assessing England's and New York's relative policy and regulatory interests in the conduct underlying the dispute. Regarding application of foreign law, the court failed to recognize that either England or New York would have to apply some foreign law and hence that factor favored neither forum. And the need to apply some foreign law is not sufficiently burdensome to require dismissal in any event.

ARGUMENT

A district court's decision to dismiss on the grounds of *forum non conveniens* is reviewed by this Court for an abuse of discretion.

> A district court abuses its discretion when "(1) its decision rests on an error of law … or a clearly erroneous factual finding, or (2) its decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions." … In the context of *forum non conveniens*, we may also reverse when a district court fails to consider all the relevant factors or unreasonably balances those factors."

DiRienzo v. *Philip Servs. Corp.*, -- F.3d --, 2000 WL 33725106, at *4 (2d Cir. 2002) (citations omitted). In this case, the district court abused its discretion in each of those possible ways.

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

A central legal error in this case is the district court's failure to give adequate deference to plaintiff's choice of a New York forum selected because, *inter alia*, it is where defendant maintains its world headquarters and primary operations, where numerous witnesses and documents are located, and where numerous critical events and decisions took place. That error permeated and distorted the district court's analysis of the motion to dismiss. Where district courts have accorded insufficient deference to plaintiffs, this Court has recently

and repeatedly held dismissals to be erroneous. *See Iragorri* v. *United Technologies Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (*en banc*) ("In our recent cases, we vacated dismissals for *forum non conveniens* because we believed that the district courts had misapplied the basic rules" of deference.); *see also DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *5 (reversing where trial court "made only passing reference to the weight entitled plaintiffs' choice" of forum); *Guidi* v. *Inter-Continental Hotels Corp.*, 224 F.3d 142, 145 (2d Cir.2000) (reversing where "the district court did not give sufficient weight to Plaintiffs' choice of forum"); *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 103 (2d Cir. 2000) (reversing dismissal where "district court applied an incorrect standard of law" to deference analysis), *cert. denied*, 532 U.S. 941 (2001). Application of the correct standards for deference will demonstrate that far greater deference was appropriate in this case than was given by the district court.

Lacking this Court's recent guidance on the proper standards for according deference, the district court began its analysis with the overly simplistic notion that the "appropriate level of deference in a given case depends on the plaintiff's relationship with the chosen forum." [A964] While the court passingly noted that Springwell was the beneficiary of an access-to-courts treaty between the United States and Liberia – entitling Springwell to the same initial deference as a citizen of the United States – the court nonetheless focused solely on Springwell's foreign

residence and its supposed lack of "connections to the United States" in order to find that Springwell's "choice of forum should not be accorded particularly strong deference." [A966] That constricted view of deference became, in practical terms, no deference at all, and the court seemed to place on Springwell the burden of establishing that the balance of conveniences favored litigation in New York. [A977]

On both the law and the facts, however, the district court got it wrong: Springwell was entitled to far greater deference than the little or none it received. The correct legal standard for deference set out in the recent *en banc Iragorri* decision is wholly at odds with the decision below.

A. The *Iragorri* Standards for Deference.

It is well-established that a federal court with jurisdiction over a case has a solemn obligation to exercise that jurisdiction absent rare and compelling circumstances to the contrary. *Colorado River Water Conservation Distr.* v. *United States*, 424 U.S. 800, 817 (1976). Although jurisdiction may be declined if the chosen forum is unusually inconvenient, dismissal on the grounds of *forum non conveniens* is a rare and disfavored outcome. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

Forum non conveniens dismissals are especially disfavored where the forum chosen by plaintiff is home to one of the parties, and the alternative forum is home to *neither* the plaintiff nor the defendant. *Peregrine Myanmar Ltd.* v. *Segal*, 89 F.3d 41, 46 (2d Cir. 1996) (holding, in a case seeking transfer to a third-party forum, that in "weighing the *Gilbert* factors, the court starts with a presumption in favor of the plaintiff's choice of forum, especially if the defendant resides in the chosen forum, as here") (*citing R. Maganlal & Co.* v. *M.G. Chemical Co., Inc.*, 942 F.2d 164, 167 (2d Cir. 1991) and *Schertenleib* v. *Traum*, 589 F.2d 1156, 1164 (2d Cir. 1978)). This Court rarely approves dismissals under such circumstances. *See, e.g.*, *Iragorri*, 274 F.3d at 75 (vacating dismissal to third-party forum in Connecticut suit by Florida residents against Connecticut corporation); *Manu Intern., S.A.* v. *Avon Products, Inc.*, 641 F.2d 62 (2d Cir. 1981) (reversing dismissal to third-party forum in New York suit by Belgian corporation against New York corporation); *Peregrine Myanmar*, 89 F.3d at 43 (affirming denial of *forum non conveniens* motion seeking transfer to third-party forum in New York suit by Myanmar corporations against New York resident); *Guidi*, 224 F.3d at 143 (reversing dismissal to third-party forum in New York suit by New Jersey and Maryland residents against Delaware corporation with principal place of business in New York).

The strong jurisdictional obligation of the federal courts is reflected in the strong deference given to a plaintiff's choice of forum. This Court

> held in *Iragorri* that the "first level of inquiry" in a *forum non conveniens* analysis is to determine what deference is owed a plaintiff's choice of forum. 274 F.3d at 73. Ordinarily a strong favorable presumption is applied to that choice. … In *Iragorri* we ruled that a court should begin with the assumption that a plaintiff's choice of forum will stand unless the defendant can demonstrate that reasons exist to afford it less deference. 274 F.3d at 70-71.

DiRienzo, -- F.3d at --, 2000 WL 33725106, at *4.

Such deference is diminished only where a defendant can show that the plaintiff selected the United States forum for improper or invalid purposes. In *Iragorri*, this Court reviewed a range of cases regarding deference to a plaintiff's choice of forum, and synthesized the following principle:

> The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice.

Iragorri, 274 F.3d at 71-72 (footnotes omitted); *DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *5 (same, *citing Iragorri*). By making its principle equally applicable to foreign plaintiffs, this Court remained "mindful" of the United States' treaty obligations to accord certain foreign litigants equal access to the U.S. courts as domestic litigants. *Iragorri*, 274 F.3d at 69 n.2.

Iragorri identified several reasons for choice of a forum that are valid and support strong deference, as well as some reasons that are invalid. Valid considerations for choosing a U.S. forum include: "the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense." 274 F.3d at 72. More generally, this Court has considered a case's *bona fide* connection with the forum to be a valid and sufficient reason for selecting the forum. *DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *5. Invalid considerations for choosing a U.S. forum include "forum-shopping reasons – such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum." *Iragorri*, 274 F.3d at 72.

This Court also recognized that consideration should be given to a defendant's motive in seeking dismissal. "Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of *forum non conveniens* not because of

genuine concern with convenience but because of forum-shopping reasons." *Id.* at 75.

In this case, "there is little indication that [plaintiff] chose the defendant['s] principal place of business for forum-shopping reasons," *id.* at 75, hence substantially greater deference should have been afforded that choice. By contrast, there is substantial reason for this Court to be skeptical about Chase's motives in requesting that this case be ejected from its home in New York.

B. Application of the *Iragorri* Factors.

In considering the deference due Springwell's choice of forum, the district court considered only Springwell's residence and supposed lack of connections to the forum. [A966] The court's failure to consider the numerous additional *Iragorri* factors – while perhaps understandable given that *Iragorri* had yet to come down – is, nevertheless, fatal to its decision. Furthermore, a review of the *Iragorri* factors by this Court will show that Springwell was entitled to far greater deference than was accorded it by the court below, and that given such deference, this case should have remained in the chosen New York forum as a matter of law.

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

Before considering the explicit *Iragorri* factors for deference, this Court should bear in mind a basic supervening principle implicit in the *Iragorri* analysis:

Regardless of where the plaintiff resides, where the plaintiff brings suit in the *defendant's* home forum, that choice should be considered reasonable and should receive the same presumptive deference as when a resident plaintiff sues in its own home forum. "Where a U.S. resident leaves her home district to sue the defendant where the defendant has established itself and is thus amenable to suit, this would not ordinarily indicate a choice motivated by desire to impose tactical disadvantage on the defendant." *Iragorri*, 274 F.3d at 73. Alternatively expressed, a home-forum defendant's motion to dismiss should be accorded a substantial negative deference or skepticism where defendant seeks transfer to a third-party forum. Unlike the selection of a forum that is home to either plaintiff or defendant, a motion seeking transfer to a third-party forum that is home to *neither* party raises the natural inference that it is being made for tactical reasons.

The district court in this case gave no consideration to defendant Chase's residence in New York when considering the deference due Springwell's choice of a New York forum. Such failure, by itself, is reversible error sufficient to undermine the court's overall analysis. *DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *4 (reversible error where "a district court fails to consider all of the relevant factors").

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

Turning to the specific *Iragorri* factors, they also strongly support considerable deference for Springwell's choice of forum and were either never considered or misanalyzed by the district court. The same factors applied to defendant Chase's selection of an alternative forum likewise support great skepticism of the motion to dismiss.

Residence with Respect to Forum. The district court's deference analysis viewed Springwell's foreign residence through a one-dimensional prism without considering the context of plaintiff's decision to sue outside its home forum. Springwell sensibly eschewed its two possible "home" fora – Liberia or Greece – given that either of those two fora would have been substantially inconvenient to the litigation of this particular case. While Springwell is a Liberian entity, its primary operations, owners, and officers are all in Greece and little or nothing relevant to this case occurred in Liberia. Greece, on the other hand, does have some connection to this case and is the site of various relevant witnesses and events. It too makes less sense as a forum, however, for the simple reason that virtually all documents and conversations relevant to this case are in English, and translating such complex materials in a Greek court would have been burdensome to all parties, including the plaintiff. *Cf. Manu*, 641 F.2d at 66 (rejecting proposed

alternative forum in part because "the translation problem would appear to be much less serious in New York than in Taiwan").

Unable, as a practical matter, to bring this suit in its home fora, Springwell was faced with a choice of the United States, England, and Jersey (Channel Islands) as possible fora. (Moscow, another forum with connections to this case, was rejected for reasons of language, distance, and anticipated difficulties in navigating the Russian legal system.) Springwell chose the United States, and specifically defendant's headquarters location of New York, as the forum most convenient to it and as a forum that seemed self-evidently convenient to defendant.[2]

Where a foreign plaintiff such as Springwell is pressed by practicality and common sense into choosing between two or more non-home fora, its choice should not be denied deference merely because it has rejected suit in its home forum for good and sufficient reasons. Far from indicating a tactical decision to forgo convenience in favor of some inappropriate objective, the decision in these

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[2] Spiros Polemis, Springwell's principal overseeing this litigation, attended schools in the United States for approximately seven years (in both New York City and Hartford, Connecticut), and for nearly three of those years worked in the family business, which had offices in Manhattan. He is familiar with the culture and comfortable with the legal system here, and has a significant fluency in English. New York thus was a convenient alternative forum for Springwell once the option of suing in one of its home fora was rejected.

circumstances shows a serious consideration of the conveniences notwithstanding such other tactical advantages Springwell might have had from suing at home. Unlike many situations where a plaintiff seeks a U.S. forum instead of its home forum, here, where plaintiff's "home" forum is demonstrably less appropriate for the case, the most reasonable assumption is that Springwell has selected the next most convenient forum in which to bring the suit. Indeed, even Chase seems to recognize that Springwell's "home" fora are not, in this instance, presumptively convenient locations: Chase has *not* suggested transfer to Greece or Liberia. Springwell's having to choose between two non-home fora in this context does not evidence forum "shopping," but merely forum selection, which is perfectly valid.

Conversely, Chase's effort to transfer this case *away* from its forum of residence to a third-party forum must be viewed with a skepticism equal and opposite to the deference given a plaintiff suing in its home forum. Such a move on its face suggests that the motion is not being made for convenience, but rather for tactical advantage. Unlike Springwell's obvious and valid reasons for eschewing its home fora of either Liberia or Greece, there are no similarly facial deficiencies with New York as a forum. And, with numerous documents and witnesses in *both* fora, there is no presumptive reason to assume that England will serve the conveniences of the parties better than New York.

> Thus, defendants' current claims of inconvenience raise questions as to their underlying motives. The way in

> which they have used procedural tactics ultimately to obtain dismissal of plaintiffs' suit in district court in favor of [a foreign forum] counsels caution in evaluating their *forum non conveniens* motion.

DiRienzo, -- F.3d at --, 2000 WL 33725106, at *6.

Bona Fide *Connection of Case to Forum*. A significant factor in the deference analysis is whether the case has a *bona fide* connection with the chosen forum. Such a connection, even if not exclusive or overwhelming, is nonetheless a wholly valid reason for selecting the U.S. forum, and a sufficient basis for substantial deference. In *DiRienzo*, for example, this Court found that the United States' interest in the claims raised, though not "outcome determinative in the weighing of the relevant factors," was nonetheless sufficient to "demonstrate[] a '*bona fide*' connection to the United States, that is, a valid reason" for bringing suit here. -- F.3d at --, 2000 WL 33725106, at *5.

Rather than considering whether the *case* had a connection with the United States, the district court considered only whether Springwell itself had connections with the United States. [JA966] But that is not the measure of a *bona fide* connection, and the relevant connections between this *case* and this forum are ample. The location of Chase's headquarters in New York, the significant role Chase played in managing Springwell's investments and accounts and in supervising and executing the many transactions at issue, and Chase New York's control over the matter after the Russian collapse – throughout the 16 months

preceding this lawsuit, and continuing to this very day – all constitute *bona fide* connections between the subject of the litigation and this forum and thus serve as valid reasons for bringing suit in this forum. Indeed, Chase's concentration in New York of its efforts to resolve the multifaceted problems arising from the Russian collapse – negotiating with numerous parties on behalf of itself and its overseas subsidiaries – is ample testament to both the centrality of Chase New York in the underlying transactions themselves, as well as to New York's substantial connection to any resolution of the remaining dispute.

Such New York activities establish an ample *bona fide* connection between this case and New York, which is a valid reason for selecting this forum, regardless of whether the case might also have legitimate connections with other fora. Springwell's choice of forum is thus entitled to substantial deference, and certainly to far more than the "minimum" deference accorded it by the district court.

Availability of Witnesses or Evidence to the Forum. There is no serious dispute that New York is the location of numerous witnesses and substantial evidence essential to Springwell's theories of liability and thus is a perfectly logical and reasonable choice as a forum. *See infra* at 35-36. Indeed, even the district court's concern over the lack of compulsory process in New York over some foreign individuals focused not on witnesses needed for Springwell's case, but rather on witnesses supposedly useful to Chase's defense. But Springwell had

no reason for concern over *Chase's* ability to call as witnesses its few current or former employees that might be beyond compulsory New York process. Past and present Chase employees are far more likely to cooperate willingly with Chase than would similar U.S.-based witnesses be likely to cooperate with Springwell. Springwell's need to compel attendance of hostile witnesses in New York was thus far more significant than Chase's unlikely need to compel attendance of friendly witnesses in England over whom Chase has more influence. The forum of convenience from Springwell's perspective, both for its own sake and on the whole, was thus simple and straightforward: New York.

Defendant's Amenability to Suit in the Forum. Chase is obviously and readily amenable to suit in the Southern District of New York. And while Chase also is amenable to suit in England, that does not diminish the reasonability of selecting a New York forum. Indeed, the proper comparison for deference purposes is not New York versus London, but rather New York versus plaintiff's *home* forum. This deference factor asks why plaintiff left home at all, not why plaintiff failed to choose yet a third forum favored by defendant. In this case, Chase could more easily have claimed inconvenience in either Liberia or Greece, and hence the decision to leave home and come to Chase's home forum raises no adverse inference against deference. *Cf. Iragorri*, 274 F.3d at 75 (even where defendant agreed to appear in third-party jurisdiction, defendant's amenability to

suit in its home district a valid reason for selecting forum where jurisdiction in plaintiff's home forum uncertain).

Availability of Appropriate Legal Assistance. While reasonable legal assistance is certainly available in both the United States and England, given that this suit is against Chase directly, the issues Springwell views as important to its case will involve substantial inquiry into Chase's management structure within the Private Bank, its internal controls regarding derivative and emerging-market products, and its policies and procedures regarding suitability, investment risk, and marketing of new products to private banking clients and others. Because such issues involve the internal management, policies, and knowledge of Chase's headquarters and senior management, [A521-27], "*appropriate* legal assistance," *Iragorri*, 274 F.3d at 72 (emphasis added), seemed more likely to be available in the United States generally, and in the financial center of New York in particular. English attorneys, while no doubt legally capable, seem at a considerable disadvantage not merely due to location, but because of a lesser familiarity with U.S. corporate and banking structures. And any appropriate English attorneys could be expected to be far fewer in number and more likely to have a conflict than similarly appropriate attorneys in the United States. The sensible desire to have a reasonable selection among U.S. counsel when suing a U.S. banking corporation

on matters involving U.S. banking procedures and practices is, once again, a perfectly valid and sensible reason for selecting a New York forum.

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

In contrast to Springwell's ample valid reasons for bringing this suit in New York, there is no suggestion or evidence that it had any improper purpose in selecting a New York forum.

Tactical Advantage from Local Laws. There is no suggestion in this case that New York substantive law provides Springwell with any tactical advantage in its claims. Indeed, the applicable choice of law rules both here and in England suggest that there will be effectively no difference in the substantive law applied to the various claims: some will require New York law, and others English law. *See infra* at 54. Although the two fora use different procedural rules – in discovery, for example – such differences go to matters of convenience, efficiency, and expense, not substantive tactical advantage for one side or the other.

Generosity of Damages within the Forum. There can be no serious suggestion that Springwell selected its forum with an expectation of some wild generosity from a New York jury. The Southern District of New York is hardly renowned for any supposed excess of generosity, unlike the personal-injury meccas of Alabama, West Texas, or East St. Louis. And the dry, though complex,

financial calculations that will establish damages in this case are hardly akin to indeterminate valuations of death or pain and suffering, and are unlikely to be swayed by the passions or innate generosity in a particular forum.

Popularity or Unpopularity within the Forum. There are no grounds to suggest that Springwell selected New York because it would be hostile to Chase. Indeed, as Chase's world headquarters, and residence to numerous Chase employees, clients, and vendors, New York can be expected to be far more sympathetic to Chase than perhaps any forum in the world. And as a foreign corporation, Springwell certainly has no reason to expect that it would receive particularly favorable treatment in New York. Rather, Springwell trusts that New York courts and juries will treat it without bias one way or the other.

Inconvenience and Expense to Opponent within the Forum. Having sued in Chase's home forum, there is no credible claim that the forum was selected to increase Chase's inconvenience or expense, as even the district court seemed to recognize in her consideration of the private-interest factors. [A975] By contrast, Chase's effort to remove this case from New York seems little more than an effort to insulate its headquarters and New York decision makers from discovery, thereby creating artificial roadblocks to Springwell's efforts to prove its case.

* * * * *

In this case, as in *DiRienzo*, "no evidence suggests [plaintiff] had an improper motive in bringing suit here." -- F.3d at --, 2000 WL 33725106, at *5. Rather, the numerous – even if not exclusive – connections between this litigation and New York are by themselves sufficient to "demonstrate[] a 'bona fide' connection to the United States, that is, a valid reason" for bringing suit here, and proper cause for substantial deference. *Id*.

C. The Treaties with Greece and Liberia.

In addition to erring under the *Iragorri* analysis of deference, the district court also denigrated the deference value of United States treaties providing equal access to U.S. courts for citizens of Liberia and Greece.[3] Although the court purported to give Springwell the same initial deference "as it would for an American citizen" [A964-66], it later withdrew that deference, because Springwell is not a resident of the United States. The district court thus reduced those treaties to meaninglessness. While U.S. citizenship – and hence equal treatment to U.S. citizens – is not a controlling factor in the deference analysis, it nonetheless should remain a significant and positive factor in that analysis.

The Supreme Court held in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 **(**1981) that, although it is not determinative of the deference issue, U.S. "[c]itizens

[3] Copies of the treaties are reproduced in the Appendix to this brief.

or residents deserve somewhat more deference than foreign plaintiffs ….” And this Court has consistently held that beneficiaries of treaties, like those with Liberia and Greece, are entitled to the same deference as United States citizens. *See*, *e.g.*, *Farmanfarmaian* v. *Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978); *Irish National Ins. Co.* v. *Aer Lingus Teoranta*, 739 F.2d 90, 91-91 (2d Cir. 1984) (district court’s failure to apply same standards to foreign treaty beneficiary as it would to an American “tainted its entire holding”); *see also*, *In re Complaint of Maritima Aragua, S.A.*, 823 F. Supp. 143, 150 (S.D.N.Y. 1993) (“when a treaty with a foreign nation accords its nationals access to our courts equivalent to that provided American citizens,” “no discount may be imposed” upon the choice of a New York forum merely because the plaintiff is foreign).

Withdrawing treaty deference from plaintiffs who are not United States residents reduces the value of the treaties to a virtual nullity, since much of the value of the treaties is that they provide a heightened standard of treatment for United States and foreign beneficiaries of such treaties as compared to citizens of countries that have not entered into such reciprocal relationships with the United States. Many of the persons and companies that can be expected to make use of the treaties are residents of their own countries who engage in international business involving the reciprocal nation. Therefore, denying non-residents favorable treatment when they need to access the courts of the signatory nations

disserves both United States and foreign beneficiaries engaged in such business. If citizenship, apart from residence, is given no weight, then there is little difference in the treatment that will be accorded beneficiaries and non-beneficiaries of the treaties.

The United States should not be presumed to have entered into such pointless international obligations. Rather, citizenship itself – and hence the equal access provisions – should accord a significant, though not dispositive, boost in deference, even absent residence within the forum. The district court failed to add any significant deference under the treaties, and hence tainted its entire holding.

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

In this case, while the bare adequacy of England as an alternative forum is not at issue, such adequacy is merely a threshold determination and does not establish the convenience or propriety of England as an alternative forum. *Gilbert*, 330 U.S. at 506-07. That question turns on issues of deference and the balancing of private- and public-interest factors relating to convenience. Even where a minimally "adequate" alternative forum is proposed, therefore, a court must further determine whether litigation in plaintiff's chosen forum is so inconvenient as to require dismissal. "The burden of demonstrating that the plaintiff's chosen forum

is not convenient is on the defendant seeking dismissal." *DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *6.

A. Private-Interest Factors.

The private-interest factors relate to the convenience of the litigants and include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S. at 508. When considering these factors, "[r]ather than simply characterizing the case as one in negligence, contract, or some other area of law, the court should focus on the precise issues that are likely to be actually tried, taking into consideration the convenience of the parties and the availability of witnesses and the evidence needed for the trial of these issues." *Iragorri*, 274 F.3d at 74.

1. *Ease of Access to Proof*

Finding that "there are undoubtedly documents in both" potential fora, and that technological advances have minimized transportation burdens in any event, the district court found that "this factor does not favor dismissal." [A973-74] Springwell further contended that any significant documents from England were

moved to New York following the Russian collapse in order to facilitate New York-based workout efforts. The denial of discovery blocked proof of that contention, but if correct, it would tilt the factor in favor of New York.

2. *Availability of Compulsory Process*

The court below erroneously relied upon this factor in granting Chase's *forum non conveniens* motion. The court held that the testimony of several witnesses concerning Springwell's sophistication as an investor "could only be compelled in England," and that this factor weighed "heavily in favor of dismissal." [A975-76] In reaching that conclusion, however, the court failed to hold Chase to its burden of proof, made an error of law by attaching far too much significance to this factor, and paid too little attention to Springwell's need to compel attendance of witnesses in New York.

First, the district court did not require Chase to provide any evidence that the witnesses it identified in England would be unwilling to appear voluntarily in New York if Chase so requested, and the court reached its conclusion without any evidence on that issue whatsoever. The only three persons – Finbarr Sheehan, Van Mellis, and Marco Ferrazzi – actually named by the court are, like Stewart Gager, former employees of Chase or one of its subsidiaries, and there is no evidence, or even the barest suggestion, that they would spurn a request from Chase to testify in New York. *Cf. Peregrine Myanmar Ltd.* v. *Segal*, 89 F.3d at 47 ("neither side

claims that any witness will be unwilling to testify").[4] The court also referred to "London representatives" of Merrill Lynch and other financial institutions, but Chase never named such representatives, or offered any evidence that they exist or that they are still located in London, much less whether those supposed witnesses would be willing to appear in the United States. And as to all of those witnesses, there is no discussion of whether they come to New York with any regularity of their own volition. If they have reasons and occasion of their own for coming to New York, that would minimize any inconvenience to them of appearing voluntarily. *Cf. Thomson* v. *Palmieri*, 355 F.2d 64, 66 (2d Cir. 1966) (finding lessened inconvenience where "it appears that these parties and witnesses have occasion to come to New York for business purposes").[5]

As with the access to evidence issue in *DiRienzo*, Chase has failed to explain how many of the witnesses abroad would refuse to appear voluntarily or how such

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[4] The lack of evidence from Chase on this point is particularly damning given that it took the effort to ask Gager about his willingness to appear in England and presented the results to the court. One can only presume that it did not make or report the results of similar queries whether its witnesses in London would come to New York because the results would have been unfavorable to its motion. Given Chase's "burden to establish clearly each" element of forum analysis, *PT United Can Co.* v. *Crown Cork & Seal Co.,* 138 F.3d 65, 74 (2d Cir. 1998) the only reasonable assumption is that the witnesses identified would willingly come to New York.

[5] By contrast, Springwell provided evidence that Van Mellis travels to New York regularly on business. [A827]

risk of refusal "would be 'oppressive' or 'vexatious,' nor does the district court offer a satisfactory explanation." -- F.3d --, 2000 WL 33725106, at *6. And, again as in *DiRienzo*, "absent an explanation, less weight should be accorded this factor. … Of greater significance, the district court committed a legal error by failing to hold defendants to their burden of proof." *Id*.

Second, even assuming, *arguendo*, the unavailability of certain witnesses Chase might call, the district court grossly overestimated the legal significance of this factor. The supposed unavailability at trial of a handful of defense witnesses does not weigh heavily at all, but, at best, is a relatively minor consideration that is easily remedied by technological advances such as video depositions. In *DiRienzo*, this Court

> recognized the availability of letters rogatory as relevant in deciding whether plaintiffs' chosen forum is inconvenient. … While demeanor evidence is important when trying a fraud case before a jury, … videotaped depositions, obtained through letters rogatory, could afford the jury an opportunity to assess the credibility of these Canadian witnesses.

-- F.3d at --, 2000 WL 33725106, at *7 (citation omitted). Indeed, in *DiRienzo*, "most of the potential witnesses with direct knowledge of the alleged fraud [were] located in Ontario," *id*., yet this Court reversed a dismissal in favor of a Canadian forum. *See also Overseas Programming Cos., Ltd. v. Cinematographische Commerz Anstalt,* 684 F.2d 232, 235 (2d Cir. 1982) ("any difficulties … regarding

witnesses whose attendance the Court is unable to compel can most likely be resolved by the use of deposition testimony or letters rogatory"); *Thomson*, 355 F.2d 64, 66 ("Presumably the witnesses employed by the defendant corporation can be examined in the United Kingdom, by letters rogatory enforced by comity accorded the United States court by United Kingdom courts."); *Maganlal*, 942 F.2d at 169 ("any testimony MG needs from witnesses whose attendance cannot be compelled can be obtained, for example, through the use of letters rogatory"). In light of available alternatives, "the absence of process over [foreign witnesses] … does not compare with the risk of needless prejudice to the defendant involved in other recent *forum non conveniens* cases in this Circuit." *Manu*, 641 F.2d at 67. [6]

Moreover, the current residence of several potential witnesses from London seems to have changed, and hence they could not be compelled to appear in London any more than they could be compelled to appear in New York. A recent Bloomberg search, for example, lists only an Athens address for Van Mellis, who is no longer with Chase. Bloomberg Profile, May 10, 2002. And Brian Lazell, a former Chase emerging markets employee in London who reported to Jorge

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[6] Chase claimed that these witnesses would testify on only one of the many issues in this case, namely Springwell's sophistication as an investor, and the court ignored the fact that several senior Chase New York managers, including Gager, Jasson, O'Donnell, and George Zannos had extensive personal contact with Springwell and gave Springwell investment advice and, therefore, could give testimony on that issue as well.

Jasson, now is listed by Bloomberg as being in Hong Kong. Bloomberg Profile, March 28, 2002. And as for the unidentified Merrill Lynch witnesses Chase claims to be interested in, it is simply impossible to know whether they are still in London or not.

Third, the court failed to give adequate consideration to the many key witnesses for Springwell's case that are in New York. In that regard, the court considered only a single former Chase employee in New York – Stewart Gager – who had agreed, at Chase's behest, to testify in England. [A975] The Court ignored the approximately 30 New York individuals identified on documents relating to the transaction by noting that Springwell had not identified which ones would be called as trial witnesses. [A975] But that treatment is clearly erroneous given that the court itself, by erroneously denying Springwell discovery on forum-related issues, is responsible for Springwell's inability to provide information that is in Chase's hands. Information subsequently obtained by Springwell, and that would have been far more expeditiously revealed had the court not denied discovery, has identified numerous persons in New York who could well be called to testify. For example: Lesley Daniels, who was head of Market Risk Management in New York would have knowledge of the risks presented by GKOs, and the limits imposed by Chase on transactions with such assets, and the actions by Chase in response to the collapse; Gustavo Dominguez, who traded in GKOs

for Chase in New York would have knowledge GKO risks at the time that Chase was touting GKO Notes; Members of the New Product Committee who would have reviewed virtually all aspect of the GKO Notes would have knowledge of the risks involved in the Notes and the reasons for the gross imbalance in the division of risk and rewards between Chase and its clients.

3. *Cost of Witnesses*

The district court found that there was no "evidence that the cost of obtaining witnesses in either forum would be prohibitive" and hence that this factor was "not relevant" to the court's analysis. Mem. Op. at 22-23.

4. *Other Practical Considerations*

Regarding the final catch-all factor of other considerations and practical issues, the court again found no evidence that "any other factors favor one forum over the other" and thus found that this element was also not relevant to its analysis. [A975-76] While the court was correct that no other factors favored England, it overlooked the availability of more efficient and convenient discovery in the federal courts as a factor favoring New York. *See Societe Nationale Industrielle Aeropatiale* v. *United States District Court*, 482 U.S. 522, 560 & n.18 (1987) (Blackmun, J., concurring in part and dissenting in part) ("'In England, for example, although document discovery is available, depositions do not exist,

interrogatories have strictly limited use, and discovery as to third parties is not generally allowed.'") (citation omitted). England's more restrictive discovery procedures would force Springwell to use more circuitous and expensive routes of independent investigation in order to obtain even a semblance of accurate information on numerous issues largely within the knowledge and control of Chase. While "some inconvenience or the unavailability of beneficial litigation procedures" may not "render an alternative forum inadequate" as a threshold matter, *Borden, Inc.* v. *Meiji Milk Products Co., Ltd.*, 919 F.2d 822, 829 (2d Cir. 1990) (citation and quotation marks omitted), *cert. denied*, 500 U.S. 953 (1991), such considerations certainly weigh in the subsequent balance of *conveniences*. And here the unavailability of beneficial discovery procedures in England is a factor that favors New York as a forum.

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The district court itself recognized that under the private-interest factors, Springwell's choice of a New York forum was neither oppressive nor vexatious, even given the court's overemphasis on the compulsory-process factor. And when that and the other factors are properly analyzed and weighed, the private convenience of New York is either equally balanced with or preferable relative to that of England.

B. Public-Interest Factors.

In addition to the interests of the litigants, forum analysis also considers certain public-interest factors related to the convenience of the court and the forum in general. Those factors include potential "[a]dministrative difficulties" from litigating in "congested centers," the burden of jury duty if "the people of a community [have] no relation to the litigation," the "local interest in having localized controversies decided at home" where a case "touch[es] the affairs of many persons, [providing] reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only," and the interest in trying a case in a forum familiar with the "law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gilbert*, 330 U.S. at 508-09; *Iragorri*, 274 F.3d at 74 (same).

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

The district court correctly found that jury burden, court congestion, and administrative difficulties were largely irrelevant to the balance, [A970, A973], and hence they do nothing to overcome the deference due Springwell's choice of forum. *Cf. Guidi*, 224 F.3d at 146 n.5 ("the recent filling of all judicial vacancies

and the resulting full complement of judges for the District makes [concern with court congestion] of little or no present significance."). Absent any such genuine public inconvenience, the overall weight of the public-interest balance is necessarily limited.

2. *Local Interest*

Rather than considering whether this case presented a "localized controversy" as described in *Gilbert*, the district court instead looked to general policy and regulatory interests and mistakenly concluded that "England has the stronger interest in this dispute" because it believed that Springwell "purchased the Notes in England," that the "interactions between the parties took place predominately in London," and that the express and implied contracts supporting the contract and fiduciary duty claims were "entered into in London." [A967-68] While the court also recognized that New York has similar policy and regulatory interests concerning conduct within its borders in this case, it downplayed those interests by mischaracterizing or ignoring Springwell's claims. In the end, however, this case is an international financial controversy involving a limited number of parties in multiple locations, and thus is quite unlike "localized" suits regarding industrial accidents, aircraft disasters, products liability, or groundwater contamination, which can uniquely affect many persons concentrated within a particular jurisdiction. Accordingly, it would be error to characterize this case as

one that touches upon the affairs of many in England who might want the trial to be conducted within "their view and reach," *Gilbert*, 330 U.S. at 509, and this factor should have had little impact on the balance of conveniences.

Insofar as this case affects the affairs of other persons who might have invested similarly with Chase, such persons (including many Greeks managed through Chase's Hellenic Group) are located around the globe, and can hardly be considered localized in England. *Cf. Manu*, 641 F.2d at 67 ("Neither of the parties is from Taiwan and none of the Taiwanese individuals involved seems to be complaining of anything. In truth, neither proposed forum has a particular affirmative public interest in this case of the type contemplated by *Gilbert*"). Moreover, as between England and New York, this case would seem to touch a far larger group of persons in New York, where Chase maintains it headquarters and key management, and where it has numerous employees, contractors, clients, and regulators. If it applies at all, therefore, the justice-within-view interest described in *Gilbert* favors New York, not England.

As for the general policy and regulatory interests emphasized by the district court, such interests are served primarily through choice of law rules, rather than through *forum non conveniens*. And even as to such interests, the district court understated New York's comparative interest by failing to focus on the specific elements of Springwell's claims. Although the court conceded that New York had

a greater interest than England in Springwell's negligent supervision claim and its claim regarding Chase New York's post-collapse conduct, the court failed to acknowledge the substantial New York conduct, and hence New York interest, in Springwell's other claims as well.

Springwell's fiduciary duty, fraud, and negligence claims all include allegations that Chase *omitted* to disclose to Springwell the high risks of the emerging-market investments Springwell was making. Complaint ¶¶ 63, 67-68, 78 (Claims II-IV). [A70-72, A74] Much of the knowledge regarding such risks and unsuitability was held by senior Chase managers in New York such as Stewart Gager, Kathy O'Donnell, and Jorge Jasson, and those managers had an affirmative duty to disclose that information to Springwell notwithstanding any further failures to disclose by London personnel. Springwell's fraud claim with respect to the GKO Notes depends heavily on the completely inadequate and misleading "Risk Disclosure" statements sent to Springwell from New York and the failure of the those statements, and the Chase managers in New York responsible for preparing them, to disclose numerous material facts about the Notes and their underlying transactions. Similarly, Springwell's claims that CMB recommended "unsuitable" investments, Complaint ¶¶ 57, 63, 70, 77, 85, 89, 92 (Claims I-VII) [A68-76], are closely connected with New York, because the Chase managers with ultimate responsibility for determining the suitability of the investments were in New York,

including Gager, O'Donnell, Jasson, members of Chase New York's Legal Department, and very likely others who would be revealed through discovery. That the final sales pitch may have come from a salesperson in London does not negate the critical suitability decisions – and breaches of duty – in New York that both preceded and followed that pitch.[7]

The district court discounted the significance of Chase's direction and control from New York by incorrectly asserting that Springwell's argument regarding "the centrality of the 'creation' and 'marketing' of the Notes is without support in [its] own complaint[]," that the Complaint alleged only misrepresentation regarding the Notes rather than that they were "inherently illegal," and that the declaration of Springwell's expert on the involvement of Chase New York was "irrelevant." [A969] Those assertions were wrong on multiple levels.

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[7] Other events that apparently took place in New York and their relation to Springwell's Complaint include the selection and approval of the Russian bank counterparties – either Chase Moscow or others – for the foreign currency forwards to convert Rubles to Dollars and the potentially deficient structuring of those forwards, relevant both to Springwell's fiduciary duty claims and to its damages. Such currency transactions are of substantial interest to New York. *Cf. Indosuez International Fin. B.V.* v. *National Reserve Bank*, 2002 WL 857397 (N.Y., May 7, 2002) (New York interest in Ruble/Dollar forward exchange contracts).

Chase New York's direction and control over the "marketing" of the Notes relates *precisely* to the issue of the suitability of the Notes for customers such as Springwell and to the issue of what Chase decided to disclose concerning the Notes and what it chose not to disclose. And as for the "creation" of the Notes, Springwell certainly *did* allege in its Complaint that the structure of the Notes themselves was inherently illegal, and that the Notes were unsuitable independent of how they were *represented*. *See, e.g.,* Complaint ¶ 48 ("structure of the GKO Linked Notes developed by [Chase] placed on Springwell the entire risk" but "Springwell was receiving only a fraction of the benefit"); ¶ 57 (investments were "wholly unsuitable for Springwell"); ¶¶ 61(d) & 63(d) (Chase and agents duty "not to prefer their own interests over those of Springwell"; investments "were structured so as to pass along all risks to Springwell while providing substantial profits to [Chase] and its agents such that the investments benefited them, the fiduciaries, but were disadvantageous to Springwell, the beneficiary"); ¶ 85 (negligence in "recommending investments which were patently unsuitable").[8]

Expert testimony before the district court – mistakenly ignored as irrelevant, but not challenged as to accuracy – indicated that "most of the important decisions

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[8] And insofar as the district court rejected Springwell's substantive arguments because it thought the *pleadings* were not adequately descriptive, that could certainly have been corrected through amendment. *Devaney* v. *Chester*, 813 F.2d 566, 569 (2d Cir. 1987).

relating to the creation, marketing and continuing management of the GKO Notes were made at a high managerial level of Chase in New York's world headquarters" Declaration of Owen Carney, May 18, 2000, ¶ 7. [A520] Relevant activities in New York included the adoption and implementation of policies and procedures for acquiring instruments and for managing portfolios and sales to customers throughout the world, applying guidelines for new products, as expected by the Federal Reserve Bank, and implementing internal controls, accounting, auditing, and education regarding new derivative products such as the Notes in this case. [A521, A524] Activities central to both the pre- and post-issuance risk-analysis of these investments – and hence to Springwell's claims of misrepresentation and omission of critical risks – likewise would have been undertaken, and final decisions reached, by senior personnel at Chase New York. [A522, A524-27] And, because Stewart Gager in New York was most immediately in charge of Springwell's relationship with Chase and of monitoring Springwell's investments, applicable regulatory provisions would require that Gager review and ultimately approve new products being offered to Springwell. [A523]

The district court's suggestion that most "interactions" between the parties occurred in London thus ignores that critical events and breaches of duty frequently involved non-interaction – such as omissions of material information – and actions taken unilaterally by Chase in New York. It also ignores the numerous

"interactions" between Chase New York and Springwell that occurred by telephone and fax. [A801-05, A827-29] Even where a communication was ostensibly from a person or entity located in London, Springwell has evidence of a number of instances in which such "London" communications were in fact prepared in and sent from New York.[9] In some cases the ostensible London "author" of a letter apparently had no role whatsoever other than to retype verbatim a letter written by an undisclosed party in New York.

While there were certainly interactions and breaches of duty in London as well, Springwell's Complaint alleges far more – that Chase New York was both a direct participant in its own wrongful conduct as well as an indirect participant in wrongful conduct committed by its agents in London. Such direct and indirect involvement by Chase New York is more than sufficient to establish a significant New York interest in this litigation and to render a New York forum appropriate for this case. *Cf. DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *3 (noting allegations that foreign defendants "are liable as direct participants, as participants in a common scheme to defraud, and as co-conspirators in the alleged wrong" and

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[9] *See, e.g.*, [A436-42] (letter sent by Russell Carter of New York, prepared and faxed from New York but typed on CMIL stationary); [A810-13] (letters apparently prepared in New York and typed on stationery of Chase's London Branch); [A802-03] (describing ostensible London authors deferring to seemingly actual New York source of correspondence).

subsequently finding a local interest and proper forum in New York). Whereas the district court chose to ignore the relevant direction and control from New York, this Court will look to the place where conduct was controlled and coordinated in determining the various interests at stake in *forum non conveniens* cases. *See Iragorri*, 274 F.3d at 75 (noting significance of persons and documents in Connecticut related to plaintiffs' "defective design theory" despite the numerous aspects of the case that occurred outside the United States).

The district court's assumption that Springwell "purchased the Notes in London," was also incorrect. All of the critical elements of the sale occurred in New York. The sale was confirmed in writing by an exchange of fax messages from Chase New York to Springwell and then from Springwell back to Chase New York, payment for the Notes was made in New York, a copy of the Notes was sent to Springwell by Chase New York, and the financing of the purchase was confirmed by fax from Chase to New York to Springwell. *See Maganlal*, 942 F.2d at 169 ("since the contract at issue was negotiated and signed in New York, and the party charged with breach, MG, is a New York corporation, New York has a significant interest in having this breach of contract action litigated in its courts").

Finally, the district court's analysis was handicapped by its refusal to allow discovery on forum-related issues, thus preventing a proper balancing of the local interests involved. For example, it is Springwell's understanding that Chase

marketed many of the investments sold to Springwell to individuals and institutions in the United States, as well as abroad. *See, e.g.*, [A422] (representations and warranties in Note for "Holder [who] is a U.S. person"); [A784] (Terms & Conditions sheet with reference to potential sales restrictions for "persons in the U.K., U.S. and Jersey"). Limited discovery would have enabled Springwell to adduce direct evidence of such a practice by Chase, thus further supporting the local interest of the United States in fraud and negligence related to such investments. *Cf. DiRienzo*, -- F.3d --, 2000 WL 33725106, at *9 (referring to "aggressive selling techniques by [defendant] within the United States that targeted United States investors as potential purchasers of its stock" as a factor supporting a local interest in the United States).

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Overall, the district court's heavy reliance on the local-interest factor to shift the balance in favor of England was based on an erroneous legal understanding of the nature of the local interest described in *Gilbert*, an erroneously narrow characterization of the claims made by Springwell in its Complaint, basic errors in drawing conclusions from the facts themselves, and an overarching failure to allow Springwell the discovery that would have shown the extensive involvement and interest of New York in this case. Rather than supporting England as a forum, a correct analysis of local interest supports New York. No English citizens are being

sued, facing liability, or are the victims of the wrongdoing alleged. *Cf. Borden*, 919 F.2d at 828 (approving district court finding "that only the Japanese market and consumers are affected by the parties' dispute"). By contrast, a United States corporation is defendant, and that corporation and its employees will face the consequences of, and be forced to comply with, an adverse judgment. New York thus plainly has an interest in this litigation whereas England's interest is attenuated at best.

3. *Application of Foreign Law*

The district court relied heavily on the supposed need to apply foreign law to several of Springwell's claims as a public-interest factor that "strongly weighs in favor of litigation in England." [A972] The court seemed to recognize that New York law would apply to Springwell's claim of negligent supervision and its claim regarding Chase's post-collapse conduct, *id.*, but it gave such matters no apparent weight in the balance of interests. The district court's analysis was clearly erroneous. The court applied the wrong legal standard to the situation where *either* potential forum would be forced to apply a mixture of foreign and local law, and the court misanlyzed the legal elements of plaintiff's claims, thereby significantly underestimating the extent New York law would apply in this case.

First, even if the court's choice of law analysis were correct, the result would be that New York law would apply to some of Springwell's claims and English

law to others. But, if the case were dismissed and heard in England, the English court would face the very same burden as would the court below. It would also need to untangle conflicts of law issues and – under standards similar to New York choice-of-law rules – likely apply both English and New York law to the issues in this case. *See* Private International Law (Miscellaneous Provisions) Act 1995, 1995 ch. 42, pt. II § 11 ("general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur"; where "elements of those events occur in different countries, the applicable law under the general rule is taken as being … [in cases other than personal injury or damage to property], the law of the country in which the most significant element or elements of those events occurred"); *id*. § 12 (exception to general rule allowing application of different law to different issues arising in a case).

In cases involving such mixed law, the "foreign law" factor does not weigh "strongly" in any direction, and becomes largely insignificant. For example, in *DiRienzo*, both Canadian and American law would likely have applied to claims made by members of a mixed class of securities purchasers. -- F.3d at --, 2000 WL 33725106, at *8. Yet even though the vast majority of the claims in *DiRienzo* would have involved U.S. securities law, this Court held that the "interest in avoiding the application of foreign law … [did] not favor either forum" because *either* forum would have to apply at least some foreign law. *Id*.; *see also*

Peregrine Myanmar, 89 F.3d at 47 ("Moreover, it is not at all clear that Hong Kong would have an advantage in this respect, because Myanmar commercial law may control some or all of the claims.").

Second, in performing its choice of law analysis, the court understated and undervalued the contacts between New York and the issues in this case. The claims in this case involve the application of considerably more New York law than the district court took into account. As with the local interest factor, the primary problem in the district court's analysis is its painting, with a broad brush, Springwell's claims that involve multiple acts of wrongdoing, some in England and some in New York. The choice-of-law interest in regulating primary conduct – such as affirmative recommendations, the creation and transmission of a false disclosure statement, the *failure* to disclose information, marketing and suitability decisions, and the structuring of the Notes themselves – calls for application of New York law to claims and defenses that are based on conduct in New York, regardless of whether other conduct by actors in England would be judged under English law. There is plenty of primary conduct that took place in New York to be "regulated" by New York law, and the district court simply ignored such conduct in its efforts to overgeneralize about Springwell's claims.[10]

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[10] Other specific issues on which New York law is likely to apply, but which were overlooked by the district court, include: establishing the agency relationship

The district court also overstated the extent that English law would apply. For example, while the court stated it would apply English law to contract claims covered by the Notes and Repurchase Agreements, [A971], there are no such claims in Springwell's complaint. Only one of Springwell's claims sounds in contract, and the contract involved is that of Springwell's overall banking relationship with Chase's Private Bank, not the Notes or Repurchase agreement. And as the court below itself recognized, Springwell's tort claims, of course, would not be governed by the choice of law provisions in the Notes or Repurchase Agreement. *See* [A971]; *see also Krock* v. *Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996) (contractual choice of law provision governs contract claims, not tort claims incident to contract). The district court's conclusion that interest analysis and primary conduct would cause application of English law to most tort claims ultimately tracks the court's previous "local interest" analysis, and suffers from the same flaws of misreading the claims in the Complaint and ignoring primary wrongful conduct that took place in New York. In the end, while some English law will undoubtedly apply in this case, the balance between English and New

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between Chase New York and its overseas subsidiaries; damage calculations where all payments and reconciliations were to be made in New York; and an accounting of Chase's wrongful profits from its breach of fiduciary duties.

York law tilts far more towards New York than the court acknowledged, and either makes this factor a wash or tilts it in favor of a New York forum.

Third, even assuming application of English law, the district court gave far too much significance to the foreign law factor in any event. While the need to apply foreign law is relevant, it is not a sufficient basis to dismiss a case not otherwise substantially inconvenient. *Manu*, 641 F.2d at 67-68 (while relevant, "'the need to apply foreign law is not in itself a reason to apply the doctrine of forum non conveniens,' … and we must guard against an excessive reluctance to undertake the task of deciding foreign law, a chore federal courts must often perform") (*quoting Olympic Corp.* v. *Societe Generale*, 462 F.2d 376, 379 (2d Cir. 1972)); *Peregrine Myanmar*, 89 F.3d at 47 ("But even if this case raises complicated choice of law questions and requires the exclusive application of foreign law as suggested by Segal, 'it is well-established that the need to apply foreign law is not alone sufficient to dismiss under the doctrine of *forum non conveniens*.'") (quoting *Maganlal,* 942 F.2d at 169). And given the joint common-law heritage of New York and English law, and the frequent application of English law in the Southern District of New York, there is even less reason to give this factor much weight. *See Byrne* v. *British Broadcasting Corp.*, 132 F. Supp.2d 229, 238 (S.D.N.Y. 2001).

C. Balancing the Factors.

Given the fundamental premises of *forum non conveniens* that "a plaintiffs' choice of forum should rarely be disturbed" and that a defendant bears the heavy burden of establishing that "the balance is strongly in favor of" dismissal, *Gilbert*, 330 U.S. at 508; *DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *6; *Iragorri*, 274 F.3d at 70, the district court's balancing and decision in this case were clearly erroneous. A defendant cannot meet its burden merely by showing that litigation in another forum would be preferable. *Carlenstolpe* v. *Merck*, 638 F. Supp. 901, 911 (S.D.N.Y. 1986), *mandamus denied*, 819 F.2d 33 (2d Cir. 1987). Chase had the burden of proving that "the chosen forum is … genuinely inconvenient *and* the selected forum significantly preferable," *Iragorri*, 274 F.3d at 75 (emphasis added), and neither condition was met in this case.

The district court vastly overstated the need for compulsory process as to witnesses in England, ignored Springwell's need for such process for New York witnesses, and overstated the significance of that factor in any event. It further misanalyzed both the facts and the law regarding local interest and the need to apply foreign law, reaching erroneous conclusions on both the direction and significance of such public-interest factors. *DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *10 ("district court's erroneous understanding of facts central to a

case can preclude a reasonable balancing of the *Gilbert* factors and form the basis for reversal on appeal").

This case is not a localized controversy within the meaning of *Gilbert*, New York has an equal or greater local regulatory and policy interest in the events in this case than does England, the case requires application of considerably more New York law than found by the district court, and, in any event, the choice of law issues and the need to apply foreign law would be present in the courts of both England and New York.

On balance, therefore, the private interests actually favor New York, and the public interests are either a wash or likewise favor New York. Such a corrected balance not only favors Springwell's choice in the first instance, but it is necessarily a far cry from the strong showing needed to overcome the substantial deference to be accorded Springwell's choice of forum. "[T]he greater the degree of deference to which the plaintiff's choice of forum is entitled, the stronger a showing of inconvenience the defendant must make to prevail in securing *forum non conveniens* dismissal." *Iragorri*, 274 F.3d at 74; *DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *6 (plaintiffs should not have been deprived of their choice of forum except upon defendants' clear showing that a trial in the United States would be so oppressive and vexatious to them as to be out of all proportion to plaintiffs' convenience"). Unlike in *Peregrine Myanmar*, where the "district court

recognized this presumption [in favor of the plaintiff's choice of forum] and the heavy burden shouldered by [the resident defendant] in seeking another forum," 89 F.3d at 46, here the district court went out of its way to debilitate the presumption and lighten Chase's burden in seeking dismissal.

If the *forum non conveniens* factors are correctly analyzed and balanced, it is clear that this case would remain in the Southern District of New York as a matter of law and that the district court decision should be reversed.

Indeed, even under the district court's erroneous analysis of the conveniences, the court acknowledged that Springwell's choice of forum was neither oppressive nor vexatious, [A976], and hence the "balance of the private interest factors is close. *Gilbert* tells us that unless the balance strongly favors defendant, plaintiffs' choice of forum 'should rarely be disturbed.' 330 U.S. at 508." *DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *7.

The court's balancing error remains fatal even apart from the inadequate deference it provided given that even "a lesser degree of deference to the plaintiff's choice bolsters the defendant's case but does not guarantee dismissal. A defendant does not carry the day simply by showing the existence of an adequate alternative forum. The 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).[11] The "'understandable temptation'" to "'transfer cases that can as appropriately or even slightly more appropriately be tried elsewhere … must be resisted. The plaintiff's choice of forum should normally be respected.'" *Manu*, 641 F.2d at 63 (*quoting Calavo Growers of Cal.* v. *Generali Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring), *cert. denied*, 449 U.S. 1084 (1981)). At absolute best in this case the district court's own analysis demonstrated only some marginal benefit to an English forum, and such interests "are not sufficiently weighty to dislodge [plaintiff] from its chosen forum." *Maganlal*, 942 F.2d at 169.

CONCLUSION

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

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[11] *See also DiRienzo*, -- F.3d at --, 2000 WL 33725106, at *10 (defendants' demonstration of an "appropriate" alternative forum does not meet "burden of proving that litigation in the United States is unnecessarily inconvenient for them to a degree much greater than the convenience that would be afforded plaintiffs by trial in the Southern District of New York"); *id*. at *5 ("Affording less deference to representative plaintiffs does not mean they are deprived of all deference in their choice of forum. The trial court, however, after interpreting *Koster*, appears to have made only passing reference to the weight entitled plaintiffs' choice."); *Maganlal*, 942 F.2d at 168 (any "reduced weight" given to a foreign plaintiff's choice of forum "is not an invitation to accord a foreign plaintiff's selection of an American forum *no* deference since dismissal for *forum non conveniens* is the exception rather than the rule.").

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellant complies with the word type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) in that it contains 13988 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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