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Hentsch Henchoz & CIE v. Philippe D. David
Gubbay, Capital Suisse, S.A, Capital Suisse
Securites, Inc., Capital Suisse, Inc., Zooley Services
Limited, Zooley of Utah, Inc., Fernland Limited,
Douglas P. Hoyt, and John Does 1-10 : Brief of
Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

HENTSCH HENCHOZ & CIE,

Plaintiff and Appellee,

vs.

PHILIPPE D. DAVID GUBBAY,
CAPITAL SUISSE, S.A., CAPITAL
SUISSE SECURITIES, INC.,
CAPITAL SUISSE, INC.,
ZOOLEY SERVICES LIMITED,
ZOOLEY OF UTAH, INC.,
FERNLAND LIMITED,
DOUGLAS P. HOYT, and
JOHN DOES 1-10,

Defendants and Appellants.

Supreme Court No. 20020683-SC

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JUL 14 2002

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STATEMENT OF JURISDICTION

Plaintiff and Appellee Hentsch Henchoz & Cie (“HH&C”) agrees with Defendants’ and Appellants’ (collectively, “Capital Suisse,” or the “Capital Suisse defendants”) statement of jurisdiction.

STATEMENT OF ISSUES PRESENTED

1. Whether this Court should dismiss this appeal, because Appellants wilfully and contemptuously refused to obey Judge Nehring’s Orders, and refused to recognize the jurisdiction of the Utah courts, after they vigorously participated in the litigation?

Standard of Review: Because this issue is raised for the first time on appeal, this Court reviews the issue de novo.

2. Whether Judge Nehring abused his discretion by finding that a one-sided forum selection clause, which specified that HH&C, but not Capital Suisse, could bring suit only in the British Virgin Islands, was unfair and unreasonable, and the product of fraud?

Standard of Review: As Appellants admit, *see* Appellants’ Brief (“App. Br.”) at 6-7, the standard of this Court’s review of a trial court’s refusal to enforce a forum selection clause is abuse of discretion. *See Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809, 810 (Utah 1993) (“The trial court’s decision that venue is proper, despite a forum-selection clause to the contrary, will not be reversed absent an abuse of discretion”). To determine whether the trial court abused its discretion, this Court views “the facts and construes the complaint in the light most favorable to the plaintiff and indulges all reasonable inferences” in plaintiff’s favor.” *Id.* Because the “exercise of discretion . . . necessarily reflects the

personal judgment” of the trial court, this Court “can properly find abuse only if . . . no reasonable [person] would take the view adopted by the trial court.” *Brewer v. Denver & Rio Grande West. R.R.*, 201 UT 77, 31 P.3d 557, 563.

DETERMINATIVE LEGAL PROVISIONS

Issue 1: *Cummings v. Cummings*, 1999 Utah App. 356, 993 P.2d 248; *Von Hake v. Thomas*, 858 P.2d 193 (Utah App. 1999), *cert. granted*, 868 P.2d 95 (Utah), *remanded*, No. 930457; *Von Hake v. Thomas*, 881 P.2d 895 (Utah. App. 1994); *D’Ashton v. D’Ashton*, 790 P.2d 590 (Utah App. 1990).

Issue 2: *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809 (Utah 1993); *Restatement (Second) of Conflicts* § 80; *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986); *Berkeley Bank for Cooperatives v. Meibos*, 607 P.2d 798 (Utah 1980).

STATEMENT OF THE CASE

This appeal is the culmination of a massive and pervasive international fraud, in which the Capital Suisse defendants, located in Salt Lake City and Marbella, Spain, stole \$25 million from HH&C, a Swiss bank. They laundered the stolen money by wiring it to their Salt Lake City bank accounts, and ultimately gave it to their friends and family across the globe. HH&C brought legal action in Utah to trace and recover its money; in that action, the Capital Suisse defendants refused repeated invitations from Judge Ronald E. Nehring to disclose what they had done with HH&C’s money. When Judge Nehring ordered them to respond to HH&C’s discovery requests, they thumbed their collective noses at the court—they

shipped their documents from Utah to Spain, refused to return them, and refused to participate in further discovery or to recognize the jurisdiction of the Utah courts.

To accomplish the fraud, the Capital Suisse defendants created the illusion that they operated Capital Suisse, S.A., a “mutual fund for the professional investor.” Their fraudulent offering materials stated that they invested in companies on the North American Exchange, when they made no legitimate investments. They created phony net asset values for the Fund, which purported to show dramatic increases in share value in a short time. They held out Baker & McKenzie as their legal advisor, and Deloitte Touche & Tomahatsu as their auditor, when neither ever performed any services for them.

Based on these and other fraudulent misrepresentations, HH&C provided nearly \$25 million to Capital Suisse between December 2000 and February 2001. Capital Suisse never invested HH&C’s money, but converted it and gave it to insiders and others for their own use. As the fraud began to unravel, HH&C demanded “redemption” of its “shares” and return of its money. Phillippe D. David Gubbay, a convicted embezzler and the mastermind behind the fraud, repeatedly promised to return HH&C’s money, but did not. Ultimately, Gubbay attempted to foist on HH&C 3.8 million shares in PetsMarketing Inc., which Gubbay controlled, and which supposedly sold health insurance for pets. Gubbay ludicrously claimed the value of the PetsMarketing shares to be \$30 million, but the shares had no market and no market value.

In May 2001, HH&C joined ongoing legal proceedings in Marbella, Spain, brought by another defrauded “investor,” and learned that most of its \$25 million had been wired to

accounts at Zions and Wells Fargo banks in Salt Lake City. By Order dated May 17, 2001, the Spanish Criminal Court ordered the bank accounts frozen, and authorized HH&C's Spanish counsel to obtain relevant bank records to enable HH&C to trace its money.

HH&C filed an Expedited Petition in Third District Court, Judge Nehring presiding, to enforce the May 17 Order pursuant to the common-law doctrine of comity. The Capital Suisse defendants opposed the Petition, and opposed HH&C's motion for expedited discovery of the bank records. HH&C then filed a Verified Complaint, with supporting exhibits, asserting claims for fraud, civil conspiracy, breach of fiduciary duty, breach of contract, and conversion, and seeking restitution of its money. To trace its money and to prevent further dissipation, HH&C also moved for expedited discovery, including discovery of the Zions and Wells Fargo accounts, and moved for a pre-judgment writ of attachment of the Capital Suisse defendants' funds and accounts.

The Capital Suisse defendants again opposed expedited discovery, and refused repeated invitations from Judge Nehring to disclose what they had done with HH&C's \$25 million. The day after Judge Nehring authorized limited discovery of the Zions and Wells Fargo account records, the Capital Suisse defendants sought an interlocutory appeal and a stay of the litigation pending appeal. They also filed the motion that is the subject of this appeal, the Motion to Dismiss for improper venue (among other grounds), and to transfer the litigation to the British Virgin Islands ("BVI").

After Judge Nehring denied their motion to dismiss, the Capital Suisse defendants again sought interlocutory appeal of the denial and stay of the litigation pending appeal.

When Judge Nehring ordered them to respond to HH&C's outstanding discovery requests, and to disclose what they had done with HH&C's money, they improperly asserted a Fifth Amendment privilege against self-incrimination.

They also shipped all documents, computer hard drives and other records from Utah to Spain, even though their local Utah representative refused to participate for fear of obstructing justice. When Judge Nehring rejected their privilege claim, and ordered them to return the records to Utah, they refused. They filed a purported "Notice of Withdrawal of Answer," and their attorneys filed a motion to withdraw. Those filings advised Judge Nehring that the Capital Suisse defendants would "refuse to acknowledge this litigation any further," and that they "do not intend to produce any documents pursuant to any orders of the Court or otherwise to engage in any discovery under the Utah Rules of Civil Procedure."

HH&C then moved for summary judgment, based in part on affidavits from former insiders and three volumes of exhibits. In granting summary judgment, Judge Nehring specifically found that the Capital Suisse defendants had improperly invoked the Fifth Amendment, had removed documents and destroyed evidence, and had refused to recognize the jurisdiction of the Utah courts, all to conceal the evidence of their fraud, and to prevent HH&C from tracing and recovering its \$25 million.

To escape summary judgment, the Capital Suisse defendants now appeal Judge Nehring's denial of their motion to dismiss for improper venue. They invoke the jurisdiction of the Utah courts, even though they rejected that jurisdiction and wilfully and repeatedly disobeyed court orders and abused the judicial process.

STATEMENT OF FACTS

The Parties

1. HH&C is a Swiss private banking limited partnership with its principal place of business in Lausanne, Switzerland, established in Geneva since 1796. (Sup. R. 4.)¹

2. Philippe D. David Gubbay (“Gubbay”) represents himself as a citizen of Australia and France, and resides in Marbella, Spain. In 1998, Gubbay was convicted of embezzlement/fraud in Switzerland, sentenced to six months imprisonment, to pay restitution of more than \$500,000, and to be deported from Switzerland for seven years. (Sup. R. 6.)

3. Gubbay controlled, and was the alter ego of, the “Capital Suisse Group of Companies, supposedly a “world-wide financial services organization.” (Sup. R. 5.) The Capital Suisse Group of Companies (collectively, with Gubbay, the “Capital Suisse defendants”) included:

a. Capital Suisse, S.A. (the “Fund”), represented itself as a “Mutual Fund for the Professional Investor.” Capital Suisse was incorporated in the BVI in 1999, but had no offices, employees, or presence there. The Fund had no employees at all. It had offices in Marbella, Spain, but its “services” were performed by other Capital Suisse defendants, either in Marbella or Salt Lake City, Utah. (Sup. R. 5.)

b. Capital Suisse, Inc. (“Capital Suisse Utah”), a Utah corporation, had

¹“R.” for Record, refers to the record in Case No. 010905355, in which HH&C filed its Expedited Petition for Enforcement of Foreign Order on June 22, 2001. “Sup. R.” for Supplemental Record, refers to the record in Case No. 010906631, in which HH&C filed its Verified Complaint on August 2, 2001.

its principal place of business at 15 W. South Temple St., Suite 1090, Salt Lake City. Capital Suisse Utah purported to be the administrator and registrar of the Fund, and purported to provide due diligence on potential asset purchases by the Fund in the United States. Capital Suisse Utah maintained an account at Wells Fargo Bank in Salt Lake City. (Sup. R. 7.)

c. Zooley of Utah, Inc. (“Zooley of Utah”), a Utah corporation, had its principal place of business at 15 W. South Temple St., Suite 1090, Salt Lake City. Zooley of Utah purported to provide financial services for Zooley Services, including due diligence on asset purchases in the United States. Zooley of Utah maintained an account at Zions First National Bank in Salt Lake City. (Sup. R. 8.)

d. Capital Suisse Securities, Inc. (“Capital Swiss Securities”), purported to be the principal custodian of the Fund, with its principal place of business in San Rafael, California. (Sup. R. 7.)

e. Zooley Services Ltd. (“Zooley Services”), a West Indies corporation, purported to be the Fund’s Investment Adviser. Gubbay represented himself as its president, and the person responsible for investment policy. (Sup. R. 7-8.)

f. Fernland Ltd. (“Fernland”), a West Indies corporation, purported to be the sole director of the Fund. Gubbay was a director of Fernland, and corresponded with HH&C on behalf of the Fund as a director of Fernland. (Sup. R. 9.)

4. Douglas P. Hoyt (Hoyt”), a resident of Utah, held himself out as a director and officer of Capital Suisse Utah and Zooley of Utah. The Capital Suisse defendants held out

Hoyt as one of their “Key Personnel,” and as the “Chief Corporate Counsel of the Salt Lake City office” of the “Capital Suisse Group of Companies,” with responsibility to “oversee the company’s filing” of all SEC documents. (Sup. R. 9.) Hoyt is not a party to this appeal.

Gubbay’s Fraudulent Scheme

5. In late 2000, Marianne Zenger (“Zenger”), Gubbay’s Swiss representative, contacted a then-managing partner of HH&C, Pierre Jolliett (“Jolliett”). Through Zenger, Gubbay attempted to induce HH&C to give Capital Suisse money on the pretense it would be invested through a “Mutual Fund for the Professional Investor.” (Sup. R. 11.)

6. Gubbay provided HH&C with a confidential Prospectus and a Due Diligence Questionnaire, that fraudulently portrayed the Fund as successful and highly profitable, with investments that had increased substantially in value in a short time. (Sup. R. 11-12.)

7. Among other things, the Confidential Prospectus represented that Capital Suisse was audited by Deloitte, Touche & Tomahtsu (“Deloitte, Touche”), and received legal advice from Baker & McKenzie. (Sup. R. 136.) As HH&C later learned, see infra, at 20, these representations were false and fraudulent.

8. Jolliet spoke with Gubbay several times by telephone, and met with Gubbay in Spain. Gubbay boasted about Capital Suisse’s high rates of return and his track record of success. Reasonably relying on Gubbay’s misrepresentations and misinformation, Jolliet, on behalf of HH&C, entrusted Gubbay and Capital Suisse with HH&C’s money. On seven occasions, between December 15, 2000, and March 21, 2001, HH&C wired nearly \$25 million to Capital Suisse’s account at AM Amro Bank, Gibraltar. (Sup. R. 12-13.)

9. As directed by Gubbay, each of the seven wire transfers was accompanied by a “Subscription Agreement” that purported to set forth the number of Fund shares purchased by HH&C. (Sup. R. 14.) Each Subscription Agreement had a one-sided forum selection clause that required an “investor” to bring legal proceedings in the BVI, but allowed Capital Suisse to bring legal proceedings anywhere in the world.² *See* Minute Entry, October 11, 2001, at 5, reprinted in the Addendum to Appellee’s Brief (hereinafter “Add.”).

10. Gubbay directed HH&C to send each Subscription Agreement to Capital Suisse Utah, as the Fund Administrator, in Salt Lake City. Gubbay then issued to HH&C redeemable non-voting shares in the Fund. (Sup. R. 14-15.)

11. By correspondence from Salt Lake City dated April 24, 2001, Hoyt and Capital Suisse Utah stated that HH&C had purchased 65,850.2879 shares in the Fund. (Sup. R. 255.)

12. Throughout the first quarter of 2001 (when most of HH&C’s wire transfers occurred), the Capital Suisse website presented fabricated “performance figures” purporting to show an increase in the net asset value (“NAV”) of the Fund from \$100.00 per share in October 1999 to \$305.888 per share in November 2000, to \$395.769 per share in February 2001, to \$464.921 per share in of April 2001, and to \$488.91per share in May 2001. The

²Each Subscription Agreement stated in French the following:

We agree that any legal action the Funds may be the object of, be brought before the court of the British Virgin Islands, and we renounce to take any possible legal proceedings against the Funds under other jurisdictions. However, we agree that the Funds may choose to start legal proceedings against us under any jurisdiction directly connected with the place of sending of the mail or any other aspect of our file. (R. 347.)

website fraudulently stated that these valuations were prepared by the “CPAs of Capital Suisse, Inc.” and were “subject to a third party audit.” (Sup. R. 15-16, 257.)

HH&C’s Futile Attempts to Redeem its Shares

13. A routine internal review by HH&C revealed significant questions about the legitimacy of Gubbay and Capital Suisse. As a result, HH&C requested redemption of a portion of its shares by correspondence dated April 12, 2001. (Sup. R. 17, 263.)

14. By correspondence from Salt Lake City dated April 19, 2001, Hoyt informed HH&C that Capital Suisse would determine the net asset value of HH&C’s shares as of April 30, 2001, and wire the funds to HH&C. Contrary to Hoyt’s representation, Capital Suisse never redeemed the shares, and never wired the funds to HH&C. (Sup. R. 18, 265.)

15. Three HH&C representatives met with Gubbay in Marbella, Spain, on May 7, 2001. Before the meeting, HH&C requested that Gubbay provide a list of the Fund’s investments and its audit reports. At the meeting, Gubbay attempted to convince HH&C that everything was in order, but did not produce a list of investments or audit reports. Gubbay represented that HH&C would receive the audit reports later, because Capital Suisse had just changed auditors, and was now working with Ernst & Young. (Sup. R. 19.)

16. At the May 7 meeting, HH&C requested redemption of 35,000 shares. Gubbay stated that the redemption would be paid as soon as possible, but not later than June 1, 2001. HH&C confirmed the redemption request in writing by correspondence dated May 8, 2001, telecopied to Hoyt on May 8, 2001, and to Gubbay on May 9, 2001. (Sup. R. 20, 273.)

17. On May 9, 2001, Gubbay telephoned HH&C to confirm receipt of the

redemption request, and to assure HH&C of prompt redemption of its funds. Gubbay also represented that the audit reports could be reviewed at Capital Suisse's web site, but there were no audit reports on the website at all. (Sup. R. 20-21.)

18. By correspondence dated May 15, 2001, telecopied to Hoyt in Salt Lake City, HH&C renewed its April 19 request for redemption of 2,679.128 shares. (Sup. R. 21, 275.)

19. By correspondence dated June 1, 2001, Gubbay informed HH&C that the Fund "has received from a majority of its shareholders requests for redemption," that "the bulk of the assets of the Fund are primarily listed shares on North American exchanges, that the "investments are currently restricted investments under the Securities Laws of the USA," and that "for the next few months it will not be possible to sell these shares in the open market." (Sup. R. 21-22, 277.)

20. Gubbay's June 1 correspondence further informed HH&C that the Fund "is in a position" to redeem HH&C's shares "immediately" by transferring ownership of "publicly traded shares" in an amount corresponding to the "value of the shares redeemed." Gubbay stated that the Fund "is in the process of listing a number of companies on the exchange," and "anticipated" that "after these initial public offerings these investments will generate sufficient cash in the Fund to satisfy the redemption requests," in "approximately four months from now." Gubbay requested HH&C to "elect" whether to receive immediate redemption "by payment in specie," i.e., publicly traded shares, or to wait four months for redemption in cash. (*Id.*)

21. By correspondence dated June 6, 2001, telecopied to Gubbay in Spain and

Hoyt in Salt Lake City, HH&C rejected the proposed “election,” and demanded immediate redemption of all shares in cash. HH&C again requested a list of the Fund’s investments, and their estimated value as of May 31, 2001, and June 6, 2001. (Sup. R. 22-23, 279.)

22. Gubbay and Hoyt did not respond to HH&C’s demand for immediate redemption in cash. Instead, by correspondence dated June 6, 2001, Gubbay informed HH&C that Capital Suisse would compulsorily redeem 28,171.1599 of HH&C’s shares on June 22, 2001 at the net asset value on May 31, 2001, and that the redemption proceeds “will be paid on or before July 7, 2001.” Gubbay represented the net asset value of the Fund to be \$488.91 per share as of May 2001. (Sup. R. 23, 281.)

The Attempt to Exchange HH&C’s Shares for Worthless PetsMarketing Shares.

23. By correspondence dated June 15, 2001, Gubbay informed HH&C that Capital Suisse had redeemed HH&C’s shares, not by cash as had been repeatedly demanded by HH&C and promised by Gubbay and Hoyt, but by exchanging HH&C’s shares for 3,780,077 shares in PetsMarketing, Inc. (“PetsMarketing”). Gubbay represented the value of the PetsMarketing shares to be \$8.50 per share. (Sup. R. 2.) Later, in pleadings filed in Third District Court, Gubbay and Capital Suisse represented the total value of the PetsMarketing shares to be \$30 million. (R. 156; Sup. R. 26, 28.)

24. Contrary to Gubbay’s fraudulent representations, the PetsMarketing shares had no market and no market value. The share certificates stated on their face that the shares were restricted, and could not be sold or transferred until registered under the Securities Act of 1933. (Sup. R. 26, 283-92, 297-99.)

25. PetsMarketing was a Delaware corporation, supposedly in the business of selling health insurance for pets. Its business address was listed with the Utah Department of Commerce as 15 W. South Temple St., Suite 1090--the same address as Capital Suisse Utah and Zooley of Utah. PetsMarketing filed a Schedule D with the SEC in December 2000, showing a sale of 900,000 shares at \$0.25 per share, to an entity related to Capital Suisse. After that sale, PetsMarketing shares traded sporadically, if at all. By April 2001, Gubbay controlled more than 60% of PetsMarketing's shares. (Sup. R. 26-27.)

26. By correspondence dated June 19, 2001, HH&C rejected the purported redemption, and refused to accept the PetsMarketing shares. (Sup. R. 27.)

HH&C's Participation in the Spanish Criminal Proceedings

27. During its investigation, HH&C learned of Gubbay's criminal record, and learned of ongoing criminal proceedings brought in the Judicial Court of the First Instance and Instruction, No. 2 of Marbella, Spain (the "Spanish Criminal Court") brought by another defrauded "investor," Mrs. Nora DeJulian. Mrs. DeJulian had obtained an order of the Spanish Criminal Court freezing and seizing the Capital Suisse accounts at the Gibraltar bank where HH&C, among others, had wired its money. (Sup. R. 17, 28-9.)

28. Through records produced by the Gibraltar bank in the Spanish Criminal proceedings, HH&C learned that the vast majority of its \$25 million had been transferred from the Gibraltar bank to accounts at Zions and Wells Fargo banks in Salt Lake City--\$16,850,000 to Zions, and \$7,650,000 to Wells Fargo. (Sup. R. 29.)

29. By Order dated May 17, 2001 ("May 17 Order"), the Spanish Criminal Court

expanded its earlier order to include the Zions and Wells Fargo accounts. Specifically, the Spanish Criminal Court (i) ordered the freezing of accounts and financial instruments at Zions and Wells Fargo in the name of Capital Suisse, Zooley, or Gubbay; (ii) ordered Zions and Wells Fargo to produce documents to the Spanish Criminal Court relating to the accounts and financial instruments, and (iii) authorized HH&C's Spanish counsel to obtain from Zions and Wells Fargo any additional information counsel considered necessary for the Spanish Criminal proceedings. (R. 19-22.)

HH&C's Initial Efforts To Enforce the Spanish Court Order in Utah

30. On or about June 22, 2001, shortly after HH&C rejected Gubbay's attempt to provide HH&C with worthless PetsMarketing shares, HH&C filed in Third District Court an Expedited Petition to Enforce the May 17 Order. (R.1-22.) The Petition sought to enforce the May 17 Order pursuant to the common-law doctrine of comity. HH&C also sought a Prejudgment Writ of Attachment to freeze the Zions and Wells Fargo accounts. (R. 100-02.)

31. By Order dated June 22, 2001, the Third District Court, Judge Ronald E. Nehring presiding, entered a prejudgment writ of attachment freezing the Zions and Wells Fargo accounts. (R. 144-45.) On June 26, 2001, Judge Nehring heard argument on Capital Suisse's motion to dissolve the prejudgment writ. At the hearing, Capital Suisse represented that money in the accounts represented a "substantial amount of working capital" of Capital Suisse Utah and Zooley of Utah. Capital Suisse's counsel stated:

This is their working capital, Your Honor. It is how they run their business and purchase assets. They can't pay their employees if they freeze their working capital. They can't pay their bills. They'll go out of business. (R. 1913 at 35, 39.)

32. At the conclusion of the hearing, Judge Nehring dissolved the prejudgment writ, and scheduled an evidentiary hearing on HH&C's Expedited Petition to enforce the May 17 Order. Judge Nehring also expressly authorized HH&C to subpoena records from Wells Fargo and Zions, and rejected the Capital Suisse defendants' oral motion that the records were irrelevant to the issue of international comity. (R. 1913 at 48-53, 152.)

33. HH&C then served document subpoenas on Zions and Wells Fargo to obtain the account records. Capital Suisse moved to quash the subpoenas, and directed the banks not to produce any documents until the motion had been decided. (R. 148-50.) Capital Suisse also moved in limine to narrow the scope of the evidentiary hearing, and to exclude any evidence relating to the bank records as irrelevant to the issue of comity (R. 190-92.) At the conclusion of a telephone conference with Judge Nehring on July 23, 2001, the parties stipulated that HH&C would be entitled to review the Zions and Wells Fargo account balances as of June 26, 2001 and July 25, 2001 pending the evidentiary hearing. (R. 216.)

Gubbay's Flouting of the Spanish Criminal Court's Jurisdiction,
and Assertion that Jurisdiction was Proper in Utah.

34. At the same time that Gubbay and Capital Suisse obstructed every effort by HH&C to obtain records and to trace its money in Utah, Gubbay flouted the jurisdiction of the Spanish Criminal Court. In testimony before the Spanish Criminal Court on June 1, 2001, and again on July 13, 2001, Gubbay promised to provide a list of shareholders of Zooley Services. Gubbay never honored those promises. (Sup. R. 24-5.)

35. In testimony before the Spanish Criminal Court on June, 1, 2001, Gubbay promised to provide documentation concerning certain investments with which he was still

involved. Gubbay never provided this information. (Sup. R. 25.)

36. In testimony before the Spanish Criminal Court on July 13, 2001, Gubbay represented that he would provide an audit demonstrating that the Fund had invested HH&C's money in accordance with the Confidential Prospectus. Gubbay never provided an audit report, list of investments, or other financial information. (Sup. R. 24.)

37. In argument before the Spanish Criminal Court on July 4, 2001, Gubbay and Capital Suisse challenged the jurisdiction of the Spanish Court, asserting that jurisdiction was proper in Utah, not Spain. Capital Suisse asserted that the "commercial relations" were not between HH&C and Capital Suisse in Marbella, Spain, but between HH&C and Capital Suisse Utah, "with headquarters in SALT LAKE CITY (USA)." Capital Suisse and Gubbay asserted that "[t]his is acknowledged by [HH&C] by its own acts," i.e., by HH&C's sending the Subscription Agreements to Capital Suisse Utah in Salt Lake City, and by HH&C's repeated communications with Capital Suisse Utah and Doug Hoyt in Salt Lake City in its efforts to redeem its shares and recover its \$25 million. (R. 389 at 5-6 & Ex. 2.)

HH&C's Verified Complaint, and Judge Nehring's Invitations
to Capital Suisse To Disclose What Happened to HH&C's \$25 Million

38. On July 31, 2001, Capital Suisse, pursuant to Judge Nehring's order, disclosed that the balance in the Zions Account was \$2,207,006.94 on June 26, and \$804,468.31 on July 25. The balance in the Wells Fargo account was \$14,412.30 each day. (Add. 29, 30.)

39. In the face of the dissipation of the Zions and Wells Fargo accounts, and Capital Suisse's steadfast refusal to produce documents or to permit HH&C to trace its money, HH&C filed its Verified Complaint on August 2, 2001. The Verified Complaint

asserted claims for fraud, civil conspiracy, breach of fiduciary duty, breach of contract, and conversion. It sought restitution of HH&C's \$25 million; in the alternative to restitution, it sought compensatory and punitive damages. (Sup. R. 1-51.)

40. With the Verified Complaint, HH&C filed a motion seeking a temporary restraining order and prejudgment writ of attachment of the bank accounts to prevent further dissipation of its \$25 million. (Sup. R. 52-5.) HH&C also moved for expedited discovery, including interrogatories and document requests to Capital Suisse and document subpoenas to Zions and Wells Fargo banks. This discovery was intended to trace HH&C's money, to identify any investments made by Capital Suisse, and to prove that Capital Suisse and PetsMarketing each were a fraud and a sham. (Sup. R. 74-81.)

41. At argument on HH&C's motions on August 2, 2001, the Capital Suisse defendants repeatedly represented that they were disbursing money from the Zions and Wells Fargo accounts "in the ordinary course of business." (R. 1906 at 19, 20, 22.) Noting that, of the more than \$20 million wired to the Zions and Wells Fargo accounts, only \$2 million remained on June 26, 2001, and \$800,000 on July 25, 2001, Judge Nehring advised Gubbay's counsel to be prepared to disclose where the money went:

THE COURT: All right. There's in excess of \$20 million in the banks in Utah. That as of whatever the date was that I told you to tell them how much there was, there was \$800,000.

MR. EVANS [counsel for the Capital Suisse defendants]: Sorry. There was \$2 million, and then there was –

THE COURT: Oh, there's 2 million, and then there's \$800,000. Okay. You today have told me that transfers are going on in the ordinary course. Your better check your work, because, as unsophisticated as I am, there is a

certain amount of strain on my credibility to believe that it has gone from an excess of \$20 million to \$800,00 in the ordinary course.

So you should come Monday prepared to tell me what this business is that makes it so that in the ordinary course \$20 million runs out the door. I would like to know that. (R. 1906 at 24.)

42. In response to further comments from Judge Nehring, counsel promised to provide information as to what the Capital Suisse defendants had done with HH&C's money:

THE COURT: Put in burden-of-proof terms, even though perhaps formally they [HH&C] hold the burden, I think you [Capital Suisse] might. I mean the prima facie appearance of this is such that I need an explanation, and maybe its out there.

MR. EVANS: I need to go back and look at it and see where the 20 million number came from, and go back and talk to the folks at Capital Suisse, and I'll give you whatever response we have, and that's all I can do. (R. 1906 at 25.)

43. At the end of the hearing, Judge Nehring entered a temporary restraining order freezing the Zions and Wells Fargo accounts. (R. 1906 at 19; Sup. R. 123-4.) When the freeze order went into effect, approximately \$150,000 remained in the accounts. In other words, the Capital Suisse defendants transferred \$650,000 out of the accounts in the week after they disclosed that \$800,000 remained in the accounts. (Sup. R. 320.)

44. Contrary to their counsel's promise, the Capital Suisse defendants never disclosed to Judge Nehring what they had done with HH&C's money. Instead, they opposed HH&C's motion for expedited discovery, including discovery of the Zions and Wells Fargo bank account records, in telephone conferences with the Court on August 10 and 14, 2001. At the end of the August 14 conference, Judge Nehring authorized HH&C to obtain Zions and Wells Fargo account records from March 1, 2001, forward. Judge Nehring also entered

a protective order, prohibiting use of the bank records for other purposes. (Sup. R. 327-29.)

45. The next day, August 15, 2001, Capital Suisse moved for interlocutory appeal of the order granting expedited discovery, and for a stay of the trial court proceedings pending the appeal. (R. 229-31.) This Court denied the motion. (R. 342.)

46. That same day, Capital Suisse filed the motion that is now on appeal– to dismiss HH&C’s Verified Complaint for improper venue, among other grounds, and to enforce the one-sided forum selection clause in the Subscription Agreements. (R. 235-37.)

HH&C Confirms That None of Its \$25 Million Was Invested
In Any Investment, But Was Given to Family and Friends.

47. The limited Zions and Wells Fargo account records produced pursuant to Judge Nehring’s order showed that the Capital Suisse defendants never invested HH&C’s \$25 million, but used the money for their own purposes. Specifically,

(a) Gubbay’s father, Donald Gubbay, received \$4.65 million, mostly wired to his account in Port Vila, Vanuatu, a South Pacific island known as a money laundering center and tax haven;

(b) Marianne Zenger, Gubbay’s representative who “introduced” Gubbay to HH&C, received more than \$1 million;

(c) a recipient identified as “Koukouk” received more than \$5 million; and

(d) approximately \$13 million was removed from the Capital Suisse Utah account in what appeared to be cashier’s checks and redeposited in the Zoooley of Utah

account. (R. 389 at 7.)³

48. Many of these transfers, including most of the \$4.65 million transferred to Gubbay's father in Vanuatu, occurred after the Spanish Criminal Court entered its May 17 Order freezing the accounts, and therefore violated that Order. *Id.* When asked in the Spanish criminal proceeding, whether he had ordered the transfer of funds in violation of the May 17 Order, Gubbay asserted his privilege against self-incrimination. (R. 29.)

HH&C Presents Proof to Judge Nehring That Baker & McKenzie
and Deloitte Touche Never Performed Any Work for Capital Suisse.

49. By correspondence dated August 10, 2001, Baker & McKenzie, London, confirmed that it never represented Capital Suisse. Baker & McKenzie further advised that it has "on repeated occasions asked Capital Suisse to stop using our name in their marketing brochures. We have no client relationship with Capital Suisse whatsoever." (Add.14.)

50. By correspondence dated August 31, 2001, Deloitte & Touche stated that it had not performed any work whatsoever for Capital Suisse S.A. and reserves its right to sue for any injury and harm that may be caused to its reputation by virtue of Capital Suisse S.A.'s false and misleading statements in the Prospectus, as well as its right to defend any legal proceedings instituted against it by virtue of Capital Suisse S.A.'s false and misleading statements. (Add. 15.)

³After HH&C obtained the complete Zions and Wells Fargo records in late 2001, HH&C determined that none its \$25 million was ever invested in any investment, much less an investment listed on a North American exchange. At least \$19,161,660 was transferred out of the Zions and Wells Fargo accounts to the Capital Suisse defendants, their friends and family. Notably, Capital Suisse made 22 wire transfers totaling \$365,638 on the eve of the August 2 TRO hearing before Judge Nehring. Instructions for a transfer of \$138,750 to Yves Larielle were given at 1:27 p.m., 11 minutes before the start of the hearing, and after Capital Suisse had been served with the Verified Complaint and TRO motion. (R. 1796-98.)

Continued Bad Faith Litigation and Refusal to Recognize Jurisdiction

51. After Judge Nehring denied their Motion to Dismiss by Minute Entry dated October 11, 2001 (Add. 1-13), Capital Suisse immediately moved Judge Nehring to stay the litigation pending interlocutory appeal of the denial. (R. 639-42.)

52. On November 15, 2001, Judge Nehring denied Capital Suisse's motion to stay, and ordered Capital Suisse to respond to HH&C's outstanding discovery requests by December 15, 2001. Judge Nehring noted that HH&C's discovery requests had been outstanding "for some time," and told Capital Suisse that "you're under a duty to answer the interrogatories and respond to the requests for production of documents." (R. 1907 at 21-2.)⁴

53. Despite Judge Nehring's order and admonition, the Capital Suisse defendants refused to provide HH&C with any meaningful discovery. Instead, they improperly invoked a Fifth Amendment privilege against self-incrimination in response to virtually every interrogatory and document request. (R. 774-81.)⁵

54. At the conclusion of a hearing on February 8, 2002, Judge Nehring denied Capital Suisse's privilege claim, and again ordered Capital Suisse to answer interrogatories and to produce documents by April 9, 2002. Judge Nehring also ordered all defendants to

⁴By Order dated January 3, 2002, this Court denied the Petition for Interlocutory Appeal, and a Motion for a stay of the trial court proceedings pending appeal.

⁵For example, the Capital Suisse defendants took the Fifth Amendment regarding: the current location of HH&C's \$25 million; purchases or other transactions involving HH&C's \$25 million; investment holdings of the Fund, and their value; the valuation, performance, or finances of the Fund, including financial statements; the valuation, performance, or finances of PetsMarketing or its shares; and dealings between the Fund and various insiders. (R. 774-81.)

answer HH&C's Verified Complaint by February 28, 2002. (R. 1909 at 113, 116.)

55. Several weeks before Judge Nehring rejected their privilege claim, but long after he initially ordered the Capital Suisse defendants to answer interrogatories and produce documents, Gubbay directed David Smith, an officer and employee in Utah of several Capital Suisse defendants, to ship all documents and records from Utah to Spain. Smith refused, because Smith's counsel advised him that doing so could constitute obstruction of justice. Two other representatives of the Capital Suisse defendants flew to Salt Lake City from California, and shipped all documents, records, and computer hard drives to Spain. The evidence removed from Utah included financial records of Capital Suisse Utah, Zooley of Utah, and PetsMarketing, instructions from Gubbay concerning transfers from the Zions and Wells Fargo accounts, and e-mail and written communications between the Capital Suisse defendants in Spain and Utah. (R. 1915, Ex. 8, ¶¶ 7-8.)

56. When HH&C learned that the documents had been removed to Spain, HH&C moved for an order compelling their return to Utah. (R. 1520-22.) Judge Nehring granted the motion following argument on March 25, 2002, and directed the Capital Suisse defendants to return the documents by April 9. (R. 1911 at 24.)

57. On April 1, 2002, the Capital Suisse defendants filed a Notice of Withdrawal of Answer (Add.16-19), which stated in relevant part:

the Capital Suisse Defendants hereby withdraw their Answer as if it were Nunc Pro Tunc. The Capital Suisse Defendants refuse to acknowledge this litigation any further and have instructed their attorneys to take no further action on their behalf. (Add. 17.)

58. Concurrently with the filing of the Notice of Withdrawal of Answer, Capital

Suisse's counsel filed a Motion to Withdraw (Add. 19-22), stating in relevant part:

The Capital Suisse Defendants have instructed counsel to withdraw their Answer in this case. The Capital Suisse Defendants do not recognize the jurisdiction of the United States over this dispute. The Capital Suisse Defendants have instructed counsel to inform the Court that because they have withdrawn their Answer, they do not intend to produce any documents pursuant to any Orders of the Court or otherwise to engage in any discovery under the Utah Rules of Civil Procedure.

In light of the outstanding Orders from this Court requiring production of documents and cooperating in discovery, counsel for the Capital Suisse Defendants hereby request that they be permitted to withdraw as counsel. Counsel so request because the clients' instructions to withdraw their Answer has put counsel in a conflict of interest situation because as officers of the Court, they must comply with all Court Orders. Counsel have instructed their clients of their obligation under the Utah Rules of Civil Procedure as they relate to discovery and they refuse to comply or otherwise participate any further in this action. (Emphasis added.) (Add. 20.)

59. Following Capital Suisse's continuing refusal to obey Judge Nehring's orders, or to further recognize the jurisdiction of the Utah courts, HH&C moved for summary judgment on its claims for fraud, breach of fiduciary duty, and civil conspiracy. (R. 1768-70.) HH&C presented overwhelming and incontrovertible evidence of fraud, including affidavits from former officers, directors and employees Douglas P. Hoyt and David Smith (and other former insiders), and three volumes of exhibits. (R. 1771-1816, 1914-16.)

60. By order dated July 16, 2002, Judge Nehring granted HH&C's motion (Add. 22-29), specifically concluding, among other things:

In light of the compelling evidence that the Capital Suisse Defendants were, and are, engaged in fraud, and coupled with their improper invocation of the Fifth Amendment and their removal of documents from this jurisdiction, effectively destroying evidence, the Court concludes that the Capital Suisse Defendants knew that the evidence, documents and other information that they were ordered, but refused, to provide, would further prove their fraud and

assist HH&C to find and recover its assets.

The Capital Suisse Defendants' recent refusal to acknowledge the litigation is simply another ploy to avoid the consequences of their worldwide fraudulent conduct. Until they were ordered to comply with discovery, the Capital Suisse Defendants fully participated in the defense and litigation of this case by, among other things, filing an Answer to the Verified Complaint, serving discovery requests upon HH&C, filing several motions to dismiss on various substantive and procedural grounds, and twice seeking leave of the Utah Supreme Court to file interlocutory appeals. Based upon the record and evidence in this matter, it is abundantly clear that this Court properly exercised jurisdiction over the Capital Suisse Defendants. (Add. 25-26.)

61. Judge Nehring also entered judgment for HH&C in principal amount of \$24,700,000, and prejudgment interest of \$3,138,098.63. (R. 1852-54).

SUMMARY OF THE ARGUMENT

This Court should dismiss this appeal without addressing the merits, because the Capital Suisse defendants have demonstrated contempt and disdain for the Utah courts (as well as the Spanish courts). They obstructed every effort by HH&C in Spain and Utah to trace and recover the \$25 million that they stole and laundered through their Salt Lake City bank accounts. They told the Spanish court that jurisdiction was proper in Utah. They told Judge Nehring that jurisdiction was proper in Spain, and then the British Virgin Islands. They violated Spanish court orders freezing their Gibraltar bank accounts by wiring HH&C's money to Utah. They violated Judge Nehring's order to answer interrogatories and produce documents; instead, they shipped all their documents and records from Utah to Spain, effectively destroying evidence. They violated Judge Nehring's order to return the documents to Utah, stating that they would refuse to participate in discovery or recognize the jurisdiction of the Utah courts any further. They purported to withdraw their Answer to

HH&C's Verified Complaint, and their lawyers withdrew from representation.

Now, to undue the summary judgment ultimately entered against them, the Capital Suisse defendants through new lawyers seek to invoke the jurisdiction of this Court on their behalf. This Court should reject the invocation, because the Capital Suisse defendants have no right to appellate review when they stand in violation of Judge Nehring's orders. Their bad faith and delay, including their removal of records, destruction of evidence, and refusal to recognize the jurisdiction of the Utah courts, has precluded HH&C from tracing and recovering its \$25 million. This Court therefore should dismiss the appeal with prejudice.

In the alternative, this Court should affirm Judge Nehring's ruling refusing to enforce the one-sided forum selection clause or to require HH&C to bring suit in the BVI. Following *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809 (Utah 1993), and Section 80 of the *Restatement (Second) of Conflicts*, Judge Nehring found that HH&C met its burden to prove that the forum selection clause was both unfair and the product of fraud.

On appeal, Capital Suisse does nothing more than disagree with Judge Nehring's findings that HH&C met its burden. Judge Nehring found that the Fund was a sham and that the "tentacles of fraud" reached the forum selection clause, so Capital Suisse now attempts to portray the fraud as a legitimate business transaction between sophisticated international businesses. There is no small irony in this bald assertion on appeal, since the Capital Suisse defendants refused repeated invitations from Judge Nehring to show that the Fund was legitimate, that they had invested HH&C's \$25 million, and that they had disbursed money from the Salt Lake City bank accounts in the ordinary course of business.

Judge Nehring found that the forum selection clause was unfair and unreasonable, so Capital Suisse attempts to persuade this Court that there are valid business reasons for a clause that requires the “investor” alone to bring suit in the BVI, and to select the BVI as a forum. Incredibly, Capital Suisse attempts to persuade this Court that there are no contacts between the parties and Utah, even though several Capital Suisse defendants maintained offices and bank accounts here, laundered and wired HH&C’s money here, kept their records and the PetsMarketing records here, and told the Spanish Criminal Court that the commercial relations between the parties were centered in Utah, and that jurisdiction was proper in Utah.

All of the facts presented to Judge Nehring confirm his findings that the purpose and effect of the forum selection clause was to not to bring certainty or stability to a legitimate international business transaction, but to further a fraud by requiring the victims to bring suit in a distant forum where no assets were to be found or recovered. Because this Court can find an abuse of discretion only if “no reasonable [person] would take the view adopted by the trial court,” this Court should affirm Judge Nehring’s findings that the forum selection clause was unfair and unconscionable, and the product of fraud.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE APPEAL, BECAUSE APPELLANTS CONTEMPTUOUSLY DISOBEYED JUDGE NEHRING’S ORDERS, AND REFUSED TO RECOGNIZE THE JURISDICTION OF THE UTAH COURTS.

This Court should dismiss this appeal without considering the merits, because the Capital Suisse defendants have repeatedly and willfully disobeyed Judge Nehring’s orders (as well as the orders of the Spanish Criminal Court), destroyed evidence, and refused to

recognize the jurisdiction of the Utah courts. As Judge Nehring emphasized in his summary judgment ruling, the Capital Suisse defendants contempt for the judicial process crescendoed only after they sought relief from both the trial court and this Court (by interlocutory review), and only after Judge Nehring ordered them to finally disclose what they had done with HH&C's money. As a result of their wilful disobedience of Judge Nehring's orders, HH&C has been unable to trace and to recover its \$25 million, and has been unable to conduct supplementary proceedings following the entry of summary judgment. The Capital Suisse defendants have no right or privilege to seek relief from summary judgment from this Court.

The Utah Court of Appeals has consistently held that an appellate court has the authority and the discretion to stay or to dismiss the appeal of an appellant who has disobeyed the trial court's orders. In *Von Hake v. Thomas*, 858 P.2d 193 (Utah App. 1999), *cert. granted*, 868 P.2d 95 (Utah), *remanded*, No. 930457, the Court of Appeals dismissed an appeal of a fraud judgment sua sponte, because the appellant had refused to comply with district court orders to produce documents in supplemental proceedings to enforce the judgment, and had used "improper and dilatory tactics to frustrate the district court orders and to avoid appearing in court." *See* 858 P.2d at 194. The Court of Appeals "recognized the general rule that a party who is in contempt will not be heard by the court when he wishes to make a motion or be granted a favor." *Id.* at 193. Following remand, the Court of Appeals clarified that the dismissal was without prejudice, and again emphasized that an appellate court has "discretionary authority to dismiss the appeals of contumacious litigants under terms which are fair and just given the circumstances of a particular case." *Von Hake*

v. Thomas, 881 P.2d 895, 898 (Utah. App. 1994).

In *Cummings v. Cummings*, 1999 Utah App. 356, 993 P.2d 248, the Court of Appeals emphasized that it had inherent authority to dismiss an appeal until an appellant proved that it had satisfied a judgment entered by the trial court. The appellant (a husband in a divorce action) disobeyed the trial court's order to make mortgage payments on a building that had been awarded to his wife. The building was sold to avoid foreclosure, and the wife obtained two money judgments against the husband that remained unsatisfied. The Court of Appeals stated that, because the appellant violated the trial court's order, "and has now left the state in the face of a court order requiring him to be deposed in connection with appellee's efforts to collect" on the judgments, the Court of Appeals could "elect" to dismiss the appeal until appellant submitted proof that he has satisfied the judgments." The Court concluded that dismissal was unnecessary, however, because "the appeal can be easily affirmed on the merits." 993 P.2d at 251.

This Court has not yet considered whether it has the authority and discretion to dismiss an appeal when the appellant had violated the orders of the trial court, but the Utah Court of Appeals decisions are consistent with court decisions throughout the country. All of these decisions rest on the fundamental principle that the

appellate court has the power to stay or dismiss the appeal of any litigant who has contumaciously defied the order of the [trial] court. A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal order and processes of the courts of this state.

Alioto Fish Co. v. Alioto, 34 Cal. Rptr.2d 244, 250 (Cal. App. 1994). These courts have

dismissed appeals where an appellant violated court orders to answer interrogatories or to produce documents, had transferred records or assets beyond the jurisdiction of the Court, or had simply left the jurisdiction, even if the trial court made no formal finding of contempt. *See, e.g., Alioto Fish Co., supra*, 34 Cal.Rptr.2d at 250-51 (power to stay or dismiss appeal applies to “wilful disobedience or obstructive tactics” without a formal adjudication of contempt); *TMS, Inc. v. Aiharra*, 83 Cal.Rptr.2d 834, 835 (Cal. App. 1999) (dismissing appeal where judgment debtor left the jurisdiction and refused court order to answer post-judgment interrogatories); *Schmidt v. Schmidt*, 610 A.2d 1374, 1376-77 (Del. 1992) (dismissing appeal in divorce action challenging the division of property where the appellant violated a court order to place money in escrow pending division of property, and left the jurisdiction to avoid enforcement of a contempt finding); *Keidaish v. Smith*, 400 So.2d 90 (Fla. App. 1981) (dismissing appeal where appellant violated temporary injunction by transferring money and assets out of the jurisdiction); *Stewart v. Stewart*, 372 P.2d 697, 699 (Ariz. 1962) (en banc) (dismissal of an appeal is “a reasonable method of sustaining the effectiveness of the state’s judicial process,” where obdurate appellants have disobeyed trial court orders to pay alimony, attorneys' fees, court costs, or to report for a supplemental examination”).

The Capital Suisse defendants’ wilful disobedience of Judge Nehring’s orders, their removal and effective destruction of evidence, and their refusal to participate in discovery or acknowledge the jurisdiction of the Utah courts, all after they vigorously participated in the litigation for months, have irreparably damaged HH&C’s ability to trace and to recover

its money. This Court therefore should dismiss this appeal with prejudice. If this Court does not dismiss the appeal, the Court should affirm Judge Nehring's careful exercise of his discretion on the merits.⁶

II. JUDGE NEHRING ACTED WITHIN HIS DISCRETION BY REFUSING TO ENFORCE THE ONE-SIDED FORUM SELECTION CLAUSE.

In denying Capital Suisse's motion to enforce the one-sided forum selection clause in the Subscription Agreements, Judge Nehring followed this Court's ruling in *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809 (Utah 1993), and Section 80 of the *Restatement (Second) of Conflicts*. Judge Nehring held:

Utah has adopted Section 80 of the *Restatement (Second) Conflict of Laws*, which states that, "The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable." *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809,812 (Utah 1993), quoting *Restatement (Second) Conflict of Laws*, Section 80 (Supp. 1988). Presumptive validity of a choice of forum provision places on the party challenging it the burden of proving that it is unfair or unreasonable. A choice of forum provision may also be disregarded when the party seeking to avoid it can demonstrate that the contract incorporating it is a product of fraud. *Farmland Industries Inc., v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986). I find that plaintiff has alleged sufficient facts to overcome the presumption the choice of forum clause in the Subscription Agreement is enforceable by making prima facie showings that the choice of forum clause is unfair and that the contract as a whole is the product of fraud. (Add. 3-4.)

On appeal, Capital Suisse does not dispute that *Prows* and Section 80 of the

⁶ In certain circumstances, the appellate court may give an appellant a grace period to comply with the orders of the trial court before dismissing the appeal. *See, e.g., D'Ashton v. D'Ashton*, 790 P.2d 590, 593 (Utah App. 1990) (staying dismissal of an appeal for 30 days, to give the appellant, who was evading service in a divorce action, an opportunity to submit to service of process). As in *Cummings v. Cummings*, *supra*, however, the Capital Suisse defendants cannot remedy their wilful and contemptuous disobedience other than by proof that they can satisfy a judgment. Unless the Capital Suisse defendants post a supersedeas bond to fully satisfy the judgment, they should not be allowed to pursue their appeal.

Restatement (Second) of Conflicts provide the proper legal standard. *See* App. Br. at 6-7, 15-16. Rather, Capital Suisse asserts that HH&C failed to meet its burden to establish that the clause was unfair or unreasonable, or that it was the product of fraud. *Id.* at 19, 23. For the reasons stated below, Capital Suisse’s challenges to Judge Nehring’s factual conclusions and to his exercise of discretion have no merit.

A. All the Facts Presented Confirm That Judge Nehring Acted Within His Discretion In Finding That Enforcement of the Forum Selection Clause Would Be Unfair and Unreasonable.

In determining that HH&C had met its burden to prove that the forum selection was unfair and unreasonable, Judge Nehring’s Minute Entry focused on one of the many facts presented— the forum selection was one-sided, because it required HH&C to bring suit in the BVI, but allowed Capital Suisse to bring suit anywhere in the world. Judge Nehring contrasted this one-sided forum selection clause with the forum selection clause in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), in which the “selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation.” (Add. 5, quoting *M/S Bremen*, *supra*, 407 U.S. at 425). Judge Nehring noted that the Capital Suisse forum selection clause has no “such laudable and evenhanded commercial objectives” (*id.*):

Typically, a forum selection clause will identify one forum to be the site of litigation spawned by an agreement. That is not the case here. The Subscription Agreement forum selection provision poses no limitation whatsoever on the forums available to [Capital] Suisse to commence an action against plaintiff, while limiting plaintiff to bringing actions in the British Virgin Islands. Such a provision cannot, unlike the forum selection provision

in *M/S Bremen*, claim to reflect a reasonable effort to bring vital certainty to an international transaction or provide a neutral forum experienced and capable in the resolution of disputes arising from the Subscription Agreement. To the contrary, the forum selection clause appears to serve no end other than creating an imbalance in the respective abilities of the parties to the Subscription Agreement to seek redress through the courts. (*Id.*)

Capital Suisse disputes Judge Nehring’s findings by asserting that a forum-selection clause is not unfair simply because it is one-sided, and that Judge Nehring’s finding is “unsupported and contrary to well-reasoned precedent.” App. Br. at 14. Capital Suisse cites no support for this assertion,⁷ and it is a straw man in any event. Judge Nehring did not find that a one-sided forum selection clause is inherently unfair, or that in other transactions under other circumstances, there could never be valid reasons for such a clause. Rather, the one-sided nature of the clause was one fact among many that led Judge Nehring to the conclusion that its purpose and effect was not to “bring vital certainty to an international transaction or to provide a neutral forum” (Add. 5), but to further the fraud.

HH&C submits that Judge Nehring could have reached no other conclusion. Based upon HH&C’s Verified Complaint and exhibits, and the evidence presented by HH&C in opposition to the dismissal motion, Judge Nehring knew that Capital Suisse had no employees, offices, assets, or bank accounts in the BVI. No negotiations, meetings, or

⁷The sole decision cited by Capital Suisse, *Karl Koch Erecting Co. v. New York Convention Ctr. Dev’p. Corp.*, 838 F.2d 656 (2d Cir. 1988), provides no support for this assertion. In *Karl Koch*, construction contracts for the construction of a convention center in New York City specified that a contractor must bring legal action in New York state court in Manhattan. The Second Circuit specifically did not decide whether this forum selection clause was one-sided, because the developer interpreted the clause to govern all lawsuits, and because “the clause [made] no sense” if interpreted to be one-sided. *See* 838 F.2d at 656-57. Capital Suisse cites no other court decision with a one-sided forum selection clause, much less any decision upholding one.

telephone conferences with HH&C occurred there. No witnesses or documents were there, and, significantly, no assets could be recovered there.⁸

Contrary to Capital Suisse's the astonishing assertion that none "of the occurrences upon which HH&C's suit is based occurred in the United States, let alone Utah," App. Br. at 20, Judge Nehring knew that HH&C came to Utah for one reason alone—to trace and to recover the \$25 million that the Capital Suisse defendants wired and laundered here. As Judge Nehring emphasized, "improper disbursement, if any, of funds deposited in Salt Lake City accounts would constitute torts committed and injuries caused" in Utah. (Add. 8.) As Judge Nehring also emphasized:

⁸Capital Suisse misreads *Phone Directories Co., Inc. v. Henderson*, 2000 UT 64, 8 P.3d 256, for the proposition that a forum selection clause is fair and reasonable so long as there is a "rational nexus" between the forum and either the parties or the transaction. See App. Br. at 19. In *Phone Directories*, this Court held that a consent-to-jurisdiction clause, not a forum selection clause, creates a rebuttable presumption that the exercise of personal jurisdiction is fair and reasonable if there is a "rational nexus" between the forum and the parties. This Court emphasized, however, that whether a court should enforce a forum selection clause was a separate question governed by *Prows* and Section 80 of the *Restatement (Second) of Conflicts*:

the standard we announce today will ensure that enforcement of such [i.e., consent-to-jurisdiction] clauses will not be unfair or unreasonable. As such, this decision will fully comport with the general principle announced in *Prows*, and will offer specific guidance as to the particular issue raised in this case.

8 P.3d at 260 n. 7. See also *id.* at 261 ("as we stated in *Prows*, the traditional defenses allowing one to avoid an unfair or unreasonable contract, such as duress and fraud, are available to parties litigating the validity of a forum"). Thus, *Phone Directories* is irrelevant here—even if there were a "rational nexus" with the BVI, that nexus merely would have established a rebuttable presumption of personal jurisdiction. Applying *Prows*, Judge Nehring found that HH&C presented facts to overcome the separate presumption that enforcement of the forum selection clause would be fair and reasonable.

While most of the alleged statements constituting plaintiff's claim of fraud in the inducement were made in Europe, much of the evidence concerning the financial affairs of Capital Suisse and its related entities, three of which are located in Utah, is likely to be easily accessible in or from this forum. It is probable that part of all of the \$25 million at issue found its way to Utah at one time or another. The source and destination of those funds is central to determination of the merits of plaintiff's claims. I decline to send them elsewhere. (Add. 7.)

Judge Nehring also knew that the "Mutual Fund for the Professional Investor" was a sham. Baker & McKenzie never performed legal services for the Fund, and Deloitte & Touche never had never performed an audit. Its net asset values were a fiction. Despite their repeated refusal to disclose what they had done with HH&C's money, Judge Nehring knew that the Capital Suisse defendants had disbursed HH&C's money to family and friends throughout the world. They never invested any of it. To perfect their fraud, they attempted to foist on HH&C worthless shares in a business that they controlled and which supposedly sold health insurance for pets. They claimed the shares were worth \$30 million.

To further perfect their fraud, the Capital Suisse defendants attempted to insulate their victims' money from the jurisdiction of any court. They transferred much of HH&C's \$25 million from Gibraltar to Utah in direct violation of the Spanish Criminal Court's May 17 Order, and asserted their privilege against self-incrimination when questioned about the transfers in the Spanish proceedings. They told the Spanish Criminal Court that jurisdiction was proper in Utah, not Spain, because HH&C's "commercial relations" were with "Capital Suisse Utah," yet they asked Judge Nehring to dismiss or stay the Utah action in "deference to the Spanish proceedings, because the bulk of the evidence and witnesses are located in Spain or elsewhere in Europe." (R. 257.)

From all these facts, Judge Nehring was fully entitled to find that the one-sided forum selection clause was an important arrow in Capital Suisse's quiver. Its purpose was not to provide predictable "outcomes with respect to the multiple investors in the Fund," as the Capital Suisse defendants assert, *see* App. Br. at 20, because there were no investments and there were no investors. There were only other victims of the fraud. Rather, its purpose was to perfect and insulate the fraud by requiring HH&C (or any other victim) to bring legal action in a distant forum with no connection to the parties or their money.

Judge Nehring's findings are fully consistent with this Court's holding in *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809 (Utah 1993). In *Prows*, a Utah plaintiff brought breach of contract claims in Utah against a Canadian defendant and tortious interference claims against a Utah defendant. The Canadian defendant sought to enforce a clause that specified New York as the forum, arguing (as Capital Suisse argues here) that it had an interest in specifying New York "to limit the number of forums in which it may be required to bring or defend an action." 868 P.2d at 810.

This Court rejected the argument and refused to enforce the forum selection clause. This Court noted that the contract was negotiated and signed in Utah, was to be performed in Utah, and that the alleged breach and torts occurred in Utah. *See id.* at 809. Viewing the facts and construing the complaint in the light most favorable to the plaintiff, *see id.*, this Court held that enforcement of the clause would be unfair. This Court concluded that, "for all practical purposes," the plaintiff would be deprived of his day in court, because he would be forced litigate the contract claim in New York, far from the parties, witnesses, and

evidence, and to litigate the tort claim in Utah. *Id.* at 809.

As in *Prows*, several parties, important witnesses, and documents were located in Utah. As in *Prows*, enforcement of the forum selection clause would have required HH&C to litigate in yet another forum. Capital Suisse's efforts to insulate its fraud (and its refusal to obey the May 17 Order of the Spanish Court) already had forced HH&C to litigate in Spain and Utah, resulting in duplication of effort and waste of resources. Judge Nehring had every reason to believe that sending HH&C to the BVI would add another layer of insulation, but not provide a meaningful remedy, because no assets were to be recovered there.

Judge Nehring's findings are also fully consistent with *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1993), among the other decisions cited by Capital Suisse. In *Carnival Cruise Lines*, the Supreme Court enforced a forum selection clause in a form passage contract that required passengers from Washington state to bring legal action against the cruise line in Florida. The Court noted that

there is no indication that [the cruise line] set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims. Any suggestion of such a bad faith motive is belied by two facts: [The cruise line] has its principal place of business in Florida, and many of its cruises depart from and return to Florida.

499 U.S. at 595 (emphasis added).

Here the evidence of Capital Suisse's bad faith motive was overwhelming. The fact that the Capital Suisse defendants reserved to themselves the right to bring legal action anywhere in the world, as Judge Nehring noted, is telling evidence that they selected the BVI forum to discourage victims from pursuing legitimate claims, not to provide a neutral or

convenient forum. The fact that the Fund was nothing more than a vehicle for fraud, and engaged in no legitimate investment activities, is telling evidence that the Capital Suisse defendants did not select the BVI to provide stability to international business activities or the resolution of international business disputes. The fact that the Capital Suisse defendants repeatedly disobeyed the orders of the Spanish and Utah courts, is telling evidence that the BVI would provide another layer of insulation for the fraud, not a meaningful remedy.

From all of these facts, Judge Nehring acted well within his discretion in finding that the forum selection clause was unfair and unreasonable, and in refusing to enforce it.

B. Judge Nehring Acted Within His Discretion in Finding that the Agreement as a Whole, and the Forum Selection Clause, Were the Product of Fraud.

Judge Nehring also refused to enforce the forum selection clause because he found the Subscription Agreements, and the forum selection clause in each agreement, to be the product of fraud:

Plaintiff's Verified Complaint and the record developed in connection with the defendants' Motion satisfies me that plaintiff is entitled to proceed on its claim that it was fraudulently induced by Capital Suisse, S.A., to make the \$25 million investment. The one-sidedness of the forum selection clause contributes to my conclusion that I should reject the defendants' contention that a forum selection provision may be disregarded only upon a showing that it, as distinguished from the agreement as a whole, was procured by fraud. The one-sided nature of the forum selection provision strongly suggests that the provision was not the focus of negotiation. Moreover, it would be unconscionable for a party against whom a prima facie showing of fraud has been made up to invoke a one-sided forum selection provision. The imbalance in the allocation of rights under the forum selection agreement itself implies that the tentacles of fraud have included the forum selection provision within their reach. (Add. 6-7.)

Judge Nehring cited *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806

F.2d 848 (8th Cir. 1986), in which the Eighth Circuit voided a forum selection clause, even though there was no specific evidence that the plaintiff had been fraudulently induced to agree to the forum selection clause itself. The plaintiff alleged a kickback scheme in connection with its accounts at commodity brokerage firms, in which sham corporations were set up to receive the kickbacks and to which plaintiff's commodities contracts were transferred. *Id.* at 849. The Eighth Circuit held:

Farmland alleges fraudulent acts on the part of the defendants which, if proved, would be sufficient to vitiate the contract and along with it the forum selection clause. Defendants cite several cases holding that fraud will vitiate a forum selection clause only if the inclusion of that clause in the contract was the product of fraud. However, we believe that in a situation where a fiduciary relationship (such as between a commodities broker and its customer) is created by a contract tainted by fraud, the person defrauded can not be held to the contractual forum selection clause. To hold otherwise would be grossly unfair to Farmland because it would force Farmland to comply with an agreement which never would have been made had the existence of the fraud been known.

Id. at 851-52.

Capital Suisse attempts to distinguish *Farmland* by asserting that the fiduciary relationship between the customer and the commodities broker was a “controlling” or “significant” factor in the Eighth Circuit’s analysis, App. Br. at 27, and by asserting that it “is indisputable” that “no fiduciary duty existed between HH&C and the Appellants.” App. Br. at 23 n. 4. This assertion is squarely wrong. Capital Suisse’s former counsel admitted⁹

⁹In opposing the temporary restraining order, Capital Suisse’s counsel represented that “our clients, they do have a fiduciary duty to other investors besides the bank, and to freeze everything would just basically cripple them. You know, I can’t speak as to what exactly -- where the money are going, but they’re telling me that they’re sending them out in ordinary business transactions.” (R. 1906 at 18.)

to Judge Nehring that Capital Suisse owed fiduciary duties to its “clients,” including HH&C. (R. 1906 at 18.) Moreover, it is black-letter law that a stockbroker, investment advisor, or a purported “Mutual Fund for the Professional Investor,” with the discretion to invest its client’s funds, is a fiduciary to its clients.¹⁰ Thus, there is no meaningful distinction between *Farmland* and the facts presented to Judge Nehring.

Further, *Farmland* is fully consistent with fundamental Utah law that a contract induced by fraud may be voided by the victim, and may not be enforced by the defrauding party. As this Court held in *Berkeley Bank for Cooperatives v. Meibos*, 607 P.2d 798 (Utah 1980),

it is an “elementary proposition that fraud vitiated all contracts when established, and that any one induced to make a contract by false representations could be relieved from the burden thereof by a court of equity. Such in short is the holding of this court in its opinion in this case”.

Id. at 804, quoting *Swanson v. Sims*, 170 P. 774, 778 (Utah 1918). *Accord*, *Miller v. Celebration Mining Co.*, 2001 UT 64, 29 P.3d 1231, 1235; *Despain v. Despain*, 855 P.2d 254, 257 (Utah App. 1993).

Other courts have refused to enforce forum selection clauses where the entire contract was induced by fraud. In *Snider v. Lone Star Art Trading Co.*, 672 F.Supp. 977 (E.D. Mich.

¹⁰ See, e.g., *Sunrise Financial, Inc. v. Paine Webber, Inc.*, 948 F.Supp. 1002, 1009 (D. Utah 1996) (refusing to dismiss claims that stockbroker breached its fiduciary duties to its customers); *Marchese v. Nelson*, 809 F.Supp. 880, 893 (D. Utah 1993) (“the broker handling a discretionary account becomes the fiduciary of his customer”); *Hotmar v. Lowell H. Listrom & Co.*, 808 F.2d 1381, 1384 (10th Cir. 1987) (fiduciary relationship may exist if a stock broker controls the customer’s account); *Glisson v. Freeman*, 532 S.E.2d 442 (Ga. App. 2000) (a “stockbroker’s duty to account to its customer is fiduciary in nature, so that the broker is obligated to exercise the utmost good faith”).

1987), *aff'd without op.*, 838 F.2d 1215 (6th Cir. 1988), the court refused to enforce a forum selection clause in one of six contracts, through which plaintiff alleged that he was sold art plates worth far less than represented. The court rejected the argument that the fraud must relate to the inclusion of the clause itself, and applied *Farmland* outside the fiduciary relationship:

The Court of Appeals for the Eighth Circuit in *Farmland* did note, however, that it would be unfair to enforce such a clause where the entire contract was tainted by fraud because it would force the party “to comply with an agreement which never would have been made had the existence of the fraud been known.” . . . Although *Farmland* acknowledged that a fiduciary relationship had been involved, this Court believes that the allegations of fraud within the instant action must be given some mention as an equitable consideration.

672 F.Supp. at 983, quoting *Farmland*, 806 F.2d at 851-52 (citations omitted). The *Snider* court noted that the forum selection clause did not appear in a “controlling document, i.e., the central document in the dispute,” *id.* at 980, and there was no evidence that the clause was a significant part of the transaction, or that the parties had discussed it in negotiations:

Lastly, the forum selection clause appears inconspicuously on the sixth page of a six page agreement which contains numerous complex provisions. There is no evidence it was ever the subject of specific bargaining between the parties. Thus, the clause must be given less weight than if it had been a fundamental part of the transaction.

Id. at 983.

In *DeSola Group, Inc. v. Coors Brewing Co.*, 605 N.Y.S.2d 83 (N.Y. App. Div. 1993), the court held that fraud rendered the entire contract at issue unenforceable, including the forum selection clause. The court explained that “[s]ince plaintiff’s allegations of fraud pervading the agreement would render the entire agreement void, the forum selection clause

contained therein is unenforceable.” *Id.* at 84. Further, the court rejected the view that “the forum selection clause was valid since plaintiff did not allege that the clause itself was obtained by fraud” because “where a party alleges that a contract is void ab initio, the doctrine of separable contracts is inapplicable.” *Id.*

In any event, Judge Nehring’s reliance on *Farmland* is immaterial to his ruling, because Judge Nehring specifically found that the “tentacles of fraud have included the forum selection provision within their reach.” (Add. 6-7.) Judge Nehring’s ruling therefore is fully consistent with *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), in which the Supreme Court held that a “forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion,” 417 U.S. at 519 n. 14 (emphasis added).

In a similar situation, the court in *Armco Inc. v. North Atlantic Ins. Co.*, 68 F.Supp.2d 330 (S.D.N.Y. 1999), refused to enforce a forum selection clause, because the plaintiff alleged massive fraudulent activities before and apart from the contract containing the clause, and because the plaintiff alleged facts to suggest that the forum selection clause was included in the contract to further the fraud. The plaintiff insurance company negotiated to sell several of its subsidiary companies to its executives in a management buy-out. Plaintiff alleged that its representatives in the sale negotiations were secret partners of the buyers, and engaged in fraudulent activities that caused the plaintiff to make excessive payments that enriched the buyers. *See* 68 F.Supp.2d at 334.

The *Armco* court held that the fraud claims were not governed by the forum selection clause, which required disputes arising out of the Sale Contract to be brought in England,

because the fraud “grew out of events which preceded” the contract. The court noted that defendants “were engaged in a broad scheme to defraud plaintiffs out of vast sums of money,” and that the “‘gist’ of plaintiffs claims is not breach of contract, but the “series of acts by defendants resulting in the fraud.” *Id.* at 338. The court further emphasized that “plaintiffs’ claims do not derive from entitlements or benefits granted in the Sale Contract,” but from “a pre-existing comprehensive scheme by the defendants to defraud plaintiffs, of which the signing of the Sale Contract was merely one important aspect.” *Id.* at 340.

In the alternative, the *Armco* court also refused to enforce the forum selection clause because the plaintiff sufficiently alleged that the “inclusion of that clause in the contract was the product of fraud.” *Id.* at 340, quoting *Scherk, supra*. The court held that the plaintiff sufficiently alleged that the forum selection clause was the “product of fraud” because the evidence suggest that clause was included in the Sale Contract either by the buyers or by plaintiff’s representatives secretly working with the buyers, to further the fraudulent scheme:

Plaintiffs have set forth facts in the complaint that suggest that similar transactions of this type normally contain non-exclusive forum selection clauses. Plaintiffs also assert that an initial draft of the agreement provided for New York law to govern, and contained no forum selection clause, until Rossi directed Armco’s lawyers to switch forms to one that made use of exclusive U.K. forum and choice of law clauses. Because plaintiffs allege that Rossi, who was charged with protecting plaintiff’s interests in the contract negotiation, was secretly working with the other defendants in this action to defraud plaintiffs, it is not unreasonable to infer that Rossi may have included the Forum Selection Clause in order to further the alleged fraud. Similarly, if, as defendants suggest, [defendants’] attorneys first suggested the inclusion of the forum Selection Clause, it is not unreasonable to assume that Rossi and Stinson agreed to the Clause’s inclusion in order to further their alleged fraud.

68 F.Supp.2d at 340 (emphasis added).

The reasoning of the *Armco* court applies forcefully here. As in *Armco*, HH&C

alleged a massive scheme to defraud that pre-dated the seven Subscription Agreements signed by HH&C's representative. The Capital Suisse defendants perpetrated the fraud through their prospectus, due diligence questionnaire, and other offering materials, the phony NAV figures on their website, and their oral misrepresentations and omissions, before and apart from the execution of the Subscription Agreements. The Subscription Agreements, and the forum selection clauses in them, were simply one important piece of paper by which the Capital Suisse defendants perpetrated the fraud.

As in *Armco*, and as Judge Nehring noted in his Minute Entry, the one-sided forum selection clause was not typical, and it was not negotiated. Rather, it was slipped into the Subscription Agreements, which were presented to and signed by HH&C after HH&C agreed to provide its money to the Capital Suisse defendants.¹¹ Significantly, the forum selection clause in the Subscription Agreements actually executed by HH&C differs materially from English translation that Capital Suisse provided to HH&C. The English translation specified that litigation in the BVI was permissive, not mandatory. (R. 385-88.) As in *Armco*, these facts strongly support the conclusion that the Capital Suisse defendants slipped in the one-sided, mandatory forum selection clause to further their fraudulent scheme.

The Capital Suisse defendants cite no case where the forum selection clause itself was included in a contract as an instrument of the fraud. To the contrary, in every case the forum

¹¹The Capital Suisse defendants argue that HH&C presented no evidence to Judge Nehring to support his "assumption" that the forum selection clause was not the focus of negotiations. See App. Br. at 22 n. 3. All the facts presented by HH&C surrounding the execution of the Subscription Agreements, however, compel the conclusion that the HH&C never negotiated or reviewed the forum selection clause. HH&C is unaware of evidence that the clause was negotiated, and the Capital Suisse defendants never presented any.

selection clause was irrelevant to the fraud claim. In *Scherk*, for example, an American corporation expanded its European operations by purchasing three European entities. A year after the purchase, the American corporation discovered that the trademark rights were subject to encumbrances that threatened to preclude use of the marks. The American corporation brought an action in the United States, alleging in relevant part that the encumbrances had not been fully disclosed. *See* 417 U.S. at 509. In that context, the Supreme Court upheld a contractual term requiring arbitration of disputes in Paris, France, stating that a “contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied in is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.” *Id.* at 515-16.

Similarly, in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992), a forum selection clause in contracts by which an Coloradan became a member of Lloyds of London, granted English courts jurisdiction over all disputes. In upholding the clause, the Tenth Circuit noted that Lloyds had operated in London for 300 years, that the Coloradan negotiated the contracts in London, and that the Coloradan had acted as a Lloyds’ member for 10 years before bringing suit. *See* 969 F.2d at 955-56.

In neither *Sherk* or *Riley*, nor any other case cited by the Capital Suisse defendants, was there any claim, much less the compelling evidence presented to Judge Nehring, that the defendant itself was a sham and the entire “transaction” was a fraud. (There is no suggestion, for example, that any defendant in any case cited by Capital Suisse ever asserted a privilege

against self-incrimination).¹² The rationale underlying *Sherk*, that a forum selection clause is an “indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction, ” is wholly inapplicable here.

Because Judge Nehring found that the “tentacles of fraud” reached the forum selection clause itself—i.e., because the clause was included in the Subscription Agreements to further the fraud—the clause itself is the “product of fraud” within the meaning of *Sherk*, and Judge Nehring acted well within his discretion in refusing to enforce it.

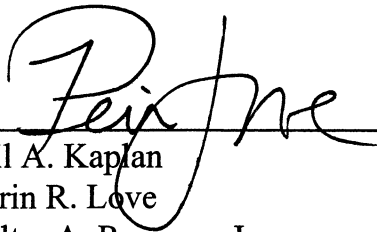
CONCLUSION

For this reasons stated in this Memorandum, this Court should dismiss this Appeal with prejudice, without addressing the merits, because Appellants wilfully and contemptuously disobeyed orders of the trial Court, effectively destroyed evidence, and refused to recognize the jurisdiction of the Utah courts. In the alternative, this Court should affirm the Minute Entry, dated October 11, 2001, that denied Appellants’ Motion to Dismiss for improper venue, because Judge Nehring properly exercised his discretion in finding that

¹²Most of the other decisions cited by Capital Suisse involve franchiser/franchisee disputes; in none of the disputes did the franchisee allege that the forum selection clause was an instrument or a product of the fraud. See *Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P.*, 254 F.3d 753, 757 (8th Cir. 2001) (complaint in franchiser/franchisee dispute “does not even remotely suggest” that forum selection clause was inserted into franchise agreements “as the result of fraud, and the brief on appeal offers no specifics concerning what the fraud might have been or how it was perpetrated”); *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1138 (6th Cir. 1991) (in franchiser/franchisee dispute, no allegation that fraud related to the forum selection clause); *Stephens v. Entre Computer Centers, Inc.*, 696 F.Supp. 636, 641 (N.D. Ga. 1988) (in franchiser/franchisee dispute, “misrepresentations of projected sales and profits” have “no connection” to the forum selection clause”); see also *Zions First Nat’l. Bank v. Allen*, 688 F.Supp. 1495 (D. Utah 1988) (in action by bank to collect on notes, no claim that forum selection clause was included in partnership agreement to further alleged fraud).

enforcement of a forum selection clause would be unfair and unreasonable, and because the forum selection clause was the product of fraud.

Respectfully submitted this 16th day of June, 2003.




Neil A. Kaplan
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Attorneys for Plaintiff/Appellee Hentsch Henchoz & Cie

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document, **BRIEF OF APPELLEES**, this 16th day of June 2003, postage prepaid and correctly addressed to the following:

Brent O. Hatch
HATCH JAMES & DODGE
10 West Broadway #400
Salt Lake City UT 84101



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OCT 11 2001

SALT LAKE COUNTY

By

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of:	:	MINUTE ENTRY
The Criminal Proceeding of the	:	CASE NO. 010905355
Kingdom of Spain and Hentsch	:	
Henchoz & Cie against:	:	
Philip David Gubbay	:	
Court of First Instance and	:	
Instruction No. 2 Marbella	:	
Court No. 1346/2000	:	
<hr/>		
HENTSCH HENCHOZ & CIE,	:	
Plaintiff,	:	
vs.	:	
PHILLIPE D. DAVID GUBBAY,	:	
et al.,	:	
Defendants.	:	

Defendants Philippe D. David Gubbay,, Capital Suisse, S.A., Capital Suisse Securities, Inc., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc., and Fernland Limited, move to dismiss or stay the proceedings in the above-captioned action. These parties also filed papers in opposition to plaintiff's Motion

for Injunctive Relief and Prejudgment Writ of Attachment. On September 5, 2001, a hearing was held on defendants' Motions. Having now fully considered the arguments advanced by the parties, together with the relevant authorities, I deny defendants' Motions.

Plaintiff is a Swiss investment bank. Plaintiff invested \$25 million in a mutual fund managed by Capital Suisse, S.A. Plaintiff alleges that defendant Philippe Gubbay controlled Capital Suisse, S.A. through a related entity, Fernland Limited. Plaintiff further alleges that all of the entities named as defendants are controlled and are alter egos of Mr. Gubbay. Plaintiff contends that its \$25 million investment has been lost through the fraud and machinations of Mr. Gubbay and his affiliated entities.

Plaintiff initially sought redress for Mr. Gubbay's alleged wrongdoing by intervening in a criminal proceeding now pending in the Kingdom of Spain. The Spanish Court issued an Order freezing certain assets of Mr. Gubbay and his related entities. Because several of these entities were located in Utah and because these entities held funds in accounts in Utah banks, plaintiff filed an action in this court seeking to extend to Utah the reach of the Spanish Order based on the doctrine of comity. I denied this request.

Plaintiff then filed this action claiming that the misdeeds of Mr. Gubbay and his affiliated entities constituted fraud and

violated Utah securities laws. Plaintiff also sought to enjoin defendants from transferring funds from their Utah accounts. In the interval between my denial of plaintiff's request to enforce the Order of the Spanish Court and plaintiff's application for injunctive relief brought under its civil action filed in this jurisdiction, the defendant entities substantially depleted the Utah bank accounts.

Defendants challenge both the personal jurisdiction of this Court over the defendants and the legal sufficiency of the plaintiff's claims brought under Utah's securities laws. The focus of defendants' challenge to this Court's jurisdiction is a forum selection clause incorporated as a term in the mutual funds Subscription Agreement executed by the plaintiff. Although the English translation of the forum selection clause has been the subject of considerable controversy, its general features are not in dispute. The clause restricts the plaintiff to bringing actions arising under the Subscription Agreement in the courts of the British Virgin Islands, while granting Capital Suisse, S.A., the authority to sue the plaintiff in any jurisdiction in which it might be amenable to process.

Utah has adopted Section 80 of the Restatement (Second) Conflict of Laws, which states that, "The parties' agreement as to the place of the action will be given effect unless it is unfair or

unreasonable." Prows v. Pinpoint Retail Systems, Inc., 868 P.2d 809,812 (Utah 1993), quoting Restatement (Second) Conflict of Laws, Section 80 (Supp. 1988). Presumptive validity of a choice of forum provision places on the party challenging it the burden of proving that it is unfair or unreasonable. A choice of forum provision may also be disregarded when the party seeking to avoid it can demonstrate that the contract incorporating it is a product of fraud. Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986). I find that plaintiff has alleged sufficient facts to overcome the presumption the choice of forum clause in the Subscription Agreement is enforceable by making prima facie showings that the choice of forum clause is unfair and that the contract as a whole is the product of fraud.

Although long stigmatized as unenforceable efforts to "oust" courts of jurisdiction, the United States Supreme Court legitimized choice of forum provisions in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907, 32 L.Ed.2d 513 (1972). The Bremen Court clearly sent a clear message to American courts that their unwillingness to enforce choice of forum provision was too often traceable to "a provincial attitude regarding the fairness of other tribunals." Courts with such foreshortened views of the horizon were at odds with the demands of global commerce and the court made it clear it was prepared to remove jurisdictional impediments that

KINGDOM OF SPAIN
V. GUBBAY

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MINUTE ENTRY

stood in the way of economic internationalism. The choice of forum provision which the M/S Bremen court enforced required litigation of a maritime dispute between German and American parties to a contract to be resolved in English courts. The court noted that the "selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation." Id. 525.

It is important, in my view, to note that the choice of forum provision drafted by Credit Suisse, S.A., does not appear to have such laudable and evenhanded commercial objectives. In fact, the forum selection clause is unlike most forum selection clauses which appear in reported cases. Typically, a forum selection clause will identify one forum to be the site of litigation spawned by an agreement. That is not the case here. The Subscription Agreement forum selection provision poses no limitation whatsoever on the forums available to Credit Suisse to commence an action against plaintiff, while limiting plaintiff to bringing actions in the British Virgin Islands. Such a provision cannot, unlike the forum selection provision in M/S Bremen, claim to reflect a reasonable effort to bring vital certainty to an international transaction or provide a neutral forum experienced and capable in the resolution of disputes arising from the Subscription Agreement. To the

contrary, the forum selection clause appears to serve no end other than creating an imbalance in the respective abilities of the parties to the Subscription Agreement to seek redress through the courts.

The inherent unfairness of the forum selection provision is also material to and reinforces plaintiff's contention that the forum selection provision should be disregarded because the Subscription Agreement was the product of defendant's fraud.

Plaintiff's Verified Complaint and the record developed in connection with the defendants' Motion satisfies me that plaintiff is entitled to proceed on its claim that it was fraudulently induced by Capital Suisse, S.A., to make the \$25 million investment. The one-sidedness of the forum selection clause contributes to my conclusion that I should reject the defendants' contention that a forum selection provision may be disregarded only upon a showing that it, as distinguished from the agreement as a whole, was procured by fraud. The one-sided nature of the forum selection provision strongly suggests that the provision was not the focus of negotiations. Moreover, it would be unconscionable for a party against whom a prima facie showing of fraud has been made up to invoke a one-sided forum selection provision. The imbalance in the allocation of rights under the forum selection agreement itself implies that the tentacles of fraud have included

the forum selection provision within their reach.

Next, I am not persuaded that Utah provides an unacceptably inconvenient forum for this litigation. While most of the alleged statements constituting plaintiff's claim of fraud in the inducement were made in Europe, much of the evidence concerning the financial affairs of Capital Suisse and its related entities, three of which are located in Utah, is likely to be easily accessible in or from this forum. It is probable that part or all of the \$25 million at issue found its way to Utah at one time or another. The source and destination of those funds is central to determination of the merits of plaintiff's claims. I decline to send them elsewhere.

I further reject defendants' contention that the doctrine of comity mandates that I dismiss or stay these proceedings. If any certainty has emerged from the proceedings in this case to date, that certainty is that the nature of the proceedings against Mr. Gubbay and the Kingdom of Spain are shrouded in procedural mystery. It would be wrong for a trial judge sitting in the state of Utah to presume that a Spanish Court would be incapable of administering justice of a quality commensurate with that expected in the courts of the United States of America. At the same time, it would be clearly improper for me to bar a party, like plaintiff, from seeking relief to which it would otherwise be entitled based on the

confused and conflicting information concerning the Spanish criminal proceeding currently contained in the record.

I am satisfied that plaintiff has established a prima facie showing of personal jurisdiction over each of the defendants. I agree with the plaintiff's assertion that the transfer of funds to Salt Lake City accounts constitutes a transaction of business under Utah's long-arm statute, Utah Code Ann., Section 78-27-22 through 28 (1996). I likewise concur in plaintiff's contention that improper disbursements, if any, of funds deposited in Salt Lake City accounts would constitute torts committed and injuries caused within this state. There is likewise sufficient prima facie evidence to support a preliminary finding of general jurisdiction over all defendants. Plaintiff has made a prima facie showing that Capital Suisse Securities, Inc., Zooley Services Limited, Zooley of Utah, Inc., and Douglas P. Hoyt, are located in Utah. It has also satisfactorily demonstrated that the affiliation of Capital Suisse, S.A., to Capital Suisse Securities, Inc., through Fernland Limited is of such a quality to extend this Court's jurisdiction to Capital Suisse, S.A., and Fernland. Thus, I am satisfied that plaintiff has adequately established a claim to general jurisdiction over Mr. Gubbay based on both the positions he holds within the defendant entities and the alter ego claims advanced by plaintiff.

Last, I deny defendants' Motion to Dismiss plaintiff's claim

KINGDOM OF SPAIN
V. GUBBAY

PAGE 9

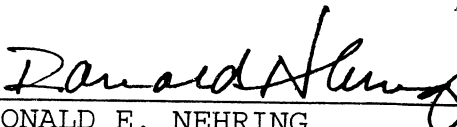
MINUTE ENTRY

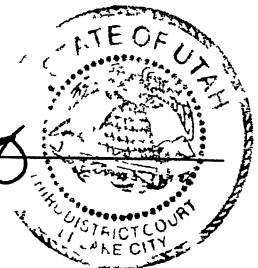
for relief under the Utah Uniform Securities Act. As pled, plaintiff's Verified Complaint adequately alleges that plaintiff received an offer to purchase the security at the direction of defendants in the state of Utah, thereby satisfying the requirements of Utah Code Ann., Section 61-1-26(1).

Having determined that this Court has jurisdiction over the plaintiff's claims, I turn to plaintiff's application for preliminary injunctive relief. Although briefed by the plaintiff in connection with its opposition to defendants' Motion to Dismiss or Stay Proceedings, the issue of plaintiff's entitlement to injunctive relief has not formally been presented to me and I decline, therefore, to rule on it at this time.

This Minute Entry shall serve as the Court's Order.

Dated this 11 day of October, 2001.


RONALD E. NEHRING
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 14th day of October, 2001:

Neil A. Kaplan
Perrin R. Love
Attorneys for Hentsch, Henchoz & Cie
201 S. Main, Suite 1300
Salt Lake City, Utah 84111

Kenneth A. Caruso
Attorney for Plaintiff
335 Madison Avenue
New York, New York 10017

Marc R. Cohen
Alex Lakatos
Attorneys for Plaintiff
2300 N. Street, N.W.
Washington, D.C. 20037

Blaine J. Benard
Matthew N. Evans
Christine T. Greenwood
Attorneys for Defendants
Capital Suisse, S.A., Zooley
Services Ltd., Phillipe D. Gubbay,
Capital Suisse, Inc., and Zooley
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111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111

KINGDOM OF SPAIN
V. GUBBAY

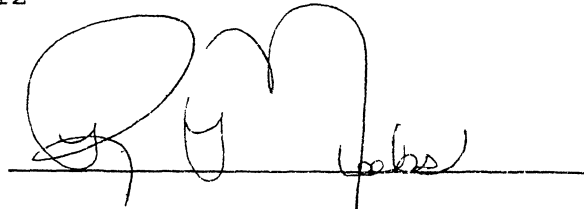
PAGE 11

MINUTE ENTRY

Mailing certificate - continued

Michael R. Carlston
R. Brent Stephens
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Salt Lake City, Utah 84145

Victoria Brieant
William N. Herbert
Coudert Brothers
Attorneys for Defendant
Capital Suisse Securities
600 Beach Street, Third Floor
San Francisco, California 94109-1312



Confidential Prospectus

COPIE

Capital Suisse S.A.

(A Company Incorporated in the British Virgin Islands
as an International Business Company)

Private placement of up to 4,990,000 redeemable non-voting shares
The minimum initial subscription is for 1.000 shares.

Dated 24th of November 2000

Number of Copy: 196

Recipient: _____

1. DIRECTORS, ADVISERS AND SERVICE PROVIDERS

CORPORATE DIRECTOR

Fernland Limited
c/o Morning Star Ltd
P.O. Box 556
Main Street
Charlestown
Nevis
West Indies.

REGISTERED AGENT & OFFICE

Capital Suisse S.A.
c/o Abacus Trust & Management
Services Ltd
Geneva Place, 2nd Floor
#333 Waterfront Drive
P.O. Box 3339
Road Town, Tortola
British Virgin Islands

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British Virgin Islands

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100 New Bridge Street
London EC4V 6JA
United Kingdom

BANK

ABN AMRO Bank N.V.
2-6 Main Street
Gibraltar

PRINCIPAL CUSTODIAN

Capital Suisse Securities, Inc.
125 Larkspur Street
Suite 202
San Rafael, CA 94901
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INVESTMENT ADVISER

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c/o Morning Star Ltd
P.O. Box 556
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Nevis
West Indies

LEGAL ADVISERS IN THE BVI

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Myers Fletcher & Gordon
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Road Town, Tortola
British Virgin Islands

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RIO DE JANEIRO

SAN DIEGO
SAN FRANCISCO
SANTIAGO
SAO PAULO
TIJUANA
TORONTO
VALENCIA
WASHINGTON, D.C.

OUR REF: MAT/ajs

DIRECT LINE:

020 7919 1823

YOUR REF:

10 August 2001

Darier Hentsch & Cie
4 rue de Saussure
Case postale 5045
1211 Geneve 11
Switzerland

Dear Sirs

CAPITAL SUISSE

This is to confirm that the London office of Baker & McKenzie has never carried out any work for Capital Suisse. In particular, we have never had any role in relation to any documentation for any fund which they have sponsored.

We have in fact on repeated occasions asked Capital Suisse to stop using our name in their marketing brochures.

We have no client relationship with Capital Suisse whatsoever.

Yours faithfully



Marwan Al-Turki

LONDOCS\1377666.01

Deloitte & Touche
P.O. Box 3083
Road Town, Tortola
British Virgin Islands

Tel: (284) 494-2868
Fax: (284) 494-7889
dtt@bvirgini.com
www.us.deloitte.com

**Deloitte
& Touche**

31 August, 2001

Hentsch Henchoz et Cie.
11 Place St. Francois
Case Postale 2972-1002
Lausanne Switzerland

COPY

Dear Sirs,

Re: **Capital Suisse S.A.**

You have advised that the British Virgin Islands office of Deloitte & Touche ("D&TBVI") is contained on a list of service providers appearing in a November 24, 2000 confidential prospectus for a private placement of up to 4,990,000 redeemable non-voting shares being circulated by Capital Suisse S.A., a mutual fund registered in the British Virgin Islands with registered offices at PO Box 146, Road Town, Tortola, British Virgin Islands. You have also advised that as an investor in Capital Suisse S.A., you have instituted legal proceedings in the State of Utah, United States of America against the promoters of Capital Suisse S.A.

In this connection, we confirm as follows:

1. D&TBVI was in October 2000 asked to act as auditors of Capital Suisse S.A., and agreed to do so, subject to the satisfactory completion of D&TBVI's due diligence requirements and the execution of our standard engagement letter.
2. On November 24, 2000 Capital Suisse S.A. did not have D&TBVI's authorisation to use D&TBVI's name in connection with any mutual fund sponsored by Capital Suisse S.A.
3. On 9th February, 2001, several months following the unauthorised use by Capital Suisse S.A. of D&TBVI's name in the Prospectus, D&TBVI received Capital Suisse S.A.'s acceptance of D&TBVI's engagement letter.
4. D&TBVI has not had any role in relation to advising on the registration of Capital Suisse S.A. in the BVI or the preparation of any documentation for any fund sponsored by Capital Suisse S.A. and has never audited or provided any services to Capital Suisse S.A.
5. D&TBVI has not performed any work whatsoever for Capital Suisse S.A. and reserves its right to sue for any injury and harm that may be caused to its reputation by virtue of Capital Suisse S.A.'s false and misleading statements in the Prospectus, as well as its right to defend any legal proceedings instituted against it by virtue of Capital Suisse S.A.'s false and misleading statements.

Sincerely,

Deloitte & Touche

**Deloitte
Touche
Tohmatsu**

Paul T. Moxley, #2342
Matthew N. Evans, #7051
Christine T. Greenwood, #8187
HOLME ROBERTS & OWEN LLP
111 East Broadway, Suite 1100
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Telephone: (801) 521-5800
Facsimile: (801) 521-9639

1
57
3

Attorneys for Defendants Capital Suisse, S.A., Zooley Services Limited,
Phillipe D. Gubbay, Capital Suisse, Inc., Zooley of Utah and Fernland, Inc.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

HENTSCH HENCHOZ & CIE,

Plaintiff,

vs.

PHILLIPE D. DAVID GUBBAY,
CAPITAL SUISSE, S.A., CAPITAL
SUISSE SECURITIES, INC., CAPITAL
SUISSE, INC., ZOOLEY SERVICES
LIMITED, ZOOLEY OF UTAH, INC.,
FERNLAND LIMITED, DOUGLAS P.
HOYT, and JOHN DOES 1-10,

Defendants.

**NOTICE OF WITHDRAWAL
OF ANSWER**

Civil No. 010905355

Judge Ronald E. Nehring

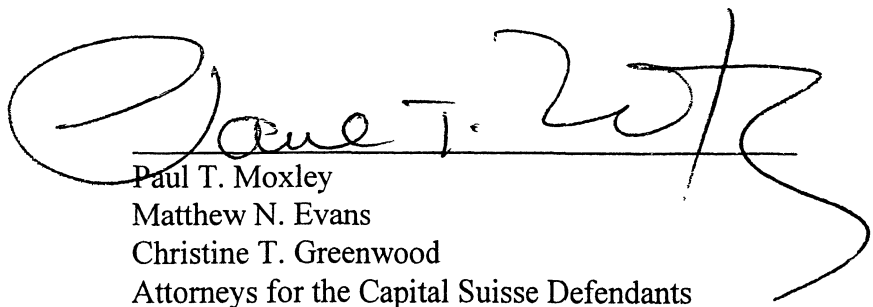
Defendants Phillipe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley
Services Limited, Zooley of Utah, Inc., and Fernland Limited (collectively, the "Capital Suisse

Defendants") hereby provide notice to the Court that they are hereby withdrawing their Answer to the Complaint.

The Capital Suisse Defendants and the plaintiff are currently litigating the same set of facts in this action in several different countries, including Spain, Gibraltar, the British Virgin Islands and the United States. In the investment contracts between the Capital Suisse Defendants and HH&C, the parties agreed that all disputes regarding the contracts would be litigated in one venue, the British Virgin Islands. For this reason, the Capital Suisse Defendants do not believe that this Court has jurisdiction to allow HH&C to proceed in this Court and they lack the resources necessary to litigate against HH&C in several different countries and jurisdictions. For these reasons, the Capital Suisse Defendants hereby withdraw their Answer as if it were Nunc Pro Tunc. The Capital Suisse Defendants refuse to acknowledge this litigation any further and have instructed their attorneys to take no further action on their behalf.

DATED this 1 day of April, 2002.

HOLME ROBERTS & OWEN LLP


Paul T. Moxley
Matthew N. Evans
Christine T. Greenwood
Attorneys for the Capital Suisse Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of April, 2002, I caused a true and correct copy of
MOTION TO WITHDRAW ANSWER, to be served by United States First Class Mail, postage-
prepaid, to:

Neil A. Kaplan
Perrin R. Love
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Michael R. Carlston
R. Brent Stephens
Snow Christensen & Martineau
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Jerome H. Mooney
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Larsen & Mooney Law
50 West Broadway, First Floor
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Attorneys for Douglas Hoyt

_____

Paul T. Moxley, #2342
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Attorneys for Defendants Capital Suisse, S.A., Zooley Services Limited,
Phillipe D. Gubbay, Capital Suisse, Inc., Zooley of Utah and Fernland, Inc.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

HENTSCH HENCHOZ & CIE,

Plaintiff,

vs.

PHILLIPE D. DAVID GUBBAY,
CAPITAL SUISSE, S.A., CAPITAL
SUISSE SECURITIES, INC., CAPITAL
SUISSE, INC., ZOOLEY SERVICES
LIMITED, ZOOLEY OF UTAH, INC.,
FERNLAND LIMITED, DOUGLAS P.
HOYT, and JOHN DOES 1-10,

Defendants.

**MOTION TO WITHDRAW
AS COUNSEL**

Civil No. 010905355

Judge Ronald E. Nehring

Pursuant to Rule 4-506 of the Rules of Judicial Administration, the law firm of Holme
Roberts & Owen hereby moves this Court for an Order permitting it to withdraw as counsel for
defendants Phillipe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services

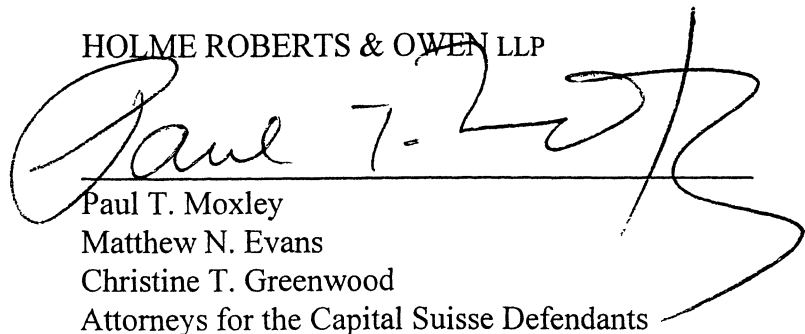
Limited, Zooley of Utah, Inc., and Fernland Limited (collectively, the "Capital Suisse Defendants") in the above-captioned action.

The Capital Suisse Defendants have instructed counsel to withdraw their Answer in this case. The Capital Suisse Defendants do not recognize the jurisdiction of the United States over the dispute. The Capital Suisse Defendants have instructed counsel to inform the Court that because they have withdrawn their Answer, they do not intend to produce any documents pursuant to any Orders of the Court or otherwise to engage in any discovery under the Utah Rules of Procedure .

In light of the outstanding Orders from this Court requiring production of documents and cooperating in discovery, counsel for the Capital Suisse Defendants hereby request that they be permitted to withdraw as counsel. Counsel so request because the clients' instructions to withdraw their Answer has put counsel in a conflict of interest situation because as officers of the Court, they must comply with all Court Orders. Counsel have instructed their clients of their obligations under the Utah Rules of Procedure as they relate to discovery and they refuse to comply or otherwise participate any further in this action. The clients have also been instructed by counsel not to destroy, conceal or otherwise dispose of any documents relating to this action.

DATED this 1 day of April, 2002.

HOLME ROBERTS & OWEN LLP


Paul T. Moxley
Matthew N. Evans
Christine T. Greenwood
Attorneys for the Capital Suisse Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 7 day of April, 2002, I caused a true and correct copy of
MOTION TO WITHDRAW AS COUNSEL, to be served by United States First Class Mail,
postage-prepaid, to:

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Salt Lake City, Utah 84101-2006
Attorneys for Douglas Hoyt



JUL 17 2002

By SALT LAKE COUNTY
Deputy Clerk

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Perrin R. Love (5505)
Walter A. Romney, Jr. (7975)
Attorneys for Hentsch, Henchoz & Cie
201 South Main Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: (801) 322-2516
Facsimile: (801) 521-6280

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of:

The Criminal Proceeding of the
Kingdom of Spain and Hentsch
Henchoz & Cie against:

Philip David Gubbay

Court of First Instance and Instruction
No. 2 Marbella
Court No. 1346/2000

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AGAINST PHILIPPE D.
DAVID GUBBAY and the CAPITAL
SUISSE DEFENDANTS**

HENTSCH HENCHOZ & CIE,

Plaintiff,

vs.

PHILIPPE D. DAVID GUBBAY,
CAPITAL SUISSE, S.A., CAPITAL SUISSE
SECURITIES, INC., CAPITAL SUISSE,
INC., ZOOLEY SERVICES LIMITED,
ZOOLEY OF UTAH, INC., FERNLAND
LIMITED, DOUGLAS P. HOYT, and JOHN
DOES 1-10,

Defendants.

Consolidated Case No.010905355

Judge Ronald E. Nehring

On June ____, 2002, the Court heard argument on Plaintiff's Motion for Summary Judgment on the First, Second and Sixth Claims against the Capital Suisse Defendants.¹ Plaintiff Hentsch Henchoz & Cie ("HH&C") was represented by Neil A. Kaplan, Perrin R. Love and Walter A. Romney, Jr. The Capital Suisse Defendants were properly served and notified of Plaintiff's Motion and chose not to oppose, or be present during the argument on, the Motion.

Based on the evidence presented by HH&C in its Motion, including the undisputed material facts and related exhibits which are deemed admitted and proven, this Court concludes that HH&C has proven by clear and convincing evidence that the Capital Suisse Defendants committed fraud and participated in a civil conspiracy to commit fraud, against HH&C and further concludes that HH&C has proven by a preponderance of evidence that the Capital Suisse Defendants breached their fiduciary duty to HH&C. The Court finds that the Capital Suisse Defendants defrauded HH&C of \$24,730,000 by acting in concert to create the appearance of a legitimate investment opportunity in Capital Suisse S.A. (the "Fund"), when, in fact, the Fund was nothing more than a ruse to defraud innocent investors. To induce HH&C to entrust its money to them, the Capital Suisse Defendants fabricated net asset value ("NAV") numbers for the Fund that had no basis in reality. The Capital Suisse Defendants further created the false appearance of legitimacy by misrepresenting that Baker & McKenzie (London) was the legal advisor to the Fund and that Deloitte, Touche & Tohmatsu (BVI) was the auditor to the Fund, neither of which was true. Once the Capital Suisse Defendants,

¹ The "Capital Suisse Defendants" refers to Phillippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited.

through these and other misrepresentations, obtained HH&C's money, they did not invest the money in legitimate investment opportunities as represented, but rather disseminated the money worldwide for the benefit of Phillip D. David Gubbay ("Gubbay"), his relatives, friends, and associates, as demonstrated by the exhibits to HH&C's memorandum in support of its motion for summary judgment.

The Court further finds, and the evidence establishes, that the Capital Suisse Defendants intended from the outset to commit fraud on a massive scale and never intended to invest HH&C's money. The purported "Subscription Agreements" between HH&C and the Capital Suisse Defendants, and any related documents, therefore, are void ab initio for fraud. Consequently, the Capital Suisse Defendants have no rights under or arising from those purported Subscription Agreements, and were not, and are not, entitled to redeem HH&C's money "in specie," i.e., with purported assets of the Fund. The evidence further demonstrates that the Capital Suisse Defendants' attempt to force HH&C to accept shares of PetsMarketing, Inc. in lieu of cash was merely another part of the Capital Suisse Defendants' fraudulent scheme and conspiracy. The Capital Suisse Defendants misrepresented to HH&C, and to this Court, the value of the PetsMarketing shares purportedly transferred to HH&C at over \$30 million. In fact, those shares had virtually no market or market value. Moreover, the Capital Suisse Defendants themselves manipulated the trading in PetsMarketing, Inc. to boost artificially the publically-quoted price of PetsMarketing, Inc. shares.

This Court's finding that the Capital Suisse Defendants defrauded HH&C is strongly supported by the Capital Suisse Defendants' conduct in this litigation. The Capital Suisse Defendants invoked the Fifth Amendment privilege against self-incrimination to avoid complying with their most basic discovery obligations in this matter. Although this Court ruled that the Capital

Suisse Defendants improperly had invoked the Fifth Amendment privilege and ordered them to comply with HH&C's discovery requests, the Capital Suisse Defendants refused to do so. To the contrary, while this litigation was pending, the Capital Suisse Defendants removed documents that they previously had maintained in their Utah offices to Spain. When ordered by this Court to return the documents and make them available for discovery, the Capital Suisse Defendants refused to comply with the Court's order and abandoned their defense of this litigation. This is not the conduct of legitimate business persons. Indeed, the conspiracy against HH&C is still ongoing, as the Capital Suisse Defendants continue to this day to coordinate with one another to hide and launder HH&C's money, to destroy and conceal evidence of their wrongdoing, and to eliminate the paper trail that would lead HH&C to its money.

In light of the compelling evidence that the Capital Suisse Defendants were, and are, engaged in fraud, and coupled with their improper invocation of the Fifth Amendment and their removal of documents from this jurisdiction, effectively destroying evidence, the Court concludes that the Capital Suisse Defendants knew that the evidence, documents and other information they were ordered, but refused, to provide, would further prove their fraud and assist HH&C to find and recover its assets.

The Capital Suisse Defendants' recent refusal to acknowledge this litigation is simply another ploy to avoid the consequences of their worldwide fraudulent conduct. Until they were ordered to comply with discovery, the Capital Suisse Defendants fully participated in the defense and litigation of this case by, among other things, filing an Answer to the Verified Complaint, serving discovery requests upon HH&C, filing several motions to dismiss on various substantive and procedural grounds, and twice seeking leave of the Utah Supreme Court to file interlocutory appeals. Based on

the record and evidence in this matter, it is abundantly clear that this Court properly exercised jurisdiction over the Capital Suisse Defendants.

The Court having carefully reviewed the memoranda filed by HH&C, including the exhibits thereto, and having considered the arguments of counsel, and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED and DECREED AS FOLLOWS:

1. HH&C's Motion for Summary Judgment on the First, Second and Sixth Claims against the Capital Suisse Defendants is GRANTED.

2. Upon entry of the Judgment, monies held pursuant to this Court's temporary restraining order at Zions First National Bank and Wells Fargo Bank, shall be immediately released to Plaintiff and the bonds that HH&C posted as security for the temporary restraining order shall also be released to HH&C.

3. The Capital Suisse Defendants, and all others acting in concert with them, are permanently enjoined from transferring and/or dissipating HH&C's assets and monies and from hiding, destroying or otherwise disposing of any records, documents or property belonging or in any way relating to HH&C's monies, to the flow of assets, proceeds, property or investments relating to those monies.

4. The Capital Suisse Defendants assets worldwide, wherever they may be located, are frozen and ordered attached, garnished and subject to the imposition of a constructive trust, to satisfy the money damages judgment awarded herein.

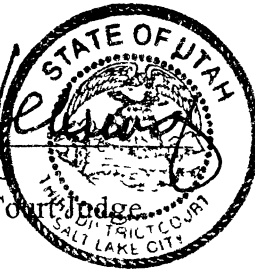
5. The Court determines, pursuant to Utah R. Civ. P. 54(b), that there is no just reason for delay of entry of judgment. The Court directs, pursuant to Utah R. Civ. P. 54(b), that final Judgment be entered in favor of Plaintiff HH&C against Defendants Philippe D. David Gubbay,

Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited on the First Claim for fraud, the Second Claim for breach of fiduciary duty and the Sixth Claim for civil conspiracy. The Court notes that the litigation in this case is complete against the Capital Suisse Defendants and that the courts adjudicating other actions involving some or all of the Capital Suisse Defendants in Spain, Gibraltar and the British Virgin Islands may want to be advised of this Court's final judgment.

DATED this 16 day of July 2002.

BY THE COURT


RONALD E. NEHRING
Third Judicial District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing proposed **Order Granting Plaintiff's Motion for Summary Judgment Against Philippe D. David Gubbay and the Capital Suisse Defendants**, was served this 31st day of May 2002, as indicated below and correctly addressed to the following:

(By Federal Express to HH&C Spanish counsel in Marbella, Spain for Hand Delivery)

Philippe D. David Gubbay,
Capital Suisse
Marina Marbella Tower
Avda, Severo Ochoa 28, 2d/4a
E-29600 Marbella, Málaga (Spain)

-and-

Urbanización Las Chapas
Casa 16
29600 Marbella, Málaga (Spain)

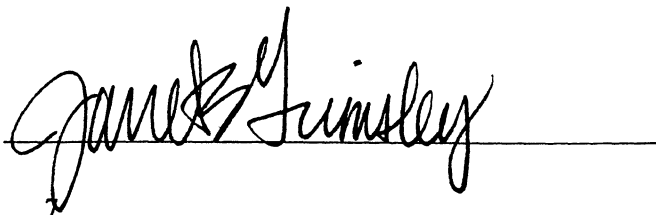
Individually and on behalf of
Capital Suisse, S.A.
Capital Suisse, Inc.
Zooley Services Limited
Zooley of Utah, Inc.
Fernland Limited

(By Hand-Delivery)

Michael R. Carlston
R. Brent Stephens
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Salt Lake City UT 84111
Attorneys for Capital Suisse Securities, Inc.

(By Hand-Delivery)

Jerome H. Mooney
LARSEN & MOONEY
50 West Broadway #100
Salt Lake City UT 84101
Attorneys for Douglas P. Hoyt

A handwritten signature in black ink, appearing to read "James G. Gimsley", is written over a horizontal line.

ZIONS BANK

LEGAL SERVICES DEPARTMENT

Zions First National Bank
P O, Box 30709
Salt Lake City
Utah 84110-0709
OR
Hand Delivered Mail to
Legal Services Department
Gateway Tower East 5th Floor
10 East South Temple
Salt Lake City
Utah 84133
(801) 524-4632

July 31, 2001

Matthew N. Evans
Holme Roberts & Owen, LLP
111 East Broadway, Suite 1100
Salt Lake City, UT 84111-5233

Re: In re: Phillip David Gubbay
Third District Court Civil No. 010905355

Dear Mr. Evans:

In response to your correspondence dated July 26, 2001 requesting account balances, the balances were \$2,207,006.94 for June 26th and \$804,468.31 for July 25, 2001. This is the balance for account number 024-75556-3 (the "Sweep Account"). The other accounts, numbers 002-22249-5 and 002-22011-9, are zero balance accounts which sweep daily to the Sweep Account. There are also no bank accounts in the name of Capital Suisse S.A., Zooley Services Limited or Phillip Gubbay with Zions First National Bank.

Should you have any further questions please do not hesitate to call.

Sincerely,



Robert A. Goodman



WELLS FARGO SERVICES COMPANY
SUBPOENA PROCESSING DEPARTMENT
P.O. BOX 29728 MAC# S4101-156
PHOENIX, AZ 85038-9728

AFFIDAVIT

Re: Criminal Subpoena	Our Reference #: 997244
Agency Case #: 010905355	Date Served: 6/26/01
Entity Served: Wells Fargo Bank Northwest, N.A. (the "Bank")	

I, **Charles Fitzner**, declare that I am employed by Wells Fargo Services Company ("WFSC") in the Subpoena Processing Department and the Bank's designated duly authorized Custodian of Records for this matter, with the authority to certify the information provided herein. The Bank reserves its right to designate another Custodian as it deems appropriate in the event an actual appearance is required.

Account balance as of 6/26/01 & 7/25/01:

\$14,412.30 \$14,412.30 as of BOTH dates.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 30th day of July, 2001, in the City of Phoenix, State of Arizona.

Subpoena Processing Representative (602) 378-7436