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Hentsch Henchoz & CIE v. Philippe D. 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 : Brief of Appellants

Utah Supreme Court

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IN THE UTAH SUPREME COURT

HENTSCH HENCHOZ & CIE,

Plaintiff and Appellee,

vs.

PHILIPPE D. 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

BRIEF OF APPELLANTS

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE RONALD E. NEHRING

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UTAH SUPREME COURT

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CLERK OF THE COURT

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TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION	6
STATEMENT OF THE ISSUE AND STANDARD OF REVIEW	6
DETERMINATIVE LAW	7
STATEMENT OF THE CASE	7
STATEMENT OF THE FACTS	9
SUMMARY OF ARGUMENT	13
ARGUMENT	15
CONCLUSION	29
ADDENDA	31

TABLE OF AUTHORITIES

CASES

<i>Bremem v. Zapata Off-Shore Co.</i> , 407 U.S. 1 (1972)	7, 13, 16, 17-19, 21
<i>Bryant Elec. Co., Inc. v. City of Fredericksburg</i> , 762 F.2d 1192 (4 th Cir. 1985)	21
<i>Carnival Cruise Lines, Inc. v. Shute</i> , 499 U.S. 585 (1991)	16, 22
<i>Excell, Inc. v. Sterling Boiler Mech., Inc.</i> , 106 F.3d 318, 320 (10 th Cir. 1997)	7
<i>Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc.</i> , 806 F.2d 848 (8 th Cir. 1986)	15, 23, 26
<i>Karl Koch Erecting Co., Inc. v. New York Convention Center Dev'p. Corp.</i> , 838 F.2d 656 (2 ^d Cir. 1988), aff'g, 656 F. Supp. 464 (S.D.N.Y. 1987)	18
<i>Marano Enterprises of Kansan v. Z-Teca Restaurants, L.P.</i> , 254 F.3d 753 (8 th Cir. 2001)	28
<i>Marra v. Papandreou</i> , 59 F.Supp.2d 65 (D.D.C. 1999)	22
<i>Marinechance Shipping, Ltd. v. Sebastian</i> , 143 F.3d 216 (5 th Cir. 1998)	22
<i>Milanovich v. Costa Crociere, S.P.A.</i> , 954 F.2d 763 (D.C.Cir. 1992)	22
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985)	16
<i>Moses v. Business Card Express, Inc.</i> , 929 F.2d 1131 (6 th Cir. 1991)	25

<i>National Micrographics Systems, Inc. v. Canon U.S.A., Inc.</i> , 825 F.Supp. 671 (D.N.J. 1993)	27
<i>Phone Directories Co. v. Henderson</i> , 8 P.3d 256 (Utah 2000)	7, 19
<i>Prows v. Pinpoint Retail Systems, Inc.</i> , 868 P.2d 809 (Utah 1993)	7, 13, 15, 16, 18, 19, 26
<i>Regency Photo & Video, Inc. v. American Online, Inc.</i> , 214 F.Supp.2d 568 (E.D.Va. 2002)	21
<i>Riley v. Kingsley Underwriting Agencies, Ltd.</i> , 969 F.2d 953 (10 th Cir. 1992)	7, 14, 24, 25
<i>SBKC Serv. Corp. v. 1111 Prospect Partners, L.P.</i> , 105 F.3d 578, 581 (10 th Cir. 1997)	7
<i>Scherk v. Alberto-Culver Co.</i> , 417 U.S. 506 (1974)	7, 14, 16, 23, 24
<i>Shearson/ American Exp., Inc. v. McMahon</i> , 482 U.S. 220 (1987)	17
<i>Stephens v. Entre Computer Centers, Inc.</i> , 696 F.Supp. 636 (N.D. Ga. 1988)	27, 28
<i>Stewart Organization v. Ricoh Corp.</i> , 487 U.S. 22 (1988)	17
<i>Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer</i> , 515 U.S. 528 (1995)	16
<i>Vitricon, Inc. v. Midwest Elastomers, Inc.</i> , 148 F.Supp.2d 245 (E.D.N.Y. 2001)	22
<i>Zions First National Bank v. Allen</i> , 688 F. Supp. 1495 (D. Utah 1988)	21, 26

STATUTES AND RULES

Section 80 of the Restatement (Second) of Conflicts of Laws16, 19

Utah Code Ann. § 78-2-2(3)(j) (1953, as amended)6

Appellants Philip D. Gubbay, Capital Suisse, S.A., Zooley Services Limited, Capital Suisse, Inc., Zooley of Utah, Inc., and Ferland Limited (collectively “Appellants”) through counsel respectfully submit this Appellants’ Brief.

JURISDICTION

This is an appeal from an order of the Honorable Ronald E. Nehring, Third Judicial District Court, dated October 11, 2001, denying Appellants’ Motion to Dismiss for lack of jurisdiction and proper venue pursuant to a mandatory forum selection clause. The order denying Appellants’ Motion to Dismiss was made final when Judge Nehring certified the entry of Final Judgment in favor of Appellee and against Appellants by an order dated July 17, 2002. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (1953, as amended).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

This appeal raises one issue: Did the trial court err in denying Appellants’ Motion to Dismiss Appellee’s claims against them for lack of jurisdiction and proper venue where, pursuant to a mandatory forum selection clause contained in the agreement executed between the parties, Appellee agreed to subject itself and disputes regarding the purchase of shares in the investment fund operated by Appellants to the jurisdiction of the British Virgin Islands courts, applying the laws of the British Virgin Islands.

Although there is differing authority, the Court’s standard of review of a trial court’s refusal to enforce a forum selection clause appears to be an abuse of discretion

standard. *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809, 810 (Utah 1993) (holding that a court abuses its discretion in enforcing a forum-selection clause where the clause is “so unreasonable that its enforcement would be . . . against both logic and the facts of the record”).¹

DETERMINATIVE LAW

The following cases are determinative of the issue stated: *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Bremem v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992); *Phone Directories Co. v. Henderson*, 8 P.3d 256 (Utah 2000); and *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809 (Utah 1993).

STATEMENT OF THE CASE

Appellee Hentsch Henchoz & Cie (“HH&C”) is one of the largest, most powerful financial institutions in the world, with offices around the globe. HH&C filed its Verified Complaint on August 2, 2001, alleging that Appellants had engaged in a conspiracy and fraudulent scheme to defraud it through Appellants’ operation of an investment fund. According to its Complaint, HH&C negotiated a transaction with a British Virgin Islands company, Appellant Capital Suisse, S.A. (“Capital Suisse”), that listed certain directors, advisors and service providers from various domiciles, one of which was Salt Lake City,

¹ In *Riley v. Kingsley Underwriting Agencies*, 969 F.2d 953, 956 (10th Cir. 1992), however, the Tenth Circuit Court of Appeals states: “The enforceability of [a] forum selection” clause is a “question of law which we review de novo.” See also *Excell, Inc. v. Sterling Boiler Mech., Inc.*, 106 F.3d 318, 320 (10th Cir. 1997); *SBKC Serv. Corp. v. 1111 Prospect Partners, L.P.*, 105 F.3d 578, 581 (10th Cir. 1997).

Utah. Although an acknowledged sophisticated investor, HH&C claims that it was defrauded into entering into seven separate Subscription Agreements with Capital Suisse, whereby HH&C invested a total of \$25 million into the British Virgin Islands investment fund operated by Appellants.

In order to obtain redress, HH&C first sought party status in a proceeding in Spain involving Appellants Gubbay, Zooley Services Limited (“Zooley”) and Capital Suisse. When HH&C could not obtain a favorable ruling in Spain, it seized upon the Utah service provider and sought out a Utah court as its next battleground, despite the existence of a contractual mandatory forum selection clause in each of the seven Subscription Agreements executed by HH&C that limit litigation regarding the Agreements to courts in the British Virgin Islands.

The mandatory forum selection clause contained in each of the Subscription Agreements, executed in the French language in Switzerland by representatives of HH&C, Pierre Jolliet and Francois Messeiller, provides:

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 proceeding 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.

Record of Case No. 010905355 (“Record”) at pp. 347, 351-52 (emphasis added).

Immediately after HH&C filed its Complaint in the Third Judicial District Court of Salt Lake County, Appellants moved to stay or dismiss the case, on August 15, 2001, on

the basis of the mandatory forum selection clause. [Record at pp. 235-36.] The trial court conducted a hearing on Appellants' motion on September 5, 2001. Subsequently, in a Minute Entry dated October 11, 2001, the court denied Appellants' motion and refused to enforce the forum selection clause. The court held that the forum selection clause was unenforceable because the Subscription Agreements as a whole were the product of fraud and, in the court's opinion, enforcement would be unfair. [Record at p. 630.]

On July 17, 2002, the trial court granted HH&C's Motion for Summary Judgment and Motion to Dismiss pursuant to Utah R. Civ. P. 41(a)(2)(ii). HH&C's Motions were unopposed by Appellants as their attorneys had withdrawn from the case and Appellants were unable to retain other counsel. The court then entered a final judgment against Appellants by an order dated July 18, 2002. Appellants filed their Notice of Appeal on August 15, 2002.

STATEMENT OF THE FACTS

1. HH&C is a Swiss private banking limited partnership with its principal place of business in Lausanne, Switzerland. HH&C is a member of a group of private bankers established in Geneva in 1796 and is authorized to engage in banking activities by the Swiss Federal Banking Commission. [Record of Case No. 010906631 ("Supplemental Record") at pp. 4-5.]

2. Capital Suisse is a company organized under the laws of the British Virgin Islands. It operates an investment fund (the “Fund”) that has been recognized as a Professional Fund under the Mutual Funds Act of the British Virgin Islands. [*Id.* at pp. 129-30.]

3. HH&C alleges in its Complaint that Appellants fraudulently induced HH&C to invest approximately \$25 million in the Fund, which Appellants allegedly improperly failed to redeem in accordance with HH&C’s request. [*Id.* at pp. 2-3.]

4. In connection with each of its seven separate purchases of shares of the Fund, HH&C and/or its authorized agents executed a subscription agreement (the “Subscription Agreement”). [*Id.* at pp. 13-14, 223-250.]

5. HH&C executed each of the Subscription Agreements in Switzerland. [*Id.* at pp. 223-250.]

6. According to HH&C’s own English translation, Paragraph 10 of each Subscription Agreement provides as follows:

I/We hereby confirm that this Subscription Agreement shall be governed and enforced in accordance with BVI [British Virgin Islands] law, without giving effect to its conflict of laws provisions.

[*Id.* at p. 252.]

7. Paragraph 12 of each Subscription Agreement provides:

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.

[Record at pp. 347, 351-52 (emphasis added)].

8. HH&C paid for the shares of the Fund by telegraphic transfer to a bank in Gibraltar. [Supplemental Record at pp. 223-250, 251-53.]

9. Through a series of letters and other demands beginning in April 2001, HH&C requested to redeem all of its shares in the Fund. [Record at pp. 280-86.]

10. The Confidential Prospectus provided to HH&C by Appellants states:

It may not always be possible to effect payments of Shares at the date of redemption due to restriction imposed on the Fund by law or contracts in relation to the resale of securities or because of market conditions of certain securities the Fund has invested in, and due to the policy to hold small cash reserves.

[Supplemental Record at p. 144.]

11. On June 1, 2001, Appellant Ferland Limited (“Ferland”), which is the sole director of Capital Suisse, explained to HH&C that it would be impossible to redeem all of HH&C’s shares in the Fund at that time. Ferland, however, offered to tender restricted shares in another company that Appellants reasonably believed met or exceeded the value of HH&C’s investment in the Fund. [*Id.* at p. 281.]

12. Ferland also offered to redeem Plaintiff’s investment in cash within four months of June 1, 2001. Ferland specifically stated: “We anticipate that cash should be available in sufficient amounts to redeem shares in approximately four months from now.” [*Id.*]

13. HH&C rejected the election by letter dated June 6, 2001. [Record at p. 288.]

14. HH&C thereafter filed its Verified Complaint in the Third District Court of Salt Lake County on August 2, 2001 claiming that Appellants engaged in a fraudulent scheme to defraud HH&C of the nearly \$25 million it invested in the Fund. [Supplemental Record at p. 2.]

15. On August 15, 2001, Appellants filed a Motion to Dismiss with the trial court, requesting that the court dismiss HH&C's claims against them for lack of lack of jurisdiction and improper venue due to the existence of the mandatory forum selection clause contained in each Subscription Agreement. [Record at pp. 235-36.]

16. In the trial court's Minute Entry dated October 11, 2001 (the "Minute Entry"), which the court stated would serve as its final order, the court denied Appellants' Motion to Dismiss, refusing to apply the mandatory forum selection clause in each Subscription Agreement. The court held that the forum selection clause was unenforceable because HH&C had alleged that the Subscription Agreements as a whole were the product of fraud and in the court's opinion enforcement would be unfair. [*Id.* at 632.]

17. On July 17, 2002, the trial court granted HH&C's Motion to Dismiss and Motion for Summary Judgment. The Motions were unopposed by Appellants as Appellants' counsel had withdrawn and substitute counsel was not retained. [*Id.* at pp.

1841-42, 1845-1850.]

18. The trial court entered a final judgment against Appellants on July 18, 2002. [*Id.* at pp. 1852-55.]

19. Appellants filed their Notice of Appeal on August 15, 2002. [*Id.* at 1874-75.]

SUMMARY OF ARGUMENT

Under the well-settled precedent of this Court and the United States Supreme Court, a forum selection clause contained in an agreement is prima facie valid and should be given effect unless the party opposing the clause's enforcement meets its heavy burden of clearly showing that enforcement would be "unreasonable and unjust" or that the clause itself was procured by fraud. *See Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809 (Utah 1993); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The trial court in this case erred by failing to apply the Prows factors and thereby reached the erroneous conclusion that the mandatory forum selection clause found in each of the Subscription Agreements was unfair and procured by fraud.

Under Utah law, a forum selection clause is unfair and unreasonable only where the party seeking to avoid the clause plainly shows that the contractual forum will be "[so] gravely difficult and inconvenient" that the party will "be deprived of his day in court." *Prows*, 868 P.2d at 812. HH&C presented no such evidence to the trial court nor did the trial court consider such evidence in reaching its decision. Rather, the court held

that the mandatory forum selection clause at issue is “unfair” because, in the court’s opinion, the clause “appears” to merely create an *imbalance* in the parties’ ability to seek redress through the courts.

It is undisputed that HH&C is a sophisticated investor. HH&C made no argument and produced no evidence that its bargaining position was unequal to Appellants’ nor did it claim that in any way it was coerced into agreeing to the forum selection clause at issue. The trial court’s conclusion that the forum selection clause is “unfair” based solely on the clause’s apparent one-sidedness is unsupported and contrary to well-reasoned precedent. The trial erred in holding that the forum selection clause is “unfair.”

The trial court also erred in holding that the forum selection clause should not be enforced because it is the product of fraud. The court held that because HH&C had sufficiently *alleged* that each Subscription Agreement, as a whole, was the product of fraud, HH&C had sufficiently alleged that the forum selection clause in each Subscription Agreement is unfair.

It is undisputed that HH&C did not establish or even allege in the trial court that the forum selection clause itself was procured by fraud. It is well-settled law that in order to set aside a forum selection clause for fraud there must be a well-founded claim that the inclusion of that clause itself in the contract, standing apart from the whole agreement, was the product of fraud. *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, n. 14 (1974); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992);

see also Prows, 868 P.2d at 812 n.5. The trial court specifically rejected this authority and instead relied exclusively upon the Eighth Circuit’s minority position in *Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986), in holding that “a choice of forum provision may also be disregarded when the party seeking to avoid it can demonstrate that the contract incorporating it is the product of fraud.” Record at p. 630. *Farmland* is contrary to Utah law, United States Supreme Court precedent, and, in any event is distinguishable, as discussed below. The trial court erred when it ignored the law of this Court and the United States Supreme Court and its decision should therefore be reversed.

ARGUMENT

The trial court refused to enforce the mandatory forum selection clause contained in each of the seven Subscription Agreements on two grounds. First, the court found that the forum selection clause was “unfair.” Second, the court held that each of the Subscription Agreements was, as a whole, the product of fraud. Neither ground is supported in law or fact. For the reasons set forth below, the trial court, in refusing to enforce the mandatory forum selection clause, committed reversible error.

I. FORUM SELECTION CLAUSES SHOULD BE ENFORCED UNLESS THEY ARE UNREASONABLE, UNJUST OR SPECIFICALLY OBTAINED THROUGH FRAUD.

In *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809 (Utah 1993), this Court expressly adopted Restatement (Second) of Conflict of Laws § 80. Section 80 reads:

The parties' agreement as to the place of the action will be given effect unless it is unfair and unreasonable.

Prows, 868 P.2d at 812, quoting Restatement (Second) of Conflict of Laws § 80 (Supp. 1988). The Court also held that under Section 80, “a plaintiff who brings an action in violation of a choice-of-forum provision bears the burden of proving that enforcing the clause is unfair and unreasonable.” *Id.*, citing § 80 cmt. c.

The Court's holding in *Prows* is consistent with the well-established precedent of the United States Supreme Court. In *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Supreme Court rejected as a “parochial concept” the idea that “notwithstanding solemn contracts . . . all disputes must be resolved under our laws and in our courts,” and held that courts presumptively must enforce forum selection clauses in international transactions. *Bremen*, 407 U.S. at 9. Since *Bremen*, the Supreme Court has consistently followed this rule and, in fact, has enforced every forum selection clause in an international contract that has come before it. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-42 (1995); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985); *Scherk*, 417 U.S. at 515-16.

The Supreme Court has also held that public policy weighs strongly in favor of the presumption set forth in *Bremen*, because uncertainty as to the forum for disputes and applicable law “will almost inevitably exist with respect to any contract touching two or more countries.” *Scherk*, 417 U.S. at 516. In other words, “[t]he elimination of all such

uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.” *Bremen*, 407 U.S. at 13-14. The Supreme Court has therefore instructed American courts to enforce forum selection clauses in the interests of international comity and out of deference to the integrity and proficiency of foreign courts, “even assuming that a contrary result would be forthcoming in a domestic context.” *Shearson/ American Exp., Inc. v. McMahon*, 482 U.S. 220, 255 n.11 (1987).

In *Stewart Organization v. Ricoh Corp.*, 487 U.S. 22 (1988), Justice Kennedy summarized the strong presumption in favor of the enforceability of forum selection clauses as follows: “a valid forum selection clause is given controlling weight in all but the most exceptional cases.” *Id.* at 33.

Consistent with *Prows*, the Supreme Court has also held that a freely negotiated mandatory forum selection clause is “prima facie valid” unless the party challenging its enforcement can “clearly show that enforcement would be unreasonable and unjust” or that the clause itself was “invalid for such reasons as fraud or overreaching.” *Bremen*, 407 U.S. at 10. The party resisting enforcement on these grounds bears a “heavy burden of proof.” *Id.* at 17.

II. THE TRIAL COURT’S CONCLUSION THAT THE MANDATORY FORUM SELECTION CLAUSE AT ISSUE IS “UNREASONABLE” OR “UNFAIR” WAS ERRONEOUS.

The trial court held that the mandatory forum selection clause contained in each of the Subscription Agreements was “unfair” because it “poses no limitation whatsoever on the forums available to Credit [sic] Suisse to commence an action against plaintiff, while limiting plaintiff to bringing actions in the British Virgin Islands.” Record at p. 631. It concluded that such a 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.* at p. 632.

The trial court cited no authority in support of its holding that the a forum selection clause at issue is unfair merely because it grants one party to the agreement the broader ability to select a forum of its own choice as opposed to the other party whose forum is chosen for it. Indeed, pertinent authority provides that such forum selection clauses are not facially “unfair” and are, in fact, enforceable. *See, e.g., Karl Koch Erecting Co., Inc. v. New York Convention Center Dev’p. Corp.*, 838 F.2d 656, 659 (2nd Cir. 1988), *aff’d*, 656 F. Supp. 464 (S.D.N.Y. 1987).²

² The trial court curiously states in the *Minute Entry* that “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.” Record at p. 632. The court provides no basis for this statement. Moreover, HH&C produced no evidence and in fact, *did not even allege*, that the mandatory forum selection clause was itself procured by fraud.

This Court in *Prows* held that in order to meet the burden of demonstrating “unreasonableness” or “unjustness” under Section 80, a plaintiff must demonstrate that the “***chosen state*** [in the forum selection clause] would be so seriously an inconvenient forum that to require the plaintiff to bring suit there would be unjust.” 868 P.2d at 812 (emphasis added). On this point, as noted by this Court in *Prows*, the United States Supreme Court has stated:

[I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be [so] gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. ***Absent that, there is no basis for concluding that it would be unfair, unjust or unreasonable*** to hold that party to its bargain.

Id., quoting *Bremen*, 407 U.S. at 18 (emphasis added). Accordingly, under *Prows* and United States Supreme Court precedent, in order to invalidate the forum selection clause at issue, HH&C must have discharged its burden of demonstrating that the “chosen state”, i.e. the British Virgin Islands, was such an inconvenient forum that HH&C would be deprived of its day in court. The record of this case demonstrates that HH&C made no such showing to the trial court. Therefore, on this basis alone, it was error for the trial court not to have granted Appellants’ Motion to Dismiss.

The Court has recently held that forum selection clauses “will be upheld as fair and reasonable so long as there is a rational nexus between the forum selected and/or consented to, and either the parties to the contract or the transactions that are the subject matter of the contract.” *Phone Directories Co., Inc. v. Henderson*, 8 P.3d 256, 261 (Utah

2000). The Fund is registered and operated in the British Virgin Islands and the Subscription Agreements at issue must be governed and enforced under the law of the British Virgin Islands. The Fund Prospectus clearly states that the Fund was not registered in accordance with United States securities laws, and neither the United States federal or state securities laws applied to the purchase. Capital Suisse is incorporated in the British Virgin Islands. In addition, HH&C, “the oldest established private bankers in Geneva,” would not be unreasonably inconvenienced if forced to litigate in the British Virgin Islands, particularly where it maintains an office in nearby Nassau, Bahamas. Record at pp. 277-78, 565.

None of the occurrences upon which HH&C’s lawsuit in the Third District Court was based occurred in the United States, let alone Utah. Record at pp. 223-250, 251-53. A much stronger case exists that the British Virgin Islands is a more appropriate forum than Utah for the disposition of this action, even absent the mandatory forum selection clause that governed the parties’ relationship.

Denial of enforcement of the forum selection clause, on the other hand, would subject Appellants to potential litigation in numerous forums around the globe and result in completely unpredictable outcomes with respect to the multiple investors in the Fund other than HH&C. It is undisputed that there is a clear nexus between the British Virgin Islands, the parties, and the transaction in question, unlike Utah where there is no nexus.

Furthermore, HH&C has produced no evidence establishing that the British Virgin Islands would not provide an adequate forum.

Moreover, HH&C made no showing to the trial court that the forum selection clause was unfair or unreasonable because of an unequal bargaining power between it and Appellants. Indeed, HH&C is one of the largest, most powerful financial institutions in the world, with offices around the globe. HH&C similarly presented no evidence of coercion. The law is well-settled that:

Where two parties, pursuant to arm's length negotiations by experienced and sophisticated businessmen, have agreed to bring any disputes in a particular forum, and where there is no compelling and countervailing reason making enforcement unreasonable, the forum selection clause is *prima facie* valid and is to be honored by the parties and enforced by the courts.

Regency Photo & Video, Inc. v. American Online, Inc., 214 F.Supp.2d 568, 572 (E.D. Va. 2002), citing *Bremen*, 407 U.S. 1; see also *Bryant Elec. Co., Inc. v. City of Fredericksburg*, 762 F.2d 1192, 1197 (4th Cir. 1985) (rejecting attempt to disregard forum selection clause in form contract where there is no evidence that plaintiff “is an unsophisticated entity lacking sufficient commercial expertise to be able to decide whether to enter into a given contract”); *Zions First National Bank v. Allen*, 688 F. Supp. 1495, 1499 (D. Utah 1988) (a party “must show an extreme inequality in bargaining

position before this court can hold that the forum selection clause is invalid because of overreaching”).³

HH&C is a highly sophisticated international business entity that was almost certainly represented by counsel when it executed the Subscription Agreements. It cannot in good faith claim that it was unaware of the forum selection clause contained in each of the Subscription Agreements it executed. Indeed, HH&C made no such argument to the trial court and in fact, never alleged such. Moreover, HH&C cannot now claim that it did not agree to abide by the terms of the forum selection clause when it entered into the Agreements. The trial court cited no such support in its decision because there is none.

³ The trial court also held, in rejecting the forum selection clause, that the “one-sided nature of the forum selection provision strongly suggests that the provision was not the focus of negotiations.” Record at p. 632. No actual evidence was introduced by HH&C to support this assumption by the trial court. Regardless, the court’s ruling is contrary to the overwhelming weight of authority enforcing forum selection clauses regardless of whether they were the product of active negotiation. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing forum selection clause contained in form passenger ticket even though it was not the product of negotiation); *Milanovich v. Costa Crociere, S.P.A.*, 954 F.2d 763, 768 (D.C. Cir. 1992) (same); *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216 (5th Cir. 1998) (enforcing forum selection clause in seamen’s employment contracts with foreign vessel owner); *Marra v. Papandreou*, 59 F.Supp.2d 65 (D.D.C. 1999) (upholding forum selection clause contained in casino license agreement where transaction was negotiated by well-financed parties with the advice of counsel); *Vitricon, Inc. v. Midwest Elastomers, Inc.*, 148 F.Supp.2d 245 (E.D.N.Y. 2001) (enforcing forum selection clause contained on back of pre-printed invoice, despite use of “boilerplate” language which was not subject to negotiation).

III. THE TRIAL COURT’S CONCLUSION THAT THE FORUM SELECTION CLAUSE IS VOID BECAUSE OF FRAUD WAS ERRONEOUS BECAUSE THERE IS NO EVIDENCE THAT THE FORUM SELECTION CLAUSE ITSELF WAS PROCURED BY FRAUD.

The trial court also refused to enforce the mandatory forum selection clause in each of the Subscription Agreements because it found that the Agreements, as a whole, were the product of fraud. The court held that 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.” Record at p. 630. In support of its holding, the trial court relied exclusively on *Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986).⁴ Because *Farmland* is a decision unique to the Eighth Circuit that directly contradicts the well-established precedent of the United States Supreme Court (as well as other courts, including the Tenth Circuit) and because *Farmland* is distinguishable from the facts of this case, the trial court’s reliance on *Farmland* was misplaced.

In *Bremen*, the United States Supreme Court recognized that a “fraud” exception exists to the enforcement of forum selection clauses. The Supreme Court clarified the limits of this “fraud” exception in *Scherk*:

In [] *Bremen* we noted that forum-selection clauses ‘should be given full effect when ‘a freely negotiated private international agreement (is)

⁴ In *Farmland*, the court refused to enforce a forum selection clause, holding that where a fiduciary relationship (such as between the commodities brokers-defendants and their customer plaintiff) is created by a contract tainted by fraud, the party defrauded cannot be held to the forum selection clause. *Id.* at 851. It is indisputable in this case that no fiduciary duty existed between HH&C and the Appellants.

unaffected by fraud . . .’ This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as is this case, the clause is unenforceable. Rather, it means that an arbitration or 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.

Scherk, 417 U.S. at 519, n.14 (emphasis added).

In *Scherk*, an American corporation and a German citizen had entered into a contract that contained an arbitration clause, which the Supreme Court describes as “a specialized forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.” *Id.* at 519. At issue was whether the arbitration clause should be enforced pursuant to the United States Arbitration Act, 9 U.S.C § 1 et seq. The Supreme Court determined that the arbitration clause was enforceable. In so ruling, the Supreme Court relied heavily upon the Court’s discussion in *Bremen* of international trade in upholding the arbitration clause. The Supreme Court wrote:

Most significantly, the subject matter of the contract concerns the sale of business enterprises organized under the laws of and primarily situated in European countries, and whose activities were largely, if not entirely, directed to European markets . . . In this case, . . . in the absence of the arbitration provision, considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract. Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its substantive laws and conflicts-of-laws rules. *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.*

Scherk at 515-516 (emphasis added).

Therefore, particularly in international business transactions, under the fraud exception rule defined by the Supreme Court in *Scherk*, there “must be a well-founded claim of fraud in the inducement of the clause itself, *standing apart from the whole agreement*, to render [a forum selection clause] unenforceable.” *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1138 (6th Cir. 1991) (emphasis in original).

The Tenth Circuit in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992), upheld this principle in a case with facts similar to those present here. In *Riley*, the Tenth Circuit upheld the enforcement of a forum selection clause requiring plaintiff to submit to the exclusive jurisdiction of courts in England. The plaintiff, a U.S. citizen, entered into an underwriting agreement with Lloyd’s of London, a British corporation which has functioned as a market for writing insurance policies for some 300 years. In order to become a member of Lloyd’s, plaintiff was required to meet certain deposit requirements and execute a General Undertaking and Member’s Agent’s Agreement, both of which contained choice of law and forum selection provisions that limited litigation to the courts and laws of England. Following large losses, the plaintiff filed suit in Colorado seeking rescission of the contract and alleged violations of federal and Colorado securities laws and common law fraud in connection with entering into the two agreements.

The Tenth Circuit enforced the forum selection and choice of law provisions, and thus denied plaintiff the right to bring his claims under Colorado statutes. The court reasoned that given the international nature of the transaction, the fact that most of the parties (except plaintiff) resided in England and that most of the activities which formed the basis for the claims occurred in England, the dispute must be resolved in England. *Id.* at 956. The Tenth Circuit held that despite plaintiff's claims of fraud in the inducement, plaintiff did not plead that "the *specific* choice of forum provisions at issue were obtained by fraud." *Id.* at 960 (emphasis in original); *see also Zions*, 688 F. Supp at 1499 ("in cases where one party fraudulently induces another to enter into a contract, the forum selection clause is still valid unless the party charged with fraud also fraudulently induces the other party to accept the forum selection clause").

In addition to the holdings of the Supreme Court, the Tenth Circuit, and the District Court of Utah, Utah law also provides that unless the forum selection clause itself was obtained by fraud, duress, or other unconscionable means, the choice of forum will be enforced. *Prows*, 868 P.2d at 812 n.5 (adopting Restatement (Second) of Conflict of Laws § 80 and stating that a party may avoid a forum selection clause by demonstrating that "(1) the choice-of-forum *provision* was 'obtained by fraud . . .'" (emphasis added). In reaching its decision to disregard the forum selection clause at issue because it found that the Subscription Agreements *as a whole* were the product of fraud, not the forum selection clause *itself*, the trial court failed to even consider the above-cited cases.

Farmland, which the trial court relied upon exclusively in its decision, is a nonbonding, nonprecedential decision and has been criticized and distinguished as inconsistent with the *Scherk* rule. In *National Micrographics Systems, Inc. v. Canon U.S.A., Inc.*, 825 F. Supp. 671 (D.N.J. 1993), the court found that a plain reading of the court's language in *Farmland* reveals that the fiduciary relationship at issue in that case was, if not the controlling factor, at least a significant one in the Eighth Circuit's analysis. *Id.* at 676, citing *Farmland*, 806 F.2d at 851. The court refused to apply the *Farmland* decision where no fiduciary duty existed. *Id.* Furthermore, the court specifically rejected plaintiff's argument that it would be "grossly unfair" to force a party "to comply with an agreement which never would have been made had the existence of the fraud been known." *Id.* The court acknowledged that "it would be very unlikely, to say the least, that any party would enter into a contract with a party it knew had defrauded it." *Id.* It held, however, that it could not agree that "this observation in and of itself is enough to overcome the established requirement that there be fraud in the inducement of the forum selection clause in particular." *Id.*

Likewise, in *Stephens v. Entre Computer Centers, Inc.*, 696 F.Supp. 636 (N.D. Ga. 1988), the court declined to follow *Farmland*, concluding that the exception for a fiduciary relationship was not warranted, and moreover was inconsistent with *Scherk*, because fraud could vitiate a contract whether or not a fiduciary relationship existed. *Id.* at 640. In doing so, the court noted that it was of no moment that the forum selection

clause was not specifically negotiated. *Id.* at 641. The trial court made no finding in this case that a fiduciary relationship existed between HH&C and Appellants.

Finally, the Eighth Circuit itself recently applied the *Scherk* rule in *Marano Enterprises of Kansan v. Z-Teca Restaurants, L.P.*, 254 F.3d 753, 757 (8th Cir. 2001). In *Marano*, the court refused to disregard a forum selection clauses found in franchise and development agreements, holding that because the complaint did not suggest that the clauses themselves were inserted into the agreements as the result of fraud, plaintiff's general allegation that it was induced by fraud to enter into the agreements "is insufficient to raise an issue that the forum-selection clauses within those agreements may be unenforceable because of fraud." *Id.*

Although HH&C argued that it was induced to enter the Subscription Agreements by the fraudulent acts of Appellants, the Verified Complaint contains no allegations that the forum selection clause itself was obtained by fraud. No such evidence was later introduced before the trial court. Despite this, the trial court specifically held that HH&C had "alleged sufficient facts to overcome the presumption of the choice of forum clause in the Subscription Agreements" by making a prima facie showing that the Agreement "as a whole is the product of fraud." Record at p. 630. Under Utah law and the above-cited authorities, the ruling was erroneous. The trial court erred in refusing to enforce the mandatory forum selection clause at issue and failing to dismiss HH&C's claims for improper venue.

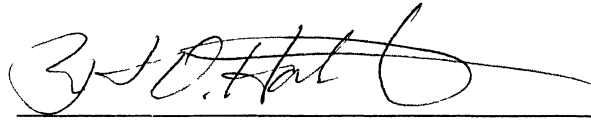
CONCLUSION

For the reasons set forth above, the trial court erred in refusing to enforce the forum selection clause contained in each of the Subscription Agreements. The court's ruling denying Appellants' Motion to Dismiss should be reversed.

RESPECTFULLY SUBMITTED this 26th day of February, 2003.

HATCH, JAMES & DODGE

By:

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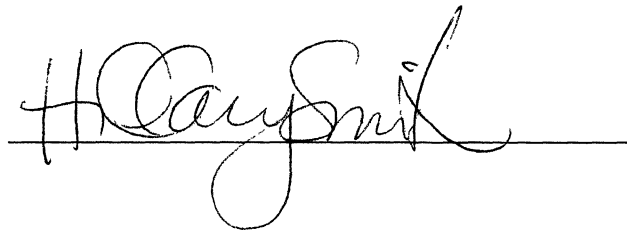
Brent O. Hatch
Mark H. Richards

Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing BRIEF OF APPELLANTS to be placed in the United States Mail first class postage pre-paid on the 26th day of February, 2003 addressed to the following:

Neil A. Kaplan
Perrin R. Love
Walter A. Romney, Jr.
CLYDE SNOW SESSIONS & SWENSON
201 South Main Street, Suite 1300
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "H. Clay Smith", is written over a horizontal line.

ADDENDA

CONSITING OF

- | | |
|--------------|--|
| Addendum “A” | Minute Entry, Third Judicial District Court, Case No.
010905355, entered on October 11, 2001. |
| Addendum “B” | Judgment, Third Judicial District Court, Case No. 010905355,
entered on July 18, 2002. |

ADDENDUM “A”

OCT 11 2001

By _____ SALT LAKE COUNTY

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

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.

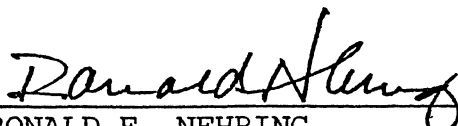
Last, I deny defendants' Motion to Dismiss plaintiff's claim

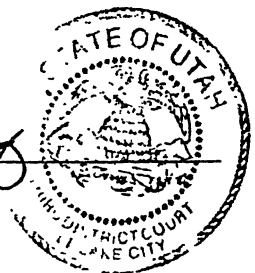
for relief under the Utah Uniform Securities Act. As pled, plaintiff's Verified Complaint adequately alleges that plaintiff received an offer to purchase the security at the direction of defendants in the state of Utah, thereby satisfying the requirements of Utah Code Ann., Section 61-1-26(1).

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



KINGDOM OF SPAIN
V. GUBBAY

PAGE 10

MINUTE ENTRY

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
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Alex Lakatos
Attorneys for Plaintiff
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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
of Utah, Inc.
111 E. Broadway, Suite 1100
Salt Lake City, Utah 84111

KINGDOM OF SPAIN
V. GUBBAY

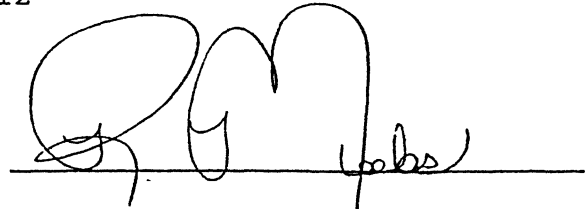
PAGE 11

MINUTE ENTRY

Mailing certificate - continued

Michael R. Carlston
R. Brent Stephens
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P.O. Box 45000
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

A handwritten signature, likely of R. Brent Stephens, is written over a horizontal line. The signature is stylized and cursive, with the letters 'RBS' being prominent.

ADDENDUM “B”

IMAGED

By

SALT LAKE COUNTY

Deputy Clerk

JUL 17 2002

Judicial District

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

ENTERED IN REGISTRY
OF JUDGMENTS

DATE

07/18/02

JUDGMENT

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

Judgment @J



010905355

JD2513556

GUBBAY, PHILIP DA

JD

This action came on for hearing, before the Court, on Plaintiff Hentsch Henchoz & Cie's
("HH&C") motion for summary judgment on the first, second and sixth claims in the Verified
Complaint against Defendants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse,

Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited. The issues having been heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED as follows:

1. Judgment is entered in favor of HH&C and jointly and severally against Defendants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited, for their fraud in the principal amount of \$24,730,000 plus prejudgment interest in the amount of \$3,138,098.63 for a judgment on HH&C's fraud claim in the amount of \$27,868,098.63.

2. Judgment is entered in favor of HH&C and jointly and severally against Defendants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited for their breach of fiduciary duty in the principal amount of \$24,730,000 plus prejudgment interest in the amount of \$3,138,098.63, for a judgment on HH&C's breach of fiduciary duty claim in the amount of \$27,868,098.63.

3. Judgment is entered in favor of HH&C and jointly and severally against Defendants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited for their civil conspiracy in the principal amount of \$24,730,000 plus prejudgment interest in the amount of \$3,138,098.63 for a judgment on HH&C's civil conspiracy claim in the amount of \$27,868,098.63.

4. 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

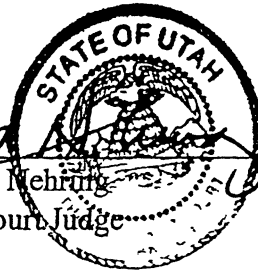
any way relating to HH&C's monies, to the flow of assets, proceeds, property or investments relating to those monies.

5. 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.

DATED this 16 day of ^{July}~~June~~ 2002.

BY THE COURT

Ronald E. Mehring
Judge Ronald E. Mehring
Third District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing proposed **JUDGMENT** 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

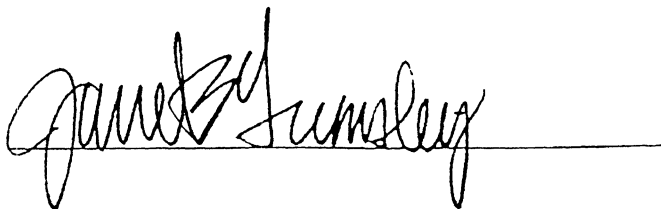
Capital Suisse, S.A.
Capital Suisse, Inc.
Zooley Services Limited
Zooley of Utah, Inc.
Fernland Limited

(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
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A handwritten signature in dark ink, appearing to read "James H. Mooney", is written over a horizontal line.